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Europe Is at a Watershed

by

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Abstract

It is not easy to see and to foresee how the European Union is moving forward. There are good and bad perspectives, both stemming from the global crisis, both with an unpredictable outcome. The goal to be achieved is the creation of a supranational government within the Eurozone.

Key-words:

Crisis in the Eurozone, supranationality, European government

It is not easy to see and to foresee how the European Union is moving forward. There are good and bad perspectives, both stemming from the global crisis, both with an unpredictable outcome.

A major element of instability lies in the fact that the strategies implemented to overcome the financial and economic crisis have so far proved quite ineffective. Each new output of the crisis (and also the latest in Cyprus) puts the future of the euro in jeopardy, and hence the European Union itself. The attempts to achieve fiscal consolidation in countries with large deficits and high national debt has resulted in the imposition of strict regulations on the Member States concerned. They have given up their sovereignty over national budgets, to an extent unheard of even in the existing federal States. And yet, the result has been largely missing: recovery has been difficult, if not impossible, due to the drop in GDP that these harsh austerity measures have caused. Growth is still modest or absent everywhere, even in the strongest countries, including Germany. In Italy, the backward leap in domestic product and the lowering of well-being is alarming and unprecedented since the end of World War II.

Two factors can account for these failures, both all the more deceiving as the country that gave rise to the crisis is now recovering under Obama's leadership. First, focusing on austerity as the only lever for recovery has proved misleading, as the International Monetary Fund has now recognised. Second, the decision-making process of the Union, which in the past four years has been based exclusively on countless intergovernmental summits, has shown all its limits. The intergovernmental method strives to coordinate national budgetary policies. However, coordinating does not mean governing. And what the EU truly needs, in particular the Eurozone, is a real economic government, to be put in force beside the existing monetary government. The crisis will not be overcome just by monetary means. Effective decisions cannot be taken through the coordination method. This has been clear since the very beginning of the euro and has now become incontrovertible.

As to the positive side of the story, in the last three years the crisis has forced governments to adopt a number of innovative measures, which never would have been introduced in normal times. For the first time, the British veto has been openly opposed and overcome: the Six-pack and Two-pack regulations and the two Treaties on the Fiscal

Compact and the European Stability Mechanism (ESM) were signed outside the EU framework. The banking union – a fundamental element to counter default risks – is progressing, albeit with difficulty: the risk of systemic crisis is now leading towards the implementation of supranational supervision, which is essential for banks operating in several national markets. The resistance of the national supervisory authorities will probably be overcome: here again, it is now clear that coordination is not enough, what is needed is a supranational power. However, as regards the other two pillars of the banking union, hurdles (the bank failure resolution procedure and a deposit guarantee) have not yet been overcome.

The road to supranationality, the only one that can ensure the future of the Union and the Eurozone, faces major resistance exerted by national governments. The German Chancellor has built her power on a policy that reflects the very strong popular aversion to any policy which is (or even seems to be) tolerant of the most indebted countries, and more generally of the Union as a whole. This will probably allow her to remain in office even after next September's elections. German public opinion stubbornly refuses to accept shared responsibility in overcoming the crisis, recovery and sustainable growth within the Eurozone. This is where Merkel's refusal of Eurobonds comes from. Any argument proving (and proof is flawless at a rational level) that to get out of the crisis and debt spiral what is required is to adopt a different budgetary policy at the European level, simply falls on deaf ears. As Tommaso Padoa-Schioppa stated years ago: "recovery should be up to the states, growth should be promoted at the European level". This approach is still largely unexplored.

Nor has the argument, based on the distortion of the single market caused by the different interest rates on government bonds, found a solution so far. Two equally healthy firms asking for a bank credit in Italy or Germany respectively, face unequal credit conditions, as the interest rates are very different. We are in fact entering a trend towards the re-nationalisation of economic policy: indeed a trend that is dangerous not only for the economy of each Member State but for the very future of the Union.

The French government has not overcome its resistance, which has been going on for more than 60 years now, to the federal completion of the Union. And Italy, which under Mario Monti's premiership had briefly regained its lost credibility, is yet again in the grip of

uncertainty and cannot at present play a major role in building the European Union, as it did on several occasions in the past.

Today the European Parliament (EP) looks to be the only European institution capable of effectively soliciting the necessary steps for federal integration of the Union. Within it, forces are gearing up for a project for institutional reforms as happened in 1984, when a Treaty project was approved by the EP; it was set aside because of the governments' inertia, but was decisive for the launch of the single market. Now Andrew Duff and other leading figures in the Spinelli Group (Cohn Bendit, Sylvie Goulard, Verhofstadt, Gualtieri and other MEPs) are moving again toward a constitutional reform of the Union. Let's hope with success.

The goal to be achieved is the creation of a supranational government within the Eurozone. What is required is the launch of a European Fiscal capacity and of a European Treasury. The financial transaction tax (FTT), now decided, can be the first step, as long as the resources it generates are used for common purposes and are, ultimately, voted on and controlled by the European Parliament ("no taxation without representation"). The bulk of the future Treaties reform can be summarised in three points: the full abolition of the veto power in the two Councils, the general legislative co-decision power of the EP, and the reform of Art. 48 UE.

How will these goals be achieved if the British government opposes them? There are two possible paths: either to adopt the opting out procedure that was accepted for the Euro, or to create a new Treaty for the Eurozone and for the Member States who are ready to accept the federal option, compatible with the single market and the acquis communautaire.

A major development plan for sustainable growth should be promoted by using public resources at the European level (in addition to the FTT, project bonds and an increase in the EU's own resources should be established), which are able to generate public and private investments even 20 times higher. This can already take place, pending the reform of the Treaties, by making use of the Enhanced Cooperation rules established in Lisbon. In this direction a citizens' initiative proposal (ECI), promoted by the Italian federalists and based on Art. 11 TEU, is about to be launched through the collection of the required signatures.

It should not be forgotten that an unresolved crisis makes the threat of a collapse of the euro ever-present. This is an outcome that powerful forces are ready to encourage through financial market mechanisms: a return to variable exchange rates within the Eurozone is too tempting a prospect in the world of international financial speculation. The tools to counter the crisis are all clear, but to be put into force they require the political will to implement them in two ways: through the allocation of sufficient resources at the European level and through the necessary institutional reforms.

Only the creation of a European government within the Eurozone, legitimised by the European Parliament, will be able to lead, after years of partial and ineffective attempts, to the turning point that European citizens have so far been waiting for in vain.

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Globalization and Cross-border Cooperation in EU Law: A Transnational Research Agenda

by

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Abstract

This paper aims to analyse a specific dimension of the progressive transformation of the territorial/nation-state law by using the particular lens of cross-border cooperation as regulated under EU law.

In order to do so, I have structured the article into two parts: the first part recalls the main features of the so-called transnational law (polycentrism, non-exclusivity of state actors in the law-making process and in the implementation of legal rules, openness, emergence of hybrid legal phenomena which do not belong - exclusively at least - to the domain of hard or soft law), while the second part analyses the legal framework of cross-border cooperation, trying to locate in this ambit those characteristics of transnational law identified in the first part.

Key-words

cross-border cooperation, globalization, transnational law, European Union, openness, frontier

1. Goals of the paper

This paper aims to analyse a specific dimension of the progressive transformation of the territorial/nation-state law by using the particular lens of cross-border cooperation as regulated under EU law.

Through this perspective I am going to examine the impact of the polycentric "globalization process" on the "territorial ambit" (a key element in the constitutional state), understood as the surface which closes off the frontiers of applicable law and excludes other sources of power, meant as the unity which unifies and separates, marks and distinguishes.

The legal fragmentation produced by the globalization process leads us to reconsider the traditional concepts of "territory" and "frontier".

Against this background, the idea of "place" changes, transforming it into a "mobile arena" for law.

The ground of legal phenomena is not any more represented by the "frontier" but by common interests, i.e. those issues and needs which go beyond the mere territorial frontiers, as happens with cross-border cooperation among territorial entities within the European Union (EU) legal order.

This article treats the law of cross-border cooperation as a case study of this new transnational law.

Analysing the main features of this phenomenon leads us to some of the grey areas of law, i.e. taking into account new legal (or para-legal) instruments and the role played by soft law and the idea of "transit" as a "relevant" factor for law.

This cross-border relevance implies the necessity to move from the idea of law as a unitary phenomenon, whose validity is ensured by the existence of a *Grundnorm,* to a concept of law as something generated by a system of cooperative relations among different actors, provided with a different legitimacy or with a legitimacy that is not entirely consistent with the traditional understanding of democratic legitimacy which we have inherited from the tradition of the nation- state arena.

In this perspective, cross-border cooperation transforms itself from a legal "exception" (if compared to classic nation-state law) to a legal "rule" within the frame of what we could call the "*integrated law of the contemporary European legal space*" (Palermo, 2011).

As for the structure of this paper, the analysis will be divided into two parts.

In the first part, the main features of the so-called transnational law will be recalled (polycentrism, non-exclusivity of state actors in the law-making process and in the implementation of legal rules, openness, emergence of hybrid legal phenomena which do not belong - exclusively at least - to the domain of the hard law or soft law) while in the second part of the work I will analyse the legal framework of cross-border cooperation, trying to find in this ambit those characteristics of transnational law identified in the fist part.

2. A note on transnational law

As written by Benhabib, "*we are like travellers navigating an unknown terrain with the help of old maps, drawn at a different time and in response to different needs. While the terrain we are travelling on, the world society of states has changed, our normative map has not. I do not pretend to have a new map to replace the old one, but I do hope to contribute to a better understanding of the salient fault-lines of the unknown territory which we are traversing*" (Benhabib, 2004, 6).

These lines say a lot about the sense of frustration of jurists before the new legal scenario created by globalization[I].

The progressive complexity in intergovernmental relations is inevitably reflected in the difficulties encountered by lawyers to analyse the varied phenomenology of "second-modern constitutionalism"[II]. In the current era of globalization, it becomes crucial to understand not only how law works, but also how the relationship between society and law has been changed. As Zumbansen (2011) put it:

"*In other words, the advent of globalization prompts an investigation into the theory/ies of society which inform(s) our – and competing – understandings of law*".

In any case, if building new conceptual maps is a titanic - and sometimes useless - work, constructing a new legal grammar able to deal with new social needs would be a sort of never ending story.

However, in this last case it is sometimes necessary to reflect upon the changes of law and how it may work as an instrument for inducing changes in the reality.

The premise is that we are moving in a "warm order", that is a complex legal order reshaped by (social, legal, cultural) conflicts[III] and by the emergence of new legal situations. However, attempts at giving precise content to these emerging uncertainties and grey areas of law using classical Kelsenian/hierarchical (instead of a horizontal/reticular) conceptions are going to fail (Ferrarese, 2011).

Conflicts and negotiation seem to be the new procedural paradigms of the new a-systemic and reactive legal logic, which forces us to set aside the rigid and traditional toolbox of the lawyer or - at the very least - to enrich such a toolbox by adopting an approach more oriented towards an "agonistic pluralism" (Mouffe, 2005).

Although following distinct approaches, both conflicts, on the one hand, and negotiation, on the other, involve a "certain degree of relationality among individuals, contexts and rules. From a narrow legal point of view one could say that the relationship between conventional law[IV] and judicial law becomes more stringent and complementary to the positive law" (Pizzorusso, 2008, 36)[V]. Clearly these processes take place in a context where pluralism is not understood as mere juxtaposition of a multiplicity of parties, but as connection and interaction or conflict among them (Delmas Marty, 2006, 18).We are moving into a situation that De Sousa Santos (2002) terms "*interlegality*", where working spaces that operate simultaneously do not limit themselves to interacting but also intersect and interpret themselves.

My contribution is situated within a frame that conceives the legal dimension not as a monolithic block surrounded by state frontiers, but as a sort of archipelago of different islands connected - and at the same time separated - by the existence of a sort of space (Ferrarese, 1998).

Against this background, globalization, complexity and polycentrism are key to understanding the transnational context wherein jurists operate.

I will use the polysemic concept of globalization[VI] in the sense of "polycentric globalization" (Held, 1995, 62; Teubner, 2004, 13), where the keystone is not so much

given by "global unity" or the construction of a global legal order, but through an organizational and regulatory fragmentation[VII] in which the relationship between the different "parts" does not necessarily respond to a model of integration or convergence.

Does globalization affect the legal phenomenon (law) as such? Does it imply a sort of swansong of law? A good way to tackle this debate is to start from the reflections on the relation between globalization and politics offered by Beck, according to whom globalization would not represent the end of politics but, rather, the projection of national politics beyond the boundaries of the nation-state (Beck, 1999). Something similar may be said of law: law has been affected by globalization in the sense that is has been forced to change its nature and context without however abandoning its function.

This point has been explained in a very clear manner by Zumbansen, among others, who argued that "*rather than describing the advent of globalisation as an end-point of legal development, from a transnational perspective, it becomes necessary to de-construct the various law-state associations in order to gain a more adequate understanding of the evolution of law in relation and response to the development of what must be described as 'world society*'" (Zumbansen, 2011).

Thus, if globalization implies the end of methodological nationalism, then it may be suggested that only a transnational perspective allows jurists to understand the current legal dynamics.

In this section of the paper I will recall the main views on the very polysemic notion of transnational law, clarifying, in a second moment, in which sense this formula is employed in the present article.

In his seminal work, Jessup employed the term transnational law "*to include all law which regulates actions or events that transcend national frontiers. Both public and private international law are included, as are other rules which do not wholly fit into such standard categories*" (Jessup, 1956, 2).

This definition is very descriptive but still reveals the necessity to go beyond the traditional categories of jurists.

In a more recent attempt at systematizing the literature, Scott identified at least three possible understandings of the term "transnational law":

- Transnational law as "*transnationalized legal traditionalism*", in other words it would be the "*law as we know it that must deal with various phenomena consisting of 'actions or events*

that transcend national frontiers', to which one might perhaps usefully add to 'actions' and 'events' something like 'relationships amongst actors'"[VIII];

- Transnational law as "*transnationalized legal decisionism*"[IX] according to which it is "*understood as the resulting (institutionally generated) interpretations or applications of domestic and international law to transnational situations*" (Scott, 2009, 870); and
- Transnational law as "*transnational socio-legal pluralism*" which "*as being in some meaningful sense autonomous from either international or domestic law, including private international law as a cross-stitching legal discipline. Rather than focusing on Jessup's broad definition that sees transnational law as some kind of umbrella within which 'other [non-standard] rules' fall alongside public and private international law, this approach sees these 'other' rules as the true – or at least the quintessential – transnational rule*s"[X].

From a methodological point of view, all these conceptions present both advantages and disadvantages, stressing the very nature of transnational law as an approach to law rather than as a specific legal branch.

Indeed, for the purposes of this article I understand under transnational law "*a methodological lens through which we can study the particular transformation of legal institutions in the context of an evolving complex society*" (Zumbansen, 2011) rather than "*a distinctly demarcated legal 'field', such as, say, contract law, or administrative law*" (Zumbansen, 2011).

A methodological lens through which it is thus possible to study law which presents itself as more open (i.e. not confined to the territory of a nation-state), reticular (i.e. implying the redefinition of sovereignty from mere *ius excludendi alios* to the right to participate in decisions taken on supra-state issues), horizontal, and multilevel.

The basic idea is connected to the famous shift "*de la pyramide au réseau*" (Ost - van de Kerchove, 2002) and to the parallel emergence of a multi-layered and interlaced context where states are coupled with other subjects since "*no level of government can maintain a monopoly of relations with its component parts*" (Cassese, 2006, 10; own translation).

The proliferation of political actors (all equipped with rule-making power) leads to a progressive proliferation of legal norms.

This means that the law peculiar to the current *disaggregated State* (Slaughter, 2000) presents itself in terms of "process" in a constant production in order to respond to the

legal pluralism generated by globalization. As said by Zumbansen, "*This approach suggests a relativisation of a number of assumptions commonly associated with law. One is its territorial connection with a politically institutionalised system of rule creation, implementation and adjudication, which, in Europe, has, for a relatively long time, been framed as the state-law nexus. From a transnational perspective, this nexus becomes, as, not only around the world, but also in Europe itself, the legal sociological lens reveals an impressive array of non-state originating norms that have long been binding human and organisational behaviour*" (Zumbansen, 2011).

However, this does not lead to the fall of the state as a crucial legal and political actor.

States are at the same time affected by the aggregation processes induced by the supranational level (EU integration) and by intra-state devolution processes (decentralization etc.), which, from a broader perspective, prompt us to question the validity of the territorial limits of state-government action.

As a matter of fact the state, although partly affected by this kind of "sandwich syndrome", retains its role as gatekeeper.

The relationship between the processes of European integration and territorial decentralization is neither linear nor exempt from ambivalence.

If the 'centralizing' effect is the most immediately noticeable consequence of the progressive constitutionalization of the "European system", decentralization is, even if only indirectly, an important element of the federalizing process[XI] in action within the EU.

The growth of the role of European regions, supported by a progressive increase in European regional policy, has created a strong impetus towards decentralization and territorial differentiation producing thus a transformation and hybridity of the classic models of territorial organization and distribution of power.

In a context where states are 'too small' to control economic or financially relevant decisions, but 'too big' to achieve efficient social and cultural policies, regions are in a privileged position as they are able to adapt their micro-identity plans to macro-functional external requirements.

While traditionally constitutional and international legal scholars who have paid attention to the consequences of legal fragmentation associated with globalisation have limited their attention to the area of fundamental rights[XII], this work focuses on the impact that this phenomenon has on territorial organization.

3. The new territorial paradigm in the transnational "landscape"

Globalization processes determine a territorial fragmentation of the field. This involves setting up a "droit déraciné" (Irti, 2007, 7), i.e. not linked to restrictions or organic connections with physical/geographical places and therefore compatible with any space and the need to continue the "spatial expansion of trade" (Irti, 2006, 9 ff). Place becomes a "mobile scenario" of law, since it acquires different shapes and forms according to a logic that is not represented - as already written - by the concept of "frontier", but by that of common interests, needs and problems that transcend territorial borders.

One clear example is the experience of cross-border cooperation in Europe.

Border regions are changing their character from "frontlines" of state sovereignty into "contact zones" for border societies (Blatter, 2004). Transnational integration processes on the one hand, and decentralization on the other, influence the institutional-territorial state architecture with regard to the government of border areas.

One could wonder which are the most viable and normatively "attractive" responses and adaptations of the constitutional systems at national, subnational, supranational and international level within an increasingly stratified and fragmented legal arena characterized by a dissymmetry between "territory" and "space".

This is indeed a crucial point which leads us to question the meaning and function of territory: does law need a spatial foundation or can we conceive of a (new) spatial form[XIII] for law?

The "dislocations" (Focault, 2001, 21) of law produce a more "functional" characterization of the same.

The main veins of transnational law - case law and contract law (Ferrarese, 2010) - try to accommodate different needs for different places, also adding or disintegrating heterogeneous places through plural formulations[XIV].

The experiences of territorial cooperation in Europe reveal a new scenario where a sort of "post-modern regionalism" seems to emerge.

This post-modern regionalism is no longer based solely on the territorial element but on the possibility of creating a set of networks in which the distinction between "internal" and "external" becomes problematic (Cannon, 2005).

The analysis conducted here shows the issues and new challenges produced by the

impact of the development of European cross-border regionalism on an international system which is "in motion", due to the influence of globalization.

In order to do that I will insist on cooperative and competitive logics characterizing the relations among borderlands in Europe and also present them in the broader context of "European relational regionalism" (Russo, 2010, 178 ff).

Indeed, if on the one hand the European Union plays a role as a framework and catalyst for cooperation, especially through the use of cross-border and interregional cooperation programs such as INTERREG, cross-border regionalism is constructed from an effort in levelling launched by peripheral regions to reduce the gap between them and more central (and developed) regions, using the transnational opportunities offered by the creation of the single market and an increasing globalization (among others, see: Kramsch, 2001).

Basically, the idea is that the change in relations between different institutional levels (sub-national, national, supranational) does not necessarily cause a loss of power and control by the state, but determines a higher importance for the "peripheries", in a way that we are experiencing a complex development of the national legal systems rather than a decrease in their sovereignty (Cannon, 2005, 20).

4. A *case study*: the cross-border cooperation in the European Union

Although the phenomenon of *cross-border cooperation* (on cross-border cooperation see: Papisca 2009; Strazzari, 2011) is not exclusive to the EU, this area represents its maximum development in a way that we can consider true border regions to be "micro-laboratories" of European integration (García Álvarez - Trillo Santamaría, 2011, 3. See also: Van Der Velde - Van Houtum, 2003).

A long time ago, Kramsh and Mamadouh pointed out that "*borders and border regions would not be merely the passive objects of forces operating at higher spatial scales, but would themselves become active sites for the re-theorization of fundamental aspects of political life, bearing value in turn across a range of geographical spaces*" (Kramsch - Mamadouh, 2003, 42). Cross-border cooperation is a more specific dimension of the broader phenomenon of "cross-border regionalism" (Scott, 2002; Perkmann - Sum, 2002), the development of which could be considered a

viable response to processes of globalization and a consequent change of the traditional features of the state.

The "philosophy of borders" – a reflection of the idea according to which the exercise of a sovereign power monopolizes public governance (Mascia, 2009, 157) and peculiar to the nation-state - faces the functional requirements of cooperation and the creation of "cognitive regions"[XV] in a kind of "unbounded regionalism" (Deas - Lord, 2006).

Territorial border entities seem to have a greater degree of adaptation to ongoing processes of change since they show a tendency to coexist and interact with other categories of international actors and organizations. If this is true, they may be seen as Trojan horses in the process of reshaping the state within the broader dynamics of EU integration.

It seems necessary to make a small "methodological premise" regarding the use of the adjective of territorial cooperation in the European context. Already in the 1990s, Levrat (1994, 143) stressed the ambiguities in the terminology of cross-border cooperation. A confirmation of this can be found in the fact that after a quick research it is possible to highlight the terminological variety used in official documents governing this phenomenon: 1) "transfrontier cooperation" (cooperation between bordering territories: Madrid framework agreement 1980; Additional protocol; European programs INTERREG, INTERREG IIA, INTERREG IIIA); 2) "interterritorial cooperation" (Protocol n. 2); 3) "transnational cooperation" (INTERREG II C; INTERREG III B); "cross-border cooperation" (art. 307.1, TFEU); and 4) "interregional cooperation" (INTERREG IIIC).

However, based on the terminology used by both the Council of Europe and the EU, I use the expression "cross-border" *lato sensu* to refer to the interaction between different territorial subjects (sub-national and even state-level) belonging to different states aimed at carrying out common actions or cooperation programs.

I prefer to use the qualification "border" because the concept refers to the idea of a cooperation having both internal and extra-territorial character (Strazzari, 2011, 153).

Although the phenomenon has an international origin (since it started with the Madrid Convention in 1980 and subsequent Protocols), its change of "nature" has happened thanks to EU law which conceives of it as a means to supplement its policy of economic and social cohesion: "*In general terms, the European cohesion policy has generally been seen as an instrument for strengthening the regional dimension of the EU Member States and as a way to enhance*

multilevel governance" (Strazzari, 2011, 170)[XVI]. Without going into the macro-theme of European cohesion policy, I merely take it into consideration in order to emphasize the legal "substrate" of this cooperative phenomenon in relation to the role of sub-state actors in the European framework.

This happens especially after the entry into force of the Lisbon Treaty which qualifies cohesion not only as "economic" and "social", but also as "territorial" (art. 3 TEU[XVII], art. 4 TFEU[XVIII], art. 14 TFEU[XIX], and Tit. XVIII TFEU[XX]).

Although connected to a "functional regionalism" (Toniatti, 2003), procedures and regulations for the development of regulations concerning structural funds "*understand the regional level as an active and necessary (i.e., not contingent) subject of integration*" (Palermo – Carmona Contreras, 2008, 77; own translation).

The key change has been represented by a progressive "institutional presence" of the regions on the EU scene, beginning with the role assigned to them in European regional policies and "*the fact that this important milestone in the evolution of the constitutional community has occurred beyond the provisions of the Treaties, in the absence of institutional involvement, and has developed through the establishment of a procedural framework requiring regions to attend or participate in the decision over and management of one of the most economically important policy at European level*" (Palermo – Carmona Contreras, 2008, 77; own translation).

Indeed, INTERREG initiatives, launched in 1989, are the first step in the "Europeanisation" of the territorial cooperative phenomenon.

The purpose of this program is very clear: to promote cross-border, transnational and interregional cooperation among border regions placed in locations within and outside the EU through financial supplies. However, these initiatives cannot be considered legal instruments aiming at facilitating cross-border cooperation, since they are limited to the financial support for projects aimed at promoting a balanced development and integration of the territories without affecting the presence of stable institutions for cooperation. Although the creation of specific legal instruments of cooperation was not the aim of these initiatives, these have played an important role and above all show us how different sources with different purposes can, in fact, encourage the development of multilevel law.

In this sense, another important step is represented by the creation of a European Grouping of Territorial Cooperation (EGTC), by which a radical change of the legal

framework in the ambit of territorial cooperation occurred with regard to all the already existing Community instruments[XXI].

Since then, the EU's role has changed, transforming itself from mere indirect economic support into direct and broad support on the basis of an *ad hoc* legal instrument.

"*The EGTC is to be seen as an instrument for integrated territorial (multilevel) governance in coherent areas split by borders. [It] is expected to contribute to legal strengthening of cooperation in a given area and to increased visibility and legitimacy of such cooperation*" (INTERACT, 2008, 133).

Regulation No. 1082/2006 (thereinafter the Regulation) establishes the frame for this legal experience. I will analyse this Regulation in a functional way for the purpose of this essay referring, as for the rest, to the huge literature on the subject (for an overview see EURAC, 2009).

The first factor to be taken into account is the pluralism of actors involved in the bottom-up creation of the organism of cooperation, as expressed by the wording of Art. 3 of the Regulation:

"*An EGTC shall be made up of members, within the limits of their competences under national law, belonging to one or more of the following categories:*

(a) Member States;

(b) regional authorities;

(c) local authorities;

(d) bodies governed by public law within the meaning of the second subparagraph of Article 1(9) of Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts" (art. 3, par. 1).

However, as already said with regard to transnational law in general, this polycentrism does not diminish the central role of the state that can prohibit the participation of sub-state entities if it considers this participation not to be consistent with the Regulation or national law or for reasons of public interest or public order. This confirms a strong state discretion in this area despite the changes induced by the European integration:

"[…] the Member State concerned shall, taking into account its constitutional structure, approve the prospective member's participation in the EGTC, unless it considers that such participation is not in conformity with this Regulation or national law,

including the prospective member's powers and duties, or that such participation is not justified for reasons of public interest or of public policy of that Member State. In such a case, the Member State shall give a statement of its reasons for withholding approval" (art. 4, par. 3).

One consequence of such polycentrism of actors is the plurality, material and subjective, of sources. On the one hand, indeed, there are different legislators that contribute to the definition of the regulatory framework (also for the *renvoi* of the Regulation to national law). On the other, we find ourselves before a jungle of legal acts of a different nature and belonging to different fields: the Regulation, the national acts of implementation, the statute and the convention of each EGTC.

This produces a "paradoxical" effect: although the Regulation and the relevant EU provisions aim to create a common framework for action in the field of territorial cooperation, even in this area EU law has inevitably to deal with the existing constitutional diversity at national level; this situation results in the creation of legal heterogeneity and asymmetry.

In fact, the reference to national law (Art. 7, 2[XXII]) is a *renvoi* to a context where sub-national authorities enjoy a distinct and fragmented constitutional *status* (for example, there are regions with legislative powers and mere administrative regions[XXIII]).

The relevant discipline of territorial cooperation is thus based on the interaction between the "minimum requirements" of the EGTC, established by the Regulation, and national law, and this conducts to an evident legal complexity:

"*These provisions create a European-wide legal basis with certain common obligations for transfrontier cooperation applicable in all states, which has never existed so far […]. the Regulation is restricted by the limitations stemming from national law (since the final decision on whether an entity is entitled to participate in an EGTC is in the hands of the national state and is dependent on the respective national legislation). Furthermore, many characteristics of an EGTC are determined by the respective national law of the state, where the EGTC has its headquarter. Therefore, an EGTC with the same members and same tasks will have different features if it has its headquarter in state A or state B because of the different legal framework provided by each state*" (Engl, 2009).

Concerning the material plurality of sources (*hard law*, *soft law*), the Regulation designs an atypical and complex architecture as shown by Art. 2:

"*1. An EGTC shall be governed by the following:*

a) this Regulation;

(b) where expressly authorised by this Regulation, the provisions of the convention and the statutes referred to in Articles 8 and 9;

(c) in the case of matters not, or only partly, regulated by this Regulation, the laws of the Member State where the EGTC has its registered office.

Where it is necessary under Community or international private law to establish the choice of law which governs an EGTC's acts, an EGTC shall be treated as an entity of the Member State where it has its registered office.

2. Where a Member State comprises several territorial entities which have their own rules of applicable law, the reference to the law applicable under paragraph 1(c) shall include the law of those entities, taking into account the constitutional structure of the Member State concerned".

This "cascade system" confirms the atypical nature of the Regulation, more similar to a directive, since it needs to be completed by national legal norms and the para-legal discipline of this cooperative body (EGTC convention and statute). As a consequence, this interordinamental interaction presents many problematic issues for judges in charge of interpretation and application of this "patchy" legal framework (Strazzari, 2011, 154).

5. Final remarks

In this article I presented the law of cross-border cooperation in EU law as an example of transnational law. To do this, I structured the article into two sections: in the first part I made clear what is meant by transnational law (taking into account the main definitions existing in the literature and trying to clarify the relationship between transnational law and classic branches of law). In the second, , I offered a brief and functional analysis of the regulation on cross-border cooperation in the light of what had been presented as being the features of transnational law. This also explains the selective approach adopted with regard to the provisions of the relevant EU Regulation. These conclusions certainly do not exhaust the subject, but the purpose was to find openness, incompleteness of state law, polycentricism and fragmentation of sources - characteristics of transnational law as such - in the legal phenomenon of cross-border cooperation.

In the conducted analysis cross-border cooperation presents itself as a multi-level, dynamic and complex ambit where different legal systems meet: international law

(especially if we focus on the origins of such cooperation), EU law, and national laws characterized by a different "territorial constitution" represent a complex and composed chemistry.

In order to study this phenomenon it is necessary to employ a procedural perspective, conceiving of this combination of legal provisions in a dynamic way, because it is impossible to understand the relation among levels in a non-hierarchical manner where no level has supremacy over another.

This situation reflects the decline of an exclusively hierarchical reading of the relationship between legal orders. With this, I am not arguing for the end of the principle of hierarchy as such but, rather, for the end of the exhaustiveness of this principle as the sole criterion of analysis. This connects to the parallel, not exhaustivity, of state law in the transnational background[XXIV].

This situation is often described as the outcome of legal pluralism produced by what was called "second modernity" or "liquid modernity" (Baumann, 2000) of law. In the representation given by some authors, "solid modernity" has an *endemic tendency to totalitarianism*[XXV], due to its heavy, solid, compact and systemic character that we find represented in the era of the "civil code" (especially in those produced under totalitarianism[XXVI]) in which, for example, the general principles of legal order served as points of "closure" for a self-referential system in which sovereignty was conceived as a "right to the have the last say" on the definition of legally relevant situations present in a given territory. Today, however, sovereignty presents itself rather as a "right to participate" in decision-making processes concerning legal situations that are no longer constrained to the territory of a single state. In this context, state law appears as "open" not only with regard to the fundamental rights dimension but also on "territorial" issues. As said by Ferrarese: "The loss of solidity manifests itself as a fall in terms of 'physicality' of the world, i.e. as a reduction of barriers, fall of barriers, overcoming or porosity of borders, and emancipation from rigidity" (Ferrarese, 2002, 54; own translation).

The emergence of issues not simply governable by state actors inevitably lead to the use of logical relationships and cooperation with the abandonment of the legal-rational tradition inherited from legal positivism. Cross-border cooperation in areas not only "genetically" predisposed to overcome national boundaries - transport, tourism,

environment, etc. - but also those traditionally belonging to a state sphere of decision-making, such as health, is a good example of this[XXVII].

It is not the case that the law of cross-border cooperation has been described as something which "reverses what can be called the 'nation-state exception' in the history of mankind"[XXVIII].

This scenery can be represented through a multi-layered scheme where each territorial entity has an interest in participating in the progressive institutionalization which has changed the structure and goal of territorial cooperation.

The functional nature of this kind of cooperation has given territorial cooperation a broader character and confirms the success of the relational logic as a general method of political decision in multi-layered legal contexts.

Like in other areas of European integration, in this case the origin of the phenomenon equally has an economic nature: one of the reasons that led to the development of territorial cooperation was the lack of competitiveness of cross-border territories.

The decrease of the "border effect", together with the existence of distinct "*differentials in terms of unitary costs of production*"[XXIX], if carried out within territorial cooperation responds well to the political strategy of "spillover" and step-by-step development.

Against this background, the EGTC has created an interesting dynamic, first of all because it gave a new boost to initiatives of cross-border cooperation already in existence and also because of gathering attention to the idea of territory and by giving internal and external frontiers new blood.

The law of cross-border cooperation is characterized by an inherited ambivalence: its differentiated and plural structure (plurality of sources, actors, actions and practises), on the one hand, is accompanied by a unitary and pragmatic function on the other:

"*the law of CBC is a pluralistic (multiactor and multilevel) law, which, in its essence, boils down to a 'procedural skeleton' represented by cooperation mechanisms of domestic law but goes far beyond that. It thus follows that, on the one hand, the more effective the cooperation procedures, the swifter the CBC. On the other hand, however, while the bones of the law of CBC are essentially the domestic cooperation procedures, the flesh around them is represented by the political capacity of the cooperating bodies as well as by the activities of all the involved actors that contribute to create the whole picture*" (Palermo, 2012, 84).

The law of cross-border cooperation thus represents a relevant case study to understand new dynamics of transnational law for different reasons and as a matter of fact: "*the new law of CBC epitomizes the integrated legal order of the 21st century: a multisource, multilevel, multi-actors, multidisciplinary and multinational legal system, yet a unitary phenomenon, where soft law and actual practices also play an essential role. The study of the law of CBC is key to understanding of the legal reality of the present and future*" (Palermo, 2012, 88).

Its open nature makes cross-border cooperation a useful perspective to analyse the a-systematicity (meant as the end of the closed system) of the legal sources in transnational law.

The crisis of the state has produced the end of the state monopoly on legal sources applicable in its own territory. This phenomenon has at least two effects.

On the one hand, state law cannot - completely at least - cover the discipline of the activities on state territory. On the other hand, it highlights the importance of new legal phenomena involving different subjects and institutions and, more generally, the emergence of a new reticular governance.

In this context, we cannot find a basic norm which centralizes and redistributes the law making power (an example of this is given, at international level, by the *Codes of Conduct*[XXX] and, for what concerns our ambit of investigation, the conventions and statutes of the ETGC).

This implies the relativization of the distinction between "external" and "domestic" law and between "law" and "non-law" *as a result of the "already mentioned relativisation of a territorial grounding of law in a particular jurisdiction*"[XXXI]. This implies that the state and its law must interact not only with other states (entities provided with general purposes and universal competence over their territory), but also with different actors (public/non-public; on this, see Cafaggi, 2010) gradually emerging in the supra-state arena.

This is why the phenomenon of cross-border cooperation allows us to deal with the challenges by which lawyers in the scenery of transnational law are confronted. In this sense, jurists cannot limit themselves to a mere apologetic or formal approach to analyse these new phenomena but they have to employ a critical perspective through which it is possible to isolate problematic elements, going beyond the mere descriptive plan and acting as a "brake", to employ the famous metaphor of Bruce Ackerman (1989).

Among the main challenges there is above all that to ensure greater consistency in the jungle of sources of the law of cross-border cooperation and to guarantee greater clarity about the role played by some organizations such as the Council of Europe, without necessarily incurring a sense of frustration generated by a frantic search for a final decision-maker able to ensure the "certainty" of this law[XXXII]. One could think of different ways of doing this: conceiving of cross-border cooperation as a fertile ground for the development of dynamics similar to those advocated by supporters of the so-called global administrative law (enhancing, for instance, the procedural character of the law of cross-border cooperation; on GAL see: Krisch - Kingsbury, 2006; Cassese, 2005); those suggested by scholars interested in global constitutional law, thus understanding cross-border cooperation as a platform for the creation of a uniform discipline aimed at protecting certain assets provided with constitutional relevance in a multi-level context (see for instance Kumm, 2009; for an account of the debate between global administrative and constitutional lawyers see Krisch, 2010); or even conceive of the law of cross-border cooperation as an autonomous legal field, treating it "*as a specific legal branch rather than just a 'common pattern*"'(Palermo, 2012, 88).

This debate goes beyond the goals of the present article but shapes the research agenda of jurists today, which is why I limit myself to a brief consideration, stressing that the non-sectoral character of the law of cross-border cooperation has the merit not to exclude *a priori* a possible contribution by scholars coming from different disciplines (constitutional, administrative, comparative, and international lawyers, among others) in this respect.

To conclude, the law of cross-border cooperation represents a turning point in the progressive efforts made by lawyers at adapting their toolbox to new categories of transnational law.

Jurists, like Alice in "Through the looking-glass, and what Alice found there" by Lewis Carroll, "*must accept the dissolution (non-operativity) of her categories (moving towards something means going away from it, talking flowers and inanimate things; in order to understand, it is necessary to read backwards) and develop new cognitive and normative strategies in order to reduce the complexity of the world of the mirror*"[XXXIII].

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I "*Legal inquiries into the future of law in an era of globalisation are regularly confronted with accounts of law's alleged weakness to extend itself effectively beyond national, jurisdictional boundaries. At the same time, lawyers are not the only scholars by far who reflect on the regulatory challenges of today, which are often summarised under the heading of 'global governance'. An investigation into the nature and scope of legal regulation in this context is unavoidably exposed to questions of origin and function, on the one hand, and to questions of relations, compatibility and inter-disciplinarity, on the other. In this often polemic and heated discourse of disciplines and narratives, an effort to re-construct a discipline's approach and methodology offers insights into both the trajectories and the characteristics of a particular discipline's 'take' on the problems which are at stake in a fast evolving highly asymmetric global arena*". Zumbansen, "Defining the Space of Transnational Law".

II As Martinico put it "by 'second modernity constitutionalism' I refer to post national constitutionalism or constitutionalism beyond the State dimension" (Martinico, 2011).

III I am referring to "systemic conflicts", i.e. conflicts produced between different legal orders and provided with a relevant impact on the fundamental principles of the orders involved in the conflict. They are positive and natural conflicts which contribute to the development of the system in the sense employed by Halberstam with regard to the role played by conflicts in the multilevel legal orders in Europe and US (Halberstam, 2009, 326 ff.) On the concept of "systematic conflict" (although in a different context) see Reuten - Williams (1994).

IV By "conventional law" I do not refer to the law of Treaties or to the law of conventions as understood in English constitutional law. Rather, by this formula I mean law (norms, standards, criteria) created by agreements stipulated or accepted by subjects put on equal footing or at least characterized by a relation which cannot be read in pure hierarchical terms.

V As stressed by Frediani (Frediani, 2010, 214 ff) the progressive valorization of the contractual instrument is due to its "agility" and "flexibility" in adapting quickly the legal framework to the changes affecting the social and economic context", lending itself to that "adaptive function" that the law is called upon to play in the global legal space.

VI There is a massive body of literature on the idea of globalization, among others, see: Beck, 1999; Giddens, 2001; Robertson, 1992; Sassen, 2007; Zolo, 2006; Ferrarese, 2011; Ferrarese, 2000; Held-Mcgrew, 2007; Held, 2007; Cassese, 2006.

VII In this sense "*"global" […] is not unity but ubiquity. It is not a whole with a global meaning able to transmit to the distinct parts of the totality*" (Irti, 2006, 60; own translation).

VIII "*The first of the three approaches begins with a focus on empirical context and environment – in other words, transnational phenomena attracting or indeed, in some cases, seeking to avoid regulation – and then, with some strong if implicit premise that such phenomena are heightening and broadening with every passing day .This approach then asks how/where 'law', as we currently know and practice it, fits into the picture. This approach might focus on the first sentence of Jessup's seminal framing of a meaning for 'transnational law' by saying it is 'all law which regulates actions or events that transcend national frontiers'*" (Scott, 2009, 870).

IX "*A second approach to transnational law would concede that the legal traditionalist may be correct to say that the 'law' dealing with transnational phenomena can always in some respects be analytically traced to one or more domestic legal systems and/or public international law*" (Scott, 2009, 870).

X "*This approach sees in 'transnational law' something more than decisions plus extrapolations from decisional results in transnationalized contexts. Rather, transnational law is imagined as in some respects occupying its own normative sphere. For example, a not uncommon way of speaking about transnational law is as a kind of law of the interface or, as I have elsewhere described this strand of thinking, law that is neither national nor international nor public nor private at the same time as being both national and international, as well as public and private*" (Scott, 2009, 873).

XI On the concept of "federalizing process" see: Friedrich, 1968; La Pergola, 1987.

XII A very interesting study going into this direction is that by Gordillo. The author argues that: "*This situation creates an apparent complexity in the management of interterritorial relationships, a complexity that also affects, in a significant manner, legal security. For individuals (either an individual or a legal person, from a foundation to the largest corporation) perhaps the most important thing is to live under a firm order making predictable the legal consequences of their actions. Because talking about 'fragmentation of international law', 'legal pluralism' or orders that organize their coexistence through 'counterlimits' or 'contrapunctual law' principles or, more generally, the so-called 'global governance' that some call 'governance' (to give some examples that we shall discuss in this book) is undoubtedly of great interest to the doctrine, and tries to understand*

some realities and influence them, there is no doubt that these ideas have inspired the solutions that supranational courts have given in the litigation that has arisen. But it raises some doubts about the fact that these doctrinal models or theoretical constructions may provide confidence (in terms of legal certainty) to multinational companies and investment funds that operate in a context that could be described as transnational" (Gordillo, 2012, 3-4) and "*first, the messy interordinal overlap prevents individuals from having a clear idea regarding their particular 'charter of rights and obligations', that is, what fundamental rights are recognized and what obligations they have. Secondly, the very existence of different levels of protection of fundamental rights according to the applicable legal order does not seem a priori objectionable. Now the problem arises when the minimum rights considered by some orders as indispensable are not respected – this is where the application of an EC/EU regulation (being a direct development of a UN sanction) does not comply with one or more of the fundamental rights recognized as such in the national Constitution*" (Gordillo, 2012, 7).

[XIII] In the words of Irti, the choice between "spatial foundation of law" and "law in spatial form" is the same as the choice between the "place of the group that determines and structures the norms" and the "norms that are projected into the space of men" (Irti, 2006, 20 ff; own translation).

[XIV] In this "*law tends to create singular relations with places […] and places can be inhabited by legal plural and variable relations*" (Ferrarese, 2011, 388; own translation).

[XV] Scott, 2000. For a definition of cognitive regions see: Väyrynen, 2003: "These authors define regions with the help of such concepts as trust, common identities, and shared values as these are embedded in cross-border networks. Such imagined or cognitive regions – often produced by the spread of liberal values and interests – are delineated by non physical markers. The existence of a cognitive region does not necessarily require that its members occupy a common space for it can be formed through non spatial interactions. A major type of cognitive region is the security community whose members expect change to occur peacefully and disputes to be resolved non-violently".

[XVI] On cohesion policies and role of regions see: Hooghe - Marks, 2001; Leclerc, 2003.

[XVII] Art. 3 TEU, 3: "*The Union shall establish an internal market. It shall work for the sustainable development of Europe based on balanced economic growth and price stability, a highly competitive social market economy, aiming at full employment and social progress, and a high level of protection and improvement of the quality of the environment. It shall promote scientific and technological advance.*

It shall combat social exclusion and discrimination, and shall promote social justice and protection, equality between women and men, solidarity between generations and protection of the rights of the child.

It shall promote economic, social and territorial cohesion, and solidarity among Member States.

It shall respect its rich cultural and linguistic diversity, and shall ensure that Europe's cultural heritage is safeguarded and enhanced".

[XVIII] Art. 4 TFEU, 2, lit. c: "*Shared competence between the Union and the Member States applies in the following principal areas: ...(c) economic, social and territorial cohesion*".

[XIX] Art. 14 TFEU: "*Without prejudice to Article 4 of the Treaty on European Union or to Articles 93, 106 and 107 of this Treaty, and given the place occupied by services of general economic interest in the shared values of the Union as well as their role in promoting social and territorial cohesion, the Union and the Member States, each within their respective powers and within the scope of application of the Treaties, shall take care that such services operate on the basis of principles and conditions, particularly economic and financial conditions, which enable them to fulfil their missions. The European Parliament and the Council, acting by means of regulations in accordance with the ordinary legislative procedure, shall establish these principles and set these conditions without prejudice to the competence of Member States, in compliance with the Treaties, to provide, to commission and to fund such services*".

[XX] Devoted to economic, social and territorial cohesion (Art. 174-178 TFEU).

[XXI] For example, the European Economic Interest Grouping (Regulation EEC 2137/85 of the Council of 25 July 1985 concerning the creation of a European Economic Interest Grouping (OJ n. L 199 of 31 July of 1985) or the European Cooperative Society (Regulation EC n. 1435/2003 of the Council of 22 July 2003 on the Statute for a European Cooperative Society (OJEU n. L 207 of 18 August 2003).

[XXII] Art. 7, 2, Regulation No. 1082/2006: "*An EGTC shall act within the confines of the tasks given to it, which shall be limited to the facilitation and promotion of territorial cooperation to strengthen economic and social cohesion and be determined by its members on the basis that they all fall within the competence of every member under its national law*".

[XXIII] As pointed out by Strazzari: "*The involvement in CBC of subnational units, enjoying legislative powers or even treaty-making power, can turn out to be a problem for those countries whose subnational units are merely entitled to administrative powers. In these cases, intervention at the national political level can become convenient, at least when the cooperation concerns matters beyond the competences conferred to the domestic subnational units. The political backing-up of the central government can also be necessary to avoid any potential infringements of the national foreign policy. CBC may become a highly sensible political*

issue when it involves subnational units with significant economic resources and powers" (Strazzari, 2011, 169). See for instance the content of the Karlsruhe Accord and of the Valencia Treaty between Spain and Portugal.

[XXIV] "*In order to unpack the claims of an increasingly de-territorialised or, autonomous nature of regulatory governance, it is necessary, on the one hand, to re-visit the arguments which were launched by some scholars who connected the claim of an 'exhaustion' of law and of the nation-state's regulatory power with an emphasis on 'social norms*'" (Zumbansen, 2011).

[XXV] "*That heavy/solid/condense/systemic modernity of the 'critical theory' era was endemically pregnant with the tendency towards totalitarianism*" (Bauman, 2000, 25).

[XXVI] See for instance Art. 12 of the Provisions on the Law in general of the Italian Civil Code.

[XXVII] See for instance the Directive 2011/24/EU of the European Parliament and of the Council, dated 9 March 2011 on the application of patients' rights in cross-border healthcare and the EGTC "Hospital de la Cerdanya" 2011/S 59-096124 http://www.boe.es/boe/dias/2011/02/11/pdfs/BOE-A-2011-2663.pdf.

[XXVIII] Palermo, 2012, 72. Palermo refers to Ortino, 2002, 76.

[XXIX] Blanco González, 2008, 15 ff. The creation of common and hyperspecialized structures between regions with similar problems can contribute to the creation of competitive advantages especially if supported by complementary factors like the "fluid exchange of information," "cooperative culture" and "unique hierarchical dependence" (own translation).

[XXX] "*An example taken from the corporate law context may serve as an illustration: the much lamented, regulatory "failure" of traditional, state-based legal-political intervention into multi-national corporations (MNC) has long been serving as an argument for the need to develop either distinctly "post-national", institutionalised governance forms or to strengthen further the grip of self-regulatory and soft instruments, which have only a voluntary binding nature*" (Zumbansen, 2011).

[XXXI] "*Importantly, this trajectory of legal evolution can be studied as a process of law's transnationalisation. Despite its prima facie appearance as being relevant exclusively within the nation state's framework of legal ordering, the just alluded-to scholarly projects in legal sociology, legal theory and anthropology, and philosophy of law are reflective of the changing environment of legal systems. This transformation is foremost perceived as one of eroding boundaries, boundaries between form and substance, between public and private ("states" and "markets"), but is, at its core, concerned with the contestation, de-construction and relativisation of the boundaries between law and – non-law. At the height of the regulatory state with its climactical belief in juridification and in law as social engineering, law today is often seen as having become irrelevant in the face of global challenges*" (Zumbansen, 2011).

[XXXII] "*Finally, it would be wrong, from such a perspective, to expect international or supranational actors to become the ultimate decision-makers because the very essence of CBC runs counter to the presence of such an ultimate authority. Too often in the political discourse, but also in the academic literature, the new international and supranational sources of CBC law are still looked at from a hierarchical perspective, from which it is simplistically expected that the international actors will replace the state power as the supreme authority. But the international norms cannot provide a substitute for that which they are contributing to the dissipation of. What is all the more essential is the very presence of international norms, dealing with the phenomenon of CBC, that provide a common framework for reference and seek to establish common procedures. The recurrent frustration expressed in the literature about the role of the Council of Europe in the field of CBC and the excessive enthusiasm for the EGTC are two sides of the same coin. They stem from the wrong point of departure, which implies that the main player and the source of law could be identified. Such an approach is linked to a very statist reading of the law, in which a Grundnorm is always to be found for which one level of government is democratically accountable*" (Palermo, 2012, 85).

[XXXIII] Scamardella, 2009. See for instance the following passage from Carroll's book: "'I think I'll go and meet her', said Alice, for, though the flowers were interesting enough, she felt that it would be far grander to have a talk with a real Queen. 'You can't possibly do that', said the Rose: 'I should advise you to walk the other way'. This sounded nonsense to Alice, so she said nothing, but set off at once towards the Red Queen. To her surprise, she lost sight of her in a moment, and found herself walking in at the front-door again. A little provoked, she drew back, and after looking everywhere for the queen (whom she spied out at last, a long way off), she thought she would try the plan, this time, of walking in the opposite direction" (Carroll, 1871, 21).

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The Multiannual Financial Framework 2014–20 – Best European value for less money?

by

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Abstract

The eurozone crisis has made budgetary issues the focal point of political and public debates about the European Union. Besides the pessimistic context and conflictive nature of the ongoing negotiation of the multiannual financial framework 2014–20, there seems to be a common ground to work towards an EU Budget that contributes to growth and employment in line with the Europe 2020 strategy. If this common understanding materialises, then this would not only be a major step to convert the budget into an instrument to overcome the crisis but also change the nature of the communitarian budget. In this article, I analyse the principal conflictive topics as well as the negotiation positions and proposals of the main actors in order to present the current state of the negotiation of the MFF 2014–20. I will specifically analyse the preferences of the main actors.

Key-words

multiannual financial framework; EU budget; Europe 2020 strategy; Common Agricultural Policy; Cohesion Policy

Introduction

The eurozone crisis has made budgetary issues the focal point of political and public debates about the European Union. These debates on transfers from national budgets to European crisis mechanisms and bailout funds have distorted the public perception of the financing of the EU and its spending policies. The EU budget is based on a multiannual financial framework (MFF), negotiated between the individual members and agreed upon at the level of European institutions. Traditionally the negotiations of the MFFs have been highlighted in the academic literature and media as tortuous battles where agreements are reached only at the last minute.[I] Since the EU budget represents only roughly 1 per cent of the Community Gross National Income (GNI), the question is why so much political drama? In fact, the negotiations of the MFFs are more than purely financial negotiations about budgetary costs and benefits of different Member States but determine the EU's financial resources and policy priorities for several years. In this sense the MFFs combine three complex elements: the debate on the budgetary exercise, the policy goals and the institutional influence of the different actors in the decision making process.

The euro crisis and conflicts among Member States on budgetary stimulus for growth or national cutbacks have affected the ongoing negotiations. The perceived decline in public support for the EU has added further tension, as has the fact that the Member States most affected by the crisis are the same that had received structural support from the EU budget over several decades.

Nevertheless, besides the pessimistic context and conflictive nature of the ongoing debate, there seems to be a common ground among Member States to work towards a MFF 2014–20 that contributes to growth and employment in line with the Europe 2020 strategy. If this common understanding materialises, then this would not only be a major step to convert the budget into an instrument to overcome the crisis but also change the nature of the communitarian budget. Even though the European Commissioner for Budget, Mr. Lewandowski, made it clear that the EU budget is not the "magic solution" to the crisis, the question remains open and crucial: How far can the MFF 2014–20 help to counteract the negative impacts of the crisis and the social impact of the austerity measures

implemented across Europe? What is the role of the current debate on the MFF 2014–20 for the present economic crisis?

While small and insufficient to address the crisis in Europe, the EU budget is the principal financial instrument for joint action by Member States to face common challenges. In relation to national budgets, the distinctive role of the EU budget lies in financing investments where important economies of scale can be reached, steering national policies, but also in co-generating investments from private and public sectors. In fact, the EU budget consists of up to 95 per cent of policy-related investment expenditure and only 5 per cent of administrative expenditure.

Historically, the EU budget has played an important role in the EU integration process, making it acceptable for Member States through specific financial compensations and financing major EU policies such as the CAP and Regional Policy. These "compensations" were locked into the EU budgetary resource structure and made the EU budget quite "inflexible" and resistant to reform. Nevertheless, the EU budged has evolved, adapting its financing and spending structure to the EU integration process as well as to specific challenges. This has progressively consolidated the budget as a main economic instrument.[II]

In this article, I analyse the principal conflictive topics as well as the negotiation positions and proposals of the main actors in order to present the current state of the negotiation of the MFF 2014–20. I will specifically analyse the preferences of the main actors

- with regards to the budgetary exercise, i.e. the distribution of resources among the spending "headings" or policy areas compared to the MFF 2007–13;
- with regards to policy goals, i.e. the role that the MFF 2014–20 should assume in order to overcome the crisis as well as to contribute to the fulfilment of the objectives of the Europe 2020 strategy; as well as
- in relation to the institutional setting, i.e. the respective roles of the European Commission and the European Parliament in the budgetary decision making process.

In answering these questions, this article aims to give an insight into the complex negotiation of the MFF 2014–20 and contribute to the debate on whether the MFF 2014–

20 will reinforce the ongoing paradigm change in the perception of the EU budget, from a budget aimed at compensating Member States for their political compromises to a budget aimed at solving EU-wide problems.

1. The state of the negotiation

The budgetary negotiation process started some years ago with a broad public debate on the EU budget.[III] Several new ideas came up, aiming at a refocusing of EU spending priorities and the financing of the EU budget (Haug et. al. 2011).[IV] However, as a major difference to former negotiations, the negotiation of the MFF 2014–20 takes place in a context of economic crisis: the first major crisis of the euro and public debt markets. The negotiation is also complex for several other reasons:

- It is the first time that 27 Member States negotiate an MFF. The enlargements of 2004 and 2007 resulted in a significant shift in the balance of net contributors and net beneficiaries, especially in the cohesion policy where Poland became the largest recipient. Croatia will join the European Union on 1 July 2013 as its 28th Member State.
- The MFF 2014–20 must fulfil the objectives of the Europe 2020 strategy.
- The Lisbon Treaty has introduced new objectives for the EU which require financing, such as territorial cohesion, policies on migration and climate change as well as the creation of a European External Service.
- There will be a greater role for the European Parliament, which will have to adopt the Regulation before the Council makes its decision (co-decision procedure).
- There is no effective ongoing parallel negotiation on resources which would allow compensating Member States for some compromises.
- Negotiations are carried out in a political climate characterized by an increasing euroscepticism, not only among citizens but also among the political elite.

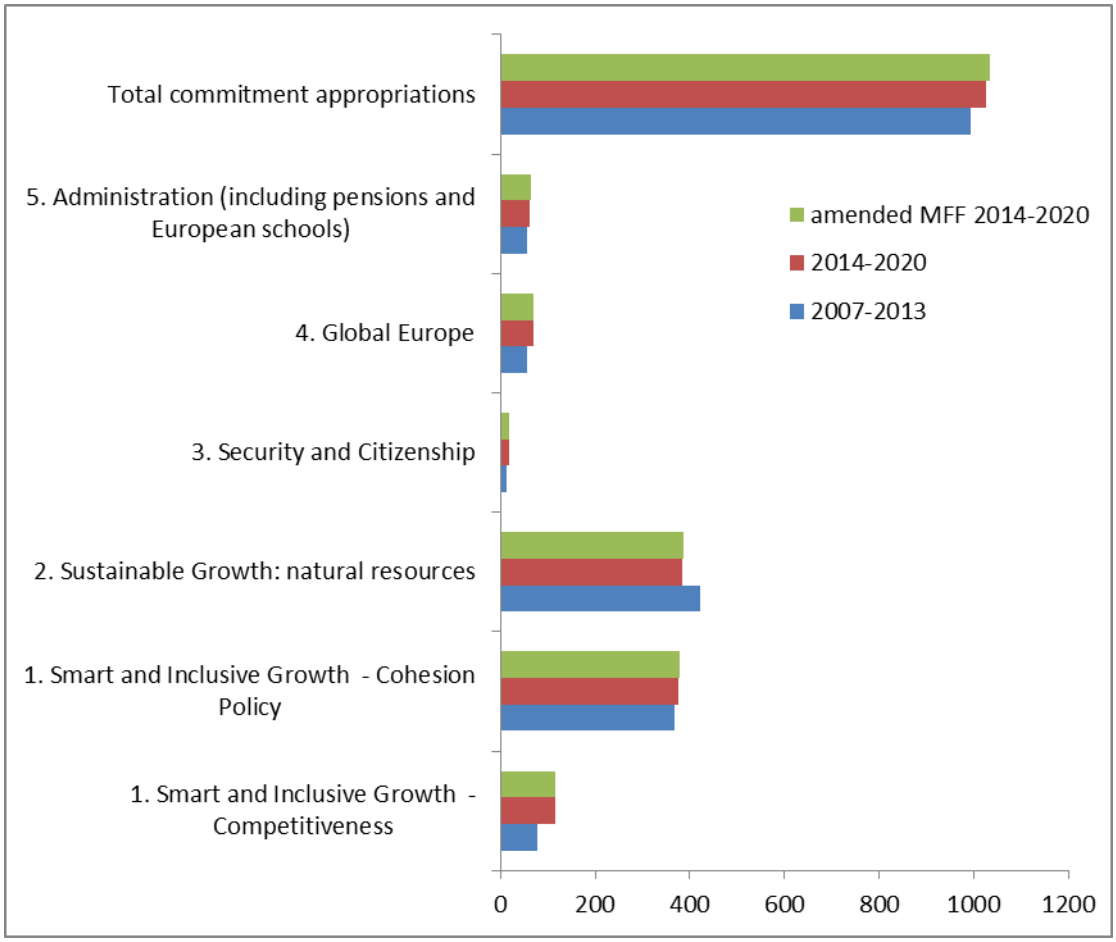
During the past months, the Polish and Danish EU Presidencies have undertaken efforts in order to narrow down Member States' positions. Although the Danish Presidency achieved some progress during the first months of 2012, it could not advance enough to have a first concrete debate on an outline of the MFF 2014–20 at the June

Council. Member States are still divided on several key elements of the European Commission's proposals and the discussion still concentrates primarily on the overall size of the MFF 2014–20 as well as on the decisive questions of the CAP reform and future Cohesion Policy (Kölling et. al. 2012a). Two broad groups of opinions can be identified: the "Friends of Cohesion Policy"[V] on the one hand and the "Friends of Better Spending"[VI] on the other. Although both groups agree that the EU should direct its efforts primarily at measures which significantly contribute to sustainable economic growth and employment, the first group focuses on the fact that the EC's budgetary proposal constitutes the absolute minimum for this task. The second insists on the need to limit public spending and considers that the quality of spending is key to creating additional growth. In this controversial debate, longstanding arguments on financial cost-sharing as well as about the added value of EU policies like the CAP and the lack of intervention in areas where spillover effects could be expected get mixed up with the debate on the future role of EU institutions in the budgetary decision making process.

Despite this conflict, the idea that the MFF 2014–20 should play an important role in stimulating growth has appeared to be gaining force. During the European Council at the end of June, Member States adopted the "Compact for growth and jobs" which will reallocate €60 billion of unused structural funds and €60 billion of capital from the European Investment Bank to fast-acting growth measures.[VII] In addition, Member States stated in the Council conclusions that the EU budget must become a catalyst for growth and the creation of jobs across Europe[VIII].

However, already at the General Affairs Council on 24 July 2012 this consensus seemed to have disappeared, and the two groups were facing each other again. During this Council the European Commission presented a revised proposal for the MFF 2014–20 which included the accession of Croatia as well as the most recent economic data. While the "Friends of Cohesion Policy" disapproved the revised proposal as not consistent with the message of the earlier European Council, the "Friends of Better Spending" criticised the proposal as based on over-optimistic economic forecasts and being too generous.

Figure 1: Comparing MFF 2007–13, the original MFF 2014–20 proposal and the updated proposal (in million Euros and 2011 prices)



Source: Own elaboration, based on COM(2012) 388 final; COM(2011) 500

After taking over the EU Presidency, the Cyprus government held a series of bilateral meetings with Member States and continued to work on the "negotiating box". In addition, President Van Rompuy will start bilateral negotiations at the beginning of November in order to prepare the "endgame". Finally, at the end of October the European Parliament is expected to adopt its revised position. Despite this tight schedule, Member States expressed their willingness to reach an agreement at a special European Council scheduled for 22–23 November and dedicated solely to the MFF 2014–20. The final agreement should be achieved during the European Council of 13–14 December since, according to budget rules, the Commission has to start preparing the 2014 budget in January 2013

(Kölling et. al. 2012b). If no agreement is reached by the end of 2012, the 2013 ceilings will be extended to 2014 with a 2 per cent inflation adjustment (TFEU, Art. 312.4).

2. The preferences of the main actors

2.1 The European Commission

The publication of the European Commission's proposal marked the starting point for negotiations. As we could see also during previous negotiations, the structure and the content of this proposal have implications for the way in which Member States develop their positions.

In general terms, the proposed structure and duration for the MFF 2014–20 represent a continuation of the MFF 2007–13. The EC tried to accommodate the austerity demands by some Member States in order to maintain a certain influence over the negotiation process and to avoid the risk of a stalemate in the negotiation. However, the proposal also included insights from the budget review as well as initiatives made by the EP. In this regard, the EC proposed several innovative elements and changes to the "rules of the game" on budgetary decision-making. The main innovations of the proposal can be summarised in the following way:

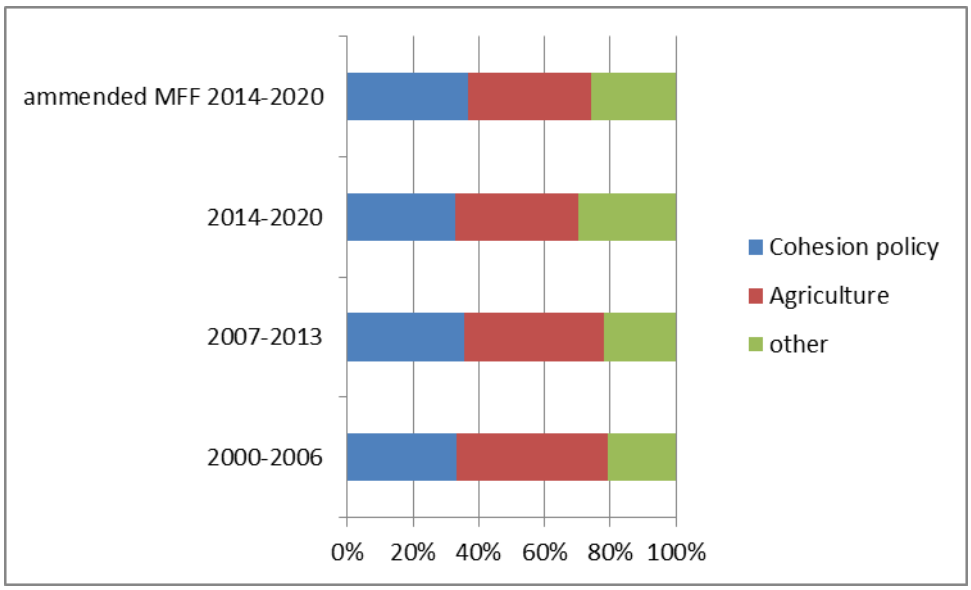
- Concentration on key policies, above all those of the Europe 2020 strategy, in order to prioritise spending on growth and employment policies to respond to the economic crisis in the EU;
- EU spending should clearly offer a "European added value", meaning that there is a general budgetary constraint and choices have to be made;
- Simplification, i.e. reduction of instruments and administrative costs, especially as regards the structural funds and funding for research and innovation;
- Introduction of *ex ante* and *ex post* conditionality in regional policy, thus linking the use of structural funds to national budgetary management and fulfillment of the Stability and Growth Pact objectives;
- Flexibility within and across budgetary headings as a response to a traditional demand of the European Parliament;

- An own resource system based on a new Financial Transactions Tax (FTT) and a reformed Value Added Tax (VAT) resource: this is indeed *the* main innovation in the proposal and tries to give the EU budget greater autonomy and a new source of income that is not linked to national GDPs; and finally
- Enhanced use of innovative financial instruments (Public-Private Partnerships and the European Investment Bank) in areas such as research, innovation and structural funds.

With regard to the overall ceiling, the Commission foresees an overall amount for the seven years of €1,025 billion in commitments (equal to 1.05 per cent of the EU GNI) and €972.2 billion in payments (1 per cent of EU GNI). This represents a 5 per cent increase of the EU budget with respect to the MFF 2007–13.

Regarding the specific spending headings, although all spending headings have been subject to dynamic reforms over the past decades, the two largest – the Common Agricultural Policy (CAP) and Cohesion Policy – are again the most hotly debated topics. Headings 3 (Security and Citizenship) and 4 (Foreign Affairs) and surprisingly also heading 5 (Administration), where smaller amounts are concerned, are less problematic.

Figure 2: Evolution of spending headings in relation to the total of the MFF

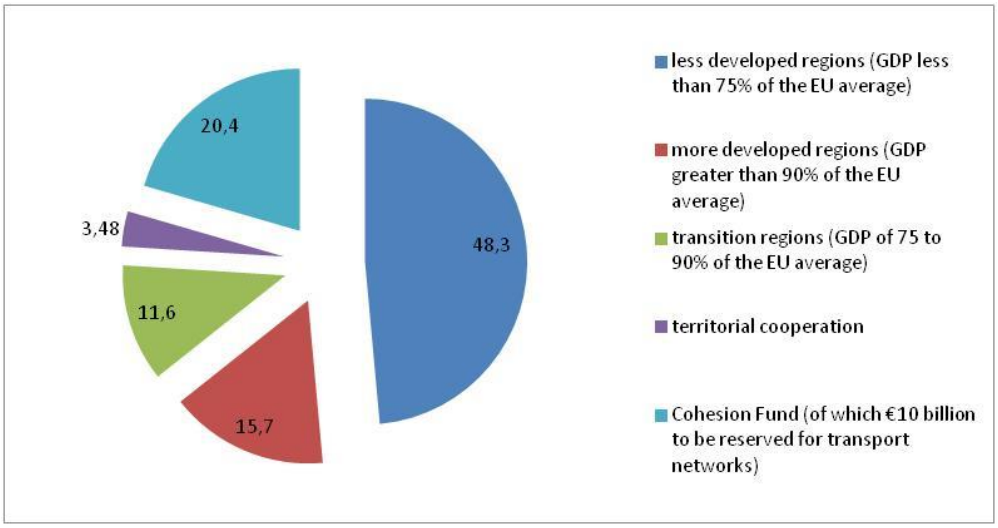


Source: Own elaboration based on COM (2011) 500.

Cohesion Policy

In general terms, the EC proposes €376 billion for Cohesion Policy, which in absolute figures means an increase over the 2007–13 allocation. However, this amount includes €40 billion reserved for a future infrastructure fund that would work completely differently from programs traditionally co-financed by the Structural Funds.

Figure 3: Allocation of resources for Cohesion Policy (in percentages)



Source: Own elaboration, based on COM(2011) 500

As a novelty, a specific amount of Cohesion spending would be earmarked according to the priorities of the Europe 2020 strategy (the most developed regions, for instance, will have to spend at least 20 per cent of European Regional Development Fund allocations on energy efficiency and renewable energy projects). Another new element is the creation of "Transition Regions" with a per capita GDP of between 75 and 90 per cent of the EU average. These regions will receive a "safety net" of structural funds money amounting to at least two thirds of their allocations during the MFF 2007–13. In general, the Commission proposed to reduce the absorption rate from 4 to 2.5 per cent of the GNI for cohesion allocations.

Common Agricultural Policy

In order to ensure that the reformed CAP contributes to the goals of the Europe 2020 strategy, the EC proposed a stronger conditionality of direct payments to farmers, which

means that 30 per cent of direct support will be made conditional upon environmentally supportive practices. Additionally, proposals regarding the capping and convergence of direct payments and the inclusion of the second pillar of the CAP (rural development) into a common strategic framework, together with the Structural Funds, are further elements of the CAP reform as proposed by the EC. In addition to that, after two decades of progressively decoupling CAP support from production, the EC proposed to support especially active farmers.

The amount of expenditure dedicated to the CAP continues to decrease with reference to the MFF 2007–13, and the share of the CAP of the total budget will be reduced from 41 to 36 per cent.

Research and Innovation

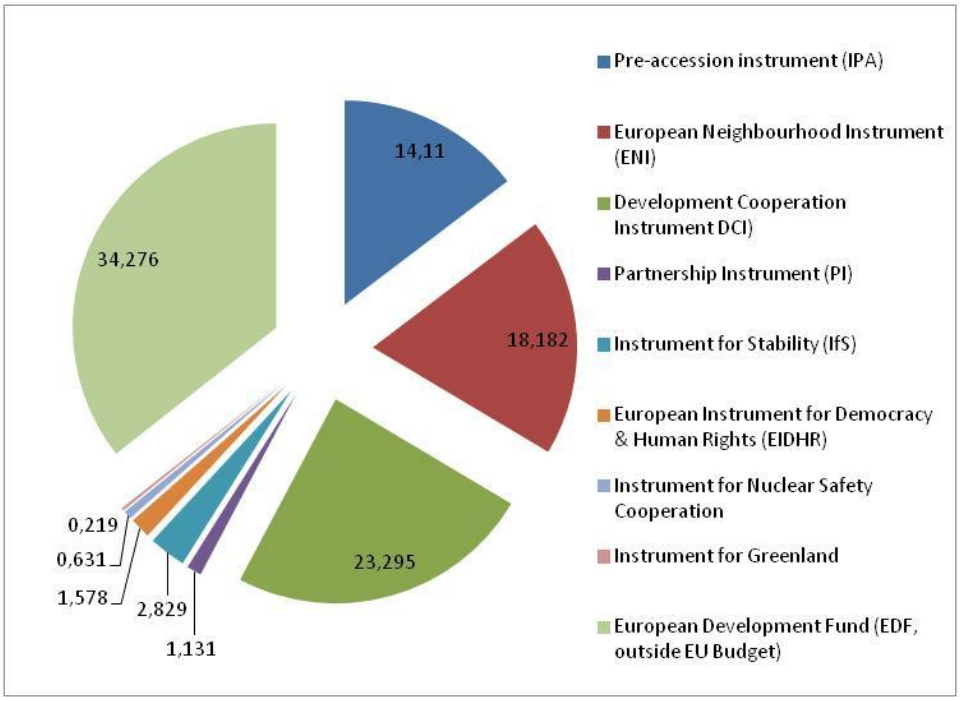
Taking into account the outcome of the budget review, the positions of the EP, as well as those of the European Council, the EC proposed a 46 per cent increase to reach €80 billion in spending for research and innovation. Research should be based on the principle of excellence and be business-oriented. In addition, the new Common Strategic Framework for research, innovation and technological development (Horizon 2020) will concentrate on areas that could stimulate economic growth and competitiveness, e.g. health, food security, bio-economy, energy, and climate change.

External Actions

Despite the sovereign debt crisis, the Commission proposed to increase the resources for its external actions to €96 billion, thus following the expectations brought forward during the budgetary review as well as the objectives for EU external actions defined in the Lisbon Treaty and the Europe 2020 strategy. The EC will focus its work on four policy areas: enlargement, neighbourhood, cooperation with strategic partners, and development cooperation. The proposal foresees nine financial instruments. Only one, the Partnership Instrument, has been newly created and is to replace the Industrial Cooperation Instrument. The main differences to the current framework lie primarily in policy-guiding principles: differentiation, conditionality, concentration as well as a renewed attempt to achieve simplification. Moreover, the increased conditionality related to the

implementation of EU external action instruments has redefined the geographic focus to further represent new elements.

Figure 4: Financial instruments for the EU external action and amounts proposed (in million Euros)



Source: own elaboration, based on COM(2011) 500

Administration

Administrative expenditure currently accounts for 5.7 per cent of spending, used for the European Parliament (20 per cent), the European Council and the Council of Ministers (7 per cent), the Commission (40 per cent) and the smaller institutions and bodies (15 per cent). For the next MFF, the EC proposes a 5 per cent reduction in the staff of each institution as well as measures to increase bureaucratic efficiency.

2.2 The European Parliament

The Treaty of Lisbon gave the European Parliament (EP) the power of consent as regards the expenditure side of the budget (TFEU Art. 312). Although the assent procedure does not formally grant a power of amendment to the EP, this is a fundamental change compared to the previous negotiations because Member States now have to

incorporate the opinion of the EP before reaching the final agreement. The experience of the first two years of the Treaty has also shown the enhanced political role of the European Parliament in annual budgetary negotiations.

During the current negotiations for the MFF 2014–20, the EP not only assumed a new formal role but has also been one of the major players from the very start of the process, for example:

- the EP did not wait for the Commission proposal before presenting its own position;
- the EP elaborated position papers on conflictive issues according to the negotiation steps of the Council;
- the EP representatives met with the Trio presidency ahead of the General Affairs Council; and
- the EP has increasingly become the contact point for national parliaments on a day-to-day basis and also, in a conceptual manner, at common conferences.

Traditionally, because of the lack of budget autonomy and responsibility, the European Parliament has had an incentive to propose expenditure programmes. In practice, however, differences in the incentives for Member States and the EP have been reduced, on the one hand, by a growing acceptance among MEPs of an austerity approach towards budgetary decisions and, on the other hand, by the interests of individual Member States in specific expenditure headings. In this sense the definition of a common position on specific spending headings, e.g. the Cohesion Policy, is increasingly complex.[IX] In the same way, with regard to the CAP reform, MEPs have submitted more that 7,000 amendments to the draft proposals for reform,[X] and the Agriculture Committee will have to work hard to find a common position which has to be voted upon by the end of November.

Nevertheless, an overwhelming majority of MEPs approved the report of the Special Committee on Policy Challenges and Budgetary Resources for a Sustainable European Union after 2013 (SURE), which called for an increase of at least 5 per cent over the 2013 budget for the next MFF. This would raise the size of the budget to 1.1 per cent of the EU GNI. According to the EP, this would not signify additional costs for the Member States. In this sense the European Parliament voted, on 23 May 2012, in favour of an FTT as a measure to generate additional own resources for the EU budget. This resolution

underlined the EP's position that it will not give its consent to the MFF without a political agreement on a reform of the own resources system. In addition, a further resolution on the MFF 2014–20, calling for more flexibility in shifting funds between the different areas of expenditure as well as between fiscal years, was adopted by an overwhelming majority in June 2012.

2.3 The EU Presidency

The mediation provided by the EU Presidency is indispensable to finding compromises and to the elaboration of a final package deal. Adopting a "European hat", Presidencies keep the negotiations moving at various institutional levels and present compromise options on conflicting issues at critical moments in the negotiation. While the Polish EU Presidency pursued a "bottom-up" philosophy in order to clarify the EC proposals as well as to improve the understanding of individual negotiation positions, the Danish EU Presidency assumed a more proactive approach and presented, during its term, different versions of the "negotiating box". Experience shows that small Member States make good EU Presidencies since they are cautious in their external behaviour, acting as honest brokers. However, until now no small country has ever been able to reach an agreement on an MFF. It has always been the bigger Member States that could subordinate certain national material interests to the benefit of reaching an agreement.[XI] This could also be seen during the negotiation of the MFF 2007–13, where the excellent Luxemburg Presidency could not accomplish an agreement but the UK Presidency did, accepting a reduction of its "rebate". Finally, the then only recently elected Chancellor Merkel helped with some additional resources to reach the package deal.

Whether Cyprus, which is now presiding over the EU for the first time, will fulfil both these expectations and its own ambitions has yet to be seen. Several observers consider that its limited administrative resources, the fact of being a minority government and the fragile economic situation are not the best conditions for a successful EU Presidency.[XII] Nevertheless, Nicosia has confirmed its ambition to reach an informal agreement at the October European Council, a deal with the European Parliament in November and a final agreement in December. In January 2013, Ireland will assume the Presidency, again a small country but more experienced in chairing the Council.

2.4 The Member States

The Member States receive different amounts of financial resources from specific headings of the EU budget and contribute to a different degree to its financing. Although these national balance sheets or net returns do not reflect the benefits of EU integration, EU Member States have traditionally concentrated on these zero-sum terms in order to determine their negotiation positions.

The bargaining power of Member States and the unanimity rule, according to which each Member State has a veto and can thus block the final agreement, determine the outcome of the intergovernmental negotiation. Within this context, the top one or two priorities of each Member State have to be accommodated as far as possible, no matter the size of the country. Nevertheless, in the EU27 coalition building has become more important. As already mentioned, two broad groups can presently be identified: the "Friends of Cohesion Policy" and the "Friends of Better Spending". Although the names have changed, both groups represent the traditional division between net contributors and net recipients. Additionally, these groups (with the exception of Italy) also reflect the existing conflict of opinion among Member States on EU anti-crisis measures as well as the tense relation and mistrust that persist between them.

With regard to the "Friends of Better Spending", already in December 2010 the UK, France, Germany, The Netherlands and Finland sent an open letter to Commission President Barroso, demanding an increase of the MFF 2014–20 below the rate of inflation. Since then, around ten Member States have claimed the same austerity for the MFF 2014–20 as applied at the national level, as well as a concentration on "better spending" for "smart growth". During the General Affairs Council on 24 April, a group of seven Member States, signing as "Friends of Better Spending", issued a non-paper reiterating their demands for a limitation of public expenditure at the European level[XIII]. In this sense the impact and not so much the amount of EU funds should be increased in order to reach sustainable growth and the economic governance objectives. In addition, the spending of EU funds should be planned, programmed, controlled, and evaluated in a more efficient way.

Similar concerns were raised on the amended MFF 2014–20 proposal. The group claimed it was still inconsistent with the current economic crisis and Member States' fiscal consolidation efforts. The "Friends of Better Spending" represents those countries where

debate at the national level is highly politicised and where the EU budget has become an issue of political symbolism. National parliaments such as those of the Netherlands and the UK have approved negotiating lines for their governments, dictating a nominal freeze of the budget. In other countries, such as in Germany, debates among citizens and policy-makers backing the austerity position of their government have taken place, expressing concerns about their role as European paymasters.

The group of "Friends of Cohesion Policy", on the other hand, was formed by the new Member States plus Portugal, Greece, and Spain in 2004 to secure the role of Cohesion Policy in the negotiation of the MFF 2007–13. The Polish government then re-activated the group, which presented its first joint declaration at the General Affairs Council in November 2011, defending the necessary resources for the Cohesion Policy and the CAP. On 24 April 2012, 12 Member States[XIV] plus Croatia signed a communiqué in Luxemburg stating that the Commission's proposal concerning the Cohesion Policy would represent the absolute minimum. In early June, the "Friends of Cohesion Policy" group adopted a further statement in Bucharest, signed by 14 Member States[XV] plus Croatia, reiterating the important contribution that the Cohesion Policy makes in terms of growth and employment. The "Friends of Cohesion Policy" also adopted a negative view on the reduction of the Cohesion Policy budget by around €5.5 billion in the revised MFF 2014–20 and claimed that the revised proposal "is not consistent with the message of the [June] European Council"[XVI].

Besides the manifest conflict between the "Friends of Cohesion Policy" and the "Friends of Better Spending", each group internally disagrees over which headings of the budget should be subject to spending restrictions, which headings should be prioritised, as well as over how the EU should be financed.

Overall Ceiling

Because of the general austerity debate, no Member State advocates an increase of the level of the EU budget as foreseen by the EC. However, among the "Friends of Better Spending" a debate has emerged on how much the budget should be reduced. While in January 2012 the UK, Germany, Austria, The Netherlands and Sweden demanded that the Commission's proposal needed to be reduced by €100 billion, Finland claims a budget of less than 1 per cent of EU27 GNI.

After first supporting the austerity demands, Italy has since recently sympathised with the "Friends of Cohesion Policy". France changed its position after the national elections and, together with the Czech Republic, has not specified what amount of reduction it seeks. However, there is a growing number of Member States demanding the inclusion of spending topics which have so far been placed outside the budget within the MFF structure, e.g. emergency tools for agricultural market crises. This could require cuts in other areas.

Cohesion Policy

Naturally, the cohesion countries try to ensure sufficient funding for the Cohesion Policy in order to approach the average level of development in the EU and to create beneficial conditions for economic growth in their less developed regions. In this context, several cohesion countries have criticized the new macro-fiscal conditionality for Cohesion Policy. Although the goal of conditionality, as favoured by the "Group of Better Spending", is to punish misbehaviour on the national level, suspending funding will have the most direct negative impact in these regions. Some countries (Italy, Poland, Lithuania and Estonia, amongst others) have called for macroeconomic conditionality to apply to all EU policies, not just in the field of structural, rural development, and fisheries funds. The definition of the new category of "transition regions"[XVII] has also been met with scepticism, and several Member States have argued that it would be best to concentrate resources on regions most in need. On the other hand, some French and German regions have opposed their government's position and firmly support the new category of "transition regions". The "Friends of Cohesion" have demanded not to include specific measures in the future Cohesion Policy for Member States with a significant decrease of their GDP between 2007 and 2009.[XVIII] This has been criticised by the Spanish government, which has only joined this group together with the Czech Republic in June 2012, after this demand had been excluded and the future role of Spain as net beneficiary clarified.

In addition, not all beneficiaries of the Cohesion Policy concentrate on this spending heading alone, in the sense that cuts under other headings in favour of Cohesion Policy are not supported by all Member States. Furthermore, several Member States, mainly the "Friends of Better Spending", would like to cap spending in Cohesion Policy and create a "reversed safety net" or concentrate structural funds on tackling unemployment, in general,

and youth unemployment, in particular. These proposals could also divide the "Friends of Cohesion", which all have different needs to meet.

Common Agricultural Policy

The proposals regarding the CAP reform also deeply divide the Member States. On the one hand, the proposals do not follow the preferences of those Member States (such as the UK, Denmark and Sweden) critical of the CAP, who have proposed to eliminate or substantially reduce direct aid. On the other hand, the proposals have not been welcomed by traditional beneficiaries of the CAP either, like France, Ireland and Spain, which amongst others criticize the cuts in the overall spending of the CAP and argue that the reform proposals go too far. A third group, comprising Poland and some other new Member States, demands a much stronger reform of this policy in order to achieve an equalisation of direct payments and fair competition for farmers in the EU market, as well as support for increasing the competiveness of European agricultural products on the global market. In 2010, France was the biggest recipient of agricultural funds with 18 per cent, while Germany and Spain jointly occupy the second place, each receiving 13 per cent of overall agricultural expenditure.

Research and Innovation

Apart from discussions to omit certain projects – such as the International Thermonuclear Experimental Reactor – from the main headings of the MFF, overall Member State representatives tend to be satisfied and recognise the advantages of public-public and public-private partnership instruments put forward in the Commission's proposal. Some conflicting points are related to the new financing rules proposed by the Commission. In addition, some Member States have criticised the concentration on excellence and demanded programmes which would help to reach the capacities needed in order to compete with those Member States who, traditionally, have been more successful in European R&D programmes.

External Actions

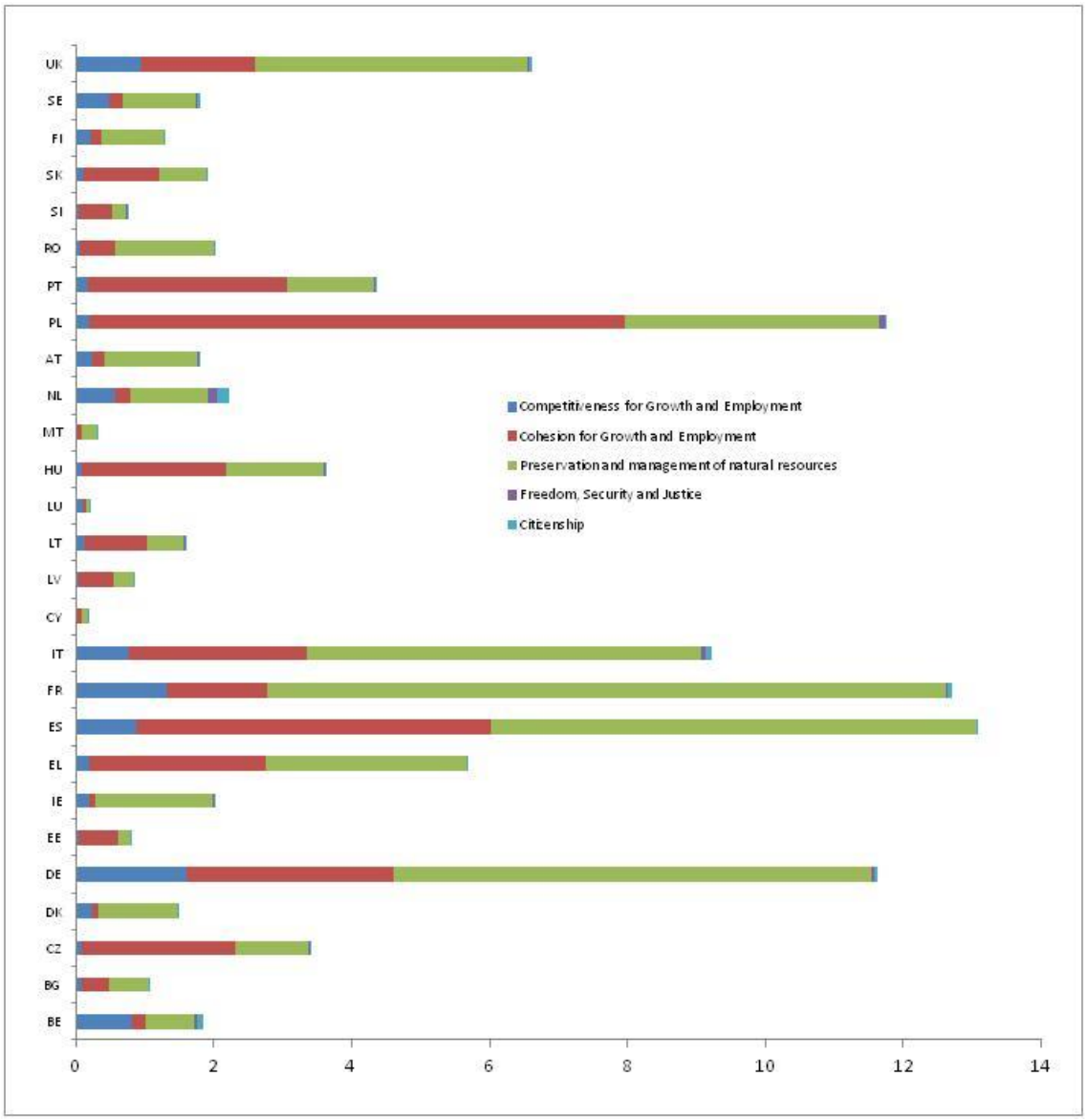
In general terms, the proposal to differentiate and concentrate external spending have been welcomed by the Member States, too. A key priority for Member States, the EC and

the EP is to respect the commitment to dedicate 0.7 per cent of GNI to the fulfilment of the Millennium Goals. Enlargement and the ENP are further priorities. Nevertheless, Member States looking to retain spending under specific headings (like PAC or the Cohesion Policy) would probably argue that cuts be made elsewhere (such as under heading 4). Moreover, Member States which advocate a reduction of the EU budget would accept cuts under heading 4 in order to achieve the final agreement. In addition, we can expect a heated discussion on the question of which specific regions will receive financial support and on how the new policy principles for EU external actions will be put in practice. The Spanish government has already argued that there should be an increase in funds for Latin America and expressed concern over the fact that the MFF 2014–20 will exclude bilateral agreements with eleven countries in Latin America.

Administration

While several Member States, such as Finland, Ireland, The Netherlands, Spain and Sweden, have demanded additional cuts under heading 5, Belgium, Luxemburg and Poland on the other hand support the Commission's proposals under this heading.

Figure 5: Funds received by Member State by spending headings (in billion Euros as of 2010)



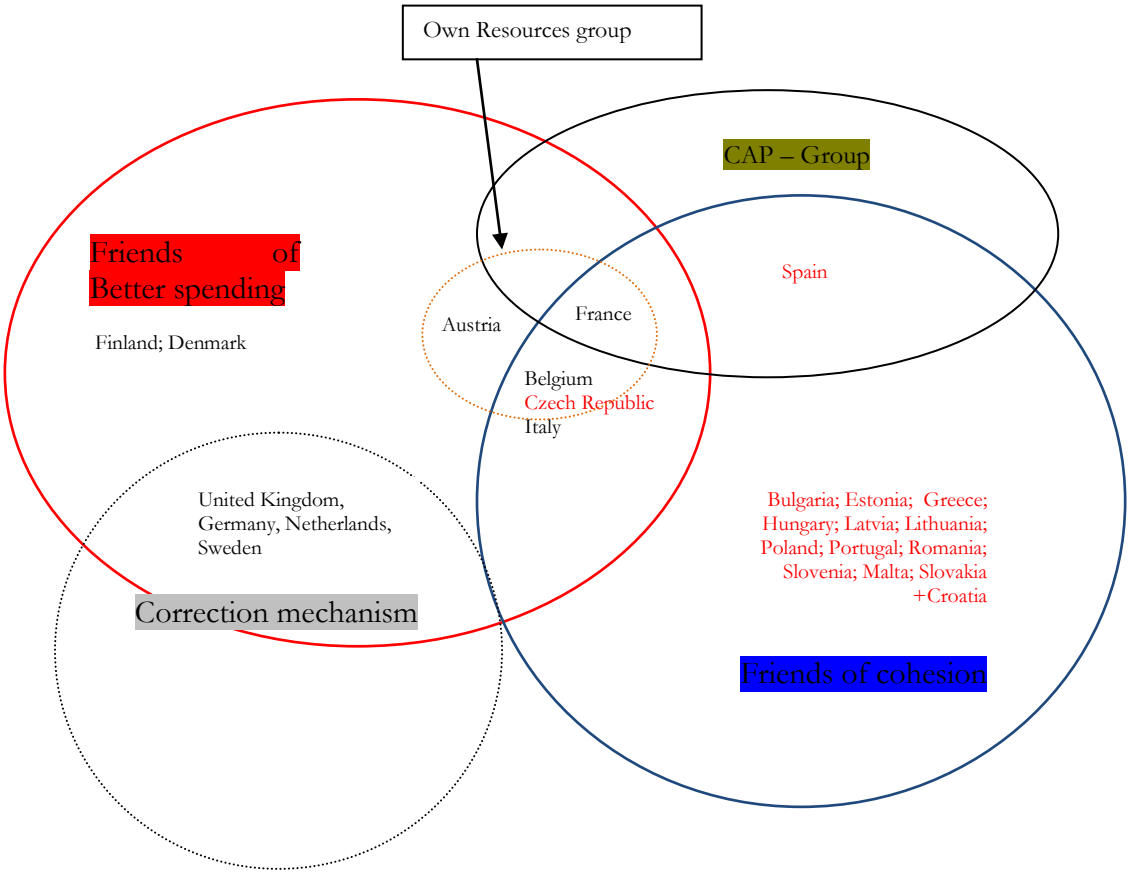
Source: Own elaboration, based on: http://ec.europa.eu/budget/index_en.cfm

EU Own Resources

Almost all Member States agree that the own resources system needs to be reformed and that the current VAT-based own resource should be abolished. Nevertheless, the question of how such a reform should be carried out is highly controversial. Belgium, Greece and Austria are in favour of introducing a Financial Transactions Tax (FTT) and consider allocating a portion of revenue from it to the EU budget. Especially France has

taken the lead in demanding new own resources in order to ensure coherence between the ambitions and capacities of the EU budget. Germany is also in favour of introducing an FTT but would like to collect it by itself and continue with the GNI-based resource. The UK has already firmly rejected all proposals regarding new own resources. "We're not going to agree to some clever ways of raising additional funds through the back door", said UK Europe Minister David Lidington during the General Affairs Council on 24 July.

Figure 6: simplified scheme on Member States positions on conflicting issues on the MFF 2014–20



Source: Own elaboration

Conclusions

In this text I have analysed the principal conflicting topics as well as the preferences of the main actors in order to outline the challenges which the Cypriot EU Presidency has to overcome in order to reach an agreement on the MFF 2014–20 by the end of this year.

In particular, with regard to the budgetary exercise and according to the EC proposals and reactions to it by the EP and Member States, I conclude that the MFF 2014–20 continues the evolutionary process of former MFFs within the logic of an EU budget according to which Member States are not willing to go beyond small incremental changes in the structure of the EU budget. Although both policies have been deeply reformed as to their internal operation, the CAP and Cohesion Policy remain the most important spending headings and represent the most important issues on the agenda. In this sense the current negotiation also reflects the longstanding conflict inherent in the logic of the budget structure. Since no Member State has claimed an increase of the EU budget, the question is: where to cut spending? There are strong positions regarding the Cohesion Policy and the CAP and cuts on spending of External Actions or for Competitiveness seem very likely to occur in order for a final agreement to be reached.

With regard to the policy goals, the strong consent of all actors to increase the conditionality of spending upon fulfilment of the objectives of the Europe 2020 strategy, as well as to use the EU budget as a tool to stimulate job creation and growth in areas where the EU can deliver an added value, can be confirmed. However, there is no consensus on how to stimulate job creation or on what exactly constitutes a European added value.

Although an increasing percentage of spending is earmarked for fulfilment of the Europe 2020 strategy and although other "horizontal" headings further increase their share in the total budget, the EC did not present a revolutionary budget. Its proposals thus reinforce the evolutionary paradigm in the perception of the EU budget, from a budget aimed to accommodate Member States preferences to an instrument meant to address common European interests.

In relation to the institutional setting, the establishment of a new system of own resources, which would represent a qualitative step towards EU fiscal autonomy, seems unlikely in the current negotiation. In addition, there is no consensus between Member States on how to give European institutions more flexibility for shifting funds, according to

their own criteria, between the different areas of expenditure. Nevertheless, the current negotiation has shown that the EP assumes a much more proactive and self-conscious role.

In sum, the current negotiation shows that we will not see a substantial change in the structure of the EU budget, but a clear redefinition of specific spending headings as regards investment in growth and job creation.

Finally, after so much political drama, agreement on the MFF 2014–20 cannot guarantee that the EU budget will become a solid financial instrument, since the MFF only specifies the overall limit for the spending headings. Expenditure of the annual budgets of the last two decades has always been lower than the MFF ceilings (Núñez Ferrer 2012).

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I In this respect see (Laffan 2000), (Serrano Leal 2005); (Enderlein et al. 2005), (Lindner 2006), (Ackrill et al. 2006), (Núñez Ferrer 2007), (Dür et al. 2010), (Heinemann et al. 2010), (Kölling 2010).

II The first MFF was agreed for 1988–92 (Delors I) in order to provide the resources needed for the budgetary implementation of the Single European Act and the single market. The MFF 1993–99 (Delors II) contained a significant increase of structural and cohesion funds as a basis for the preparation of Member States in view of the single currency. The MFF 2000–06 (Agenda 2000) secured the necessary resources to finance the enlargement process and the present MFF 2007–13 pursues the main objective of reducing the "gap" among new and old Member States.

III European Council, Conclusions of the European Council, 15-16/12/2005.

IV COM(2010)700), 19/10/2010.

V Comprising Bulgaria, Croatia, Czech Republic, Estonia, Greece, Hungary, Lithuania, Latvia, Malta, Poland, Portugal, Romania, Slovakia, Slovenia, and Spain - Italy also sympathises with this group.

VI Comprising Austria, Germany, Finland, France, Italy, The Netherlands, and Sweden.

VII Member States agreed to increase the capital of the European Investment Bank by €10 billion, which will increase the Bank's overall lending capacity by €60 billion. The other €60 billion come from the reallocation of unused structural funds (€55 billion) and the pilot phase of the Europe 2020 Project Bond Initiative (€5 billion).

VIII European Council, Conclusions of the European Council, 28 – 29/06/2012.

IX "EU kicks off negotiations over regional funding budget", Euroactive, 13/07/2012.

X 2,292 amendments to Direct Paymernts proposals, 2,127 amendments to Rural Development proposals, 2,094 amendments to Single Market proposals and 769 amendments to Finance and Cross Compliance proposals.

XI 1988 Germany; 1992 UK; 1998 Germany; 2005 UK

XII "Journey towards the unknown", Europolitics, 13/07/2012

XIII Non-paper of 24 April, signed by AT, DE, FI, FR, IT, NL, SE. France, has not signed the non-paper of the 29th of May (signed by AT, CZ, DE, FI, NL, SE, UK)

XIV Bulgaria, Estonia, Greece, Latvia, Lithuania, Hungary, Malta, Poland, Portugal, Romania, Slovakia, and Slovenia.

XV Bulgaria, Czech Republic, Estonia, Greece, Hungary, Lithuania, Latvia, Malta, Poland, Portugal, Romania, Slovakia, Slovenia, and Spain.

XVI "New proposal worries Friends of Cohesion", Europolitics, 24/07/2012.

XVII This category will include all regions with a GDP per capita between 75 per cent and 90 per cent of the EU-27 average.

XVIII Friends of Cohesion Policy, Luxemburg communiqué, 24 April 2012.

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Reshaping Disability Policy Making in Italy: The 'Focal Point', the National Observatory on the Situation of Persons with Disabilities, and... the Absence of Regions?

by

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Abstract

On 30 March 2007, Italy signed the UN Convention on the Rights of Persons with Disabilities (CRPD) and ratified it by Law 18/2009. Through this, Italy has committed itself to reforming the structure of its own policy making process. It seems that Italy has taken its international commitment seriously, in compliance with Art. 117(1) of the Italian Constitution, for the last years have witnessed attempts to 're-imagine' the configuration of the whole 'institutional' disability domain. It is nonetheless surprising that the efforts at national level are not counterbalanced by identical commitments in the Regions (despite their important powers in the disability domain).

This essay aims to investigate the most intriguing aspects of current disability policy making, without neglecting empirical insights and dropping some comparative hints. This article is divided into six sections. After a succinct introduction, the main features of the Convention will be recalled. Then, the CRPD will be framed to fit the Italian legal order. Section 4 and 5 focus on how disability policy making has been reshaped in the process of the implementation of Art. 33 CRPD in the Italian legal system. Section 6 will provide concluding remarks.

Key-words

UN Convention on the Rights of Persons with Disabilities, Focal Point, National Observatory on the Situation of Persons with Disabilities, Disability Policy Making

1. Introduction

On 30 March 2007, Italy signed the UN Convention on the Rights of Persons with Disabilities (hereafter CRPD, or simply "the Convention") and ratified it by Law 18/2009.[I] By acceding to the Convention, Italy has committed itself not only to higher standards of non-discrimination with respect to persons with disabilities and to improving accessibility and social inclusion, but also to reforming the structure of its own policy making process. The CRPD contains specific provisions that respond to the need to translate the rights of disabled people into concrete domestic law, policies and good practices. In particular, in addition to the international monitoring system and quasi-judicial mechanism set forth, respectively, in Art. 34 CRPD and in the Optional Protocol, Art. 33 CRPD requires Parties to create or designate specific national institutions which will be responsible for implementation and a framework which will be in charge of 'monitoring', with the former being placed under government oversight and the latter independent and inclusive of civil society organisations (Stein and Lord, 2010; Marchisio et al., 2010; de Beco, 2012).

In line with the call from the Office of the High Commissioner of Human Rights (OHCHR) to consider Art. 33 CRPD a priority (UN Human Rights Council, 2010), Italy has started the implementation process by 'reshaping' its own disability policy making. In spite of the harsh economic crisis that has deeply affected the country, the focal point and the coordination mechanism were designated and a monitoring body, the "National Observatory on the Situation of Persons with Disabilities" (*Osservatorio Nazionale sulla condizione delle persone con disabilità* – hereafter National Observatory), was set up through the ratification instrument. Additionally, Italy is (slowly) commencing to reform the legislation in force, with the view of realising the objectives of the Convention.

Italy has taken its international commitments seriously, in compliance with Art. 117(1) of the Italian Constitution: these years have witnessed some attempts to 're-imagine' the configuration of the whole disability domain, and so far the prospects for an efficient implementation of the CRPD are quite encouraging[II]. Nonetheless, even if there has been a general presumption of compliance of these structures with the Convention, there is still a considerable gap between the aspirations of Art. 33 and Italy's achievements. Looking

closely at both the designated focal point and the National Observatory, several weaknesses could be identified. In particular, on the one hand there is a weak involvement of the Regions, and, on the other hand, the National Observatory appears as a hybrid body (to some extent, it seems more similar to the 'coordination mechanism'), which *de jure* and *de facto* can hardly be considered in compliance with Art. 33(2) CRPD.

Thus, the time seems ripe for a more robust debate among legal scholars and a more reflective advocacy to expand the reach and the effectiveness of the disability policy making structure created subsequent to the entry into force of the Convention.

This essay aspires to be read as a basis for future academic exploration. It aims to investigate the most intriguing 'institutional' aspects of current disability policy in Italy, without neglecting empirical insights and comparative hints. The implementation of Art. 33 CRPD at the national level will be critically discussed *vis-à-vis* the lack of involvement of the Regions.

With regard to its structure, this essay is divided into further five sections, following this brief introduction. First, the main features of the Convention will be recalled (Section 2). Then, Section 3 will 'frame' the CRPD in light of the Italian legal order: both the ratification process and the status of the Convention will be discussed briefly. Section 4 and 5 will focus on how disability policy making has been 'reshaped' in the process of implementation of Art. 33 CRPD. Finally, Section 6 will conclude with some general remarks.

2. The CRDP: Principles, Main Features and "Policy Making Obligations"

In December 2006, the CRPD and its Optional Protocol were approved by the UN General Assembly. The Convention, which entered into force on 3 May 2008, is the first human rights treaty of the 21st century and represents a landmark piece of international law (Quinn, 2009, 89). Traditionally, both national and international norms have tended to think of the disadvantageous situation of disabled persons as reflecting their specific impairments, physical or mental, rather than as a result of discrimination or otherwise inadequate respect for human rights (Quinn and Arnardottir, 2009: *passim*). By contrast, the CRPD embodies the official recognition of disability as a human rights issue, and affirms

the 'social' model as opposed to the 'medical' model of disability (Barnes and Mercer, 2010: 18 *et seq.*).[III] The scope of the Convention is extremely broad: the text does not simply prohibit disability discrimination, but it also covers civil, political, economic, cultural and social rights and is built upon the core and manifold concepts of the dignity of each individual, autonomy, and self-determination.

The Convention includes an introductory set of provisions outlining its purpose and key definitions (Arts. 1-2). Art. 2 provides, *inter alia,* a comprehensive definition of discrimination, including 'any distinction, exclusion or restriction on the basis of disability which has the purpose or effect of impairing or nullifying the recognition, enjoyment or exercise, on an equal basis with others, of all human rights and fundamental freedoms'. Articles 3-9 CRPD set out general provisions to be applied throughout the treaty text. In view of the subsequent analysis, it must be observed that Art. 4 CRPD requires Parties to: take measures to abolish disability discrimination; engage in the research and development of accessible goods, services and technology for persons with disabilities and to encourage others to undertake such research; provide accessible information about assistive technology to persons with disabilities; promote professional and staff training on the Convention rights for those working with persons with disabilities; and to consult and involve persons with disabilities in developing and implementing legislation and policies and in decision-making processes concerning CRPD rights. Significantly, Art. 4 further requires Parties to adopt an inclusive policy approach to protect and promote the rights of persons with disabilities in all laws and programmes. This suggests the need for a screening exercise to assess policy and laws *vis-à-vis* the Convention, and programming inclusion across sectors. This, on the one hand, suggests the very idea of mainstreaming and, on the other hand, obliges States to 're-think' their whole disability policy making.

Arts. 10 through 30 enumerate the specific substantive rights, which are formulated as obligations upon States: the right to life (Art. 10), freedom from torture (Art. 15) and other forms of abuse (Art. 16), the right to education (Art. 24), employment (Art. 27), political participation (Art. 29), legal capacity (Art. 12), access to justice (Art. 13), freedom of expression and opinion (Art. 21), privacy (Art. 22), participation in cultural life, sports and recreation (Art. 30), respect for home and family (Art. 23), personal integrity (Art. 17), liberty of movement and nationality (Art. 18), liberty and security of the person (Art. 14), and adequate standard of living (Art. 28).

In addition, the Convention pays attention not merely to what 'ought to be done' but also to the institutional preconditions necessary to ensure that it 'can be done' at the domestic level (Quinn, 2009a: 215). Gerard Quinn has emphasised these as striking 'process-based innovations' (Quinn, 2009b: 215). In particular, the need to translate the Convention's provisions into hard domestic law, policies and good practices is embedded in the final provisions, namely in Arts. 31-40 CRPD. Among these provisions, Art. 33 is certainly the most relevant. It sets forth a complex mechanism of internal follow-up procedures. As mentioned above, it requires Parties to intervene in the very structure of their policy making process to make the rights of people with disability really effective (Seatzu, 2009).

Art. 33(1) CRPD states that Parties to the Convention must designate 'one or more focal points within their governments for matters relating to the implementation of the Convention'. The OHCHR envisages several focal points, plus an overall focal point which responds to the need to ensure the existence of a general oversight and promotion role (UN Human Rights Council, 2010). The focal point(s) must be situated at governmental level and should develop and coordinate a coherent national policy on the Convention. In other words, the focal point(s) should both drive and execute national disability policies. According to Art. 33(1) CRPD, Parties to the Convention can also designate a "coordination mechanism". The creation of such a coordination mechanism is desirable but not compulsory. If created, the coordination mechanism should be located within the government and perform the tasks of further supporting and coordinating (as its denomination suggests) the implementation of the CRPD across all sectors and levels of government. However, there is no clear distinction between the focal point and the coordination mechanism, neither from the point of view of structural requirements nor as regards the functions to be performed.

Art. 33(2) requires Parties to designate or establish a 'framework, including one or more independent mechanisms', to promote, protect and monitor the implementation of the Convention. Parties enjoy significant latitude regarding what this framework should consist of. The wording of the Convention seems to leave the door open to: the creation of a new *ad hoc* framework, which includes a new, independent mechanism and other new bodies; the designation as a framework of a single, existing or new independent mechanism; or to the sharing of tasks among different (existing and new) entities, which

should form a coherent whole. It is fairly clear that the framework must be capable of carrying out the functions explicitly indicated in Art. 33(2) and must include one or several independent mechanisms. It is well established that, in designating or establishing such a mechanism, Parties to the Convention 'shall take into account' the *Principles relating to the Status and Functioning of National Institutions for the Promotion and Protection of Human Rights*.[IV] These principles, known as the *Paris Principles*, provide for the responsibilities, composition and working methods of National Human Rights Institutions (NHRIs) according to the following headings: competence and responsibilities; composition and guarantees of independence and pluralism; methods of operation; and principles concerning the status of commissions with quasi-jurisdictional competence (the latter being only optional).[V] This reference to the *Paris Principles* can raise criticism: it is not clear whether it is really possible to apply these principles to actors other than NHRIs nor, from a more substantive point of view, who will evaluate the compliance of independent mechanisms with them. In addition, the use of the expression 'shall take into account' literally seems to mean that the *Paris Principles* provide a source of inspiration , rather than a compulsory parameter, in transposing Art. 33(2) CRPD. Despite this criticism, it is now accepted that 'the *Paris Principles* provide important guidance to identify the characteristics the framework should overall possess, while accepting that not all components of the framework need to be fully compliant with the *Paris Principles*'. In other words, the OHCHR clarifies that the *Paris Principles* should apply, without any distinction (UN Human Rights Council, 2010), to the independent mechanisms, including to mechanisms other than NHRIs (De Beco, 2011).

Art. 33(3) provides that 'civil society, in particular persons with disabilities and their representative organizations, shall be involved and participate fully in the monitoring process'. This provision thus further specifies the general principle of participation of people with disabilities (Article 3(c) CRPD), as well as the general obligation to consult with and actively involve persons with disabilities, including children with disabilities, through their representative organisations in "the development and implementation of legislation and policies to implement the present Convention, and in other decision-making processes concerning issues relating to persons with disabilities" (Article 4(3) CRPD). In light of these provisions, persons with disabilities and their representative organizations must be involved in the implementation process carried out by the governmental structures established under Art. 33(1). In this respect, the wide consultation of a variety of interested

parties is an important means of ensuring that measures taken are acceptable and practically workable for persons with disabilities.

Finally, it is worth recalling that, whilst the Convention lacks a judicial enforcement system, Art. 34 provides for an international para-judicial monitoring mechanism (the "Committee on the Rights of Persons with Disabilities"), itself regulated by the Optional Protocol. Art. 35 provides for a reporting system: according to this provision, each State Party must submit a comprehensive report to the Committee on measures taken to give effect to its obligations under the Convention and on the progress of the implementation process.

3. Framing the CRPD and the International Obligation to Intervene on Disability Policy Making in the Italian Legal System

3.1 The ratification of the CRPD

As mentioned above, Italy ratified the CRPD through Law 18/2009, two years after signing, and within three years of UN approval (de Amicis, 2009). No reservations to the Convention were made upon signature and ratification.

The ratification process was quite quick if compared to that of other European countries, some of them still in the process of concluding the Convention.[VI] The inherent importance of the CRPD and the need to radically change the detrimental situation experienced by the majority of people with disabilities (Chiatti and Lamura, 2010)[VII] was acknowledged by all political parties. A– considering the troubled Italian political system – extraordinary consonance was found in both chambers and can be read as a signal of the perception of the seminal ideological shift inherent in the Convention. The Senate, almost unanimously, approved the ratification bill presented by the Government in January 2009, rejecting the criticism raised regarding the limited presence of people with disabilities within the National Observatory and its inadequate financial equipment (which was ensured by extracting money from the social fund).

Even if a study to assess the overall compliance of domestic legislation and policies with the CRPD was carried out in 2008 by the Institute of International Legal Studies at the National Research Council (*Istituto di Studi Giuridici Internazionali, ISGI; Consiglio*

Nazionale delle Ricerche, CNR) upon the request of the Ministry of Labour and Social Policies (ISGI, 2007), no amendments or other actions to eliminate the few inconsistencies highlighted by this study were provided for. No preliminary scrutiny of regional laws took place beforehand. It seems that the organizations representing people with disabilities (DPOs) did not enforce a comprehensive preliminary scrutiny of all national and regional rules on disability since they feared this would have delayed the approval of the ratification bill.

Notably, the negotiation of the Convention was conducted within the framework of the European Union (EU). Whereas this circumstance has not *per se* accelerated the process of ratification, it is safe to say that strong coordination at EU-level has created not only a positive attitude towards ratification, but also an additional commitment to ratify the CRPD, in compliance with the principle of sincere cooperation enshrined in Art. 4(3) TEU[VIII].

3.2 Status and effects of the CRPD

The Convention was ratified through an ordinary law in compliance with Art. 80 of the Italian Constitution and enjoys *prima facie* the same position in the hierarchy as other ordinary laws. However, ever since the 2001 constitutional reform, Art. 117(1) provides that 'legislative powers shall be vested in the State and the Regions in compliance with the Constitution and within the constraints deriving from EU legislation and international obligations'.[IX] This provision seems to establish a higher status (namely a sub-constitutional one) for international sources of law.

Up to now, the most of the Constitutional Court's judgments interpreting Art. 117(1) have pertained to the European Convention on Human Rights (ECHR; *e.g.* cases No. 348 and 349/2007 and the subsequent decisions No. 311/2009, No. 317/2009, No. 80/2011 and No. 113/2011). Nonetheless, they provide a firm guidance for determining the status of the CRPD in the Italian legal order. It must be recalled that, ever since the 'overcommented' twin cases No. 348 and 349/2007, the Court has shown an increasing openness towards international law (*inter alia* Ruggeri, 2008, Pollicino, 2008; Martinico and Pollicino, 2010). The Court firmly stated that Art. 11 Const. does not apply to the ECHR, nor to other international treaties (irrespective of their subject matter).[X] As noted by Fontanelli and Biondi, the Court restated the plain 'general rule according to which, in the

absence of any specific constitutional provision, international norms enter the Italian system with the same rank as the Italian legal acts that implement them', but affirms that '[t]he platform of Article 117(1) guarantees an infra-constitutional standing to international treaty law (ECHR included) within the Italian legal order' (Fontanelli and Biondi Dal Monte, 2008). There is a difference of treatment of EU law, which is considered to have quasi-constitutional status and, consequently, to be subordinated not to the entire Constitution, but only to its fundamental principles (this is the famous counter-limits doctrine). In addition, the Court's formal hierarchy-based approach excludes any power for common judges to set aside national legislation in conflict with the ECHR (and, of course, with other international treaties, including the CRPD).

From this it can be inferred that the national norms ratifying the CRPD (like norms ratifying and executing other international treaties) cannot be abrogated by a subsequent law (i.e. *resistenza passiva all'abrograzione*). In addition, with regard to the Constitutional Court's judgments, it has emerged that national judges have to interpret, as far as possible, domestic provisions in a manner consistent with international provision (D'Amico e Randazzo, 2009). When such an interpretation is not feasible, or when a judge doubts an international norm's constitutionality, a constitutional review is necessary on the basis of a potential violation of Art. 117(1) of the Italian Constitution.

However, the status and the effects of the CRPD cannot simply be those of other international sources. This is so because the CRPD is a mixed agreement[XI], thus it is, at least partially, EU law and should be treated as such. Could we then argue that national judges, in situations governed by EU law, are under the obligation to disallow a domestic provision that contradicts with the CRPD? Indeed not. Because, *in abstracto,* the CRPD seems capable, in light of its objectives and spirit, of conferring rights upon individuals, but the provisions are literally addressed to the Parties. Thus, it might be argued that none of its provisions is sufficiently clear, precise and unconditional to have direct effect under the standard established long ago by the ECJ. Only the ECJ can consider whether or not an international provision has direct effect. Thus, in situations governed by EU law (e.g. State aid), a judge suspecting a contradiction between a domestic provision and the CRPD should probably ask for a preliminary ruling under Art. 267 TFEU. In areas that are clearly outside of EU competence, the judge should first attempt to interpret the national provision in a manner consistent with the Convention. If, despite this attempt, a

contradiction between a domestic provision and the CRPD still persists, the judge should ask for a constitutional review.

Up to now, Italian judges have resolutely applied the principle of consistent interpretation. After the entry into force of the CRPD, many significant cases issued in front of lower courts have interpreted Italian law in light of the principles enshrined in the Convention. One of the first and most relevant cases was the decision issued by the *Tribunale di Varese* on 6 October 2009, in which the court stated that the pragmatic features (modalities) of the 'support administration' provided for in Arts. 405 *et seq*. of the Italian civil code must be determined with regard to the CRPD (Falletti, 2010; Ferrando, 2010).[XII] In recent decisions, administrative tribunals have interpreted the provisions on public contributions to cover the cost of residential treatment for people with disabilities (Art. 3(2-ter) of Legislative Decree 109/1998 and Art. 6 of Law 328/2000) in light of the CRPD.[XIII] The Italian Constitutional Court (ICC) has also relied on the CRPD. It is worth recalling its decision of 22 February 2010,[XIV] when the ICC declared unconstitutional a provision of the Budget Law 2008 (namely Art. 2(413) and (414) of Law 244/2007) which fixed the number of support teachers for children with disabilities in public schools and abolished the possibility (provided for in Art. 40 of Law 104/1992) to hire additional support teachers with fixed-term contracts in order to provide specific additional educational assistance to children with serious disabilities (Troilo, 2012). The ICC declared that Art. 2 of the Budget Law infringed upon the right to education of children with disabilities, which is set forth in Art. 38(3) and (4) of the Constitution[XV], and the principle of equality. Nonetheless, in defining the content of the fundamental right to education, and as part of its *ratio decidendi,* the Court referred to Art. 24 of the CRPD.

4. Reshaping Italian Disability Policy Making

4.1 The Directorate-General for Inclusion and Social Policies as a Focal Point

As mentioned above, Italy has taken the obligation to 're-shape' disability policy making very seriously. It thus started the CRPD implementation process by designating the focal point and the coordination mechanism: both of them coincide with the Directorate-General for Inclusion and Social Policies (hereafter 'the Directorate'), which recently replaced and absorbed both the Directorate-General for Inclusion, Social Rights and Social

Responsibility and the Directorate-General for Governing the Social Policy Fund and Monitoring Social Expenses[XVI]. Unsurprisingly, as in the majority of EU Member States[XVII], Italy thus designated as focal point for matters relating the implementation of the Convention an internal organisation of the Ministry of Labour and Social Policies, and it seems that no other options had been considered.

The Directorate has (probably) been deemed by the Italian authorities to be the most appropriate focal point since it has traditionally been in charge of disability matters. Nonetheless, even if the requirement that the focal point(s) must be at governmental level is fully accomplished, this choice could be questioned.

In general, the preference for a social affairs-related structure has been criticised by many commentators (EFC, 2010) and by DPOs since this does not fully reflect the comprehensive human rights approach to disability envisaged by the CRPD. It was suggested that the focal point should have been placed within ministries dealing with justice, human rights or under the jurisdiction of the office of the Prime Minister to symbolize the rejection of the outdated model of compartmentalising persons with disabilities solely based on their perceived inadequacies.[XVIII] As regard Italy, the scope of action of the Directorate may seem, at a first sight, too weak to transform (or, better still, to revolutionize) the still limited scope of disability policy. One might also sustain that the Directorate is too 'specialized': it does not cover all the fields touched upon by the Convention, but mainly addresses issues related to employment, social affairs, and non-discrimination without any (at least explicit) wide-ranging rights-based approach. It might also be argued that, in view of effectively implementing the CRPD's far-reaching provisions, other structures should have been elected as 'focal point': e.g. the Interministerial Committee for Human Rights (*Comitato interministeriale per i diritti umani*, *CIDU*) attached to the Ministry of Foreign Affairs[XIX]. This body could be deemed more appropriate to reflect the human rights-based approach of the Convention. In addition, the CIDU already plays the role of focal point as regards other UN treaties and the Council of Europe and, in any event, it will be in charge of submitting/presenting a report to the CRPD Committee as well as preparing answers and explanations if requested so by the UN organ. Another option that would have deserved to be explored is the choice of the Presidency of the Council of Ministers (i.e., the Prime Minister) as focal point: in this case,

the focal point would have had the significant power to require cooperation from other ministries, thus mainstreaming disability.

Despite this criticism, it must be recognised that the choice does not automatically neglect the conception of disability as a human rights issue, nor the social model itself. The Directorate fulfils many of the expectations as to what a focal point should do, and its mandate includes the tasks to build capacity within the government on disability-related issues and to contribute to the development of policies and legislation that affect disabled people. In addition, from the very beginning the Directorate has pursued the aim of implementing the social model of disability as envisaged by the Convention and, since it also acts as the secretariat within the National Observatory (as it will be discussed further),[XX] has attempted to create fruitful conditions in order to mainstream the rights of people with disability.

Like other countries[XXI], Italy clearly opted for a single focal point: unlike for example in France,[XXII] where all administrations, services and bureaus involved in disability policy are responsible for matters related to the implementation of the CRPD, no other focal points at the ministerial level were formally appointed; nor were regional focal points designated.

Even if there is no fixed scheme, different horizontal focal points dealing transversally with disability policy within their respective competences have been considered a viable and remarkable solution, in particular to foster the implementation of the social model envisaged by the CRPD (de Beco, Hoefmans 2009). In this respect it might be noted that the Italian option of a single focal point at the ministerial level can prove useful for rationalising and centralising all possible institutional players involved in disability policy and represents considerable strengths. A single focal point can be the driver of a consistent national disability policy agenda and may be more efficient, since it avoids duplication of functions. By contrast, a proliferation of focal points may seriously endanger the efficiency and effectiveness in the implementation of the Convention. A single focal point minimises the risk that when many are comptenet, in the end no one is really responsible for the proper transposition of the CRPD into the domestic legal framework. Moreover, in times of economic crisis, a single focal point is probably 'less expensive' and makes it possible to devote resources to the substantive implementation rather than to structural aspects. Lastly, it is easier both for persons with disabilities and international institutions to identify the body responsible for implementation.

In any case, and regardless of any reproach that can be raised, the capacity of the Directorate as a focal point to competently and resourcefully carry out the tasks provided for in Art. 33(1) and to mainstream disability is to be verified *in concreto* and in the long run. Up to now, there are no major achievements directly and exclusively attributable to the Directorate itself.[XXIII] However, the Directorate has occasionally collected suggestions for legislative reform by civil society actors, thereby maintaining a link with NGOs and citizens. In addition, and as we will discuss in the subsequent section, in its capacity of technical secretariat to the National Observatory (Art. 4 of Decree 167/2010), it has provided a remarkable contribution to preparing the biannual action plan on disability.

4.2 Where Are the Regions?

Several focal points covering each of the different layers of government (local, provincial, regional, national) have also been envisaged to ensure the implementation of the CRPD in regional or federal states, involving all territorial administrations which have relevant competences in the fields covered by the CRPD (de Beco, Hoefmans, 2009: *passim*). In order to ensure the respect of their territorial structures, some EU States have opted for several focal points, for example the UK[XXIV], Belgium[XXV] or Austria[XXVI] By contrast Italy, which can certainly be described as a regional (Anzon-Demmig, 2008; Caretti and Tarli Barbieri, 2009) or even a '*de fa*cto federal system' (Bilancia et al., 2010), chose quite surprisingly to create a single focal point, and this choice cannot but be questioned.

It should be recalled that the legislative competence over disability matters is shared between the State and the Regions, and that the boundaries between their respective competences are not clear as they pretend to be. Art. 117 of the Italian Constitution gives the State the exclusive legislative power over the 'determination of the basic level of benefits relating to civil and social entitlements to be guaranteed throughout the national territory' (so called *LEP*). According to this provision, national law must define binding financial thresholds which are essential to guaranteeing civil and social rights. The Regions cannot limit or condition these thresholds (*ex pluribus* Guiglia, 2007). In addition, the State has exclusive legislative power on 'general provisions on education' and 'social security'. The competence on 'job protection and safety', 'education, subject to the autonomy of educational institutions and with the exception of vocational education and training', 'large transport and navigation networks', 'communications', 'national production, transport and

distribution of energy', 'complementary and supplementary social security', 'co-ordination of public finance and taxation system', and on the 'enhancement of cultural and environmental properties, including the promotion and organisation of cultural activities' is shared between State and Regions. Moreover, the 'Regions have legislative powers in all subject matters that are not expressly covered by State legislation'.

The State certainly has strong legislative powers over disability issues, since it is in charge of the 'determination of the basic level of benefits relating to civil and social rights'. Such a cross-cutting national competence implies that whenever a regional law provides for benefits related to civil or welfare rights, it must be subordinated to the national law that establishes the minimum standards with regard to those rights[XXVII]. Up to now, the Constitutional Court has recognised this key responsibility of the State in legislating on disability. Accordingly, it has so far rejected a constitutional review for violation of the division of competences of the most important national pieces of legislation on disability, the abovementioned Law 104/1992, and of other national laws. However, there is a myriad of regional laws and regulations governing the situation of people with disabilities, and coordination between State and Regions is essential to exert the full potential of the CRPD.

Representatives of the so called State-Regions Conference *(Conferenza Stato-Regioni)*[XXVIII], a cooperative body established to discuss issues of regional interest, are included in the National Observatory, which is preparing the future national action plan for disability. Thus, a certain degree of coordination is achieved within the National Observatory. However, it is fairly unclear whether and how further and additional contacts with the Regions will take place. Moreover, at present, there is no sign of projects or attempts to appoint regional focal points.

It seems at least regrettable that there is no formal and explicit involvement of the Regions in the implementation process. The lack of regional focal points can (potentially) cause gaps and inconsistencies and may jeopardize the attainment of the objectives of the Convention, but more generally it can hamper the realization of an effective disability policy making structure. In addition, this choice seems to frustrate the subsidiarity principle and the principle of autonomy, expressly affirmed in the Italian Constitution[XXIX].

Thus, even if the choice of electing a single focal point is formally obedient to Art. 33(1) CRPD and brings considerable practical (and financial) advantages, it is uncertain whether this solution really fits into the Italian system in the same manner as it might be

adequate for States with a minimum level of decentralization (traditionally referred to as unitary).

4.3 The Directorate-General for Inclusion and Social Policies as a Coordination Mechanism: What kind of coordination will be provided?

As regards the designation of the Directorate as coordination mechanism, a few remarks can be added.

First, it is useful to recall that the Convention does not provide for a clear distinction between the focal point and the coordination mechanism, neither from the point of view of the structural requirements nor the functions to be performed. The doctrine has also been quite vague. Even the OHCHR study has not provided a fruitful and lucid guidance, since it advocates the designation of an overall focal point, *in toto* similar to the coordination mechanism, and it is unclear how this would distinguish itself from the coordination mechanism, where it exists (UN Human Rights Council, 2010, para. 33). The Italian choice to designate the same Directorate reflects this substantial lack of clarity.[xxx]

It must be noted that the Directorate should carry out horizontal coordination (i.e. among different Ministries within the Government). However, it is not certain how this is taking place. Despite the fact that informal coordination has taken place up to now, no relations with other bodies or directorates in other Ministries have been formalized. In addition, there is no involvement of parliamentary structures. That is quite surprising given that Parliament alone enjoys legislative power, i.e. the capacity to adopt appropriate laws to implement the Convention.

As regard vertical coordination (i.e. cooperation among different level of governments), there seems to be, at present, no open cooperation with the Regions. This is probably so because, as we will see in the subsequent section, such coordination is taking place within the National Observatory, which is a true composite body in which representatives of the government, local authorities and civil society try to find a synthesis to implement the goals put forward by the CRPD.

The coordination mechanism should have been an opportunity to reinforce the cooperation among different ministries (an explicit commitment of the Directorate in this respect in view of fully implementing the Convention), but also to reinforce vertical coordination among different territorial administrations. However, it appears that the

formal coincidence among focal point and coordination mechanism and the substantial absence of coordination with the Regions blur the situation and ultimately frustrate the spirit of Art. 33(1) CRPD in this respect.

5. Independent Monitoring or Government Control over the Convention?

5.1 The National Observatory on the Situation of Persons with Disabilities: A Brief Overview

The complexity of the transposition of Art. 33(2) CRPD is well known and recognised by both scholars and DPOs. The difficulty of setting up an independent mechanism compliant with the *Paris Principles*, especially for those countries which do not have a National Human Rights Institution (NHRI) (de Beco, 2011; de Beco, 2008), and the need for a framework capable of carrying out the complex tasks mentioned under Art. 33(2) have challenged several States. Many of them, also within the EU, are still in the process of choosing whether to designate or establish a framework, as well as examining how to set up an independent mechanism. Even in Sweden, a country with a strong welfare structure and an efficient and well-rooted disability policy, the implementation of Art. 33(2) has encountered some troubles.

By contrast, Italy did not vacillate and, from the very beginning, opted for setting up a new structure, the National Observatory on the Situation of Persons with Disabilities (*Osservatorio nazionale sulla condizione delle persone con disabilità*).

The National Observatory was envisaged in the ratification law (i.e. in Art. 3 of Law 18/2009) and then created by a specific bylaw, Decree No. 167 of 6 July 2010 (Regulation of the National Observatory, hereinafter Decree 167/2010),[XXXI] which entered into force in October 2010. The text of the Regulation was preceded by a consultation process which involved all major DPOs and is the result of a common will to create an adequate body to fully implement the Convention.[XXXII] Nevertheless, it seems that no other options but the creation of this Observatory were taken into consideration: neither the creation of an NHRI nor the creation of a framework was examined. A subsequent Ministerial Decree of 30 November 2010 set up the National Observatory and nominated its members.

With regard to its structure, the Observatory is organisationally placed within the Ministry of Labour and Social Policies in Rome (Art. 1 of Decree 167/2010) and also financed by it. In compliance with Art. 4(1) of Decree 167/2010, the Directorate-General for Inclusion and Social Policies functions as the Observatory's technical secretariat.

According to Law 18/2009, the number of members should not exceed 40 and must respect the principle of equal opportunities between men and woman. The Decree of 30 November nominated 40 members, which included nine representatives of various ministries, two representatives of local authorities (of Province and Municipalities, respectively), two representatives of the Conference State-Regions, two representatives of the Social Security Institutions (*INPS* and *INPDAP*), one representative of the National Statistics Institute (*ISTAT*), seven representatives of social partners (trade unions and industry organisations), 14 representatives of organisations of persons with disabilities (many of them part of the National Council on Disability, the *Consiglio Nazionale sulla Disabilità CND*)[XXXIII] as well as three independent experts. The National Observatory also includes ten permanent guest members (*invitati permanenti*), without voting rights, who are mainly representatives of civil society[XXXIV]. It is not clear what the function of these participants is, but they certainly increase the inner pluralism of the body and could provide input and feedback on the activities carried out. The National Observatory is chaired by the representative of the Ministry (Art. 3 (2) of Law 18/2009).

Within the National Observatory, according to Art. 3 (1) of the Decree 167/2010 a Scientific Committee was constituted. This Scientific Committee is composed of two representatives of the Ministries (namely one representative of the Ministry of Labour and Social Policies and one representative of the Ministry of Health), one representative of the Regions and one of the local authorities, three representatives of organizations of disabled persons, and three experts (chosen by the Ministry). Its task is to determine the technical orientation of the Observatory.

With regard to its mandate, Art. 1 of Decree 167/2010 expressly defines the National Observatory as a consultative body in charge of technical-scientific support for the elaboration of national disability policies. Its tasks are namely to promote the implementation of the Convention, to prepare the biannual action plan for promoting rights of persons with disabilities, to monitor disability policies in Italy, and to promote

studies and research activities on disability, including the collection of statistical data on the situation of persons with disabilities.[XXXV]

The preparation of a biannual action plan is certainly one of the most noteworthy tasks. In particular, the plan is to be discussed in and prepared by the National Observatory. It is then to be adopted by Decree of the Presidency of the Republic upon the proposal of the Ministry of Labour and Social Policies, after approval by the Council of Ministers, thus taking the rank of a bylaw.

It must be noted that the National Observatory is provided with an annual budget of 500.000 EUR, from 2009 to 2014, funded by the general budget of the Ministry; decisions on the use of funds are taken by the Ministry and the Observatory (by consensus)[XXXVI]. In 2010, almost the whole annual budget was spent on an agreement with the Institute for the development of vocational training of workers (*Istituto per lo sviluppo della formazione professionale dei lavoratori*- ISFOL) for the preparation of the biannual action plan. In 2011, most of the budget was allocated for an agreement with ISTAT on the collection of updated statistical data on disability.

Remarkably, the National Observatory has started to operate relatively quickly after its creation, not least thanks to the pressure placed on it by DPOs. After its first meeting, which took place on 16 December 2010, the National Observatory began to elaborate a procedural document to establish its own working scheme. On May 2011, Methodological Notes on the organization of the work of this body were released, approved on 6 July 2011. The latter (soft law) document was the first tangible act of the National Observatory itself, and shows a strong commitment to the preparation of the report to be submitted to the CRPD Committee, to the biannual disability action plan setting forth policy priorities as well as to the revision of statistical indices to monitor the implementation of the Convention more effectively. Through these Notes, six working groups were constituted, each of them 'chaired' by a DPO member. Each group undertook a separate line of analysis with a somewhat different purpose, and the results of each have been gathered to contribute to the elaboration of the State report to be submitted to the CRPD Committee.

5.2 Strengths and Weaknesses of the National Observatory

Since Italy does not have a NHRI and the wording of the Convention leaves the door open to the designation of a single existing (or new) independent mechanism as a

framework, the choice to create a new body was probably the most suitable and easiest way to implement Art. 33(2). Nevertheless, from the overview provided above, it lucidly appears that the National Observatory is an 'odd', hybrid body, more similar to the coordination mechanism of Art. 33(1) than to the monitoring mechanism envisaged in Art. 33(2). It is certainly an interesting body and presents considerable strengths, but also important weaknesses and a substantial lack of compliance with the *Paris Principles*.

As mentioned above, according to these principles, independence and pluralism of a mechanism must be guaranteed. In particular, independence has a triple meaning in the *Paris Principles*: functional independence (i.e. freedom from governmental interference), personal independence (i.e. the members of the mechanism should be able to act in a pressure-free environment and be appointed according to a fair and clear procedure), and financial independence (i.e. the independent mechanism must have sufficient resources at its disposal and manage its own budget, that is decide by itself how best to allocate funding).

It appears at first glance that the composition of the National Observatory is plural and ensures appropriate inputs from different sectors in society while offering an opportunity to confront different perspectives, but that is also ensures the mainstreaming. In addition, it is remarkable that representatives of the Regions are also part of this body. This can help to ensure a certain degree of coordination in implementing the Convention, especially in areas of regional competence. The number of people with disabilities appointed as members is also noteworthy, especially considering that initially it was provided that only a minimum of 20% of DPO members should sit within the National Observatory[XXXVII].

But even if a pluralist representation of social forces is ensured, functional and financial independence is far from guaranteed. Government departments are heavily represented and, differently from what happens for example in the Austrian *Monitoringausschuss*, they also participate in the deliberations. As mentioned, this considerable presence of members of the bureaucracy makes the Observatory an amalgam, more similar to a coordination body than to the framework/independent mechanism provided for in Art. 33(2). In addition, the National Observatory is not given a fully independent budget: the amount allocated to it comes from the budget of the Ministry, even if expenditures are agreed concomitantly.

The Scientific Committee inside the National Observatory also has a pluralist composition: it creates the impression of a sort of 'small Observatory'. It is notable that the Committee is linked to civil society: the fact that three of its members come from DPOs unequivocally shows an effort to include persons with disabilities in the monitoring process, as required by Art. 33 CRPD. It is also apparent that the Committee is intended to be a technical body, but it is not really clear whether it should represent an independent mechanism. It is evident that in terms of lacking organizational and functional independence this does not comply with the *Paris Principles*. A crucial point is that, again, many of its members are representatives of the ministries and, more generally, of the public administration. In addition, the tasks given to the Scientific Committee consist more in technical advice to the implementation process of Convention, rather than in monitoring, promoting and protecting it.

Even if the terms 'framework, including one or more independent mechanisms' may be considered ambiguous, it has been underlined by many scholars that such a framework must include truly independent mechanisms, since the promotion, protection and monitoring of the implementation of the Convention must be carried out by bodies that fully comply with the *Paris Principles*. Although the wording of Art. 33(2) leaves the Parties with a great deal of flexibility and allows the inclusion in the framework of different organs and institutions (e.g. parliamentary commissions, judicial organs…), it imposes the designation and establishment of one (or several) independent mechanism(s) fully compliant with the *Paris Principles*. The National Observatory and its Scientific Committee are quite far away from being free from any governmental interference

Finally, as regards the Observatory's tasks, Art. 33(2) makes it clear that there are three distinct (but inextricably linked) dimensions of the assignment to be carried out by any framework: protect, promote and monitor the implementation of the CRPD. In this respect, the OHCHR study affirms that 'promotion' includes a broad range of activities, from awareness raising to scrutiny for compliance of existing national legislation, regulations and practices (UN Human Rights Council, 2009, para. 64).[XXXVIII] Analogously, the task of 'protection' includes investigation and examination of individual and/or group complaints, the provision of mediation, strategic litigation, and even representing plaintiffs in front of courts and tribunals (UN Human Rights Council, 2009, para. 66). Lastly, the OHCHR study explicitly states that 'monitoring' can only be achieved through assessing

progress, stagnation or retrogression in the enjoyment of rights over a certain period of time (UN Human Rights Council, 2009, para. 77).[XXXIX] The activities of the National Observatory, mentioned in Art. 3(5) of Law 18/2009, allude to the monitoring of the implementation of the Convention, as well as to promotion of the rights of persons with disabilities. But the task of protection is not even mentioned. Certainly the framework is unable to carry out any form of quasi-judicial function.

This analysis of the National Observatory makes apparent there was a valuable attempt to create a pluralist, participatory, specialized and multifunctional body. However, due to its substantive lack of compliance with the *Paris Principles*, one may easily conclude that Italy has not properly implemented Art. 33(2) CRPD yet.

5.3 Is there Room for Improvement?

On the basis of the arguments cited thus far, the establishment of the National Observatory is (at least) insufficient to comply with Art. 33(2) CRPD, as it was also noted in the *ISGI*'s study[XL]. Since at this stage a modification of the body is unlikely to happen, an easy way out would be to create, in addition, a truly independent para-judicial body, i.e. an independent administrative authority, modelled after other administrative authorities (e.g. the Antitrust Authority, or the Data Protection Authority). This means that it should be authorized to hear and consider complaints and petitions and conciliate or issue binding decisions – the National Observatory does not have any of these prerogatives.

The creation of an NHRI would, probably, be the best option *in abstracto* (better even than the setting up of an independent administrative authority), but it is difficult to predict whether this is feasible. Indeed, a new law on the creation of an Italian NHRI is currently under consideration in the Senate, but it is not clear when (and if) it will be approved.[XLI] It must be noted that the bill under discussion is the latest in a series of drafts never passed: a first draft law was already approved in April 2007 by the Chamber of Deputies, but remained to be endorsed by the Senate. Another draft was introduced into the Senate in late 2009 and discussed in February 2010. The current bill, presented on 5 May 2011, is going through a complex parliamentary *iter*: the upcoming elections and the harsh economic crisis are quite likely to delay its final endorsement.

The formal involvement of the judiciary (almost absent, up to now) could also be an option, even if the form of such an involvement should be carefully considered. Certainly

the creation of 'extraordinary or special judges' is forbidden by Art. 102 of the Constitution. However, since specialised sections for specific matters within the ordinary judicial bodies may be established, such an option (its pros and cons) should be explored.

In addition, relations between the National Observatory and other bodies already in place (such as the *Istituto per lo sviluppo della formazione professionale dei lavoratori (*ISFOL), which will, according to the Methodological notes, carry out the legislative analysis for the report to be submitted to the CRPD Committee, or the Permanent Observatory on Integration of Pupils with Disabilities - *Osservatorio permanente per l'integrazione degli alunni con disabilità*)[XLII]) should be optimized and clarified. Up to now, an informal collaboration with the Observatory on Infancy and Adolescence (*Osservatorio per l'Infanzia e l'Adolescenza*)[XLIII] has been conducted, but a formal and more transparent partnership is advisable.

6. Concluding Remarks

Perhaps it is too early to examine whether the 'reshaping' of Italian disability policy making has been conducive to a proper implementation of the CRPD and to, ultimately, empower persons with disabilities. The changes that have taken place indisputably require long-term evaluation. However, the overview provided for here allows us to draw some concluding remarks.

The ratification of the CRPD in Italy has not led to substantial processes of change, but it has certainly led to a partial reassessment of disability policy making which has involved only the State. The Regions have been substantially absent from this process. No regional focal points have been established. This is particularly regrettable considering the relevant competences that Regions possess in social matters and areas like culture or territorial organisation, which are crucial for implementing the Convention.

All in all, it can be noted that the implementation of Art. 33(2) is revealing to be problematic. The National Observatory as a sort of consultative participatory structure (regardless of its lack of compliance with Art. 33(2) CRPD) is just the starting point, but cannot be considered a point of arrival. Still Italy is not fully in compliance with the CRPD, it should more convincingly engage in the construction of a true framework formed by a network of structures to capture the transformative potential of the CRPD.

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[I] Law of 3 March 2009 n.18 '*Ratifica ed esecuzione della Convenzione delle Nazioni Unite sui diritti delle persone con disabilità, con Protocollo opzionale, fatta a New York il 13 dicembre 2006 e istituzione dell'Osservatorio nazionale sulla condizione delle persone con disabilità*', in G.U. n. 61 of 14 March 2009.

[II] The changes that are taking place have been boosted by civil society actors, trade unions and by organizations that represent people with disabilities who aim to combat discrimination and marginalization: all of these actors form networks, mobilize campaigns that advance disability rights through advocacy, and try to communicate with public institutions with a great emphasis on the Convention.

[III] The 'medical' model tends to view persons with disabilities as 'objects' who are to be managed or cared for. The 'social' or 'human rights' model views persons with disabilities as subjects and not objects, emphasising respect for the equal human rights of persons with disabilities.

[IV] This formulation recalls the one used in the Optional Protocol to the Convention against Torture (OPCAT), which requires States to give due consideration to these Principles when designating or establishing national prevention mechanisms.

[V] United Nations General Assembly A/RES/48/134 85th plenary meeting, 20 December 1993. The *Paris Principles* were defined at the first International Workshop on National Institutions for the Promotion and Protection of Human Rights in Paris on 7-9 October 1991 and adopted by United Nations Human Rights Commission Resolution 1992/54 of 1992 and General Assembly Resolution 48/134 of 1993.

[VI] Estonia and Greece completed the ratification process in May 2012. The Netherlands is still in the process of ratifying the Convention.

[VII] ISTAT 2003, see <http://www.disabilitaincifre.it/prehome/quanti_disabiliinitalia.asp> (accessed 10 August 2012).

[VIII] According to the European Court of Justice, the principle of sincere cooperation governs relations between the EU and the Member States during all phases of an international agreement to which both the EU and the Member States are going to be parties to (see *inter alia* Opinion 1/78, *International Agreement on Natural Rubber*, 1979 E.C.R. 2871).

[IX] On Article 117(1) of the Constitution, introduced after the 2001 constitutional reform, there has been a flushed debate among scholars. According to some scholars, Art. 117(1) should be referred to only as regards the relationship between State and Regions because its purpose is not that of governing the hierarchy of sources (Pinelli, 2001; Cannizzaro, 2001). Others (*e.g.*. Guazzarotti, 2006: 505) argued that norms implementing international law obligations into the domestic order can serve as an interposed standard of review (an interpretation which has then been adopted by the Italian Constitutional Court).

[X] Art. 11 reads as follows: 'Italy rejects war as an instrument of aggression against the freedom of other peoples and as a means for the settlement of international disputes. Italy agrees, on conditions of equality with other States, to the limitations of sovereignty that may be necessary to a world order ensuring peace and justice among the Nations. Italy promotes and encourages international organizations furthering such ends'.

[XI] 'Mixity' refers to the fact that one part of an international agreement falls within the scope of the powers of the EC/EU while another part falls within the scope of the powers of Member States (on mixed agreements see *inter alia* Heliskoski, 2001; Hillion, Koutrakos, 2010).

[XII] <http://www.altalex.com/index.php?idstr=127&idnot=47673> (accessed 30 July 2012). Another recent important decision of *Tribunale di Varese* was recently released: Decree of 9 July 2012, see at <http://www.personaedanno.it> (accessed 25 August 2012).

[XIII] *Inter alia Consiglio di Stato* 16 March 2011, n. 1607; *Consiglio di Stato*, sez. III, 10 July 2012, n. 4085 at <http://www.giustizia-amministrativa.it/> (accessed 30 July 2012).

[XIV] Case 80/2010 of 22 February 2010 at < http://www.cortecostituzionale.it> (accessed 30 July 2012).

[XV] Art. 38(3) affirms that 'disabled and handicapped persons are entitled to receive education and vocational training'. According to Art. 38(4) 'Responsibilities under this article are entrusted to entities and institutions established by or supported by the State'.

[XVI] Art. 10 of the Decree of 7 April 2011 No. 144 (in GU 197 of 25 August 2011) re-organized the Ministry of Labour and Social Policies. See <http://www.lavoro.gov.it/Lavoro/Istituzionale/Ministero/AmministrazioneCentrale/DG_Inclusione.htm> (accessed 28 August 2012).

[xvii] Many (in fact, almost all) of them designated as focal point for matters relating the implementation of the Convention the Ministry of Welfare, Labour, Social Affair/Policy (different according to each national denomination), or an internal structure of the Ministry itself (e.g. Romania), generally pre-existing, or a specific body within the Ministry or somewhat linked to it (e.g., Spain).

[xviii] Open-ended consultation on National Frameworks for the Implementation and Monitoring of the Convention on the Rights of Persons with Disabilities organised by the OHCHR, Geneva, October 26 2009, at <http://www2.ohchr.org/english/issues/disability/docs/ReportConsultation26102009.doc> (accessed 20 March 2012).

[xix] The Committee was originally created by the Ministerial Decree of 15 February 1978, No. 519, then modified in 2007 by Ministerial Decree <http://www.cidu.esteri.it/ComitatoDirittiUmani/>. The Committee of Ministries for Orientation and Strategic Guidance on Human Rights Protection (*Comitato dei Ministri per l'indirizzo e la guida strategica in materia di tutela dei diritti umani)*, created in 2007 by a Decree of the Presidency of the Council of Ministers and attached to the Presidency of the Council of Minister, could also have represented a good option. It must be noted, however, that at present this Committee has 'disappeared' from the structure of the Presidency.

[xx] See also <http://www.lavoro.gov.it/Lavoro/md/AreaSociale/Disabilita/> (accessed 28 August 2012).

[xxi] *E.g.* in Spain a single focal point for matters relating to the implementation of the Convention has been designated. It is the *Consejo Nacional de la Discapacidad* (National Disability Council), now regulated by Royal Decree No. 1855/2009 of 4 December 2009).

[xxii] See the Third Disability High Level Group report on the implementation of the CRPD in the Member States (2010), available at <http://ec.europa.eu/social/BlobServlet?docId=5070&langId=en> (accessed 30 August 2012).

[xxiii] The Directorate (and the whole Ministry) is promoting studies on disability. It deserves to be mentioned that a new report on disability has been published on the website of the Ministry of Labour and Social Policies. G. Gori (ed), *Il sistema di protezione e cura delle persone non autosufficienti Prospettive, risorse e gradualità degli interventi*, at <http://www.lavoro.gov.it/Lavoro/Strumenti/StudiStatistiche/> (accessed 10 May 2012).

[xxiv] The UK designated the Office for Disability Issues (ODI)[xxiv], a cross-government organisation set up in January 2005. ODI works with government departments, disabled people and a wide range of external groups. Separate focal points were also appointed for devolved administrations in Scotland, Wales and Northern Ireland, and the ODI itself functions as regional focal point for England. Several focal points were considered necessary to respect the UK devolutionary system and competences of sub-national entities, which touch upon many areas covered by the Convention (e.g. education, housing or social work).

[xxv] This choice was made because disability policies are a mix of policy measures belonging to the competency of the federal state (e.g. anti-discrimination law, quotas for federal civil servants, disability benefits), the regions (e.g. wage subsidies) or the communities (e.g. vocational training, culture and leisure). All the structures indicated as focal points were already pre-existing. At the federal level, the General Administration of Persons with Disabilities (*Direction générale des Personnes handicapées*), within the Federal Public Service Social Security (*SPF Sécurité sociale*)[xxv] was designated. In the Flemish Region, the Flemish Agency for Disabled People (*Vlaams Agentschap voor Personen met een Handicap*, VAPH) was designated. In the Walloon region and in the German-speaking community the focal points are, respectively, the Agency for the Integration of Persons with Disabilities (*Agence Wallonne pour l'Intégration des Personnes handicapées*)[xxv] and the Authority for Persons with Disabilities (*Dienststelle für Personen mit Behinderung*). The Francophone Brussels Service for Persons with Disabilities (*Service bruxellois francophone des personnes handicapées*) is responsible for implementing disability policy in Brussels, but it has not yet formally been appointed as focal point.

[xxvi] The *Länder* are on the way to establish their own focal points. At present, the Austrian focal point is the Federal Ministry of Labour, Social Affairs and Consumer Protection (BMASK) together with the Federal Social Office, which has nine Offices as local contact points.

[xxvii] *Ex pluribus* on this competence, see the Constitutional court's decisions No 248/2006; No. 50/2008; No. 207/2010; No. 248/2011.

[xxviii] <http://www.statoregioni.it/> (accessed 31 August 2012).

[xxix] Art. 118 and Art. 5 of the Italian Constitution.

[xxx] Best practices seem to be those of States which experimented with 'mixed bodies' for coordination. For example, Denmark, with only a single focal point, has decided to set up a coordination mechanism to deal with horizontal coordination of disability issues within the government, i.e. to facilitate contacts among different ministries. The Danish inter-ministerial committee of civil servants on disability matters within the Ministry Social Affairs is not devoted to coordinate the activities of focal points, since there is only one focal point, but instead has to facilitate cross-cutting activities in different sectors, share knowledge about the individual ministries' tasks in order to increase awareness of when a problem affects several sectors, and to solve ad hoc tasks for the government of disability. It includes representatives of all ministries, and disability organisations are also involved in the committee's work. In this inter-ministerial committee persons with disabilities take up an essential role in caring for general interests together with public authorities.

[xxxi] Ministerial Decree of 6 July 2010, No. 167 *'Regolamento recante disciplina dell'Osservatorio nazionale sulla condizione delle persone con disabilità ai sensi dell'articolo 3 della legge 3 marzo 2009, n. 18'* (Entry into force 23/10/2010), available at <http://www.lavoro.gov.it/Lavoro/md/AreaSociale/Disabilita/Osservatorio/> (accessed 20 July 2012).
[xxxii] See reply of the Vice-Ministry of Labour, Michel Martone, to the Deputee of the radical party Luca Coscioni, on 16 April 2012.
[xxxiii] The DPOs represented are: FAND (*Federazione Associazioni Nazionali Disabili*), UIC (*Unione Italiana Ciechi*), ENS (*Ente Nazionale Sordi*), ANMIL (*Associazione Nazionale Mutilati e Invalidi Lavoro*), UNMS (*Unione Nazionale Mutilati per Servizio*), ANMIC (*Associazione Nazionale Mutilati e Invalidi Civili*), FISH (*Federazione Italiana Superamento Handicap),* FAIP *(Federazione Associazioni Italiane Para-Tetraplegici*), EDF (European Disability Forum), DPI (Disabled Peoples'International), FIADDA (*Famiglie Italiane Associate per la Difesa dei Diritti degli Audiolesi*), ANFFAS (*Associazione Nazionale di Famiglie di Persone con Disabilità Intellettiva e/o Relazionale*), *Autismo Italia*, FIABA (*Fondo Italiano Abbattimento Barriere Architettoniche*), COORDOWN, UNIAMO F.I.M.R. Onlus (*Federazione Italiana Malattie Rare*) and *Gli Amici di Luca*.
[xxxiv] Art. 2 of the Decree of 30 November 2010.
[xxxv] Art. 3 (5) of Law 18/2009.
[xxxvi] Art. 8 of Decree 167/2010.
[xxxvii] See reply of the Vice-Ministry of Labour, Michel Martone, to the Deputy of the radical party Luca Coscioni, on 16 April 2012.
[xxxviii] UN Human Rights Council, *Thematic study by the Office of the United Nations on the structure and role of national mechanisms for the implementation and monitoring of the Convention on the Rights of Persons with Disabilities*, para. 64.
[xxxix] In the 2010 Guide for Monitoring released by the OHCHR, it is expressly stated that: 'Monitoring activities could: Provide national monitoring mechanisms with information on the state of implementation of the Convention; Provide information to the Committee for its constructive dialogue with States; Identify potential breaches of the rights of individuals under the Convention which could form the basis of a communication to the Committee under the Optional Protocol if the State concerned has ratified it; Identify reliable information on grave or systematic violations of the Convention which could be submitted to encourage the Committee to undertake an inquiry under the Optional Protocol if the State concerned has ratified it; Follow up on recommendations of the national monitoring mechanisms and the Committee to strengthen implementation of the Convention' (OHCHR, 2010: 32-33).
[xl] See supra ft. 13.
[xli] Bill on the setting up of the National Commission for the promotion and protection of human rights (DDL C4534 '*Istituzione della Commissione nazionale per la promozione e la protezione dei diritti umani*') <http://www.senato.it/leg/16/BGT/Schede/Ddliter/37199.htm > (accessed 31 August 2012).
[xlii] In January 2012 a Permanent Observatory on Pupils with Disabilities (*Osservatorio permanente per l'integrazione degli alunni con disabilità*) has been established within the Ministry of Education. The functioning of this Observatory is still unclear. However, this body could certainly be part of the network.
[xliii] <http://www.minori.it/osservatorio>.

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Overcoming the Legal Iron Curtain: Similarities and differences in the use of preliminary references between new and old Member States

by

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Abstract

This article analyses the determinants that lead national courts across EU countries to use the preliminary reference procedure, paying special attention to the differences and similarities in the use of this mechanism of judicial cooperation between the old and the new Member States incorporated in 2004 and 2007. The study presents original and comprehensive data on the use of preliminary references (1961-2011) in all 27 Member states. Besides confirming the impact of common factors already tested in the literature, this research additionally identifies some differences in the institutional dynamics influencing the use of preliminary references across older and newer Member States.

Key-words

Court of Justice of the European Union, CJEU, preliminary references, new and old Member States, CEE, legal and political institutions

1. Introduction

In the last couple of decades, the literature has developed diverse explanations to account for how national judges' preferences and national institutional structures encourage the legal integration of Europe by means of Article 267 TFEU (Alter, 1996, 1998, 2008; Burley and Mattli, 1993; Carrubba and Murrah, 2005; Mattli and Slaughter, 1998b, 1998a; Stone Sweet and Brunell, 1998; Stone Sweet, 2004; Weiler, 1994; Vink et al., 2009; Wind et al., 2009; Wind, 2010; Hurnef and Voigt, 2012). Scholars tried to assess whether legal and political institutional factors can explain why the Court of Justice of the European Union (CJEU) received more preliminary rulings from some Member States of the EU than from others. Until recently, the interest in the study of preliminary references made by national courts from new Member States has been limited, with some exceptions (see Kühn, 2006; Sadurski, 2008; Hurner and Voigt, 2012), due to their only recent incorporation into the EU and, consequently, the poor involvement of their national courts in the preliminary reference procedure established by Article 267 TFEU (ex-Article 234 TEC).

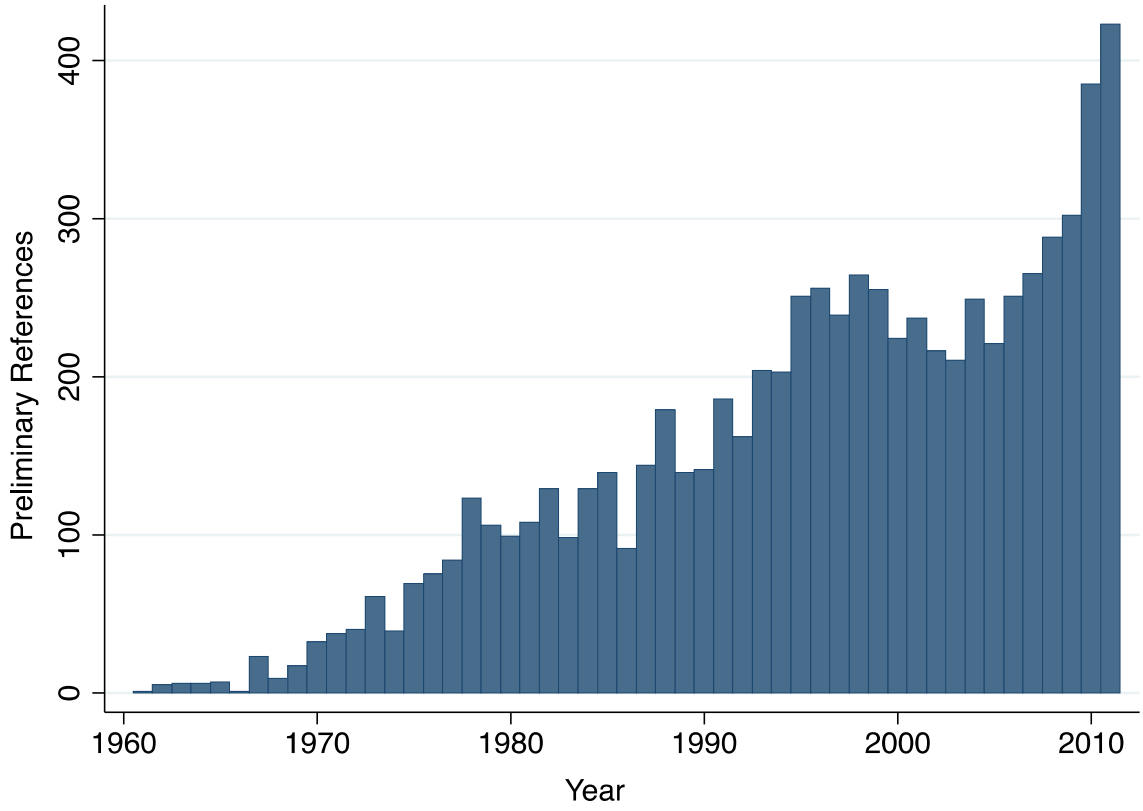
Nevertheless, this situation has, since recently, changed as new Member States have started to cooperate with the CJEU, to the extent of equaling or even surpassing the number of references sent by old Member States' courts. From one year to another, in some of these Member States from Central and Eastern Europe (henceforth CEE) the number of references requested has doubled or tripled. But despite the increasing judicial cooperation between the CJEU and new members' courts, little is known so far about the impact of legal and political institutions on the use of the preliminary references procedure by CEE courts as compared to the older members. This raises new questions related to the judicial behavior of national courts of new Member States, such as: 1) to what extent may the trends in the use of preliminary references in new member states be explained by the same institutional factors accounting for its use in older ones (e.g. dualism, judicial review of legislation, years of membership, among others); and, what is more important, 2) is there any specific institutional effect characterizing the preliminary references procedure within CEE?

This article seeks to complement previous contributions on the institutional analysis of preliminary references by offering an assessment of the rationales for the involvement of national courts in newer Member States compared to older ones. This assessment will help to lift the "iron legal curtain" dulling our understanding of the use of preliminary references within newer Members States and shed some light on the common and similar factors driving the use of adjudication in both groups of Member States. For that purpose I will present comprehensive data on the use of preliminary references (1961-2011) in all 27 Member States (MS). The article is organized as follows: in the next section I briefly describe the historical pattern in the use of preliminary references in new and old Member States. The second section describes the main explanatory factors accounting for the use of preliminary references. The third section describes the research design and data used for the empirical analysis in section four, before the article ends in a conclusion.

2. A descriptive assessment of the use of preliminary references in older and newer Member States

The literature on European judicial politics has explained the increasing relevance of preliminary references (PR) and its variation across EU countries since 1961 (see Figure 1), considering temporal as well as country-related explanations.

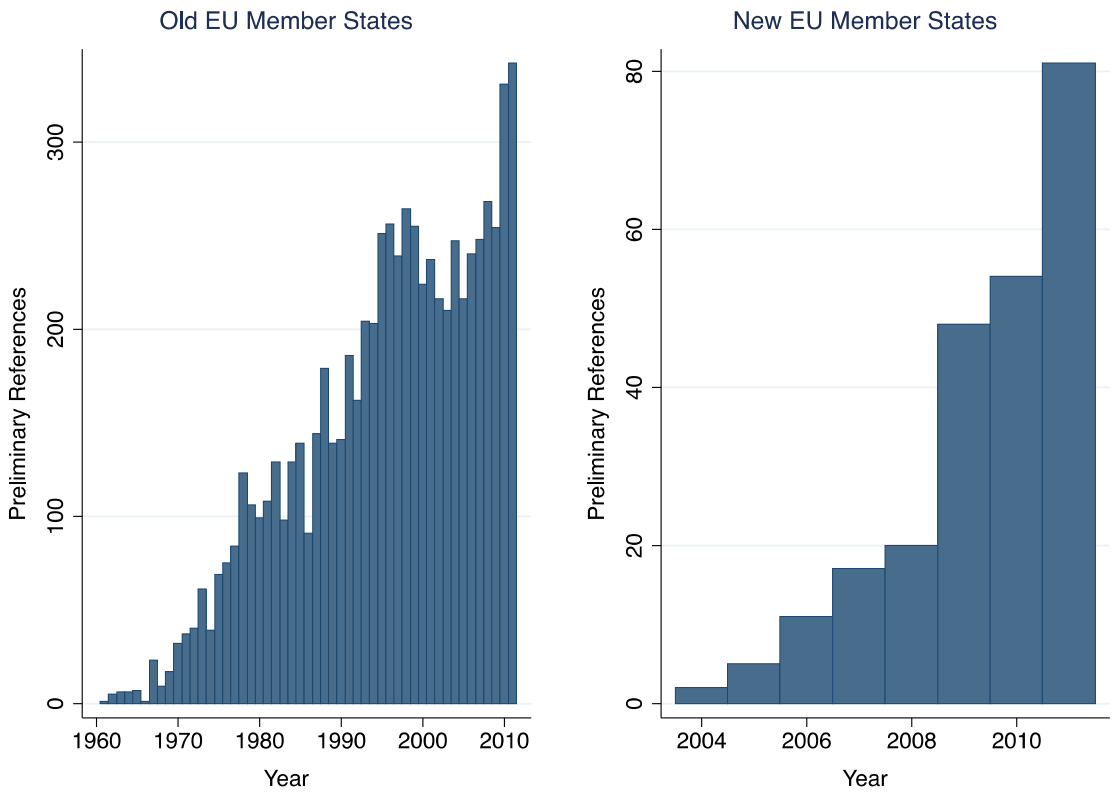
Figure 1: Total amount of Preliminary References in the EC/EU by year (1961-2011



Source: CJEU statistics on judicial activity – http://curia.europa.eu/jcms/jcms/Jo2_7032/

As was said before, the inclusion of new Member States from CEE, as a separate group of analysis, has been missing due to their only recent integration and their poor involvement in the preliminary reference procedure. However, that situation has changed. Figure 2 confirms the increasing adaptation of national courts from CEE countries to the use of PR since their membership in 2004 and 2007, respectively, concluding that, as has happened also within the old MS, new member states are more likely to send more requests for preliminary references as the duration of their membership, and with it their experience with the EU legal system, increases.

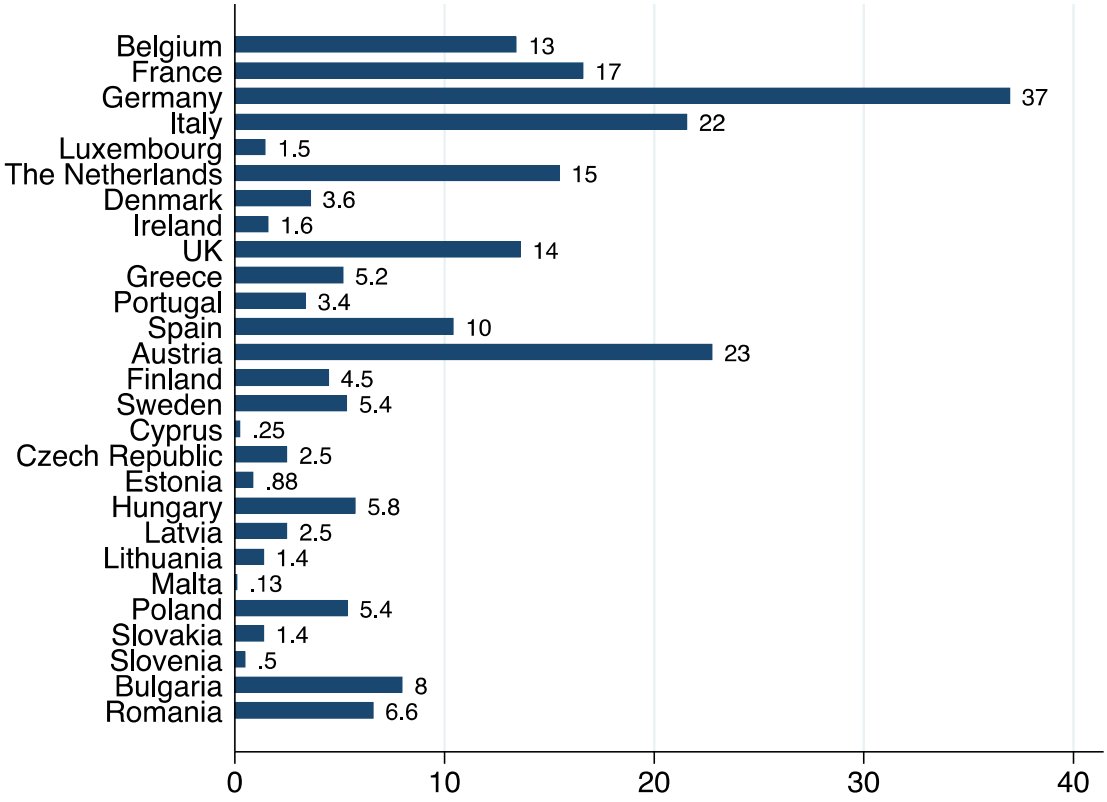
Figure 2: Preliminary references by old and new EU member states (1961-2011)



source: CJEU statistics on judicial activity – http://curia.europa.eu/jcms/jcms/Jo2_7032/

That situation becomes even more evident by looking at the differences in the use of preliminary references across countries through controlling for the number of years (see Figure 3). After controlling for temporal effects, we can better appreciate the large heterogeneity among the EU-27 countries and, what is more interesting, detect clear differences within the "new members" group. As regards the heterogeneity across EU-27 we see, for example, how countries like Romania and Bulgaria, after five years, of membership have doubled the number of references per year made by countries with more than 15 years of EU membership (e.g. Ireland, Sweden, Finland, among others). It is also important to emphasize the variation among CEE countries. For example, Member States that accessed the EU in 2004 perform differently as regards preliminary references, observing a variance that ranges from 0.25 for Cyprus to 5.8 for Hungary.

Figure 3: Preliminary references per years of membership (1961–2011)



Source: CJEU statistics on judicial activity – http://curia.europa.eu/jcms/jcms/Jo2_7032/

Therefore, this heterogeneity in the use of preliminary references demands an improvement of the institutional explanations when accounting for CEE countries. Despite the evident relevance of membership duration for the engagement of national courts in PR, we still need to know to what extent this variation in the use of preliminary references in new Member States is also a consequence of institutional factors. If so, we also need to know whether national courts from new Member States react to the same institutional incentives than the rest of the EU-15 when they request CJEU rulings. Hence, which factors may influence the use of preliminary references, according to the existing body of literature?

3. The institutional determinants of the use of preliminary references by national courts

In this section I will explain the legal and political factors offered in the literature to account for the use of preliminary references. Most of the variables presented here belong to previous explanations given by scholars devoted to EU judicial politics. However, this article will try to test also new hypotheses, such as *government capacity* and the *counter-limits doctrine*.

3.1 Openness of the domestic legal order: monism vs. dualism

Monism and dualism regarding EU law might be seen, rather, as symptoms of the different constitutional openness of a domestic legal order. Theoretically, dualist orders treat national and international law (including European law) as two separate sources of law, while monist systems integrate international legal orders into the national normative system with binding force (Hoffmeister, 2002; Ott, 2008). As a result, while *monist legal orders* integrate international and European legal systems as a part of national norms – implying the unconditional acknowledgment of EU law primacy – states with *dualist systems* emphasize the difference between national and international law and do not automatically accept European legal supremacy.

With regards to the effects of this differentiation on the preliminary references made by national courts, on one hand, several scholars argue that national courts in monist legal system are more willing to apply EU law, especially when they suspect EU law to contradict the principles of their national legal systems. As a result of their greater willingness and experience with international law and instruments, national courts from monist contexts will rely more often on supranational adjudication than courts in dualist systems (Alter, 1996; Hornuf and Voigt, 2012). Accordingly, we should expect national courts in dualist countries to be less willing to cooperate with supranational courts when they have to decide about the reception of EU law within their national legal system (Vink et al., 2009):

h_1: Member states with monist systems are more likely to make preliminary references to the CJEU than those with dualist systems.

On the other hand, other scholars instead endorse the idea that national courts in dualist systems are more likely to send preliminary references. In such contexts, litigants might be more likely to engage national courts in legal disputes over the applicability of EU law over national law and, as a consequence, will force judges to ask for references. The scarce experience of judges with international law and the direct applicability of EU law may encourage asking for a CJEU ruling to solve legal disputes and conflicts (Vink et al., 2009):

h_2: Member states with dualist systems are more likely to make preliminary references to the CJEU than those with monist systems.

3.2 Counter-limits to EU law

National constitutional and supreme courts in several Member States have established reservations to the supremacy doctrine – like in the *Solange* case[I] in Germany – and, by extension, also to EU law reception, in order to preserve the autonomy of their national constitutional and legal order (Martinico, 2012). These reservations have allowed higher courts to retain for themselves the right to review whether European Union institutions – mainly the CJEU – act within the competences conferred upon them and in respect of fundamental national constitutional norms (Albi, 2007). In such contexts, national courts will try to prevent the intervention of European institutions beyond their national limits and, in addition, to avoid the reversal of their decisions by higher courts when they apply EU law beyond its national limits. Hence,

h_3: National courts are less likely to make preliminary references when its highest national court has adopted the doctrine of counter-limits.

3.3 The role of higher courts within the multi-level judicial architecture

Following Article 267 TFEU and the CILFIT doctrine[II], higher (non-constitutional) courts, as last instance courts, have the obligation to call for preliminary references when they have serious doubts about the application of EU law. Hence, we should expect an increase in the amount of preliminary references as the number of higher courts growths (Hornuf and Voigt, 2012). Ramos Romeu (2006) and Kornhauser (1992a, 1992b) reinforce this argument by indicating how higher courts, as judicial bodies specialized on legal

interpretation, are more likely to receive and address complex EU law issues. So, they will request the intervention of the CJEU to solve complex doctrinal conflicts in case they cannot do it by themselves in applying the doctrine of *acte claire*. Moreover, Ramos identifies that references are costly and require a lot of time and effort from lower courts, which are not always equipped with the resources needed for this task. Otherwise, higher courts – due to more legal resources – are more willing to be involved in preliminary references. All together, that is: the obligation coming from Article 267 TFEE and CILFIT, the complexity of EU law cases addressed to higher courts, and the number of resources available for sending preliminary references, make higher courts more willing to cooperate with the CJEU than ordinary courts. As a result, we would expect more recourse to the use of preliminary references as the number of higher courts increases:

b_4: Member states with a larger number of higher courts are more likely to make preliminary references to the CJEU than states with less higher courts.

3.4 Judicial review of legislation powers

On the one hand, legalistic explanations argue that judges already entitled with judicial review power of legislation are more likely to send preliminary references (Alter, 1996, 1998; Stone and Brunell, 1998; Mattli and Slaughter, 1998; Carruba and Murrah, 2006). So, courts familiar with the power to preclude the application of national law will easily accept the chance to send preliminary references and declare national law null as a natural extension of their national pre-existing judicial powers. On the other hand, political accounts, assuming that ordinary judges are willing to increase their judicial power vis-à-vis other national institutions, emphasize the fact that national judges without the power of judicial review of legislation cooperate with the CJEU to legitimate the exercise of their newly conferred review powers against their national highest courts, like constitutional courts, who may try to circumvent their authority (Tridimas & Tridimas, 2004; Vink et al., 2009; Hornuf and Voigt, 2012). To test this intra-judicial competition argument, I offer a categorization that measures the extent of judicial review powers across higher courts as acknowledged by national rules: *No judicial review*, *decentralized judicial review* (all courts) and *centralized* (only the highest court). The classification mainly distinguishes judicial systems where only a higher court (such as constitutional courts) is entitled with the power of

judicial review from those in which this power is spread across the whole national judiciary. According to the intra-judicial competition theory, then:

h_5: National courts are more likely to send preliminary references in centralized judicial review systems than in judicial systems with decentralized or no judicial review powers.

3.5 Common Law

European countries with a common law tradition are attached to the general rule of binding precedent more than countries with other legal traditions (e.g. civil law, Scandinavian law, etc.). Judges socialized in this culture will be more aware of and used to the usage of CJEU precedents, and hence make less use of preliminary references. Similarly, Hornuf and Voigt (2012) state that judges in common law countries have themselves a more active role in the developing of law. That behaviour is extended to the application of EU law, where judges are more prone to solve EU legal conflicts and doubts without the intervention of the CJEU:

h_6: Member states with a common law tradition are less likely to make preliminary references to the CJEU than member states with a different legal tradition.

3.6 Support for the European Union

Burley and Mattli claim that judges are worried about public opinion on Europe and cannot deviate from their political preferences regarding the European Union (Burley and Mattli, 1993; Carrubba and Murrah, 2005). Traditionally, the literature measures this support for the EU using the percentage of citizens who think that membership of the EU is "a good thing" for their country, with data drawn from the Eurobarometer[III]. The more public opinion is in favour of EU, the lower the costs for national courts of sending preliminary references to solve legal conflicts concerning the incorporation of EU law into the national legal system. Hence,

h_7: National courts are more likely to send preliminary references when the national political environment is favourable to European integration.

3.7 Government capacity for an effective and correct implementation of EU legislation

Wrong transposition by national implementing authorities will generate questions about the compatibility and doubts about the correct transposition/implementation of EU law into the national legal system. Litigants, looking for compliance of national authorities with EU law, rely on judicial institutions (such as the CJEU or national courts). National courts, as a last resort for citizens, will send preliminary references to solve potential interpretation and compatibility conflicts generated by low-quality implementation of EU legislation and obligations by their administration. When government and administration do not comply with their EU law obligations or incorrectly transpose EU legislation, national courts will request CJEU rulings to push governments towards full compliance with EU law. By contrast, the effective transposition and full compliance with EU law by the implementing political authorities reduces the odds of legal conflicts and, consequently, the number of preliminary references against the national authorities. Accordingly,

h_8: National courts will refer more often to the CJEU in countries with a lower quality of implementation.

4. Research Design: Data and method

This section describes the data sources, variables and statistical technique used to test the hypotheses presented above. The data set includes information on preliminary references[IV] (dependent variable) and other legal and political factors (independent or explanatory variables) of EU Member States from 1961 until 2011. For the analysis I estimate a linear panel regression with random effects for the number of referrals sent to the CJEU by country. The selection of a random-effects model was determined by some variables for which within-cluster variation is minimal over time.

Next, I offer a description of the coding of the explanatory variables used in the analysis to test the hypotheses. Furthermore, I have included several "control variables" that are non-related to legal and political institutions but which, according to the literature, may affect the use of preliminary references, like *population* or *years of membership*.

- *Dualism* is a dummy variable that achieves the value of 1 if a Member State has a dualist legal system and 0 otherwise. Poland, the Czech Republic, the Slovak

Republic, Romania, Bulgaria, Slovenia, Estonia, Lithuania, Latvia, Cyprus, Belgium, France, Luxembourg, the Netherlands, Spain, Portugal, Greece and Austria were coded as monists, while Hungary, Italy, Germany, the UK, Ireland, Malta, Sweden, Finland, and Denmark were coded as dualists. The information on legal systems was gathered from Hoffmeister (2002) and Ott (2008).

- *Number of higher courts* measures the number of higher courts in a country. Constitutional courts are excluded from this categorization. Source: Association of the Councils of State or the Supreme administrative jurisdictions of the European Union.[V]
- *Counter-limits to EU law:* The variable achieves the value of 1 if national constitutional courts, supreme courts or similar instances have established national doctrinal limits to the application of EU law, and 0 otherwise. The countries scoring 1 are **Italy** (based on the judgments of the Italian Constitutional Court in *Frontini* [Decision No. 183 (1973)], *Granital* [Decision No. 170 (1984)], and *Fragd* [Decision No. 168 (21.04.1989)]), **Germany** (Judgments of the German Constitutional Court (BVerfGE) in *Solange I* [BVerfGE 37, 271 (29.05.1974)], *Solange II* [BVerfGE 73, 339, 2 BvR 197/83 (22.10.1986)], the *Brunner case* in Maastricht [BVerfGE 89 (12.10.1993)] and *Lisbon Treaty* [BVerfGE, 2 BvE 2/08 (30.6.2009)]), **Belgium** (Cour d'arbitrage's judgment No. 12/94, Ecoles Europeenes (01.02.1994)), **France** (Conseil Constitutionnel in *Maastricht* (02.09.1992), in *Amsterdam* (31.12.1997) and in the *Constitutional Treaty* [Décision No. 2004-505 DC (19.11.2004)), the **UK** (House of Lords *Factortame* judgments: 1st judgment [Regina v. Secretary of State for Transport Ex Parte Factortame Limited and Others (18.05.1989)] and 2nd judgment (11.10.1990)), **Denmark** (Danish Supreme Court of the Maastricht Treaty in *Carlsen v. Rasmussen* case (06.04.1998)), **Greece** (Greek Council of State decision in *Bagias v. DI KATSA* [Decision No. 2808/1997)]), **Spain** (Judgment of the Spanish Constitutional Court in Maastricht [Decision nº 1236 (01.07.1992)], Constitutional Treaty [Declaration No. 1/2004]), **Poland** (Polish Constitutional Court judgments on the Polish Accession Treaty [Case K 18/4 (11.05.2005)], and on the European Arrest Warrant [Case P 1/05 (27.04.2005)]), the **Czech Republic** (Czech Constitutional Court's Post-Accession Decision [Pl. ÚS 50/04 (08.03.2006)] and the Decision on the ratification of the

Lisbon Treaty [Pl. ÚS 29/09 (03.11.2009)]), and **Cyprus** (Cyprus Supreme Court (Ανώτατο Δικαστήριο Κύπρου) Judgment of 7 November 2005 (Civil Appeal no. 294/2005) on the Cypriot European Arrest Warrant Law).

- *Common law:* This variable assumes the value of 1 in countries with elements of the common law tradition (UK, Cyprus and Malta), and 0 otherwise. Also countries resulting in part from the civil law and the common law tradition, such as Ireland and Scotland, are considered.
- *Type of judicial review of legislation:* These variables code the kind of courts that can review the constitutionality of laws within a country. I have created three variables distinguishing a) countries with no judicial review, b) countries where ordinary courts are empowered with judicial review, also named as *decentralized*, and c) countries where judicial review is exercised only by constitutional courts and hence *concentrated*. The information for old members was collected from Vink et al. (2009), while the values for CEE countries were gathered from the Comparative Constitutional Analysis Project.[VI]
- *Recent EU membership:* This variable achieves the value of 1 if the country accessed the European Union during either the 2004 or the 2007 enlargement, and 0 if otherwise.
- *Support for the European Union:* This variable measures the support of Member States' citizens for the European Union. The percentages are taken from the Eurobarometer,[VII] considering the question of whether citizens think that membership of the EU is "a "good thing.
- *Government capacity:* This variable corresponds to an index from the Democracy Barometer[VIII] created by Kriesi and Bochsler (2012) as a combination of indicators that measure the conditions for efficient implementation: 1) a public service independent from political interference, 2) bureaucratic quality and effective implementation of government decisions, and 3) absence of corruption and the willingness for transparent communication. According to the main hypothesis national courts will refer more often to the CJEU when national governments do not fulfil their European demands because of poor governmental capacity. Values for Latvia were not available.

Control variables

- *Population:* Member states with a large population should tend to litigate more and, as a result, will send more preliminary references (Stone and Brunell, 1998). The variable was transformed to its logged value. Source: Eurostat, accessed August 2012.
- *Years of membership* measures the duration of EU membership of a country. This variable is used as a proxy for the experience of national courts with EU legal instruments and their acquaintance with PR proceedings. More experience makes it more likely that a court will send preliminary references to the CJEU (Ramos, 2006).

Table 1 lists some of the descriptives for the variables detailed above.

Table 1: Descriptive statistics

Variable	Obs.	Mean	Std. Dev.	Min	Max
Preliminary references	647	11.477	14.647	0	83
Dualism	647	.415	.493	0	1
Counter limits to EU law	647	.295	.456	0	1
Number of higher courts	647	1.956	1.065	0	5
Judicial review: no judicial review	647	.217	.413	0	1
Judicial review: decentralized	647	.233	.423	0	1
Judicial review: centralized	647	.548	.498	0	1
Support for the European Union	575	56.82	14.665	20	88
Government Capacity	639	64.648	19.586	23.4	97.2
Common law	647	.145	.352	0	1
Population	647	16.218	1.525	12.6	18.2
Years of membership	647	18.077	14.165	0	50
Recent EU membership (CEE)	647	.139	.346	0	1

5. Empirical Findings

Table 2 reports the results of the models estimated for the hypotheses on the use of preliminary references. To test the validity of the explanations presented I make use of five different models. While the first two models estimate the effect of the variables for all Member States (EU-27), specifications 3, 4 and 5 assess the impact of similar variables for two separate groups: old (3 and 4) and new (5) Member States. To clarify: model 4 has been included to be compared with model 3 and see whether the effect of the independent variables in old Member States is robust and constant since the accession of CEE countries to the EU in 2004.

Table 2: Time series cross-sectional linear regression

	1	2	3	4	5
Variables	***EU-27 1961-2011***	***EU-27 1973-2011 Full model***	***Old MS 1973-2011***	***Old MS - 2004-2011***	***New MS 2004-2011***
Dualism	2.657	0.752	4.665	4.758	2.442**
	[1.843]	[3.627]	[4.581]	[4.179]	[1.057]
Counter limits to EU law	1.540	-3.099	-3.359	-2.263	-1.201
	[3.444]	[3.219]	[3.759]	[2.929]	[1.271]
Number of higher courts	2.429**	4.037**	5.593***	7.363***	-0.498
	[1.056]	[1.594]	[0.638]	[1.036]	[0.362]
Judicial review category of reference	No judicial review	No judicial review	No judicial review	No judicial review	Centralized
Judicial Review: Decentralized (all courts)	-1.395	-0.342	-4.570*	-1.587	5.786***
	[2.670]	[3.420]	[2.767]	[4.141]	[2.191]
Judicial Review: Centralized (only higher courts)	4.057	7.174**	7.477*	7.677*	
	[3.511]	[3.512]	[4.272]	[4.335]	
Common law	-1.093	0.857	0.115	-2.696	5.400***
	[2.268]	[3.374]	[2.460]	[1.947]	[2.027]
Population	1.992**	3.301***	3.094*	5.185***	2.176***
	[0.803]	[1.157]	[1.684]	[1.235]	[0.593]
Year of membership	0.530***	0.477***	0.476***	0.617***	0.636**
	[0.150]	[0.145]	[0.153]	[0.156]	[0.251]
New member states (CEE)	1.847	4.274			
	[4.657]	[5.818]			
Support for the European Union		-0.079	-0.082	-0.115	-0.103*
		[0.070]	[0.078]	[0.082]	[0.061]
Government capacity		0.133	0.115	0.142	-0.266***
		[0.122]	[0.112]	[0.097]	[0.100]
Constant	-38.243**	-65.742**	-64.423**	-109.191***	-17.768
	[15.121]	[30.366]	[32.603]	[24.587]	[11.889]
Observations	647	567	485	120	82
Number of countries	27	26	15	15	11
R2 within	0.4033	0.2439	0.2449	0.1559	0.238
R2 between	0.7081	0.8048	0.8987	0.9217	0.8896
R2 overall	0.6028	0.6701	0.6876	0.833	0.4877
Wald test	0.000***	0.000***	0.000***	0.000***	0.000***
Robust standard errors in brackets	*** significant at 10%; ** significant at 5%; *** significant at 1%**				

As regards the results for the EU-27 (see models 1 and 2), and taking as a reference the full model 2, the impact of *the number of higher courts* across years and countries is remarkable . The coefficients for this variable are significant at 5%, meaning that EU Member States refer 4.037 more preliminary rulings to the CJEU if the number of higher courts increases by one unit across time and/or between countries. This finding emphasizes the relevance of the engagement of higher courts within the preliminary reference procedure.[IX]

A second interesting finding for all 27 Member States (still model 2) is related to the type of judicial review of legislation. Looking at the dummy variable "Judicial review: centralized", which tests whether national courts are constrained by constitutional courts or similar send more rulings than countries where judicial review is not allowed (the base category), one can see how national courts refer 7.174 more rulings to the CJEU in a

centralized system than in other situations to increase their judicial power vis-à-vis higher courts. As I have indicated above, national judges will try to legitimate the exercise of their newly conferred review powers by playing the CJEU against the national highest courts.

A third and more interesting effect is shown by the CEE or new Member States variable in model 2. This variable was included to control for the effect of these new members as a group. This strategy helps us to identify the persistence of additional omitted variables affecting the relationship between older and newer MS. However, the results indicate that there are no other hidden factors accounting for the variance in our dependent variable.

Once some common dynamics in the application of EU law are identified, I have estimated models 3, 4 and 5 to account for any dissimilar institutional effects among old and new Member States through the analysis of the variation in the use of preliminary reference within groups. In the case of EU-15 countries (see models 3 and 4 for old MS), I stress the impact of two institutional factors: *number of higher courts* and *judicial review powers*. As we can see, the *number of higher courts* has a positive and stronger effect on the number of preliminary references compared to the full model for the EU-27. Furthermore, the analysis suggests how, as for the full models, judges under centralized system are more likely to send preliminary references to legitimate the use of judicial review powers vis-à-vis higher courts. In addition, the findings also show that countries where national courts are already empowered with review power by their national rules are less likely to send preliminary references than those countries with no judicial review. Likewise, model 4 for the EU-15 since 2004 confirms the impact of the same variables.

Even more interesting are the findings in model 5, showing substantial differences in the kind of variables affecting the variation in the use of preliminary references across the new Member States. Firstly, we can appreciate how *dualist* CEE countries send more preliminary references than new *monist* members, while in the case of old member states there is no effect by this variable. This makes us wonder to what extent these differences between monist and dualist systems are diluted as EU legislation, rules and traditions take root within a national legal orders over time, as has happened for the EU-15.

Moreover, contrary to what happens in EU-15, we observe how new Members States with decentralized judicial review (e.g. Estonia) send more preliminary references than CEE countries with no power to review legal acts. This finding points to the relevance of

pre-existing judicial review powers among recent EU members so that judges embrace the duty of sending preliminary references.

Furthermore, we see how government capacity impacts significantly on the number of preliminary references within CEE countries: to have a government with a high transposition capacity has a negative effect on the use of preliminary references. Contrariwise, national courts are more likely to send preliminary references in countries with low government capacity, i.e. states in which the problems of wrong implementation of EU legislation are more likely to occur, such as Romania and Bulgaria (Falkner and Treib, 2008; Trauner, 2009). This finding points out that courts not only ask for CJEU rulings with the intention to solve doubts about the application of EU law, but also to force government and administration to fully enforce their European obligations.

As regards other factors, the results show a strong and constant effect by the control variables throughout all models: the rate of preliminary references will be higher in member states with a larger *population* and more *years of membership*. Nevertheless, we can observe how the establishment of counter-limits by higher courts to preserve the autonomy of their national constitutional and legal order has no effect on the likelihood of using preliminary references. Finally, and finishing with new member states, the decreasing effect of *support for the European Union* (at 10% of significance) and, unlike expected, the positive impact of *common law* systems on the use of preliminary references must be emphasized.

6. Conclusions

In this article I have analysed the use of preliminary references in the EU-27 with the main aim of explaining institutional differences and similarities between old and new Member States leading to the activation of Article 267 TFEU by national judges. The results of the analysis do not reveal any common institutional dynamic influencing the behaviour of courts in their recourse to preliminary references. However, they suggest some differences in the judicial and political institutional dynamics driving the use of preliminary references within new and old Member States. While in the case of the EU-15 the use of preliminary references seems mainly to be influenced by the role played by higher courts and the inter-judicial competition between lower and higher courts, in CEE

countries the main factors explaining the use of preliminary references are the dualist tradition of some countries, the previous experience of national courts with judicial review powers, and the incapacity of governments and administrations to successfully implement EU policies and legislation.

The findings of this article offer preliminary evidence on the similarities and differences between new and old Member States as regards the use of preliminary references. While the data on preliminary references suggests an increasing trend in the use of (annual) preliminary in CEE countries, this work also advocates the existence of some specific factors explaining the request of CJEU rulings on the other side of the "iron legal curtain". Some of the factors in new Member States seem to be related to the recent integration of EU principles and norms within national legal orders and the adaptation capacity of political institutions to comply with EU legislation. Nevertheless, we can expect a reduction of the impact of dualism on the use of preliminary references as courts becomes more familiar with the application of EU law, as it has also happened in the EU-15. In addition, it has become quite clear that national courts are just as, if not more, important in newer Member States than in older ones in terms of policy-making, not least because of their relevance for improving the quality and correct judicial enforcement of EU law when national governments fail to correctly implement EU legislation at domestic level.

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I Judgment of the German Constitutional Court - *Solange I*. BVerfGE 37, 271 (29.05.1974).

II C-283/81 CILFIT v. Ministero della Sanità [1982].

III http://ec.europa.eu/public_opinion/index_en.htm.

IV The data on preliminary references was gathered from the official statistics on the judicial activity of the Court of Justice of the European Union: http://curia.europa.eu/jcms/jcms/Jo2_7032/.

V http://www.juradmin.eu/en/home_en.html.

VI http://www.concourts.net/.

VII http://ec.europa.eu/public_opinion/index_en.htm.

VIII http://www.democracybarometer.org/.

IX The same models have also been estimated using a linear regression clustered by countries with similar results.

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Implementing fiscal decentralization in Italy between crisis and austerity: Challenges ahead

by

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Abstract

Since 2010 the Italian central government has embarked on a challenging program of fiscal consolidation, which is hugely affecting sub-central government finances. Sub-national governments are involved in reaching general government fiscal targets through reduction in central government transfers, new fiscal rules, borrowing and expenditures limits. These restrictions risk to put the fiscal federalism reform to a standstill – despite the progress obtained in 2010 and 2011 with the approval of the implementing decrees of Law no. 42/2009. Conversely, carrying out the fiscal federalism reform in order to seek efficiency gains in the provision of public services and smoothing out intergovernmental relations may represent one of the most important structural measures to address consolidation needs.

Key-words

Fiscal federalism, fiscal consolidation, local taxation, economic crisis, public services

1. Introduction

Managing financial relationships among levels of government represents one of the most complex policy issues all over the world. Finding an efficient mix between different sources of revenue (taxes, non-taxes, transfers, borrowing) for sub-national governments is one of the main objectives of the normative fiscal federalism literature. However, a "one size fits all solution" is not viable and every country should find some sort of tailor-made model suitable to its own institutional peculiarities.

Italy has been facing this challenge since the early 1990s, when it embarked on a process of transforming its system of intergovernmental relations into a regionalized quasi-federal one. The process culminated – at least temporarily – in the constitutional amendment of 2001 that set up a multilayered system of territorial governance based on three autonomous levels: regional, provincial, and municipal. The new Constitution has extended the range of basic responsibilities assigned to regional governments to education and social protection as well as a number of other areas. It introduced, at the same time, an asymmetrical system of devolution, meaning that regional governments can themselves decide over the new functions they want to be assigned[I].

However, most of the constitutional mandates still have to be implemented. As for financial relationships, Law n.42 of 2009, after two years of discussions, set up the legal framework and authorized the government to issue several legislative decrees that will define the new revenue system of regional and local governments, without incurring extra costs and thus maintaining fiscal neutrality. So far, nine delegated decrees have been issued, but many of them merely replicate the provisions of Law n.42 and postpone the resolution of the most intriguing issues that mainly have to do with the new equalization system. Full implementation of the Law will require at least another five to six years.

This process has been hindered by the deepening of the economic and financial crisis and the central government's fiscal consolidation efforts over the last few years. As a matter of fact, Law n.42/2009 was implemented between 2009 and 2011. This timeframe is exactly the period when the ongoing financial crisis exacerbated fiscal pressures on all levels of government in Italy. This short note focuses on the impact of the crisis on local

governments and their responses in terms of policy options according to the most recent data and evidence and in comparison with what has emerged from other EU countries. Moreover, we will investigate whether and how the current fiscal decentralization process is affected and hampered by the economic crisis.

This essay is divided into three sections. The first summarizes the main features of the revenue system of local governments taking into account the impact of the most recent reforms. The second describes the financial impact of the central government's fiscal consolidation policy on sub-national finance between 2007 and 2011 in Italy and also in comparison with other European countries. Finally, the last section examines the main challenges which must be addressed by sub-national governments in searching for reducing costs without harming public service delivery and the impending risk of a stalemate in the whole decentralization process due to the persisting Italian general government public finance distress.

2. Main features of the Italian sub-national revenue system: trends and issues

The main scope of Law n. 42/2009, complying with the indications of Art. 119 of the Constitution reformed in 2001, is to reduce the Italian historical mismatch between sub-national spending responsibilities and autonomous sources of revenue. In 2010, the Italian government defined this objective through an effective metaphor: "*straightening the crooked tree of public finance*" (Governo italiano, 2010), i.e. reducing the asymmetry between revenue and expenditure decentralization (fiscal gap). As a matter of fact, according to many scholars the excessive mismatch between revenue and expenditure responsibilities assigned to sub-national governments that must be covered by intergovernmental transfers and/or borrowing risks relaxing their fiscal discipline and accountability, thus softening the budget constraints felt at that level. In reality, Law n.42/2009 is a framework law that has set only the principles for the different elements of the whole fiscal decentralization process, leaving their implementation to legislative decrees.

These decrees, issued between 2010 and 2012, regulate the revenue assignment and transfers for all levels of government, the transfer of assets from the State to sub-national governments, and accounting and fiscal rules (sanctions and controls) for sub-national

governments not complying and incurring an unplanned deficit[II]. We will concentrate on the first two issues, revenue assignment and transfer rules, which are directly tied to the above-mentioned issue of the fiscal gap.

As for the first topic (revenue assignment), the system of local taxation in Italy has actually already changed dramatically in the second half of the '90s in terms of fiscal autonomy – making the local finance tree much more straighter.

The move towards local financial autonomy was a response to strong political pressure in favour of a more decentralized government, deriving in turn from a growing dissatisfaction with the inefficiencies that still permeated the workings of the central government. In fact, until the early '90s, the system had been forced to pay a high price in terms of efficiency. Low tax autonomy and dependence on transfers from the centre had allowed local administrators to shirk their responsibilities and made taxpayers lose perception of the cost of local public services. Hence there was overspending as a result of the provision of non-requested or only inefficiently delivered services. It was the negative assessment of these outcomes that underpinned the reform in the 1990s.

Moreover, in the same period, the steady devolution of taxation powers to regional and local governments went hand-in-hand with the reallocation of spending responsibilities owing to the framework law (L.59/97), the so called Bassanini Act – after the name of the Minister who drove it through – which provided for a mechanism of devolution of powers to the regions in many important areas hitherto carried out by the State, and from the regions to provinces and municipalities over a multi-year period.

Turning to tax decentralization, it must be kept in mind that the process had already commenced in l993 with the introduction of the "municipal property tax" (ICI), which closely resembled the real estate tax administered by local governments across the world and which is considered "the most hated tax" around the world (Slack, 2011). The tax base was determined centrally according to a cadastral system, while the municipalities were free to determine their tax rates within a set range determined by the national government[III]. In 1998, municipal fiscal autonomy was bolstered by the introduction of a personal income tax surcharge, whereby the municipalities could levy a flat tax rate on the income tax base determined by the central government, with a maximum ceiling of 0.5 percent. New, important sources of own taxation were introduced also for regions and provinces. After a period of stalemate at the beginning of the new century, the framework Law n.42/2009

and the implementing legislative decrees[IV] introduced several innovations into sub-national governments' revenue system. A new form of property tax (IMU), very close to the former ICI, was introduced, updating the assessment of the tax base with a huge increase in the cadastral property values and modifying the range of rates freely applicable by municipalities. In addition, a share of these revenues was attributed to the central government: a most criticized model of upward sharing which misrepresents taxing responsibilities, reducing local governments to act as mere tax collectors on behalf of central government[V]. Regions and communes were also entitled to a share in the VAT, to impose further personal income tax surcharges, and also to introduce new taxes provided that they do not apply to central government tax bases (e.g. the new municipal tax on services, TARES, starting in 2013).

This revamping of local taxation, combined with an increased autonomy in setting the level of service fees and charges, is symptomatic of the drastically increased level of financial discretion of local governments compared with the 1980s. In l980, sub-national governments accounted for about 3 percent of total general government tax revenues, but this share has risen to about 15 per cent in 2011. This can also be shown through the long-term evolution of the vertical fiscal imbalance (VFI) of local administrations (Figure 1). This indicator is calculated as 1 minus the share of sub-national governments' (SNG) autonomous revenue (tax and non-tax revenue) from total general government (GG) consolidated revenue (net of internal transfers) divided by the share of local administration expenditures from total general government consolidated expenditures.

Formally, the VFI of sub-national governments can be defined as:

$$VFI = 1 - \frac{\text{revenue decentralization}}{\text{spending decentralization}}$$

where:

$$\text{revenue decentralization} = \frac{\text{SNG own revenue}}{\text{GG revenue}}$$

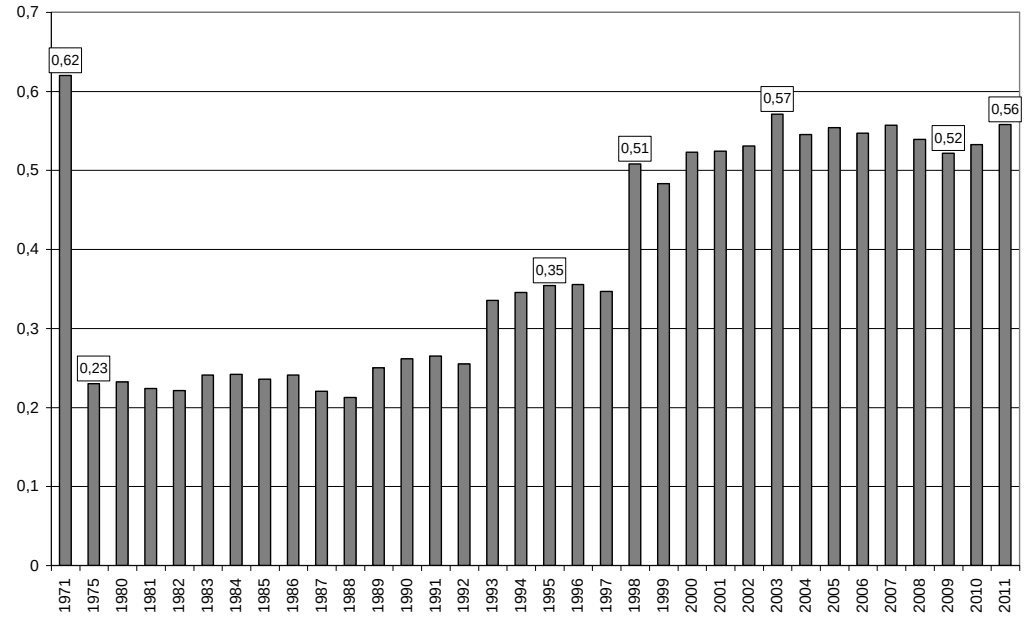
and

$$\text{spending decentralization} = \frac{\text{SNG own spending}}{\text{GG spending}}$$

The highest value in Italy was reached in 2003 (0,57), but it will probably be overtaken in 2012 and in the following years due to the increase in revenues collected through the new property tax (IMU). In this sense, the government's statement about the "crooked tree" in 2010 unfairly underestimated – probably for political reasons – the reduction in vertical fiscal imbalance achieved in Italy at the turn of last century. However, an optimal level of vertical fiscal imbalance has never been determined. Empirical literature based on cross-country evidence is scant – mainly because of limitations on data availability and homogeneity – and with non-univocal results, even though most studies have found that large VFIs are associated with lower fiscal discipline (IMF, 2011). Moreover, dealing with VFIs also implies addressing the issue of horizontal fiscal imbalances (HFI) and fiscal equalization. In fact, within each level of sub-national government, there are always some jurisdictions which are richer than others, with ensuing differences in revenue raising capacity and/or local service provision costs and needs. Thus, high regional disparities – like they exist in Italy – in the capacities to generate revenue require more expanded equalisation arrangements. Transfers from central government to match VFI therefore also have to take into account horizontal differences in order to allow sub-national governments to provide their citizens with a comparable offer of local public services at a similar level of tax burden[VI].

Conclusively, despite the re-introduction of significant tax autonomy, the finances of the Italian sub-national governments are still dependent on government transfers to match both vertical and horizontal fiscal imbalance. In addition, *de facto* individual grants have continued to be distributed on the basis of historical precedent. Italy could further reduce its vertical fiscal imbalance, but there is not much room for significant local tax autonomy increases after the recent reforms (Longobardi, 2013). The only way to reduce the VFI is to rely on the new tax sharing arrangements tied to equalization policies aimed to offset HFI.

Figure 1. Vertical fiscal imbalance of Local administrations in Italy from 1970 to 2011



Source: our calculations on data from Central statistical office. Higher values represent minor imbalance.

However, we must be careful in dealing with the concept of fiscal autonomy. More tax revenues deriving from tax sharing arrangements (e.g. VAT for regions and communes) can be assimilated to sub-national taxes according to the current accounting procedures[VII], however they resemble more central government transfers, for two reasons. First, tax sharing formulae can become very complex, breaking the link between what a sub-national government generates in terms of tax revenues and what it retains in its territory. Secondly, sub-national governments often have no discretion in determining tax base and rate over shared taxes. True, Law n.42/2009 has explicitly stated that the lion's share of central governments transfers to sub-national governments should be replaced with own taxes, but given that around 80 per cent of sub-national governments' expenditures are likely to be defined as essential and/or fundamental and are granted by the central government to its citizens (see below), there will arise the need for a big equalization fund, either horizontal or vertical (or both).

Until now, however, many attempts at reforming this system have failed in the last twenty years because redistributive conflicts among the different types of local governments have impeded the implementation of a new system of central grant distribution that is more clearly and fairly designed. In fact, while apparently all local

governments are in favour of decentralization, there is no consensus about the best version of decentralization to adopt. The more well-off local governments – situated in the Northern and/or the more urbanized areas – emphasize the need for increased fiscal discretion and a laissez-faire approach to fiscal decentralization, while the poorest governments – mostly located in the South – are much more resistant to giving up the current "gap filling" procedure which guarantees their current level of expenditure.

Unfortunately, a new, viable equalization grants system for both regions and local governments, outlined by Law n.42/2009 and two legislative decrees[VIII], is still to be introduced; only preliminary steps toward implementation have been accomplished. Its main innovation is based on the substitution of the "historical spending assessment" through the "standard cost assessment" method, with a central government guarantee for the provision of a minimum level of public services in health, education, welfare and transport provided by regions and a still undefined set of services provided by local governments (municipalities and provinces) for all the "fundamental functions" of provinces and communes[IX]. Article 117 of the Constitution describes as the exclusive competence of the central government the definition of "essential levels of service provision" for a set of basic services at regional level that are considered "necessary to guarantee equality of basic individual and social entitlements across the whole nation" and the specification of fundamental functions of provinces and communes. The basic services include health, education and social protection and, in part, transport, whilst the fundamental functions of local governments have been determined only provisionally. According to current estimates, the whole set of these services will account for at least 70% of sub-national expenditure.

The new system for these basic services will be based on the following steps:

a. Definition, for each regional function, of the essential level of service provision (LEPs). There is no clarity about the concept and content of LEPs. Clearly they are standards. According to the prevalent interpretation LEPs are more than standards ensuring minimum levels, otherwise the Constitution would have termed them minimum levels of service. They also have to be standards ensuring sustainable levels of service provision, compatible with keeping a financial equilibrium.

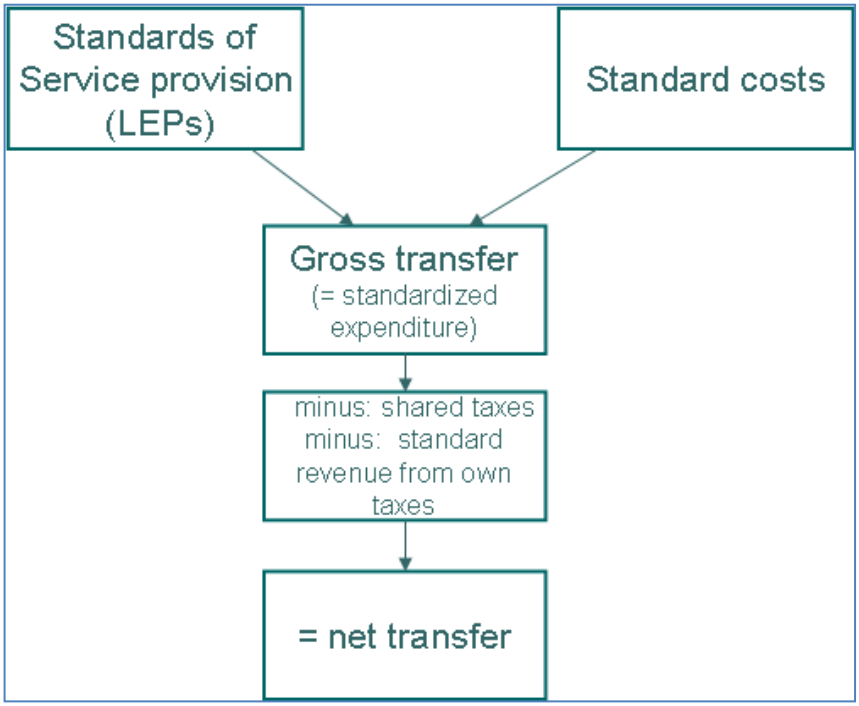
b. Estimating, for each sub-national unit and for each service, the standard (efficient) cost corresponding to the essential level.

c. Summing up the costs for all the concerned services.

d. Calculating the revenue deriving from levying, at a standardized rate, the own taxes notionally assigned to fund these functions, the revenue from the surcharge of the Personal Income Tax, and the revenue arising from a still to be determined share of the VAT and other shared taxes notionally pre-assigned to these services.

e. Determining the net transfer as the difference between d. and c.

Figure 2. The new transfer system for financing the essential levels of service (LEPs) provided by Regions



The role of own sub-national taxes has been specified by government decrees[X] leaving much room for taxes shared with the central government that are likely to play a relevant role in a system based on strong equalization principles (being based on levels of standard provision of services).

It must be noted that the rationale for financing the fundamental functions of provinces and communes is very similar. The main difference relates to the method used to assess the standardized expenditures, that is the objective expenditure needs, even though it is not still clear how and when it will be implemented[XI]. However, since functions related to basic services (e.g. social assistance) are often shared between regions and local

governments, the issue of how to consistently assess the standardized expenditures for both levels of government it still far from being resolved.

As for regional expenditures not related to LEPs, transfers from central government will be determined by equalizing revenue capacity against a standard (average) personal income surcharge rate applied to their current tax bases. In other words, there will be a horizontal equalization fund financed by sub-central governments with per capita personal income surcharge revenues above average and from which sub-central governments with revenues below average will take extra resources. For "non-fundamental" local government expenditures an analogous mechanism of horizontal revenue equalization has been established.

It is well known, both at a theoretical and a practical level, that the definition and measurement of standardized expenditures – or establishing how much expenditure will be required to provide an adequate level of service – is one of the most controversial issues and requires a lot of analyses and experimentation before full implementation to avoid extra-costs which are not allowed by the law. It must be remarked that this last clause, fiscal neutrality, is probably too strict and, if partially relaxed, could allow for a "win-win" game that is politically more acceptable among sub-national governments during the phasing-in period of the reform, facilitating its effective implementation[XII]. This is the reason why the new system should also be put in place gradually, in order to avoid any disruption of services in those local governments that are supplying services inefficiently. In fact, the introduction of a new financing system would necessarily involve some reallocation of resources between units, but these shocks could be minimised during an adjustment phase.

It is beyond the scope of this note to describe the other relevant SNG sources of revenue such as user charges, borrowing, and sale of assets. It is more important to mention the role of the so called Domestic Stability Pact (DSP), which has established the most stringent limitations on the fiscal autonomy of local governments. The DSP is a typical fiscal rule, in use since 1999, and has become the primary tool for the central government to tighten fiscal discipline at the local level. By means of the DSP central government engages all levels of government in its effort to abide by the EU Stability and Growth Pact. Although originally intended as a means of reducing both budget deficits and the amount of debt at all levels of government, the DSP has gradually shifted its focus

from controlling the budget balance of local governments to imposing specific ceilings on single items of expenditure and introducing financial and administrative sanctions rather than incentives to foster compliance. Fiscal limitations have varied both in kind and degree, including limits on expenditures and hiring practice. Moreover, despite its name it is not a pact *stricto sensu* since its rules have always been defined by state legislation without adequate consultation of sub-national governments. In this sense, the current Italian governance system has characteristics both of a centralized state, with its tight control over local spending and budget balances, and of a quasi-federal model, with its focus on local taxes as a means of financing a large part of local expenditure.

In conclusion, since 2009 fiscal decentralization in Italy has embarked on quite a demanding process of changing financial relationships between different level of governments. Yet, the ground-rule of fiscal neutrality set for this challenging reform has been hugely affected by the 2008-09 crisis and the necessary involvement of sub-national governments in national consolidation strategies.

3. The impact of central government fiscal consolidation policy on local governments' budgets and policies

3.1 Recent trends in Italy

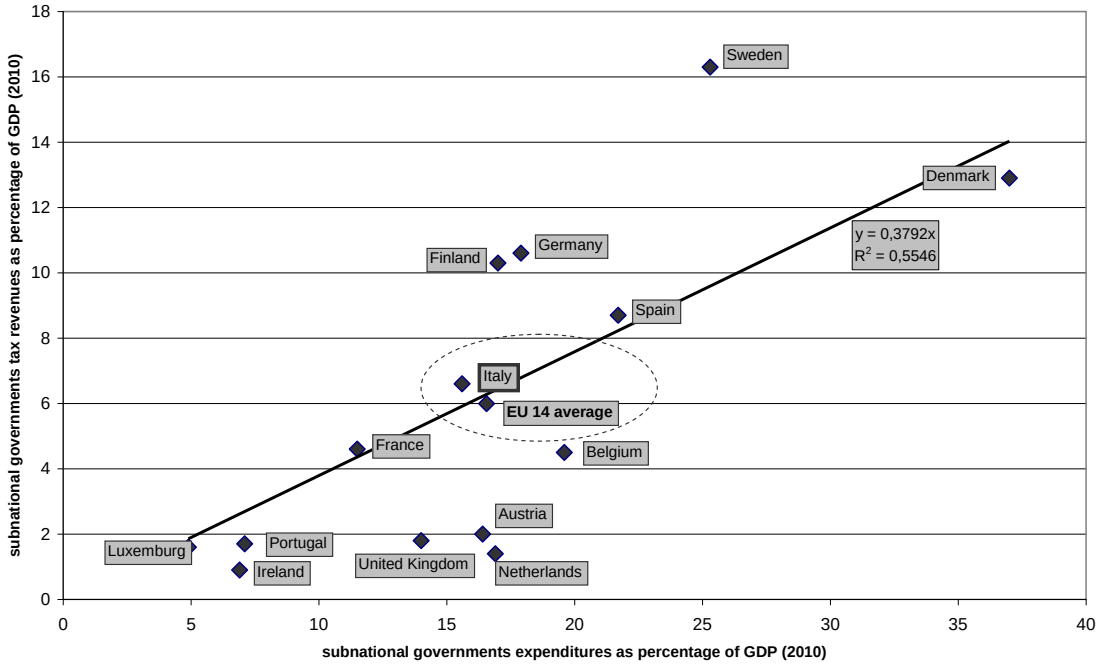
Sub-national governments in Italy have a significant role in fiscal policy making in the network of intergovernmental relations. There are several economic reasons which can explain why the financial health of sub-central governments is crucial for the maintenance of general government public finance soundness. First, their debt generates a number of potential risks, such as externalities affecting the reliability of central government debt, the risk of widespread contagion on the financial markets and "moral hazard", namely the anticipation of bailouts from central governments. In addition, the sub-central financial situation may affect the evaluation of the central government's possibilities to consolidate, and therefore threaten the credibility of central government's consolidation plans. Sub-central governments' consolidation targets in terms of deficit and debt reduction are often considerable, but their margin of manoeuvre to increase their own revenue is usually limited, inducing them to recur more to the reduction of expenditure by performing pro-

cyclically. In general, anti-cyclical performance can be guaranteed only by some extra-support from the central government.

Italy, compared with the other EU15 countries, has an average level of decentralization (Fig. 3), measured by the proportion of sub-national government expenditure and tax revenue from total GDP[XIII]. However, we must stress that Italy had ranked very low in terms of decentralization until the mid 1990s and only after that has reached the current level through an impressive dynamic in the weight of own tax revenues on GDP (Fig.4).

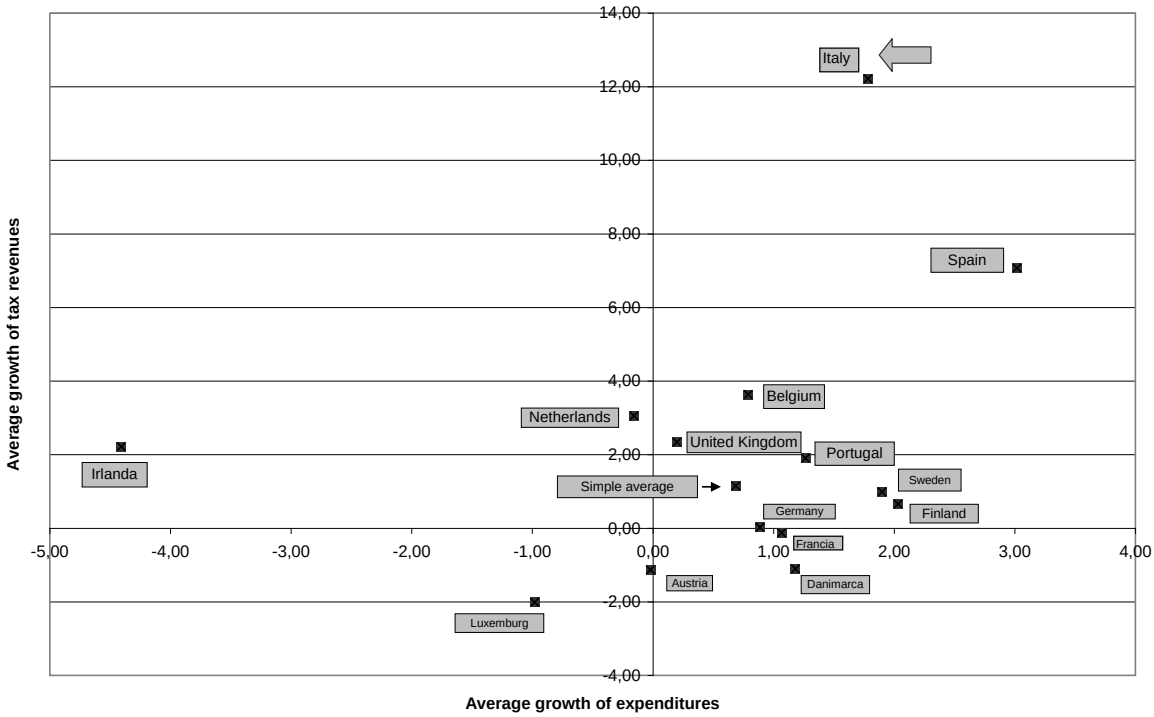
Unlike other countries, Italy has since the beginning of the crisis in 2008 not recurred to fiscal stimulus packages at either national or sub-national level due to its huge indebtedness. Therefore, fiscal consolidation never stopped and has hit hard on sub-national governments' finance. In practice, fiscal tightening in Italy has induced a reduction in vertical fiscal imbalance of sub-national governments without fully replacing state transfers with own local taxation (*fiscalizzazione*).

Figure 3. Decentralization in EU14 Countries in 2010



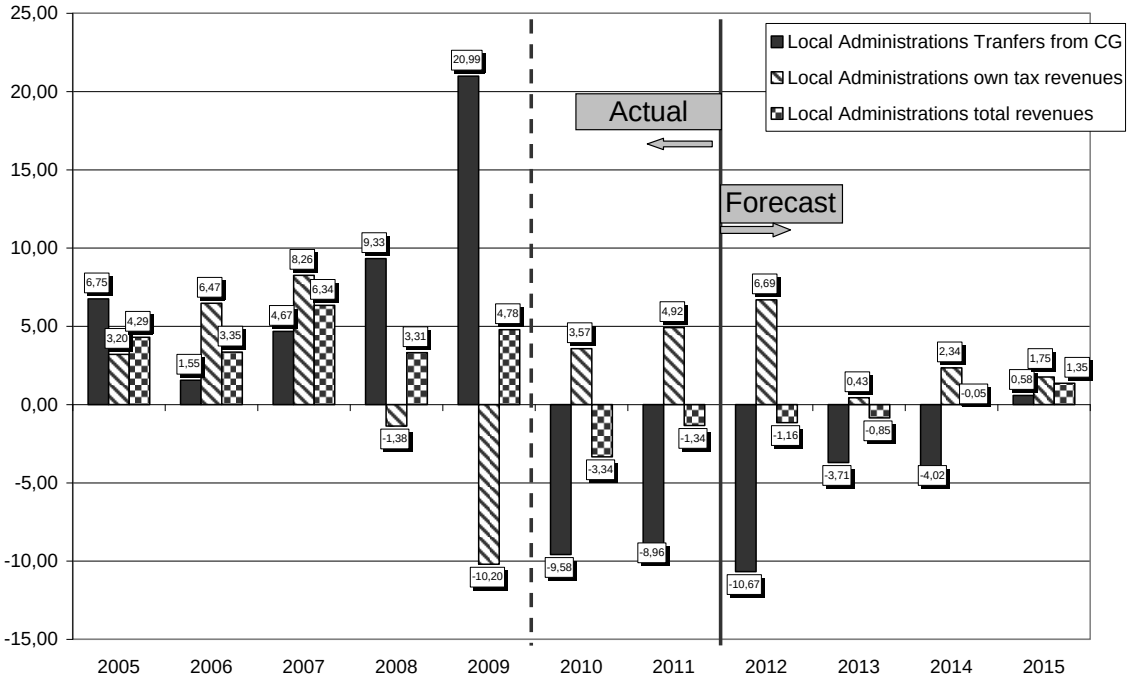
Source: OECD, data of Greece missing.

Figure 4. Yearly average growth of the share of sub-national governments tax revenues and expenditures from general government tax revenues and expenditures (2010-1995)



This has implied a restriction in total sub-national government revenue over the last two years (2010-2011) for which definite data are available. In fact, looking at the financial data (Fig. 5), the revenue pattern shows a clear turning point between 2009 and 2010 when local administrations' total revenues, for the first time, underwent a reduction of more than 3 per cent in monetary terms. It is worth looking at the pattern of municipalities' revenues (Fig. 6) because it can explain the negative tax revenue pattern of local administrations in 2008-2009. Actually, the reduction of own revenues was mainly due to the abolishment of the municipal property tax for first-owned occupied houses in 2007-2008, which was substituted by an equivalent amount of State transfers, enlarging the vertical fiscal imbalance (VFI) or, metaphorically speaking, making the Italian public finance tree more "crooked". For the foreseeable future, the trend based on official forecasts looks negative until, at least, 2014 (Fig.5).

Figure 5. Revenue patterns of local administrations in Italy 2005-2011 (yearly variations in percentage)



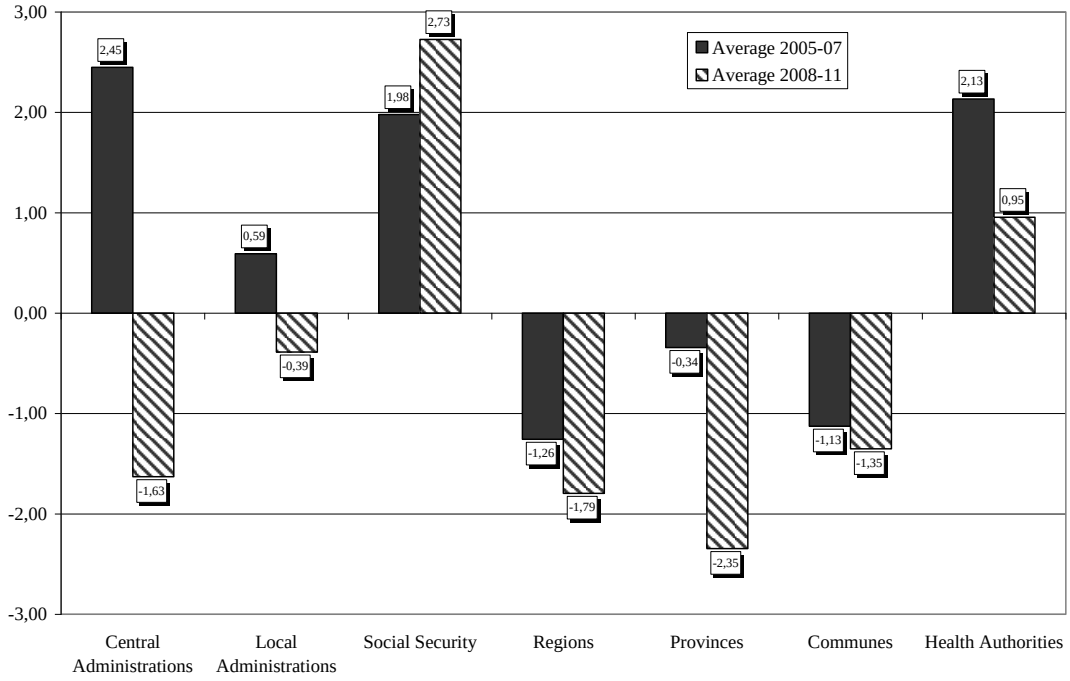
Source: Central Statistical Office and Ministry of Economy, Economic and Financial Document, 2012.

However, we cannot exclude a further tightening of the central government's restriction policy in the next few years in terms of transfer reductions and stricter fiscal rules (namely through the Internal Stability Pact).

As expected, the trend of revenues is specularly reflected by that of the expenditures. In general, breaking down according the different layers of government, a more precise framework emerges (Fig. 6):

i. there is a different trend in expenditures in real terms among the different levels of governments, as defined by general government accounts, for the period between 2005 and 2011, splitting this timeframe into two sub-periods: before (2005-2007) and after (2008-2011) the emergence of the economic crisis;
ii. among local administration expenditures only the health authorities, which are dependent on and tightly regulated by the regions and might be consolidated with them, show a positive rate of growth of expenditures in the post-crisis period;

Figure 6. Expenditure patterns of different levels of government in Italy in real terms 2005-2011 (yearly variations in percentage)



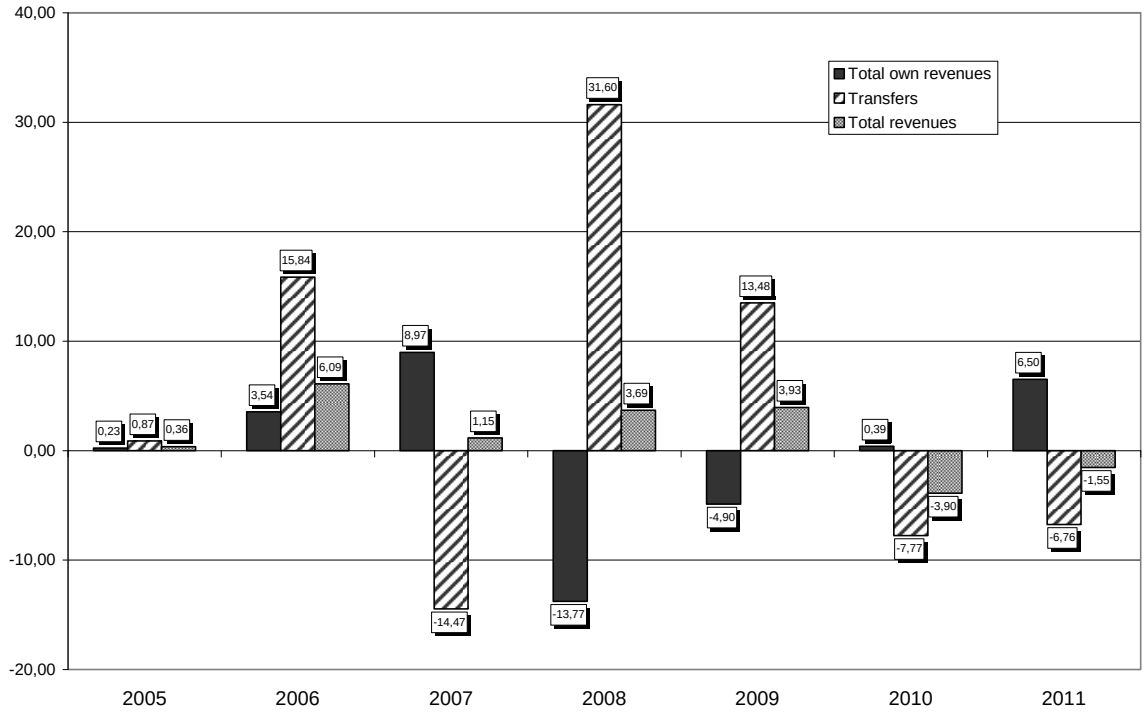
Source: Central Statistical Office. Local administrations cover all sub-national governments (including Health Authorities, other local governments and associations of municipalities). Values at constant prices 2005.

iii. in the central administration, only Social Security Fund expenditures[XIV] have maintained a positive rate of growth whilst the central administration *stricto sensu* displayed a significant reduction, inferior however to the ones evidenced by regions, provinces and communes.

However, it must be taken into account that the most stringent limitations on the fiscal autonomy of sub-central governments derive from the already mentioned Domestic Stability Pact (DSP). Actually, the most striking effect of the reduction of transfers joined to the limitations of the DSP has been the strong reduction of local administrations' final investments, more or less evenly distributed across the country. That had a significant impact upon the performance of the whole economy because sub-national governments, in particular the communes, are the most important public investors in Italy, like in other EU countries. In particular, they could have been able to finance "shovel ready" projects, capable of immediate execution, for urban maintenance. The decline of final investments from 2004 onwards is striking (Fig. 8): the reduction in final public investments by local administrations is equal to about 30 percent, due mainly to the reduction of municipalities'

investments (-29,7 percent), against a mere reduction of 2,8 percent for central administrations. It must be remarked that the decline of investments is not due to sub-national governments' lack of cash resources, but mostly due to cash payments' limits introduced by the DSP.

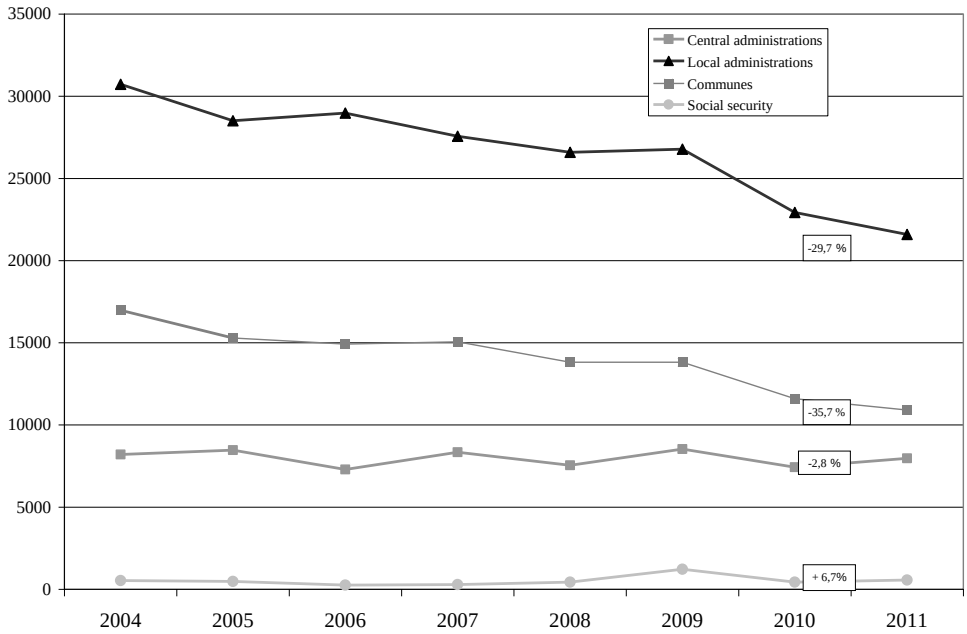
Figure 7. Revenue patterns of Municipalities in Italy 2005-2011 (yearly variations in percentage)



Source: Central Statistical Office.

Focusing on municipalities, apparently, it seems that in 2008-2009 there has been a shortfall in revenues compensated by transfers, as it so often happens in situations of economic crisis (Fig. 7). Actually, the shortfall was largely determined by the decision of the central government to abolish (against the opinion of most public finance experts in Italy) the property tax on owned and inhabited houses. Moreover, we can see how central government drastically reduced state transfers for communes (like also for the other levels of government) from 2011 onwards: -7,7 % in 2010 and -6,76% in 2011.

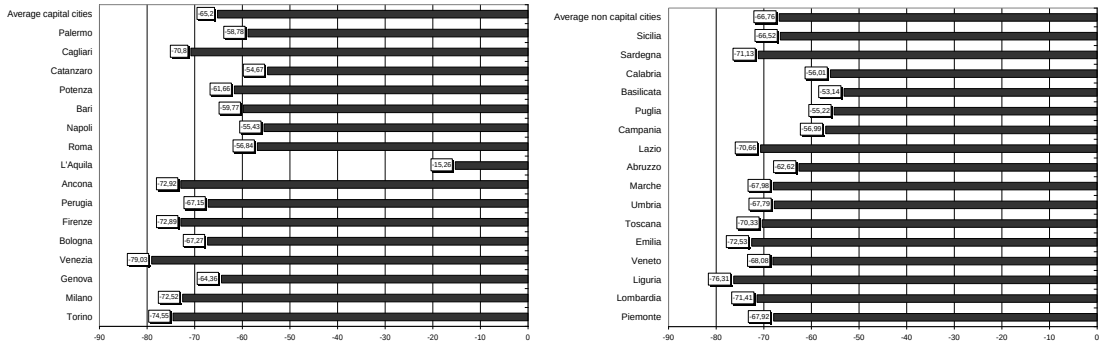
Figure 8. trend in final public investments by administration



Source: own elaborations with data from Istat. Rate of increase/decrease in real terms at constant prices 2005 inside the boxes.

As for communes, it is equally interesting to present some evidence about the variability in fiscal performance among different categories of municipalities according to their size. Historically, in Italy, the widespread network of medium-sized and large cities has performed a crucial role in driving the country's economic development. However, in our country there has never been an explicit national urban policy capable of coordinating and supporting the policies of the most important cities in order to support and valorise their economic and urban specialization. This is a critical issue because countries which have not adequately invested in cities are generally performing worse in a crisis. As a matter of fact, cities are on the front line when it comes to face the consequences of the crisis, especially with regard to employment and social problems. In this respect it also appears that cities are facing challenges similar to the ones they confronted during the mass industrial restructuring which took place twenty or thirty years ago, and that they can draw positively on their past experience. In Italy we lack a recognized definition of urban areas, but we can give some evidence about the financial patterns of Italian medium-sized and large cities through looking at the regional capitals.

Figure 9. Decline of average per capita transfers to municipalities by regions
(a) Regional capitals (b) Other regional cities



Source: own calculations on data from Istat. Note: regional capitals on the left side (a) correspond to regions on the right side (b). value for L'Aquila due to special state transfers for the earthquake of 2008. Even Rome had a special regime.

We should expect that central government supported the biggest cities more in order to meet their greater needs. However, comparing (in Fig. 9) the pattern of central government grants between the two groups (regional capital cities and other municipalities), this pattern is quite similar and the reduction appears to be more or less the same (-65,2% vs. -66,76%). We may reckon that the state's transfer policy has been tied to the historical expenditure approach, namely that it applied a mere linear reduction across all municipalities.

In conclusion, three aspects can be highlighted:

1) sub-national finance had a pro-cyclical impact in 2010-2011 (and also in 2012, according to still provisional data). In other words, the fiscal consolidation policy produced decreasing expenditures and/or the raising of taxes and other sources of autonomous revenue (fees etc.) to balance their budget – measures that were unable to make up for the decline in central government transfers[XV];

2) there has been an uneven distribution of cutbacks among the different sub-national governments, economic items of expenditures (e.g. pay freezes on local public employment, but no cuts in employment only a blockage of turnover, a huge decline of final investments) and expenditure functions (e.g. "urban maintenance", culture, etc.); more detailed evidence can be found in Dexia (2011);

3) moreover, it is likely that we have seen an uneven and inefficient distribution of cutbacks between urban and non-urban governments and different areas of the country

whose effects in terms of efficiency and equity are difficult to assess using the available evidence.

The final effect has been a significant shift in the weight of sub-national governments in the Italian economy, preventing them from performing a positive (anti-cyclical) role during the most acute phase of the current economic crisis. Moreover, the downside of this fiscal consolidation policy is that it relies on across-the-board cuts, which are difficult to sustain and do not address the roots of public expenditure inefficiency.

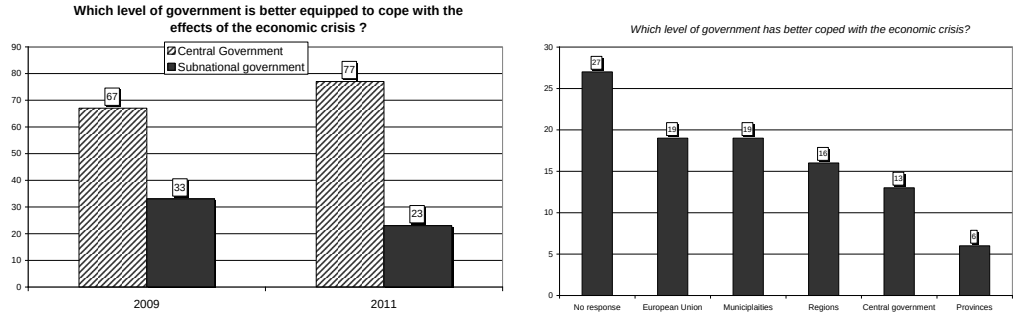
According to various sources, it turns out that sub-national governments, in particular municipalities, have addressed – at least until the beginning of 2012 – this situation of crisis using various alleviation strategies for their citizens and businesses, not mutually exclusive and often successful. Among others we can mention the following:

- reductions of user charges in social services (canteens, kindergartens, etc.);
- promotion of minor public works and maintenance of infrastructure, when allowed by the internal stability pact;
- various special welfare benefits to families in need;
- reductions of the local surcharge on the income tax for low-income categories;
- vouchers for temporary work for the unemployed;
- facilitating the relationship between companies and local banks to overtake "credit crunch" restrictions; and
- various forms of aid to come to the rescue of companies suffering from the crisis.

Conversely, it is also interesting to assess citizens' attitudes toward the crisis and about the role that local governments should perform to cope with it. Some recent surveys offer results that must be taken into consideration (Cittalia, 2011).

On one side, there is a vast awareness of the major role of central government in dealing with the crisis, significantly growing from 2009 to 2011. This seems to be a confirmation of Musgrave's principles for allocating functions among levels of governments, which imply that stabilization policies are the responsibility of the center. However, there is a better assessment of the role played by municipalities and regions (together with the EU) in responding to the crisis which is more positively rated than the State (Fig. 10).

Figure 10. Citizens' attitudes toward the crisis

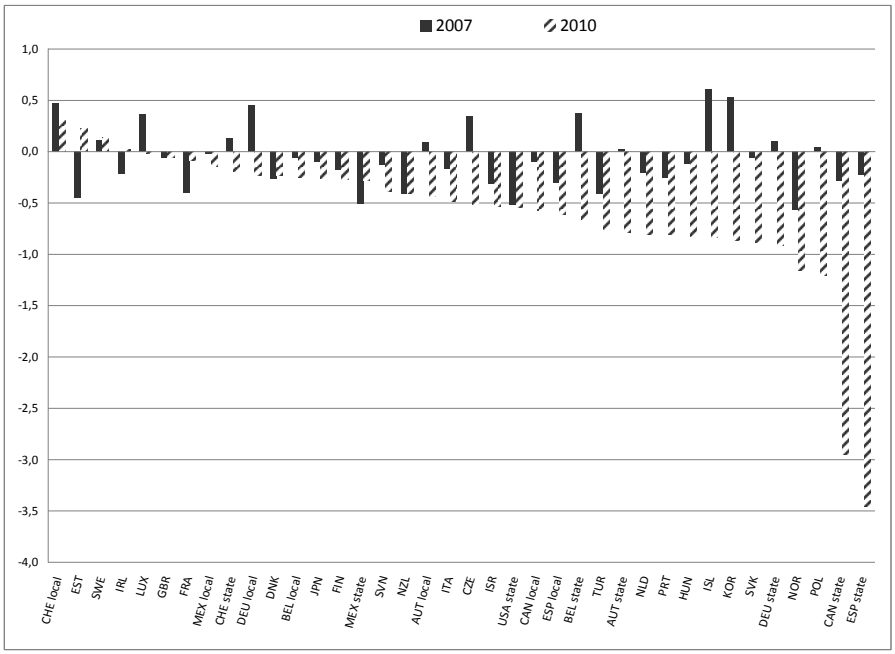


Source: Cittalia, November 2011

3.2 Recent trends in other countries

Since the worsening of the financial and economic crisis, national fiscal consolidation policies in Europe have required sub-national governments to contribute to their targets since they account, on average, for 13% of public debt and 13% of public deficits, and are responsible for 30% of public spending.

Figure 11. Evolution of sub-national government budget balances as a share of GDP 2007-10



Source, OECD, 2012. For federal states data are broken down by states and local governments.

After supporting sub-national governments during the crisis in 2008-09, central governments are now cutting transfers to lower levels of government. This has been done

directly, by reducing discretionary transfers (see examples in table 1), or indirectly, due to falling central government revenues of which sub-national taxes represent a share or based on which the transfer formulas are calculated. As a result, in most countries sub-national deficits (Fig.11) and debt rose between 2007 and 2010, often going beyond what is permitted by self-imposed or central government imposed fiscal rules.

In general, however, the financial situation of these governments is still healthier than that of the central government. Therefore, some countries are exploring the possibility to increase sub-national government tax autonomy, to encourage them to expand into other types of revenue (such as fees and the sale of assets), and to increase the effectiveness of local public spending.

Table 1. Examples of discretionary reductions in transfers in Europe

	2009	2010	2011	2012	2013	2014
Estonia (million EUR)	-84,11	2,34	9,59	0	0	0
Finland	7,50%	6,80%	The central government has announced that it will reduce the grants by EUR 631 million during the government term (2011-15).			
France	Freeze of the value of the transfers at 2010 level.	Freeze of the value of the transfers at 2010 level.	Freeze of the value of the transfers at 2010 level.			
Greece (million EUR)		(total amount)	3,6 (variation from the previous year)	98	-344	178
Hungary (in nominal currency)	113,3	-49,1	-110,7 Fiscal planning in progress.			
(as % of SNG revenues)	*(-3.6%)*	*(-1.5%)*	*(-3.5%)*			
Italy, ordinary regions (million EUR)		-4 000	-4 500			
Italy, provinces (million EUR)			-300	-500		
Italy, municipalities (>5 000 inhabitants) (million EUR)		-1 500	-2 500			
Ireland	-15%	-18%				
(as % of SNG revenues)	*(+3%)*	*(+4%)*				
Portugal (million EUR)	-22	51	-146	-178		
(as % of SNG revenues)	*(-0.2%)*	*-0,50% (-1.4%)*	*(-1.7%)*			
Sweden (billion SEK)		17	-9	-3		
United Kingdom (English Local Authorities) (million GBP)	+3 020	+2 659	-2 259	-1 150	-1 783	-633

Source: OECD Fiscal Network questionnaire, in OECD, 2013.

Sub-national governments have reacted in different ways to this new context of fiscal consolidation. Some of them protect politically sensible items of expenditures (e.g. social services or unemployment benefits), others reduce staff costs and/or intermediate consumption, while most of them scale back on investments (Tab. 2). Direct investments in 2010 – the last year for which data are available – plunged by 7,6 per cent on average in the EU27.

For the future we can forecast a further decline, taking into account the stricter European rules introduced with the Fiscal Compact and the new budget balance rules which, if applied strictly, will reduce the borrowing capacity of sub-national governments to finance investments. This new fiscal framework does not bode well for the future of the European economy because it will worsen the European recession. Only a well designed turnaround in EU economic policy could reverse this trend.

Table 2. Changes in sub-national revenues and expenditures in EU27 countries 2009-2010

	%		%
Taxes	-1,5	Personnel	0,7
Grants	-1	Intermediate consumption	1,4
User charges	2,3	Social expenditures	3,5
Sale of assets	-2,6	Direct investments	-7,6
Total revenues	-0,8	Financial charges	-0,7
GDP	1,8	Total expenditures	-0,01

Source: Dexia, 2011.

4. Challenges and risks for the decentralization process in Italy

The need to balance austerity with more stimulatory policies is now a global one. Yet we can expect fiscal consolidation to remain a prominent feature of economic policy in Italy. Fiscal consolidation is likely to be particularly contractionary when many countries consolidate simultaneously—two conditions relevant to Italy's current environment. This likely scenario makes subnational governments face a serious challenge that, in a nutshell, could be synthesized in the following question: can a national fiscal consolidation policy in the midst of profound institutional change aiming for greater fiscal decentralization create some sort of backlash effect which will drive the country toward recentralization? Against this background, the answer is likely to be affirmative. The economic and financial crisis in Italy between 2011 and 2012 has contributed to put the reform agenda to a standstill, notwithstanding the great expectations from which it had originated and despite the fact that the same conditions have led most other countries to plan and carry out structural reforms of the fiscal relations between levels of government in order to seek efficiency gains in the provision of local service without giving up on equitable distribution. Therefore, the risk of a profound slowdown in the implementation of law n. 42 is looming,

and the issue of decentralization and fiscal federalism has nearly disappeared from the political debate in view of the 2013 national elections.

However, the international debate (CoE, 2010) even suggests a positive view of the effects of the economic slowdown on local governments trying to see the crisis not only like a threat, but also as an opportunity (even if it is now hard to sell this catchword to administrators and officers facing hard budget constraints…). Several countries besides Italy – e.g. France, Belgium, the Czech and the Slovak Republic, the United Kingdom, Finland, Greece, and Ireland – have embarked on structural reforms of intergovernmental financial relations and a territorial organization in order to improve their performance and accountability enhancing efficiency. These reforms aim at reshaping intergovernmental relations without giving up on the well-known advantages of decentralization. In this sense, it is undeniable that the acknowledged huge variability in the performance of local governments suggests potential efficiency gains. However, even in the absence of reforms, autonomous responses of sub-national governments might be directed toward effective objectives. Possible policy options, experimented with across the world, can be listed here for a mere illustrative purpose:

- a new strategy of territorial reorganization aimed at capturing scale and functional economies. So far, the extremely large number of very small municipalities has made economies of scale in the implementation of policies hard to realise, and measures to overcome this have at best been only partially successful. In theory, their opposition should be weaker than in times of prosperity in light of the expected financial savings that could overcome their budget squeeze;
- innovation in products and processes and diffusion of best practices among sub-national governments, also through incentives provided by higher levels of government (Dunleavy et al., 2011);
- the sale of underutilized assets; often sub-central governments own a huge amount of assets without being able to valorize them, despite their responsibilities in urban planning;
- more effective multilevel governance: competence is often shared between levels of government, obscuring accountability. According to many scholars, for instance, the Italian constitutional reform requires a revision and clarification of the degree of

prerogatives assigned to the different governments. Reorganising the system to avoid overlapping responsibilities and improving transparency and accountability in local government finance might therefore increase public administration effectiveness;

- improving the performance of local public services and investments; more accountability can be obtained by placing local officials' performance under closer public scrutiny through means such as external auditors, representative local assemblies, public interest bodies and civil society; and
- a more effective relationship (PPP) between the public and for-profit and non-profit private actors (i.e. greater cooperation with civil society) in order to maintain an adequate level of services despite the reduction in resources.

Therefore, in general, despite the hardness of the past three years (2010-2012) a silver lining can emerge from the recession as well. Local administrators are forced to take a hard look at their currently performed activities and make decisions about what really matters (ICMA, 2011). The austerity and fiscal restraint have required them to alter bad habits, removing waste and promoting social innovation, thus putting them "on the top of their toes" to respect their fiscal boundaries. In fact, even in Italy a lot of local governments' best practices have emerged across the country (OECD, 2011, pp.149-153).

On the other hand, it is undeniable that we have assisted to numerous cases of wrongdoing among Italian sub-national governments and consequent bailouts. Regions and municipalities have often recurred to various form of creative bookkeeping, hiding operating deficits and mitigating current cash flow problems. However, the answer cannot lie with "recentralization" policies, which in the past have not secured an effective control of local public finances either, but with a renewed commitment to decentralization. Therefore, in this context, the main question refers to what policy reforms must be prioritized to make fiscal decentralization compatible with fiscal discipline. We can offer two general indications.

First of all, the achievement of fiscal discipline can be facilitated through formal arrangements, such as strengthening the role of the existing Intergovernmental Committees (Conferences) linking central and local governments. In fact, inducing lower levels of government to greater responsibility for fiscal outcomes implies that sub-national governments have to be deeply involved in the devolution process. The Conferences have

advisory functions and also 'co-manage' policies, in the sense that they should help, through agreements, to elaborate activities to steer and coordinate numerous sectors of the State, in particular the fiscal consolidation policy in order to respect EU rules such as the "six pack" and the "fiscal compact". To date, however, central government has imposed decisions regarding fiscal rules (domestic stability pact) without the adequate participation of sub-national governments. The new Intergovernmental committee for coordinating public finance, which should manage, in a cooperative way, the most relevant financial decisions, is not yet operational and should be put in place immediately after the 2013 elections. In the medium term this system should be consolidated through a constitutional review aimed at its transformation into a federal arrangement, which should also envisage the representation of regions through a new senate.

Secondly, further effective policy options can be found in new mechanisms of control and incentives, in addition to stricter accounting procedures, to improve fiscal performance. For instance, one of the legislative implementing decrees[XVI] in Italy introduces new tight reporting rules for all sub-central governments, in particular before elections. More precisely, the budgets of the sub-national governments must be audited by externals auditors and published on their websites. If the results are not consistent with the fiscal rules (Framework law on local governments, Italian Internal Stability Pact, stability laws, accounting rules), heavy sanctions may be imposed on the political officers, such as the automatic disqualification from office and a ten-year ban from taking part in elections and holding office. Moreover, these rules improve the possibility for the people to express their "voice" through the political process. However, and inexplicably, they have not yet been implemented.

In conclusion, addressing the fiscal challenges in Italy will not require more centralization – under the pretext of the crisis – but better decentralization, finalising the process underway since 2009.

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[I] However, to date no region has been entitled to perform new functions.
[II] An updated description of Law n.42/09 implementation can be found in the last report of the Bicameral commission for fiscal federalism; see Commissione parlamentare per l'attuazione del federalismo fiscale, 2013.
[III] The rate could originally be set from 4 to 7 per thousand. The new rates may range between 7,6 per thousand (4 per thousand for self-owned occupied houses) +/- 3 per thousand.
[IV] In particular, d.lgs. n. 216/2010 and n. 23/2011 for Communes and d.lgs. n.68/2011 for Regions and Provinces.

[V] It must be noted that the stability law approved at the end of 2012 partially corrected this anomaly.
[VI] "HFI might be interpreted as the VFI that is, so to speak, 'left over' when the VFI problem of revenue-expenditure imbalance is solved for the richest sub-national government" (Bird, Tarasov, 2004, p.81)
[VII] For instance personal income tax shared revenues were classified as own tax revenues and not grants in the municipalities' budgets even though they were not determined on a territorial basis.
[VIII] Namely d. lgs. n.216 /2010 and d. lgs. n.68/2011.
[IX] The "fundamental functions" should be precisely defined by a new framework law on local autonomies which is still pending in Parliament.
[X] In particular, d.lgs. n. 23/2011 for municipalities and n. 68/2011 for regions and provinces.
[XI] For province and communes it should be partially implemented as of 2013, while for regions it is already in place for health services, but neither designed nor experimented for the others.
[XII] For instance, Italy could follow the example of many countries in the developed and underdeveloped wolrd which have embarked on an ambitious decentralization process, introducing a contingency fund subject to clear and transparent rules to address unforeseeable situations.
[XIII] The relation between the two indicators can be interpolated with a straight line with a good fitting (R^2 = 0,55).
[XIV] Social security in Italy is performed by autonomous Funds managed at central level.
[XV] According to the OECD, sub-national governments had already performed a pro-cyclical role from 1980 to 2008 in Italy; see Blöchliger et al. (2010).
[XVI] We refer to d. lgs. N. 149/2011.

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Security Council Resolutions before European Courts: The Elusive Virtue of Non Direct Effect

by

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Abstract

UN Security Council resolutions lack direct effect, as they are not intended to oblige States in terms of means but just of results. This statement by the ECJ in the *Kadi* judgment has recently been used by the European Court of Human Rights in order to avoid the crucial decision over the *hierarchy* between obligations arising from the ECHR and the UN Charter. This article describes the "elusive virtue" of such a rationale as a formalistic but useful interpretive tool which avoids that national and regional courts commit themselves openly to a "*Solange* style" dialogue with UN institutions. In parallel, an analysis of UN Monitoring Team reports will show how UN institutions also prefer a certain degree of fluidity in the relationship between Security Council resolutions and national and regional legal orders. Giving the absence of a judicial interlocutor in the UN "smart sanctions" system and the difficulty to make the former compatible with European fundamental principles, the second-best solution of the supposedly flexible nature of UN resolutions is still to be preferred.

Key-words

European Court of Human Rights, Court of Justice of the European Union, UN Resolutions on terrorism, Fundamental Rights, *Solange* doctrine.

1. Introduction

After the decisions by EU Courts on the *Kadi* saga, a new piece to the picture of conflicts between UN Security Council "smart sanctions" resolutions and human rights was recently added by the European Court of Human Rights (ECtHR) in the *Nada* case.[I] This decision relies upon a rationale already advanced by the ECJ in *Kadi*: the absence of direct effect of Security Council resolutions, whose nature is supposed to leave States enough discretion in the implementation process in order to make their requirements compatible with obligations deriving from human rights standards.[II] While the *Kadi* judgment's main focus seems to be on the self-contained, "constitutional" nature of the EU's legal order, its definition of Security Council resolutions as lacking direct effect offered a – maybe involuntary – support to the ECtHR, suggesting to Strasbourg a useful way to gradually abandon the excessive deference to UN resolutions shown in its precedent *Behrami and Saramati*.[III] The ECHR being a different international treaty than EU treaties, the ECtHR had to follow an approach different from the ECJ when facing the same problem of the lawfulness of internal (national) measures implementing resolutions of the Security Council (hereafter: SC). The most evident difference – as questioned by the French government in *Nada* – is that the ECHR system is not as "constitutional" as the EU's.[IV] But it is not from this perspective that the issue will be tackled by the ECtHR. Indeed, Strasbourg will follow the pathway already traced by the ECJ: notwithstanding the clear hierarchy of international obligations established by Article 103 of the UN Charter, SC resolutions impose upon States merely an obligation of results, but not one of means.

This article will explore the beneficial effect of such an interpretive tool for the relationship between UN and European legal orders (the EU and the ECHR). The supposed flexibility of Security Council resolutions represents an "exit strategy" which helps courts avoiding the difficult task of settling once and for all a clear hierarchy between the UN Charter and other international instruments or "constitutional" principles (as the ECJ characterized human rights protection under EU treaties).

A similar approach is sometimes described as "elusive", or formalistic, since it prevents a clearer doctrinal construction of the relationship between UN and other legal orders, on

the one hand, and ignores the importance of starting a constructive discourse with UN institutions about the role of human rights within the UN Charter, on the other hand. The article will try to give a persuasive explication why such a second-best solution is preferable to committing to a complex and long-term "constitutional discourse" with UN institutions. In particular, recalling the example of the WTO, the article will highlight the impossibility of openly addressing the Security Council in the way described by the *Solange* doctrine, which famously regulates the relationship between the German Constitutional Court (and other constitutional courts) and the ECJ. Lacking a real judicial interlocutor in the UN "smart sanctions" system, courts rightly keep away from opening up their legal orders to SC resolutions and from anticipating a future deference to UN bodies.

In the last part of the article, an analysis of the reports of the UN Analytical Support and Sanctions Monitoring Team will support the idea that a hidden and imperfect dialogue between UN institutions and national and regional courts is a better solution than an open and mutually confident dialogue. Giving the ambiguous nature of UN smart sanctions together with the clear intention of the SC not to create a real judicial body empowered to review listing decisions, European Courts' choice to mark a clear distinction between their "systems of values" and that of the Security Council smart sanctions machinery deserves further support.

2. Conceptualizing the relationship between EU and other legal systems

Relationships between Security Council resolutions and other international treaties have undergone three different conceptualizations in EU and ECHR case law: the first belongs to what can approximately be defined as a monist conception, according to which SC resolutions are at the top of a hierarchy of norms, as provided by Article 103 of the UN Charter, so that their provisions prevail over every other treaty, irrespective of their human rights content.[V] Arguing differently would allow a regional court – for example the European Court of Human Rights – «to interfere with the fulfillment of the UN's key mission [to secure international peace and security]».[VI] The practical effect of this conception is that the responsibility of a state implementing a SC resolution cannot arise from a human rights treaty such as the ECHR, signed by the state itself.

The second approach is similar to this, but it includes an important exception: measures implementing SC resolutions are not immune from judicial review when the resolution at hand is suspected to conflict with *jus cogens*, which admittedly constrains also UN institutions.[VII] This approach seems audacious as it questions the validity of the UN resolution itself, thus eroding the authority of the SC. Yet, given the difficulty of ascertaining what norms in the international legal order have this pedigree and the impossibility to equate conventional human rights norms to *jus cogens*, the result of this second approach risks to be as deferential as the former regarding the power of the SC, as was the case also in the *Kadi* judgment of the Court of first instance.[VIII]

The third is the so called "pluralistic approach", according to which the EU legal order has an autonomous nature, distinct from the international legal order, so that EU measures implementing SC resolutions must be subjected to the judicial review of the Court of Justice in order to ascertain their compatibility with EU 'constitutional principles'.[IX] This judicial review is not intended to ascertain the lawfulness of the SC resolution itself, but only that of the measure implementing the resolution, so that the primacy of SC resolutions in international law is left untouched.[X] Even with this deferential recognition of the «primacy of [SC] resolution in international law»[XI], the result of this third approach seems more audacious in terms of human rights protection and, more generally, in terms of the protection of the "constitutional status" and autonomy of the EU legal order: its legitimacy depends on its own values, not on the international legal order. This contrasts strongly with the deferential approach adopted by the ECtHR in the aforementioned *Behrami* and *Saramati* case, were the ECHR's legitimacy was perceived to be depending on the UN legal order and/or the international legal order in general.[XII] The refusal of the ECJ to scrutinize the lawfulness of SC resolutions under *jus cogens* was commonly criticized as a symbolic deference to the UN legal order. As a matter of fact the outcome of the judgment in question amounted to a full review of the EC regulation implementing the SC resolution at hand, as if it were an ordinary act of secondary legislation, thus giving no weight to its UN linkage.[XIII] Yet the ECJ practiced authentic deference when it maintained, for a maximum period of three months, the effects of the annulled regulation, arguing that an immediate annulment «would be capable of seriously and irreversibly prejudicing the effectiveness of the restrictive measures imposed by the regulation and which the Community *is required to implement*». What is more, for the ECJ it could not «(…) be

excluded that, on the merits of the case, the imposition of those measures on the appellants may for all that prove to be justified».[XIV] All that implies a strong presumption in favor of the listing decision by the Committee, whose merit cannot automatically be overpowered by the unfairness of its procedure. Pending the judgment by the ECJ on the annulment of the second decision by the General Court on the further listing of Mr Kadi,[XV] the SC removed Mr Kadi from the UN list on October 2012 and, a few days later, the EU also struck Mr Kadi form its list. "This means that as a matter of fact, the EU has always been in full compliance with the resolutions of the UN Security Council (…) as far as Mr Kadi was concerned".[XVI]

3. Refusing SC resolutions direct effect in order to avoid conflicts

Beyond these three theoretical approaches to the relationship between SC resolutions and national or regional legal systems, there is another interpretive tool which has gained success among European Courts: the *absence of direct effect* of SC resolutions. According to the ECJ in *Kadi*,

the Charter of the United Nations *does not impose the choice of a particular model* for the implementation of resolutions adopted by the Security Council under Chapter VII of the Charter, since they are to be given effect in accordance with the procedure applicable in that respect in the domestic legal order of each Member of the United Nations. The Charter of the United Nations leaves the Members of the United Nations a free choice among the various possible models for transposition of those resolutions into their domestic legal order.

(...) It is not a consequence of the principles governing the international legal order under the United Nations that any judicial review of the internal lawfulness of [the contested regulation] in the light of fundamental freedoms is excluded by virtue of the fact that that measure is intended to give effect to a resolution of the Security Council adopted under Chapter VII of the Charter of the United Nations.[XVII]

If the three approaches of the European Courts analyzed above are normative conflict-solving tools, this one represents a tool to avoid conflicts by preventing them. In fact, if SC resolutions are not directly applicable to national or EU legal orders, since they merely oblige Member States in terms of results but not of means, it derives that their lawfulness is not at stake.

For some commentators, this passage in the ECJ judgement constitutes a 'sympathetic interpretation of the Security Council resolution in question' which amounts to 'somewhat closer to a charitable consideration of international law'.[XVIII] For others, the passage is worthy of consideration and the Court should have better developed it in order to adopt 'an internationally-engaged approach which drew directly on principles of international law instead of emphasizing the particularism of Europe's fundamental rights'; 'the ECJ could have concluded that the Resolutions could not be implemented as they stood, without the interposition by the EU, within its freedom of transposition, of a layer of due process such as to protect the interests of affected individuals'.[XIX] This way to understand the interpretive tool of the absence of direct effect is not elusive: the "incompleteness" of SC resolutions implies that Member States (or the EU) have to implement them with regard to the whole framework of norms and values enshrined in the UN Charter, thus respecting the human rights commitments made in the Charter itself.[XX] The consequence would be for a national or regional court to commit to a constructive dialogue with UN institutions about international customary human rights law and the proper way to develop a "human rights"-oriented interpretation of SC powers. That seems to be the approach followed by the ECtHR in *Al Jedda*, where Strasbourg recalled Articles 1 and 24(2) of the UN Charter in order to affirm that 'in interpreting its resolutions, there must be a presumption that the Security Council does not intend to impose any obligation on Member States to breach fundamental principles of human rights. In the event of any ambiguity in the terms of a Security Council Resolution, the Court must therefore choose the interpretation which is most in harmony with the requirements of the Convention and which avoids any conflict of obligations'.[XXI]

But there is also another way to understand and use the "no direct effect" tool – a minimalist way that basically aims at avoiding normative conflicts under the veil of the formalistic recognition that a source of law needs further implementation while leaving enough discretion to the implementing authority. Nothing more and nothing less. As we

have already sketched in the Introduction, that was approximately how the ECtHR in the *Nada* case understood the idea that the UN Charter does not prescribe the "direct applicability" of SC resolutions. Following the pathway already traced by the ECJ in *Kadi*, Strasbourg will eschew the hierarchy issue posed by Article 103 of the UN Charter by upholding that SC resolutions impose upon States simply an obligation of results, not of means.

In a first case, it was relatively easy for the ECtHR to ascertain that the SC resolution in question did not illustrate *how* the multinational force should have contributed to maintaining security and stability in Iraq; in particular, the internment of suspected criminals or terrorists without charge and without judicial guarantees was not explicitly referred to in the resolution.[XXII]

In a second case before Strasbourg things were quite different, as the SC resolution at stake clearly mandated Member States to prevent listed people from entering and transiting their territories.[XXIII] Seemingly, the ban had to be applied irrespective of obligations deriving from human rights treaties to which Member States are parties. Resolution 1390 quite clearly admitted only a derogation permitting that listed people could enter or transit for the fulfillment of a judicial process, leaving the SC itself with the power to determine on a case-by-case basis other justified derogations.[XXIV] Notwithstanding those clear indications, the ECtHR preferred to stretch its interpretation of the resolution, ignoring the "*voluntas auctoris*" and considering its wording as sufficiently flexible to leave Member States with enough room for maneuvering in order to harmonize the obligations arising from the ECHR with those arising from the UN Charter.[XXV] In doing so, the ECtHR explicitly referred to the aforementioned assertion of the ECJ in *Kadi* on the absence of a direct effect of SC resolutions.[XXVI] As a result, the responsibility for the infringement of the applicant's rights shifted from the SC to the respondent State.[XXVII]

All this seems to be a strategic solution which spared Strasbourg the crucial decision over the *hierarchy* between obligations arising from the ECHR, on the one hand, and obligations arising from the UN Charter, on the other, as the Court rested its case on the insufficient effort by the State to harmonize, as far as possible, the obligations that the respondent Government regarded as divergent.[XXVIII] If compared with the previous cases of *Behrami and Saramati* and *Al Jedda*, we must notice a significant shift in the Court's reasoning in *Nada*. First of all, in contrast to *Behrami and Saramati*, the ECtHR seemed to

lose its previous certainty about the hierarchy between obligations arising from Chapter VII of the UN Charter and those arising from other international treaties, since Strasbourg described the issue as a *question to be determined*, and not determined once for all.[XXIX] Secondly, Strasbourg did not affirm anymore that the SC resolution at stake had to be interpreted consistently with the UN Charter itself and its commitment to human rights, as it made in the aforementioned passage in *Al Jedda*. Aware of the clear intention of the authors of the resolution at stake,[XXX] the Court confined itself to requiring that the respondent State make an interpretation of the SC resolution consistent with the ECHR only. Resembling the affirmation of the ECJ on the constitutional and autonomous character of the EU legal order, the ECtHR hinted at 'the Convention's special character as a treaty for the collective enforcement of human rights and fundamental freedoms' in order to rebut the respondent State's argument about the binding nature of SC resolutions and to place upon it the burden of a consistent interpretation of SC resolutions.[XXXI]

4. Constitutional implications of the elusive virtue of non-direct effect

Within a wider scope, we can say that the strategic tool of the non-direct effect of SC resolutions spared Strasbourg the "tragic" choice between collective security and individual freedom, between the effectiveness of the fight against terrorism and the judicial protection of fundamental rights. Instead of balancing substantial values, the Court preferred a formalistic approach based on the supposedly flexible nature of international obligation. As sustained by eminent scholars, the direct effect (and similar conceptual tools such as the "self-executive" nature of international treaties) is an "elusive virtue":[XXXII] its attractive aspect consists in its ability to avoid normative conflicts between legal systems (which are also systems of values).[XXXIII]

The usual criticism of the elusive virtue of direct effect points to the formalistic risk of covering a substantive choice endorsed by courts in favor of one interest (an asset of rights or of public policy) against another. Economic freedoms, just to make reference to a topical example, are equipped with the direct-applicability apparatus afforded by EU law, and that leads to the dismantling of many welfare and social legislations of Member States.[XXXIV] But sometimes things are more complicated than this, as our case about SC resolutions against terrorism shows.

Sometimes the formalistic tool of (non) direct applicability or of (non) direct effect is part of a complex argumentative strategy put forth by one normative level towards another (superior or external) level in a way which not simply intends to jeopardize the effectiveness of this second normative level. Looking at the decisions of the European Courts over SC resolutions on terrorism and the formalistic approach they adopted in order to neutralize the legal force of such resolutions, we can pose the following question. By refusing judicial immunity to SC resolutions' implementing measures, are European Courts only protecting their own regional systems (EU law or the ECHR) from the oppressive supremacy of SC decisions, or are they (also) protecting the coherence and legitimacy of the UN legal order itself? 'Judicial review by domestic courts, far from imperiling the efficiency and authority of the UN, might bestow an enhanced transparency and legitimacy on the UN system'.[XXXV] As we will see further down, such a doctrinal interpretation of the *Kadi* judgment by the ECJ has not been refused by SC institutions themselves. In its Ninth Report, the UN Analytical Support and Sanctions Monitoring Team asserted that 'the involvement of national and regional courts can help the Committee to strengthen the regime as an effective response to the threat from Al-Qaida and the Taliban, without undermining the authority of the Council'.[XXXVI]

In the *Kadi* case, the ECJ faced a puzzling situation: endorsing the "monistic" approach of the Court of First Instance (CFI, now the "General Court") would have implied a clear commitment by the EU to international law, marking a strong difference between the EU and the United States.[XXXVII] As stated in its case law, international obligations entered into by (the former) European Community are directly binding for community institutions, and their force is superior to secondary law.[XXXVIII] But the paradox is that, in the case of SC anti-terrorism resolutions, such a choice would also have implied the endorsement of the United States policy on international security and counter-terrorism: a policy charged with political ideology and clearly aimed at making executive powers prevail over the two other branches, the legislative and the judiciary, and considering the legal protection of fundamental rights as an obstacle to the effective fight against international terrorism.

Something similar happened in the well-known saga on the relation between WTO obligations and the EU legal order. Given that some of the most important WTO litigation cases of the EU involve exports to the United States in crucial fields such agriculture or food, granting WTO obligations direct effect would have implied a twofold, puzzling

consequence. The ECJ would have showed a commitment to international and transnational law and their institutions (in contrast to the approach of the United States)[XXXIX], but at the same time the ECJ would have endorsed economic and industrial choices sponsored by the United States (for example Genetically Modified Organisms) with great impact upon the crucial fields of agriculture, food and health.[XL] Thus, the refusal of the ECJ to grant direct effect to WTO norms and even to quasi judicial decisions of the WTO Dispute Settlement Body represents a strategy aimed at lowering the level of internal *effectiveness* of WTO norms in order to avoid a test on the internal *legitimacy* of those external norms.[XLI] That is to say that the ECJ, in doing so, avoided the difficult task of reviewing the legitimacy of WTO norms according to the 'constitutional' principles and values of the EU.[XLII]

5. A *Solange* doctrine also for the UN?

Another puzzling aspect: the ECJ refused to apply to the UN Charter the same philosophy it had applied to EC and EU treaties. UN obligations would result to be highly ineffective if each Member State judiciary applied – even indirectly – its own scrutiny.[XLIII] But granting jurisdictional immunity to measures implementing SC resolutions would also have meant neglecting any judicial protection of fundamental rights at EU level, thus triggering a possible reaction by national constitutional courts, as was the case with the well-known *Solange I* decision by the German Federal Constitutional Court.[XLIV] The relative "closure" of the EU to the international legal order, or at least, to the UN legal system, is then one of the conditions posed by Member States for the acceptance of EU law primacy (implicitly or explicitly).[XLV]

Yet the ECJ was reproached exactly the fact that it did not try to start a dialogue with the UN institutions following the *Solange* doctrine of the Bundesverfassungsgericht.[XLVI] "As long as" (*solange*, in German) the UN does not endow fundamental rights with a protection comparable to that of the EU, the ECJ will review the lawfulness of the decisions of UN bodies. That amounts not only to a warning by the ECJ but also makes sure that a future reform of the SC sanctions system could lead the Court to exercise self-restraint. Why not anticipate such a 'comity' scenario?

The formalistic tool of the non-direct effect prevents European Courts to analyze more deeply the intrinsic legitimacy of the SC targeted sanctions system according to basic values common not only to national and regional systems but also to the UN Charter and international law. That elusive strategy also avoids formulating clear and long-term conditions for UN institutions in order to accord SC resolutions a high(er) level of effectiveness in national and regional legal orders.[XLVII] That was precisely what the Bundesverfassungsgericht did with its *Solange* doctrine. But it cannot be omitted that the *Solange* doctrine was conceived as an instrument to connect two different *judicial* systems at national and Community level, respectively.[XLVIII] But in the case of the UN smart sanctions system, judicial interlocutors of national and regional courts are still lacking.[XLIX]

The issue is not new in the transnational institutions landscape: looking once again at the WTO, it is worth noting that the Appellate body of this Organization tried to sketch a 'fundamental rights' doctrine in order to stress the fact that fundamental rights protection is one of the values internal to the system, which is not blindly and uniquely devoted to international markets and world-wide competition. Resembling the initial evolution of the ECJ on fundamental rights, the WTO Panel first affirmed the irrelevance of international law norms on environmental protection evoked by the respondent State as justification for its protectionist measures conflicting with WTO rules. Such a line of reasoning was later reversed on appeal by the WTO Appellate Body, which corrected the one-dimensional vision of the Panel by recognizing that even in the WTO legal order international norms on environmental protection must be taken into account.[L] The result was that the relevant WTO norms must be interpreted consistently with international law principles on environmental protection. All that did not lead to reverse the practical result of the litigation (the condemnation of United States protectionism) – on the contrary, it only strengthened the justification of such a condemnation as well as the legitimization of the WTO as a whole.[LI]

Notwithstanding those similarities between the WTO and the EU, advocating a *Solange* doctrine for WTO norms in order to support their direct effect in the EU legal order seems quite difficult.[LII] It must be mentioned that already at the beginning of the dialogue between the German Constitutional Court (or the Italian one)[LIII] and the ECJ the Community order was endowed with crucial prerequisites for the 'constitutional absorption'[LIV] of fundamental rights in the EC. First of all, the Community judicial system

recognized individual and group standings to challenge Community measures directly before the ECJ. Secondly, individuals could always obtain, through preliminary ruling, a review of Community legislation by the ECJ. Considering the WTO, even if its litigation procedure has evolved from diplomacy to rule of law, Panel and Appellate Body are quasi judicial bodies but not real courts yet.[LV] What is more, private parties have no standing before the WTO's dispute settlement body.[LVI]

Can the UN system avoid the same kind of skepticism?

As well known, the SC smart sanctions system does not endow listed persons and entities with any judicial remedy against listing decisions. Even if, at the time of the *Kadi* judgment of the ECJ, the system had already evolved in order to increase the fairness and transparency of listing and delisting procedures, the ECJ considered them as lacking any right to effective judicial protection. In particular, the UN focal point charged with the task of receiving individual claims of delisting did not grant a guarantee comparable to the right to judicial protection.[LVII] After the *Kadi* judgment and surely also as a consequence of it, the SC enacted a reform creating the Ombudsperson charged with the task of receiving individual requests for delisting and of cooperating with the Sanctions Committee in the delisting procedure. Notwithstanding the formal recognition of the independence and impartiality of the Ombudsperson, even this reform did not change the criticism raised by EU Courts: following the *Kadi* litigation, the General Court held that the new office of the Ombudsperson 'cannot be equated with the provision of an effective judicial procedure'.[LVIII] The judgment of the General Court has been appealed before the ECJ and the process is still pending. In the meantime, the SC enacted another resolution in order to improve the fairness of the delisting procedure, without however transforming it in a truly judicial remedy.[LIX]

It is not easy to predict the outcome of the process pending before the ECJ but the *Kadi* saga, together with the Strasbourg case law, can be read as follows. The recourse to the 'elusive virtue' of the non-direct effect of SC resolutions (in terms of their incompleteness which leaves states room for maneuvering) often corresponds to a sort of *fictio juris*, given that direct effect and its equivalents are not objective and measurable features of some sources of law or some provisions, but the product of judicial interpretation. Sometimes the legal fiction borders on hypocrisy, as was probably the case for the ECJ in *Kadi* and, almost surely, for the ECtHR in *Nada*. But that does not

necessarily imply a criticism of the interpretive tool at hand. Appealing to the programmatic nature of some legal provisions or of an entire category of sources of law (such as WTO agreements or SC resolutions) can be seen as an exit strategy when other interpretive tools enabling the judicial de-construction of normative conflicts are lacking. In the SC resolutions on smart sanctions those tools are missing because the language used by European Courts (and courts in general) is not a language common to UN institutions, given that the UN legal order – at least in our case – is interpreted by institutions acting through means of *executive* and not *discursive* methods, as would be the case if a UN judicial organ could issue complaints about the lawfulness of listing procedures.[LX] Given the persistent lack of a UN judicial interlocutor for national and regional courts, the *Solange* doctrine cannot be transplanted to the SC targeted sanctions system. But this does not mean that some form of hidden dialogue among European (and national) Courts and UN institutions is not taking place, as the following analysis of the reports of the UN Analytical Support and Sanctions Monitoring Team will show.

6. Inverting the rationale of *Solange*: the thesis of the UN Monitoring Team

In its Ninth Report, adopted after the ECJ's *Kadi* judgment, the UN Monitoring Team took note of the fact that European and American courts had started reviewing national implementation procedures and stated that this would offer an independent review of listing decisions by the Committee, thus pre-empting 'any initiative that the Security Council might have taken… to create its own independent review mechanism'.[LXI] The UN Monitoring Team explicitly linked this (paradoxical) statement to the quest for an independent body charged with the power to review the listings advanced by critics. The paradox lies in the fact that the UN Monitoring Team inverted the rationale of the *Solange* doctrine, interpreting the judicial intervention of national and regional courts *not* as an invitation to achieve equivalent or comparable judicial protection at the supranational (UN) level, but as a reason *not to start* any reform aimed at introducing such a judicial remedy. In its Tenth Report, the UN Monitoring Team explicitly reaffirmed the same position,[LXII] adding the following points: introducing a 'quasi-judicial review panel' would not be a

solution, as it would not stop EU Courts from making their autonomous review of listing decisions. This arises from the fact that the rationale of *Kadi* 'suggests that the [EU] Court is obligated to conduct its review as a matter of European law, not by the absence of another appropriate and adequate forum'.[LXIII] This may be a typical example of when a dialogue falls short, since this interpretation of *Kadi* is questionable, but what counts here is the fact that the UN Monitoring Team exploits the EU jurisprudence in order to demonstrate the uselessness of introducing a body of judicial nature at UN level charged with the reviewing task.

The strategy of the UN Monitoring Team (started in the Ninth Report) remains the same: a discussion on such a reform was pre-empted by national and regional courts. Giving the difficulties of such a reform,[LXIV] we can say that the *Kadi* jurisprudence helped the UN institutions to avoid an awkward discussion on the subject. From a different perspective, the UN Monitoring Team objected that creating an independent review body would risk hampering the work of the Sanction Committee without solving the problem of national and regional courts' denial of SC resolutions immunity from jurisdiction. Indeed, there is no certainty that *all* regional and national courts would consider the panel as sufficiently effective.[LXV] Although questionable, this assumption about the irreducible judicial pluralism marks the difference with the *Solange* doctrine: when the ECJ started its jurisprudence about fundamental rights as a 'general principle of community law', its national counterparts were the constitutional or supreme courts of the (then) six Member States sharing similar law traditions and cultures.[LXVI]

One could imagine that the last remark of the UN Monitoring Team pre-empted any kind of dialogue with national and regional courts, especially with EU courts, but such is not the case. The rationale advanced by the UN Monitoring Team in its later reports is apparently not very coherent, as they all start with the admission that the creation of an Ombudsperson to review delisting requests 'is unlikely to satisfy calls for an effective and independent judicial review',[LXVII] ending with the assertion that the (realized) introduction of the Ombudsperson's review satisfies the fairness standards requested by the ECJ in *Kadi*.[LXVIII] The argumentative strategy of the UN Monitoring Team, in fact, is not that obscure: instead of convincing national and regional courts of the fairness of listing and de-listing procedures, reforms of the smart sanctions system must aim at convincing listed persons and distracting them from national and regional judicial challenges of the sanctions

in favor of the more effective remedy of the UN Ombudsperson. In its Eleventh report the UN Monitoring Team suggested the Sanction Committee 'to encourage Member States to require a listed party to exhaust the process available at the United Nations before seeking relief in their national and regional system'.[LXIX] And the suggestion was rapidly put in force by Resolution 1989 (2011), where Member States and relevant international organizations and bodies are requested to 'encourage individuals and entities that are considering challenging or are already in the process of challenging their listing through national and regional courts to seek removal from the Al-Qaida Sanctions List by submitting delisting petitions to the Office of the Ombudsperson'.[LXX] In its Twelfth report the UN Monitoring Team went further still, stressing the attractive force of the Ombudsperson process, which has demonstrated to be more effective than national and regional judicial remedies.[LXXI]

Even if in a relatively ambiguous way, the UN Monitoring Team thus committed itself to a dialogue with EU Courts. It is worth noting that, before the creation of the Ombudsperson, the Monitoring Team downplayed the potential threat to the sanctions system arising from the activism of national and regional courts. On the contrary, it seemed to welcome the potentially beneficial role of such an activism for the fairness of the UN system as an external corrective contribution.[LXXII] Once the office of Ombudsperson had been created and started its reviewing task, the UN Monitoring Team changed its approach. On the one hand, it stressed the threat that national and regional judicial review represented for the UN sanctions system, addressing the *Kadi* judgments – the ECJ decision of 2008 and the General Court decision of 2010 – as a challenge for 'the legal authority of the Security Council in all matters, not just in the imposition of sanctions',[LXXIII] and recognizing that pending cases before the courts (such as *Kadi*) 'still have the potential to damage the regime or to distract it from looking forward'.[LXXIV] On the other hand, the UN Monitoring Team entered into a dialogue with various courts, especially with EU Courts, in order to convince them that the Ombudsperson process had reached the level of fairness required in order to accord SC resolutions and the Sanctions Committee's decisions judicial immunity.[LXXV] In doing so, the Monitoring Team was aware that the Ombudsperson process had to resemble a judicial process as much as possible, especially with regards to the transparency requirement.[LXXVI]

Interestingly, the UN Monitoring Team spent few words to contest the legal approach sustained by the ECJ in *Kadi* (that the constitutional nature of the EU legal order is distinctive from any other international treaty and therefore not submitted to the hierarchy rule enshrined in Chapter VII of the UN Charter).[LXXVII] Nor did it object to the supposed margin of appreciation left by the Charter to Member States in implementing SC resolutions, as asserted by the ECJ in *Kadi*. In doing so, the UN Monitoring Team seemed to share the same attitude of 'conflict avoidance' followed by the ECJ and the ECtHR when relying on the formalistic argument of the lack of direct effect of UN resolutions. This strategy of the Monitoring Team seemed to confirm the idea that legal pluralism is not the cause of the political problems encountered by the SC in implementing its smart sanctions system; as a matter of fact, it is just a symptom or an effect.[LXXVIII] At the same time, the hierarchical tools available in a monistic – *constitutional* – structure (for example the prevailing force of SC resolutions as affirmed by Chapter VII of the UN Charter) are not resolutive in themselves. As a matter of fact, the SC has avoided a confrontational approach towards States or the EU until now, notwithstanding the lack of deference shown by their Courts with regards to the UN sanctions system.[LXXIX]

7. The "comity proposal" advanced by the Monitoring Team to European Courts: good reasons to refuse?

The conditions posed by the UN Monitoring Team to national and regional courts (especially to EU Courts) are quite clear: on the one hand, courts are not expected to defer completely to the SC's authority and thus to accord resolutions and listing decisions full judicial immunity; on the other hand, a court's decision regarding the national implementation of a listing will have persuasive value for the Sanction Committee when reviewing the corresponding listing as long as it carefully evaluates the 'reasons for listing as stated by the Committee' and accords 'appropriate deference to its fact-finding and decision-making prerogatives'.[LXXX] A further request to courts, made by the UN Monitoring Team after the Ombudsperson had become effective, is to recognize 'that an acceptable and equivalent level of review can be achieved through a system unique to the Security Council that does not precisely emulate a national judicial system'.[LXXXI]

We do not know if these conditions posed by the UN Monitoring Team to national and regional courts will be accepted by the ECJ in the eagerly awaited appeal judgment on the General Court decision of 2010. Incidentally, it seems difficult to consider the Ombudsperson as equivalent to a judicial authority from the point of view of its independence, give its short-term appointment.[LXXXII] What is sure is that, although avoiding a clear proposal for a long-term dialogue between UN bodies and European Courts along the *Solange* pathway, national and European judicial – but also political – criticism[LXXXIII] of SC resolutions has contributed to inducing reforms of the smart sanctions system.[LXXXIV] The major one of those reforms is surely contained within the 1989 resolution. First of all, that resolution calls upon the Sanctions Committee, when rejecting requests for delisting, 'to share its reasons with relevant Member States and national and regional courts and bodies, where appropriate'.[LXXXV] Secondly, it upgrades the normative force of the Ombudsperson's proposals for delisting, resembling a judicial decision: unless the Sanctions Committee decides by consensus within 60 days that individual sanctions shall remain in place, Member States are obliged to terminate sanctions.[LXXXVI]

The most powerful objection to the "comity" proposal advanced by the UN Monitoring Team remains the fact that anti-terrorism sanctions may be "smart", but they are hardly "temporary",[LXXXVII] as both EU Courts and the ECtHR have remarked.[LXXXVIII] The UN Monitoring Team itself describes the current situation as one 'whereby listings can remain through inertia', reaffirming its previous suggestion that listings should have a time limit.[LXXXIX] Even the most advanced 1989 Resolution does not tackle this issue. As a result, in the UN smart sanctions system we now find a "quasi-judicial body", on the one hand, and "quasi-criminal individuals and entities", on the other, since freezing measures and entry bans resemble criminal sanctions and not mere preventative and temporary measures.[XC] The result is that the burden of proof has shifted from criminal prosecutors to suspected persons.[XCI] Integrating such a principle into national and European legal orders (including the ECHR) would be too risky. Instead, it seems preferable to continue with this kind of mutual misunderstanding between Courts and UN institutions, hoping that further judicial challenges will trigger further institutional reforms by the SC in order to improve its accountability to individuals.[XCII]

8. Conclusions

There are three patterns followed by the European Courts in order to organize the relationship between their own legal order (EU law) or system (the ECHR) and the Resolutions of the UN Security Council. The most deferential pattern underlines that SC Resolutions enjoy a hierarchical status superior to every other normative system (the ECtHR in *Behrami*); the intermediate pattern recognizes the possibility of limited judicial review in case of conflict between those Resolutions and *jus cogens* (the CFI in *Kadi*); and the least deferential seems to give unconditional precedence to the internal "constitutional" values in order to review the internal measures implementing SC Resolutions as if they were ordinary measures of secondary EU law (the ECJ and the General Court in *Kadi in* 2008 and 2010, respectively). The recent *Nada* case of the ECtHR puts forward a fourth option already advanced in the *Kadi* case by the ECJ: States are (always?) free to chose the implementing measures that best fit the Human Rights obligations by which they are (internationally or constitutionally) bound. This approach is based on the formal assumption that SC Resolutions lack direct effect and, as such, seems to jeopardize the effectiveness of the UN's most powerful measures in the legal order of UN Member States. A plausible alternative would be create a comity approach in the EU (and UN Member States) for SC Resolutions which, following the well-known *Solange* method, would subscribe to the primacy of Resolutions under the condition of a review at UN level equivalent to the one usually performed internally. All that would imply that the UN puts in force a *judicial* review of SC Resolution. Analyzing the relevant documents of the UN (the reports of the Analytical Support and Sanctions Monitoring Team), it is quite clear that such a reform is far from being possible at the moment. This is also the most striking difference between our case and the situation where the *Solange* method originated: the comity proposition offered by the German Constitutional Court to the ECJ was made when the EC legal order was fully equipped with a truly judicial system. Notwithstanding those crucial differences between the original *Solange* scenario and the one characterizing the relationship between national and EU orders, on the one hand, and the UN counter-terrorism system, on the other, a hidden form of dialogue has been going on between European Courts and the SC: the threat of fully reviewing SC Resolutions has trigged

important reforms of the delisting mechanism. Surrendering now to the hierarchical position advanced by the UN Monitoring Team in its last reports would risk stopping further improvements of the guarantees that individual persons or entities enjoy in the UN counter-terrorism system: strengthening the independence of the Ombudsperson (making it a more powerful and stable institution) and introducing a temporary nature of listing measures (no more "inertia effects" that burden the suspected persons to prove their own innocence). A reasonable option (if not the "best" one) to obtain those improvements, while still according the due symbolic deference to the UN legal order by the national and European Courts, is the formalistic recognition that SC Resolutions are – generally speaking – conceived by the UN Charter to leave enough room for maneuver to UN Members to harmonize their contents in respect of human rights. Even if formalistic in nature, that move is not to be read as a self-interested claim of the superior "constitutional" nature of the internal order that jeopardizes the effectiveness of the UN's collective security system, but as a move capable to improve the legitimacy of the UN as a whole. Without such a dialectic development, the SC risks to be a place where some national executive powers evade the judicial (and parliamentary) control they ordinarily have to face within their own constitutional order.

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I *Nada v. Switzerland*, [GC], App. No. 10593/08, 12 September 2012.

II Joined Cases C-402/05 P and C-415/05 P, *Kadi and Al Barakaat International Foundation v Council and Commission* [2008] ECR I-06351, para. 298-299.

III *Behrami v. France* and *Saramati v. France, Germany and Norway,* [GC], App. nos. 71412/01 and 78166/01, admissibility decisions, 2 May 2007, 45 EHRR SE 85.

IV *Nada v Switzerland* (n I) para 110.

V *Behrami v. France* and *Saramati v. France, Germany and Norway* (n III).

VI *Ibid* para 149, where the Court added that reviewing state measures implementing SC resolutions «would also be tantamount to imposing conditions on the implementation of a UNSC Resolution which were not provided for in the text of the Resolution itself». See De Búrca 2009a: 18-21.

VII T-315/01, *Kadi v Council and Commission* [2005] ECR II-03649.

VIII Tridimas 2009: 113; Cannizzaro 2006: 203; Halberstam and Stein 2009: 62.

IX Tridimas defined this as a 'sovereignist approach': *Ibid* 111.

X *Kadi and Al Barakaat International Foundation v Council and Commission* (n II) para 288.

XI *Ibid.*

XII De Búrca 2009a: 38-39.

XIII Tridimas 2009: 116.

XIV *Kadi and Al Barakaat* (n II) paras 373-374.

XV Case T-85/09, *Kadi v Commission* [2010] ECR II-05177: see *infra.*

XVI Larik 2012.

XVII *Kadi and Al Barakaat* (n II) paras. 298-299.

XVIII Halberstam and Stein 2009: 49. For further critics see Gattini 2009: 229-230.

XIX De Búrca 2009a: 57-58. See also Kumm 2009: 288.

XX See Article 1, paras 1 and 3, of the UN Charter.

[xxi] *Al Jedda v The UK*, [GC], ECHR 2011, 53 EHRR 23, para 102, which so continues: 'In the light of the United Nations' important role in promoting and encouraging respect for human rights, it is to be expected that clear and explicit language would be used were the Security Council to intend States to take particular measures which would conflict with their obligations under international human rights law'.
[xxii] *Al Jedda v The UK* (n XXI) para 105: 'In the Court's view, the terminology of the Resolution appears to leave the choice of the means to achieve this end to the Member States within the Multi-National Force. Moreover, in the Preamble, the commitment of all forces to act in accordance with international law is noted. It is clear that the Convention forms part of international law […]. In the absence of clear provision to the contrary, the presumption must be that the Security Council intended States within the Multi-National Force to contribute towards the maintenance of security in Iraq while complying with their obligations under international human rights law'.
[xxiii] *Nada v. Switzerland* (n I).
[xxiv] Resolution 1390 (2002), para 2 (b).
[xxv] 'The Security Council was well aware of the conflict that would inevitably arise between its own resolutions and the obligations that certain States had assumed in ratifying international human rights treaties. For each of the resolutions that it adopted, it thus expressly stipulated that States were obliged to comply with them "notwithstanding the existence of any rights or obligations conferred or imposed by any international agreement ... prior to the date of coming into force of the measures imposed" (Resolution 1267 (1999) paragraph 7; Resolution 1333 (2000), paragraph 17)': Concurring opinion of Judge Malinverni in *Nada*, para 13.
[xxvi] *Nada v. Switzerland* (n I), paras 176 and 212.
[xxvii] According to the majority of the Court the margin of appreciation left by the resolution to states could have allowed the alleviation of the sanction regime towards the applicant, taking into account the very specific situation of the latter (the fact that he resided in Campione d'Italia, an Italian enclave in the Swiss territory, transformed the transit ban in a sort of internment, with heavy interferences with the applicant's right to respect for his private and family life). The Court therefore reproached the defendant State not to have taken – or attempted to take – all possible measures to adapt the sanctions regime to the applicant's individual situation (*ibid*, paras 195-197). Quite different is the point of view of the concurring opinion of Judge Malinverni.
[xxviii] *Ibid*, para 197.
[xxix] *Ibid.*
[xxx] *Ibid*, para 172.
[xxxi] *Ibid*, para 196.
[xxxii] The expression is borrowed from Heyd 1996.
[xxxiii] Bogdandy 2008: 403. See also De Búrca 2009b: 853, n 2.
[xxxiv] Scharpf 2002: 647.
[xxxv] Cannizzaro 2006: 191; see also Isiksel 2010: 564.
[xxxvi] 9th report of the Analytical Support and Sanctions Implementation Monitoring Team of 9 Feb. 2009, point 18 (S/2009/245) available at: www.un.org/sc/committees/1267/monitoringteam.shtml.
[xxxvii] De Búrca 2009b: 853-854 and 862, where the EU 'distinctive commitment to international law' counters the US 'instrumentalist engagement with international law'; Halberstam and Stein 2009: 67.
[xxxviii] Cases C-286/90, Anklagemyndigheden v Poulsen and Diva Navigation [1992] ECR I-6019 and C-162/96, Racke GmbH & Co. v. Hauptzollamt Mainz [1998] ECR I-3655.
[xxxix] United States consider from the beginning WTO agreements as deprived of direct effect: Leebron 1997: 210-211.
[xl] See Bogdandy 2008: 404.
[xli] See case C-377/02, *Van Parys* [2005] ECR I-01465, together with the precedents reported there; on the effects of the decisions of the WTO Dispute Settlement Body, see the ECJ judgment in joined cases 120/06 P (*FIAMM*), and 121/06 P (*Fedon*) [2008] ECR I-06513: Dani 2009.
[xlii] For example the conflict between WTO obligations to open the European Market to the import of hormones added meat, on the one hand, and health protection in the light of the precautionary principle as intended by EU institutions and legislation, on the other hand: Eeckhout 2002: 100.
[xliii] Eeckhout 2007: 205; Cannizzaro 2006: 221.
[xliv] BverfGe 37, 271 (1974). A similar warning was made also by the Italian Constitutional Court (decisions Nos. 183/1973, 232/1989, 168/1991). See, among many, Kumm 2005: 294-295; Martinico and Fontanelli 2008.

[XLV] Halberstam and Stein 2009: 63: 'the lacuna of rights protection (and rights review) proposed by the CFI would be tantamount to rejecting the mutual arrangement with the Member States under the Solange compromise'. See also Tridimas 2009: 125-126.
[XLVI] Halberstam and Stein 2009: 68; De Búrca 2009a: 58-61. For an alternative reading of the *Kadi* judgment, see Isiksel 2010: 563-569.
[XLVII] Gattini 2009: 234-235.
[XLVIII] For a generalization of the *Solange* doctrine as a method of regulating overlapping jurisdictions, see Lavranos 2008.
[XLIX] Isiksel 2010: 564-565; Gattini 2009: 234-235.
[L] *United States – Import Prohibition of Certain Shrimp and Shrimp Products, Report of the Appellate Body*, WT/DS58/AB/R, 12 October 1998, paras 130-131. (available at www.wto.org). See Scott 2000: 125.
[LI] See Simma and Pulkowski 2006: 510.
[LII] On the conceptual difference between direct effect in EU law and in International agreements, see Joined Cases C-120/06 P and C-121/06 P, *FIAMM* [2008], Opinion of A.G. Maduro, delivered on 20 February 2008, para 27-31, where the Advocate General proposed to substitute the expression "direct effect" with "the possibility of relying on international agreements" in order to avoid confusion with those two different concepts.
[LIII] Italian Constitutional Court, decisions Nos 183/1973, 232/89, 168/91 (available at www.cortecostituzionale.it).
[LIV] Halberstam and Stein 2009: 26.
[LV] Weiler 2000.
[LVI] Picone and Ligustro 2002: 567.
[LVII] *Kadi* (n II) para 322-326.
[LVIII] Case T-85/09, *Kadi v Commission*, *supra* at 15, para 128.
[LIX] Resolution n. 1989 (2011), which will be analyzed further.
[LX] That is also what make the position of the ECJ in *Kadi* different from that of the US Supreme Court in *Medellin v. Texas*, 552 US, 128 S. Ct. 1346 (2008), where the interlocutor of the Supreme Court was the International Court of Justice (the US SC considered the ICJ's judgment *Avena and Other Mexican Nationals*, 2004 I.C.J. 12, as not self-executing): see, for the opposite approach, Halberstam and Stein 2009: 67.
[LXI] 9th report (n XXXVI) point 27.
[LXII] 10th report of the Analytical Support and Sanctions Implementation Monitoring Team of 31 July 2009, point 40 (S/2009/502), available at: www.un.org/sc/committees/1267/monitoringteam.shtml.
[LXIII] *Ibid*, point 43. The reference is to para 300 of *Kadi* (n II), where the ECJ affirmed that 'What is more, such immunity from jurisdiction for a Community measure like the contested regulation, as a corollary of the principle of the primacy at the level of international law of obligations under the Charter of the United Nations, especially those relating to the implementation of resolutions of the Security Council adopted under Chapter VII of the Charter, cannot find a basis in the EC Treaty'.
[LXIV] 10th report (n LXII) points 44-45.
[LXV] *Ibid*, point 44.
[LXVI] Cannizzaro 2006: 219-220.
[LXVII] 10th report (n LXII) point 46.
[LXVIII] 12th report of the Analytical Support and Sanctions Implementation Monitoring Team of 1 October 2012, points 32 and 35 (S/2012/729), available at: www.un.org/sc/committees/1267/monitoringteam.shtml.
[LXIX] 11th report of the Analytical Support and Sanctions Implementation Monitoring Team of 22 February 2011, point 43 (S/2011/245), *Ibid.*
[LXX] Resolution 1989 (2011), para 26.
[LXXI] 12th report (n LXVIII) point 40.
[LXXII] 9th report (n XXXVI) point 18. The assertion of the Un Monitoring Team echoes the words of Cannizzaro 2006: 191.
[LXXIII] 11th report (n LXIX) point 30: see Armin Cuyvers 2011: 496-497.
[LXXIV] 12th report (n LXVIII) point 33.
[LXXV] *Ibid*, point 32.
[LXXVI] 11th report (n LXIX) point 38; 12th report (n LXVIII) point 35.
[LXXVII] See the aforementioned point 30 of the 11th report (n LXIX).
[LXXVIII] Krisch 2010: 181-188.
[LXXIX] *Ibid* at 183.

[LXXX] 9th report (n XXXVI) point 29.
[LXXXI] 11th report (n LXIX) at point 36. See Cuyvers 2011: 504.
[LXXXII] Resolution 1904 (2009) fixed an 18 months mandate to the Office of the Ombudsperson; Resolution 1989 (2011) extended the mandate for other 18 months.
[LXXXIII] See, eg, Resolution 1597 of the Parliamentary Assembly of the Council of Europe, *United Nations Security Council and European Union blacklists*, of 23 January 2008; see also the letters sent by Denmark, Germany, Liechtenstein, the Netherlands, Sweden and Switzerland to the President of the Security Council on 2008 (UN Docs A/62/891 and S/2008/428).
[LXXXIV] True-Frost 2009: 1241.
[LXXXV] Resolution 1989 (2011), para 33.
[LXXXVI] *Ibid*, para 23 (and point 12 of Annex II). Indeed, the same provision contemplates also the possibility to submit the question, upon request of a Committee Member, to the Security Council for a decision within a period of 60 days.
[LXXXVII] Freezing measures prescribed by Resolutions 1267, 1333 and 1390 have been explained as 'preventative in nature and […] not reliant upon criminal standards set out under national law': see recitals to Resolutions 1735 (2006), 1822 (2008) and 1904 (2009).
[LXXXVIII] Case T-85/09, *Kadi v Commission*, (n XV) para 151: 'the principle of a full and rigorous judicial review of such measures is all the more justified given that such measures have a marked and long-lasting effect on the fundamental rights of the persons concerned'; ECtHR decision in *Nada*, (n I) para 198: 'the restrictions imposed on the applicant's freedom of movement *for a considerable period of time* did not strike a fair balance between his right to the protection of his private and family life, on the one hand, and the legitimate aims of the prevention of crime and the protection of Switzerland's national security and public safety, on the other' (italics added). The ECJ in *Kadi* also made reference to the long-lasting effect of smart sanctions: *Kadi and Al Barakaat International Foundation v Council and Commission* (n II) para 358. See Cuyvers 2011: 494.
[LXXXIX] 11th report (n LXIX) point 41.
[XC] In *Nada*, the applicant claimed under Article 8 of the ECHR that his listing had impugned his honour and reputation, but the Courts preferred to issue only the violation of Article 8 as for the restriction of the right to leave the enclave of Campione d'Italia, considering that part of the complaint as absorbed: *Nada v. Switzerland* (n I) para 199. See the critics of the concurring opinion of Judges Rozakis joined by Spielmann, Berro-Lefevre, and those of Judge Malinverni, point 29.
[XCI] Godinho, 2010; Halberstam and Stein 2009: 30.
[XCII] True-Frost 2009: 1242-1244.

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