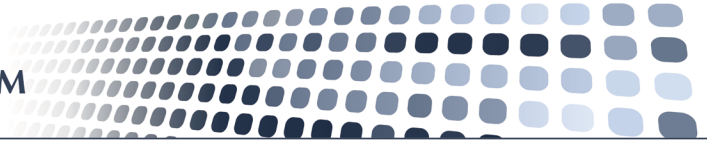




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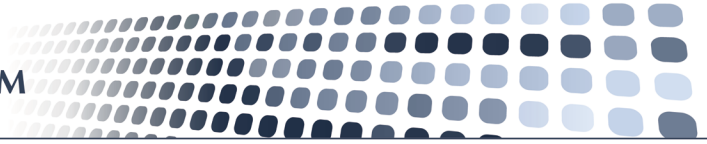


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## The transfer of State Property to Regions and Local Authorities within the Italian Fiscal Federalism Reform

by  
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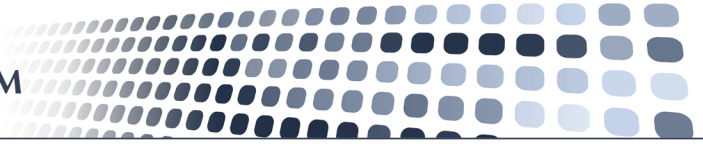


## **Abstract**

The present article examines the process concerning the transfer of State Property to Regions and Local Authorities, recently introduced in Italy pursuant to Decree 85/2010. The transfer of State owned assets and properties to territorial bodies according to this legislation is the first step in the implementation of the Fiscal Federalism Reform. The article analyses in depth the legal framework of this “Public Property Federalism” (“federalismo demaniale”) and the various steps leading to the actual transfer and assignment of some State assets to Regions and Local Authorities. The financial issues of this transfer are also discussed. The article concludes with some remarks on the future prospects of this reform.

## **Key-words:**

Transfer of State property to territorial bodies, Fiscal Federalism (FF), relationships between the State, Regions and Local Authorities



## 1. The transfer of State Property to Regions and Local Authorities: the Legal Framework

On 28th May, 2010 the Council of Ministers approved the first legislative decree to implement the law of delegation n. 42/2009 thus moving on to the second and key step in implementing fiscal federalism in Italy<sup>I</sup>. In fact Law 42/2009 merely outlines this reform and delegates to the Government the actual implementation of fiscal federalism through the adoption of a number of legislative decrees. Decree 85 of 2010, deals with “transferring public assets to Municipalities, Provinces and Regions” and includes in particular provisions governing the transfer of State Property from the State to territorial bodies (Regions and Local Authorities), the so called “Public Property Federalism” (“*federalismo demaniale*”)<sup>II</sup>. The Government has therefore chosen to “Public Property Federalism” as the first step in its implementation of Fiscal Federalism.

In Italy the transfer of State Property to territorial bodies is based on art 119 of the Constitution, as amended by the 2001 Reform of Title V of the Constitution. In its last paragraph the previous article 119 stated that Regions were to be awarded Public assets pursuant to national legislation. Therefore, the devolution of State Property and assets had already been foreseen before the Constitutional Reform of 2001, although limited to the Regional Authorities as beneficiaries.

The rewriting of the constitutional provisions on “Public Property Federalism” in the 2001 reform is more consistent with the general principles stated in Title V of the Constitution and is more oriented towards the establishment of a Republic of “Autonomies” (*Repubblica delle autonomie*) based on the principle of equivalence among the different levels of Government that make it up. In the amended article 119 of the Constitution it is stated that not just Regions, but Provinces and Municipalities too are entitled to hold Public Assets.

The reformed Constitution appears to confirm a greater degree of self government to Regions and Local Authorities (Municipalities and Provinces) in the regulation and management of the public properties that will come under them<sup>III</sup>. According to the



previous text Regions had to comply with national legislation while now territorial bodies are only bound to the general principles or tenets of national law.

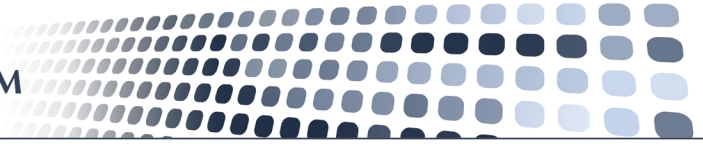
The sixth paragraph of art 119 offers a constitutional basis for the transfer of State Property to territorial bodies and can thus be considered one of the tools that territorial bodies can resort to obtain the aims set for Fiscal Federalism (as outlined by the Constitution), since the foundations for Regions and Local Authorities' effective financial autonomy. More generally, art 119 is consistent with the overall framework laid out by Title V aimed at the consolidation self-government for territorial bodies. In this case it is implemented through the transfer or assignment of certain public assets which are transferred from the State to Regions and Local Authorities which will be responsible for the management of the transferred assets.

Art 19 of law 42/2009 on Fiscal Federalism was the implementation of the last paragraph of article 119 of the 2001 amended Constitution. It laid the foundation for the ending of the transitional regime established by the Constitutional Court which had ruled that State owned assets and properties had to remain under the exclusive rule of the State until such time as the last paragraph of art 119 of the 2001 amended Constitution had been fully implemented<sup>IV</sup>.

Article 19 of the legislative decree of fiscal federalism is entitled 'Public assets of municipalities, provinces, metropolitan cities and Regions' and contains general principles and criteria to guide the actions of the law-maker delegated on "Public Property Federalism"<sup>V</sup>.

First of all, it states that all transfers from the State must be unencumbered and that transferable assets must be classed according to well defined types<sup>VI</sup>. As far as the criteria to be followed in transferring public property and assigning it, the size of the authority, its financial capability and the actual remit of authority of Regions and Local Authorities will have to be considered. The State maintains the task of drafting lists identifying the public property to be assigned to territorial bodies selected among those eligible to receive transferable goods.

The principle of the jurisdiction and location ("*territorialità*") is another criterion when assigning property<sup>VII</sup> and the "Unified Conference" ("*Conferenza unificata*") is designated as the institution where consultation and conciliation take place as a step in the process to assign State Property to territorial bodies<sup>VIII</sup>. The "Unified Conference" is the



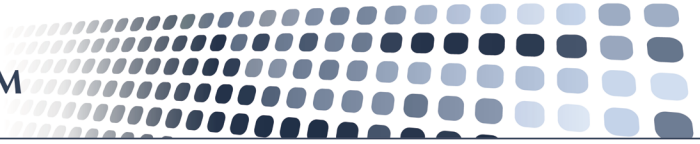
body that links the various levels of government in Italy: the National Government, the Regions and the Local Authorities. The law also states that Legislative Decrees must identify the types of properties of national interest not to be transferred to territorial bodies including the assets listed as the “National Cultural Heritage”<sup>IX</sup>. In fact these are rather general provisions which do not detail the transfer of State property to territorial bodies and leave the delegated legislator much leeway. As happens in other cases where there is delegated legislation on Fiscal Federalism, the assignment of State Property to territorial bodies is based on a rather broad mandate. Decree 85 deals with some of the key issues detailing the procedures to assign state Property to territorial bodies.

## 2. The procedure leading to the approval of Legislative Decree 85/2010

The Law on FF entails a rather lengthy procedure for the adoption of legislative decrees. It requires an agreement be found in the Unified Conference. Texts are then forwarded to Parliament so that an *ad hoc* Bicameral Parliamentary Committee on Fiscal Federalism<sup>X</sup> and the relevant Committees can voice their opinions on the financial consequences<sup>XI</sup>.

With the first legislative decree of 28<sup>th</sup> May the ordinary procedure was not fully followed since an agreement was not reached at the Unified Conference within the deadline. If an agreement is not reached with the Government, according to Law 42 art 2.3, a Report has to be drafted and submitted to Parliament motivating the failure to agree. As the government observed, in this case the failure to agree was not due to the impossibility of reaching an agreement among the parties present at the Unified Conference, but to the deadline according to the existing Law<sup>XII</sup>. The need to have a final approval of a legislative decree within the year Law 42/2009 entered into force led the Government to proceed without having reached an agreement with the Unified Conference.<sup>XIII</sup>

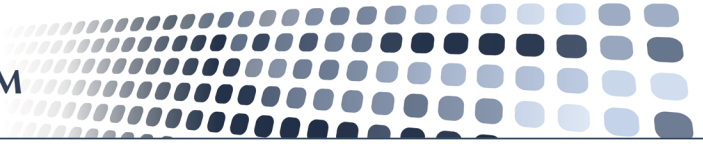
The fact the first Decree implementing Fiscal Federalism was approved without abiding by the ordinary procedure is no little matter, especially as it was the first implementation of Law 42. From this point of view, the Government might have reconvened the Unified Conference reaching an agreement guaranteeing the principle of



loyal cooperation between the National Government (State) and the territorial bodies. In fact the Unified Conference is the only body where State, Regions and LAs sit together and whose importance has increased over time, due to the absence in Italy of a Second Chamber of Parliament representing territorial bodies' interests. One ought not to forget that on March the 4<sup>th</sup>, 2010, the “Conference of State-Local Authorities”, the institutional body where National Government and Local Authorities sit jointly, expressed a favourable opinion on the text that had been agreed upon in the course of the same meeting. Several of the amendments to the Decree – if compared to the text originally submitted in December 2009 for the first time, are the result of the debate between the National Government, “ANCI” (the National Association of Italian Municipalities) and “UPI” (The Union of Italian Provinces).

Other than the procedural matters the approval of this first Decree was quite lengthy. The Government approved the first draft of the Decree in December 2009 which was followed by a second in March 2010. The text was then transmitted to the Parliament and parliamentary Committees expressed their opinions in the various steps of the procedure, suggesting a number of new amendments, introducing a number of novelties and important changes: the text approved by the Government in May 2010 was much richer in contents and shows marked differences compared to the December 2009 original text. It is noteworthy that the parliamentary opposition actively cooperated with the parliamentary majority to improve the text of the legislative decree, as had happened with the Delegated Law 42 where the opposition had also played an active role too<sup>XIV</sup>. Maintaining this positive trend is paramount for the success of the reform which will continue to involve the Parliament following procedures which will lead to other major legislative decrees assessing the ‘standard costs’ of the territorial bodies functions and determining their fiscal autonomy.

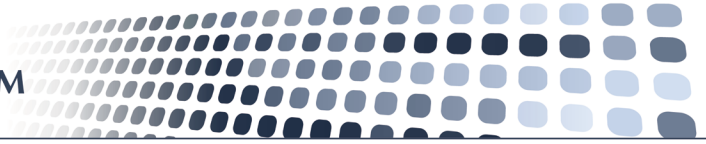
As for the procedures leading to the approval of the Legislative decree on PPF, the failure of a good cooperation between National Government and territorial bodies at the Joint Conference was partly offset by the cooperative attitude among the political parties displayed in Parliament.



### 3. Criteria to identify public properties to transfer

One of the first issues addressed by Legislative Decree 85 is the identifications of the bodies and institutions which have to draw up the list of properties to be transferred to territorial bodies. Art 19 of Law 42 outlines a system whereby it falls to the national government to draw up these lists and then the agreement for the actual transfer has to be reached in the Unified Conference. In fact, the law is not clear on this point and could be open to several interpretations as it lacks a clear distinction between the preliminary step (identification of properties) and the second one, that is to say the actual assignment. Article 2 of the decree states that the Central Government (State) is responsible for the identification of properties but also states that the agreement at the Joint Conference is a preliminary condition, which entails territorial bodies participation. Such a choice of the legislator would be understandable, because it would guarantee the actual involvement of Regions and LAs right from the beginning (identification of properties) using a federal approach. However, there are doubts as to the compliance with art 19 of the delegated legislation which, albeit not openly, seems to leave the drafting of the list solely in the hands of the central government. However, this latter provision can be seen as justified, if one considers that the properties belong to State and as a result it would stand to reason that the Central Government be the only body to decide which of its properties it wishes to transfer.

Art 3.3 of the Decree established that all properties must be identified from lists contained in one or more Decrees adopted by the President of the Council of Ministers, following an agreement at the Joint Conference and within six months of the entrance into force of legislative Decree 85<sup>XV</sup>, which is like setting the deadline on December the 26<sup>th</sup>, 2010. In fact another section of the Legislative Decree (art 7) makes provision for further two year legislative Decrees drawing up new lists to transfer to territorial bodies on their request. In other words, by the end of 2010 only the first step of PPF will be completed. Art 7 also makes provision for LAs to apply for the transfer of other public properties that had not been included in the previous Decrees of Assignment. These are two important provisions: the former extends the implementation of PPF making it permanent rather than temporary. This suggests it might continue over time rather than finish. The latter



increases the participation and the active role of territorial bodies in the process, putting them in a position whereby they can apply to the State for the transfer of properties not originally included in the Decrees of Assignment, thus increasing their holdings.

Art 3.3 also states that the lists attached to the decrees of assignment must describe the information of each property especially as for their legal status, its value, the income it yields and running costs. This transparency is important for the territorial bodies if they are to make an informed decision as to whether they wish the transfer to take place.

#### 4. How are properties transferred?

Once the procedures to identify transferrable public goods have been established, Legislative Decree 85 addresses the rules governing the transfer of properties from the State to Regions and Local Authorities.

After the publication in the Official Gazette of the lists of transferrable goods contained in the President of the Council of Ministers Decrees Regions and other Local Authorities wishing to have the goods transferred have 60 days to apply to the “Italian Public Property Agency” (“*Agenzia del demanio*”). In their applications territorial bodies should state the use they intend to make of the property and the time needed to reach their stated aims (art. 3.4). However, art. 3.1 also provides an “automatic transfer” to Regions and Provinces of the State Property relating to “Maritime Public Property” and the “Public Water-ways”, without previous requests by territorial bodies<sup>XVI</sup>.

A further Decree of the President of the Council of Ministers will then assign properties in the light of the applications received. Pursuant to the principle of subsidiarity, if a property is not assigned to the Authority closest to the citizen (the Municipal Government) it is assigned to another level of government, that is to the Province or to the Region (art 2,3). Transference entails no costs and does not require the applicant to make any payment.

The procedure laid down in the Decree therefore foresees an active participation of territorial bodies in the assignment procedure and specifically it allows them to choose the public properties they wish assigned to them. This excludes any top-down procedure for assigning properties in the absence of a clear application for assignment (by territorial



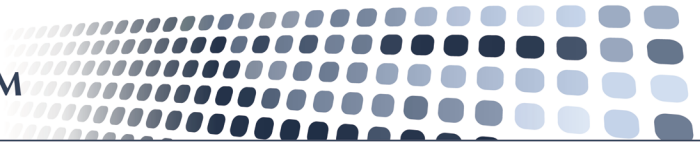


bodies)<sup>XVII</sup>. This particular section of the Decree is to be welcomed as a Municipality or Province are unlikely to manage well a State Property assigned to them against their will. However, the final choice as to which territorial bodies should receive the transferred property is left to the National government in its decree of Assignment without any prior agreement at the Joint Conference. The Government has only an obligation to ‘hear’ the relevant Regions and Local Authorities. The choice of the delegated legislator raises issues of legitimacy with reference to the contents of article 19 of the law of delegation which requires an agreement of the Unified Conference in assigning properties to territorial bodies. A mandatory procedure to seek agreement with the Unified Conference would be preferable in this phase too.

If no territorial body applies for the transfer of a property, art 3 states that such assets should be transferred to a limited pool of properties entrusted to the “Italian Public Property Agency” to assess and possibly transfer the properties in agreement with the involved territorial bodies. After three years, if the properties have not been transferred, they will once again become available and the Government may once again include them in the following decrees of available properties. This means Regions and Local Authorities can apply for the transfer of the assets they had not previously applied for. This is a useful provision as it allows a Local Authority in a difficult financial situation, and thus temporarily unable to manage property, apply for an assignment at a later stage when it might be able to cover management costs. The provision clearly indicates that the will of the legislator is to transfer all public transferrable property to territorial bodies in the long term.

Legislative decree 85 identifies a number of principles intended to guide the Government in establishing which territorial bodies the assets are to be transferred to (art. 2).

The principles to be respected are first and foremost *subsidiarity*, *adequacy* and *territorial application*. According to which properties must be assigned to Municipalities, considering their presence in the community. According to the number and type of public properties assigned, the best suited level of government will be identified. Assignment may involve higher tiers of government where they can better address the management and protection of properties.

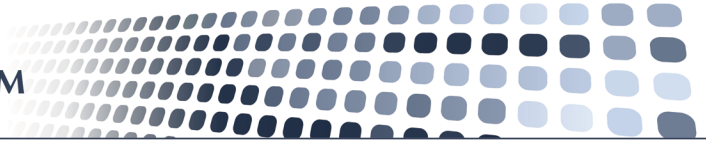


The principle of *simplification* also allows territorial bodies to dispose of or divest itself of assigned assets pursuant to existing legislation<sup>xviii</sup>. The decree states that an *ad hoc* “All Services Conference” composed by all interested territorial bodies shall be informed by the Local Authority of its decision to dispose or disinvest from the property. All the relevant territorial bodies involved in granting the permission to re-class or re-zone properties in the Master Plan and which decide general Master Plan variations including the introduction of constraints and limits, sit in the said All Services Conference.

The principle of *financial coverage* demands that a territorial body which receives the property must have the financial resources to protect, manage and develop the property. The principle of “matching functions and authority” stresses the need for a link between the actual functions of the recipient authority and need to protect and develop the said property. The latter, must take the physical, landscape and cultural features of the property into account to guarantee the protection of the environment and the development of the area.

The introduction of these many principles to guide choices in assigning public property highlights the will of the delegated legislator in using flexible criteria to assess which is the best suited Local Authority on a case by case basis. The high degree of flexibility in the decision making and choices is guaranteed by the principle of subsidiarity, a flexible principle per se which presumes a case by case decision making process. The provision of art. 2.5 adds a further degree of flexibility allowing the same property to be assigned to two or more territorial bodies. As a result, for instance a Municipality and Province may have joint management of the same property. The provision could have a positive consequence for smaller Local Authorities allowing them to join consortia and thus satisfy the requirements for the assignment to them of a property which would otherwise have to be assigned to a larger authority. However, it has to be said that this co-management might make the practicalities more complex and problematic.

The first versions of the decree on the regulation of the transfer process were inadequate in one respect, as they had no provisions to create links between Regions and other Local Authorities to agree on the purchase of State Property. An agreement among Local Authorities in every Region however now makes it possible to submit applications in a more rational manner, avoiding the risk of juxtapositions and helping the Government in the assignation process. According to art 3 each and every Local Authority will submit



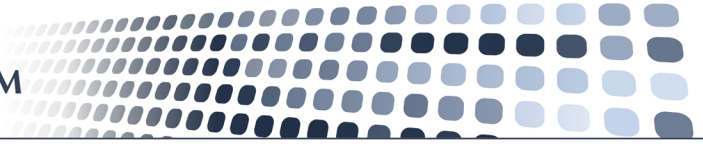
applications without a territorial bodies agreement. Every decision is however made by the central government and both Regions and Local Authorities have only to be heard before decisions are made. Hence the risk of more than one authority submitting for assignation of the same property: for instance a Municipality, a Province and a Region might apply for an airport of regional importance.

The system of applications by single Local Authorities does not appear efficient in assigning assets. As a result, an *ad hoc* article was added to the last version of the text, a little before its final approval, thus eliminating – in a measure - the inadequacy of the text. In fact art 8 allows Local Authorities to consult reciprocally and with the local branches of national authorities. Special Service Conferences may be convened and chaired by the President of the Region. The legislation stresses that the possibility of creating joint arenas among Local Authorities is aimed at ensuring the best use of public property. Consultations enable Local Authorities to put forward joint and coordinated proposals on property assignation, and results must be conveyed to the Ministry of the Economy so that the Government may take the decisions on board and incorporate them in drafting subsequent Assignation Decrees. It is a positive amendment which could favour loyal cooperation between territorial bodies and facilitate future Government decisions in property assignation.

## 5. Which properties can be transferred?

A key feature of PPF refers to the identification of the types of public properties that can be transferred to Regions and Local Authorities. Law 42 attributes the power to decide which properties are transferrable and which remain State-owned to the delegated legislator.

Art 119 of the Constitution does not state how to identify the types of assets that can be assigned to territorial bodies. The decree proceeds with the identification of the properties to transfer (art 5) according the scanty information in art 19 of the Law which, as mentioned, merely requires to identify properties of national importance that cannot be transferred, including properties belonging to the national cultural heritage. Hence the



legislator enjoys a high degree of discretionary power, which is all the more evident if one considers the reference to properties of “national importance” is very general and could lead to centralised decisions by the delegated legislator. Art 5 which refers to the list of transferable or assignable goods must be read in the light of the latest amendments to the Decree connected to art 3.1.

The first type of transferable properties the Decree 85 identifies concerns properties belong to the “Maritime Public Property” (“*demanio marittimo*”) <sup>XIX</sup>, and thus the seashore, the anchorage area, beaches and ports of regional interest, with the exclusion of properties directly used by state bodies. The latter can be assigned only to Regions with one or more Decrees by the President of the Council of Ministers within six months from the implementation of the decree 85 ( art 3.1, letter a).

The second category includes “Public Water-ways” (“*demanio idrico*”) which basically means lakes, streams and other public waters, excluding the trans-regional rivers. Cross-regional lakes can be transferred to Regions following the procedures described for Maritime Public Properties, except for lakes that fall within the boundaries of one Province that can be transferred to it (art. 3.1, lett. b).

The third group includes all the “airports of regional or local interest”, excluding those of national interest<sup>XX</sup>.

The fourth group includes all mines and relative annexes on land. Mines excluding those with oil and gas deposits are transferred to the Provinces (art. 3.1, lett. b).

The fifth group is residual in that it covers any category not included in the above, with the exception of the properties which are specifically excluded from transference. This is a significant provision because it allows the transfer of any State Property not included in the previous categories to be included, excluding the public properties which are specifically excluded from this Decree. If applied it will make it possible to transfer nearly all public property from the State to territorial bodies, excluding non transferable State Property.

The Decree includes a regimen for the transfer of “Military State Property” (“*demanio militare*”): one year from the time the present decree enters into force, following an agreement in the Joint Conference, a President of the Council of Ministers Decree will establish which of the army properties should be transferred to territorial bodies.

There are many buildings belonging to the Forces, such as disused army barracks in Italy, but the actual transfer could be problematic. A limited Company called ‘Difesa



Servizi SpA” was established in the 2010 Budget Law<sup>XXI</sup> under Defence Ministry monitoring. The company is forbidden from disposing of its assets relating to Military State Property although its purposes also include the development and management of military premises through agreements with other parties and the drafting of sponsorship agreements. One of the main aims of the company is the appreciation and development of such real estate and allows the conversion of disused military properties – such as barracks and jails - to new uses.

Including Military Public Property in the public assets capable of transfer to territorial bodies seems inconsistent with the previous decision of the legislator to attribute development and regeneration to the Ministry of defence (acting through the new Ltd Company) which means they would effectively remain Government property. So if the final outcome is to leave the regeneration of Military property in the hands of the State, only a small number would be assigned to territorial bodies and the ones that are unlikely to be the properties with the greatest potential.

The Decree identifies the types of property that cannot be transferred to territorial bodies (arts. 5.2 and 5.7) and which, pursuant to art 19 of Law 42, are to be considered of “national importance”<sup>XXII</sup>. These include properties belonging to the Presidency of the Republic, to Parliament, to the Constitutional Court and in general to all the constitutional bodies; properties used by any State or national agency or body and by the public bodies occupying them for institutional and effective institutional uses; ports and airports of national and international importance; goods that have been included in agreements or accords with territorial bodies for the rationalization or management of their respective properties; networks of national interest including energy grids, rail tracks in use, national parks and reserves.

As far as these non transferable assets are concerned, the Decree introduces a procedure to make all transactions involving state bodies transparent: they will have to motivate the reason why they are not disposing of the property. Government Bodies are under the obligation to supply the Italian Public Property Agency with the lists of goods which they wish to exclude from transfers and the Agency may demand clarification on their motivations<sup>XXIII</sup>. The Agency then has 45 days to publish the list of sites not included in its list for transfers with the motivations. Lists may subsequently be supplemented or changed following the same procedure.

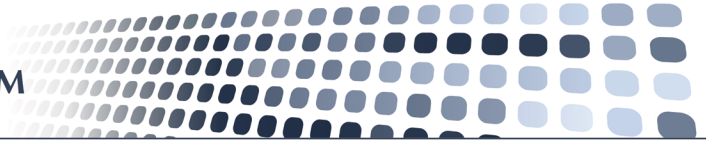


As for cultural heritage the decree requires non transferable assets and property of public interest *including those belonging to the national cultural heritage* to be identified<sup>XXIV</sup>. This means the Decree includes properties belonging to the national cultural heritage in the list of the non disposable State Property, although in practice it does allow some of them to be transferred in virtue of the 2004 legislation on Cultural Heritage which states that some parts of the cultural heritage can be transferred from the State to the territorial bodies<sup>XXV</sup>. Article 5.5 also states that the transfer to territorial bodies of the afore mentioned properties must take place within one year from the entry into force of the Decree and also states that it must follow specific agreements for the development and appreciation, and thus of the cultural development plans as stated by the law in force<sup>XXVI</sup>. Therefore, the Decree makes it possible to transfer a certain number of assets from the State or national government to territorial bodies, even if the cultural heritage of national importance should remain under the central State, as Law n. 42 states.

As one can easily see from the above lists, there are a number of public properties that potentially can be transferred from the national government to the territorial bodies, especially considering also the ‘open’ list of transferable properties. Non transferable properties will require testing how many and which properties will be actually used by state bodies for their institutionally defined purposes and what share of the publicly owned military properties will actually be transferred considering the afore mentioned problems for this class of properties. The first answers to these questions will come when the first lists of transferable properties are published.

## **6. The legal status of the transferred properties and the principle of “functional valorisation” (“valorizzazione funzionale”)**

One important issue discussed by Legislative Decree 85 is the legal or juridical status of the properties transferred to the territorial bodies. As mentioned transfer is free of charge and can present a financial opportunity for Regions and Local Authorities. They can for instance benefit from the income for the concession or rent which the Constitutional Court ruled belong to the body that holds the legal title (Sentence 26 /2004). This means

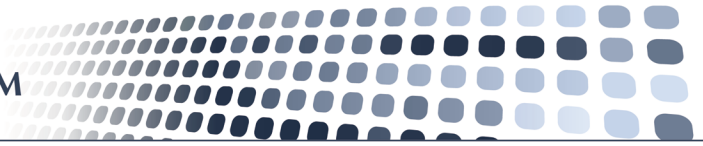


that territorial bodies can benefit from the transfer if they have a good enough level of autonomy in managing them.

Prior to the 2001 Reform, art 119 of the Constitution made provisions for the transfer of properties from the State to Regions according to the State Law. In a judgement of 1971 (Const. Court 39/1971) the Constitutional Court deemed it legal for the State to restrict the use of devolved

properties. The new article 119 of the Constitution however states that the properties and heritage should be distributed according to the general principles of the law, thus giving territorial bodies greater management powers. According to the old text, Regions had to act consistently with the national legislation as a whole while nowadays territorial bodies are only constrained by its general principles. In this respect, especially onerous constraints on territorial bodies managing the property cannot be considered a general principle of state law.

Article 19 of the Law has no reference to constraints on transferred properties and in general it does not state the juridical status of these properties. The decree (art 4) states that the transferred properties are part of the 'assignable properties' (*patrimonio disponibile*) of Regions and Local Authorities except for those listed as maritime, water properties (costal and sea heritage) and airports which will not be listed as assignable but will remain under the current legislation which lays down constraints in the management of these properties. However, the Decree also allows the State or National Government to include other properties which are excluded from the transferable properties of the territorial properties. A President of the Council Ministers Decree of Assignment will have to indicate and motivate which properties are to be excluded from the transferable properties. The State thus retains the right to further extend the list of transferred goods which have limitations of use (since they cannot be disposed of and assigned and being burdened by limitations of use). The publication of the lists will tell us which and how many properties in the lists of assignment will be burdened by limitations of use. The risk is that the opportunity to extend constraints of use of transferred properties will lead to an excessive increase of the properties with constraints, and as a result, will be a limitation on the territorial bodies' freedom to manage the properties. The transfer of properties will in any case entail the inclusion of Regions and Local Authorities in the 'legal possession' and in all the assets and



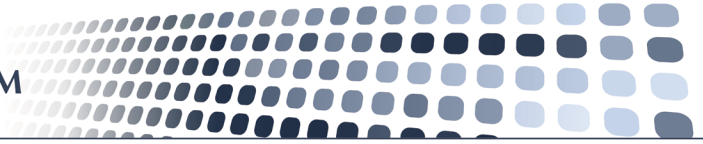
liabilities of the transferred properties even though the management of the properties is burdened by the limits of historical, environmental and artistic limits.

Decree 85 has an important provision which introduces constraints on the assignment of the transferred properties. The properties which become part of the transferable property of territorial bodies can be disposed of only once they have been appreciated and developed<sup>xxvii</sup> and only after a statement of adequacy issued by the Italian Public Property Agency or “The Agency of the Territory” (*“Agenzia del territorio”*), in reference to their respective competencies. It is an important provision which forces territorial bodies to proceed with the appreciation and development of the property and aims at avoiding the immediate transfer of properties, to raise income with their sale.

A further constraint on the possibility to dispose of transferred property is the “Decree for insolvent Local Authorities” (*“Decreto per gli Enti locali in stato di dissesto finanziario”*) (art. 2.3): until such time as the finances of the Local Authorities return solvent they cannot dispose of any assets or property which have been allocated to them, and the use of the latter being restricted to their institutional aims. It is an important and welcome provision which clearly is aimed at preventing Regions and Local Authorities in severe financial straits from selling any transferred properties to raise an income. The provision reflects to one of the main aims of Law 42 which, as mentioned, foresees the introduction of penalties for Regions and Local Authorities’ mismanagement or for causing insolvency, and rewards territorial bodies that successfully manage their finances.

An important feature of the Decree, which needs discussion in more detail, concerns the development of the properties and assets transferred to territorial bodies. This development is one of the main aims of the decree as can be seen in art 1 which establishes that territorial bodies must guarantee the ‘utmost functional valorisation’ of the transferred properties. The principle of the “functional valorisation” of the asset must be to the advantage and in the interest of the community the territorial bodies represents (art 2.4). Furthermore the Local Authority will have to inform the community of the development or appreciation of the property, by publishing on its institutional site. The valorisation of the property requires the involvement of the local communities with the aim of strengthening the bond between the said property and the local area. Municipalities may elect to hold referenda, including computerised ones, to decide what type of action is to be taken.





Decree 85 makes provision for the assignment of a property or asset to more than one common investment funds to gain maximum appreciation of the transferred property. The “Savings Bank” (“*Cassa depositi e prestiti*”) can participate in these funds (art 6)<sup>XXVIII</sup>. The provision is intended to support the financial soundness of the territorial bodies which find it difficult to manage their properties and assets and, as a result, to make the assigned properties financially viable.

Decree 85 also introduces another provision aimed at guaranteeing the development and appreciation of transferred properties and assets. As mentioned, when a Region or a Local Authority submits an application for the assignment of an asset it must also annexe a report indicating how it intends to use the said asset. To guarantee that they will abide by their commitments, the Decree allows the national Government to act as a proxy in the event of the territorial body not fulfilling its duty (art 3.5). The Government’s proxy action is aimed to guarantee the best use of the asset and its appreciation in the event of the Local Authority defaulting.

The Decree states the principle of valorisation and development of transferred properties and assets is one of its main aims: a “Public Property Federalism” which allows for the reappraisal of public assets whose potential has not been totally used to date. Territorial bodies which are assigned the property accept it *cum onere* and with the commitment to exploit and develop it: this may become an opportunity to use it and which the community may benefit from. Further proof of the importance of this principle is stated in the provision which forbids territorial bodies to dispose of an asset without first managing and developing it. A public asset should not be seen as means of raising ready cash through a sale, but as an opportunity to invest in and create the conditions so that it may benefit its community. When Regions and Local Authorities are rightly told to make good use of public assets, the State must choose to transfer assets or properties of value or at least with potential of use. The State should not merely abandon useless assets in a sort of “Federalism by neglect”<sup>XXIX</sup> which would bring no benefit either to the territorial bodies or their communities.



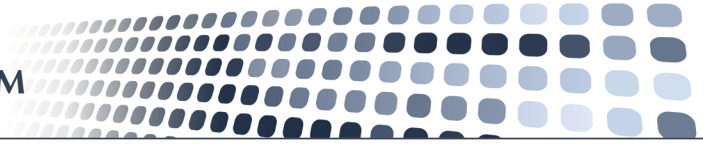
## 7. The Financial Procedures connected to the transfer of State assets

The final clauses of Legislative Decree 85 (art 9) list provisions which offer guidance on the redefinition of public finance ensuing from the transfer of public assets.

First, as said, the transfer of assets is not onerous (zero cost) and furthermore all its parts must be tax free. Decree 85 also makes provision of a redefinition of tax revenues of Regions and Local Authorities. One or more President of the Council of Ministers Decrees will be needed to reduce the flow of funds to territorial bodies as a result of the reduction of State revenue following the transfer of assets. This procedure will have to be agreed upon by the Unified Conference. The aim is to make up for the shortfall state revenue due to the assignment of the assets which cease to be a source of revenue for the State. Amounts are not easily assessed which is why the concept of prior agreement at the Unified Conference is positive: it will encourage the Government to adopt decisions agreed with the territorial bodies and avoid over penalizing the latter.

Another feature of the Decree refers to the thorny issue of the relationship between transferred assets and respect of the constraints ensuing from the “domestic stability pact”<sup>xxx</sup>. Expenditure resulting from transferred assets and their management does not fall in its entirety under the pact, by only an amount equal to the savings of State expenditure ensuing from the fact the State no longer manages the assets. A decree from the President of the Council of Ministers will quantify the amount. This provision is an attempt to address the problems of the constraints of the Stability Pact, which can seriously reduce the investment capacity of territorial bodies: the issue is crucial for the implementation of the transfer of State Property. One of the aims of this reform is to manage effectively transferred and assigned assets, and if so territorial bodies must have the resources to invest in the assets they receive. During the debate preceding the approval of this Decree the issue emerged of the need to review Stability Pact rules so as to guarantee, in general, a full implementation of Fiscal Federalism. This decree offers only a partial solution to this problem because it fails to offer territorial bodies the necessary guarantees of the resources needed to make the required investments in the assets.

The decree also contains provisions governing the financial aspects of the transfer of assets purchased by Regions and Local Authorities: the Italian Public Property Agency



must issue a statement of adequacy before allowing the Local Authority to dispose of the said asset. The Law also says that the Local Authorities must use 75% of the revenue generated by the sale of the asset to reduce their indebtedness and make investments. The remaining 25% must be invested in the Fund for the amortization of Government Bonds to reduce the number of circulating Government Bonds through refunds or repurchases. The provision is the outcome of the Parliamentary debate on federalism: the two earlier Government bills had lacked any reference to this feature. The aim is clearly to bind the amount of 25% of any revenue as a guarantee of the national public debt. The provision must be seen in the framework of the high Italian national debt, one of the most serious problems the country has been addressing in the past few years. Given the seriousness of the matter, 25% might be somewhat too low as a guarantee for the national debt and a higher percentage should have been considered to make it equal with the percentage guaranteed for non indebted Local Authorities investments. Limitations on revenue for territorial bodies that elect to dispose of the public assets assigned to them could have limited future disposal of these assets, and encouraged good management of and investment in the transferred asset, which after all is one of the principal aims of the present Decree.

The closing provision of the Decree establishes that the reform must take place without any additional financial burden for the public sector's financial position. . The transfer of State Property will have to be a zero cost reform, which is consistent with Delegated Law 42 that establishes that all Fiscal Federalism must be at zero cost for Italy. The Decree make specific reference to article 28 of Law 42, which contains provisions aimed at avoiding an increase in public expenditure to implement Fiscal Federalism. The Decree also states that the transfer of functions following the introduction of "Public Property Federalism" must correspond to the transfer of staff to avoid duplication of functions and roles.

## 8. What are the prospects for "Public Property Federalism" in Italy?

The entry into force of Decree 85 is the first step in the implementation of Fiscal Federalism in Italy as a consequence of Law 42. Procedural aspects leading to the approval



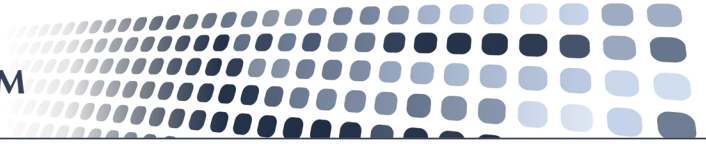
of this first decree gave rise to controversy. But instead of criticizing the lack of an agreement in the Unified Conference on this text, it is probably better to stress the positive aspects of the cooperation between Government and opposition in Parliament to make possible the improvement of several features of the Law. It would certainly be better if future implementation decrees were approved with the agreement of the Unified Conference, the body where local authorities and central government interact. But there are good grounds to hope that the spirit of cooperation and an essentially bipartisan approach will continue in Parliamentary discussion of this important reform.

From another point of view, the approval of this decree has made it possible for “Public Property Federalism” to actually take its first steps towards implementation, for the first time in Italy. In fact it introduces a discipline which indicates when and how public property and assets will be transferred to the Regions and Local Authorities.

The transfer of State Property to Regions and Local Authorities is one of the consequences of the 2001 Constitutional Reform, which introduced the “Republic of Autonomies” (*Repubblica delle autonomie*) established by art 114 of the (revised?) Constitution. If the creation of a new decentralised system necessarily requires a number of functions and duties to be moved from the State to the territorial bodies which make up the Republic, then also public assets can no longer exclusively belong to the State. With a limited number of exceptions, public assets will belong to the range of territorial bodies, from the smallest Municipality to the State itself, which form the Republic.

As happened with the radical reallocation of legislative competences between the State and Regions under the new article 117 of the reformed Constitution, this Decree will, if seriously implemented, fundamentally change the distribution of public assets. Previously State ownership was the rule, but now it will be limited to specific types of property while all other property will be transferred to territorial bodies thanks to the ‘open’ and ‘residual’ list of transferable assets (art 5.1, letter e). This arrangement is totally consistent with the distribution of administrative functions between State and Local Authorities provided by art 118 of the Constitution, which states that administrative functions are to be attributed to the closest level of government of the citizen, pursuant to the principle of subsidiarity.

The approval of Decree 85 is only the first, albeit important, step in the “Public Property Federalism process”. The definitive transfer of assets to territorial bodies requires another three key steps: Government Decrees have to list transferable assets and property;



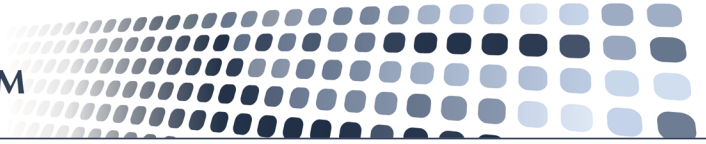
territorial bodies than must submit their requests for the assignment of the said assets and lastly other Government Decrees are needed to transfer the assets. The transfer of State Property to territorial bodies, as established by the present Decree, will be a continuous over the coming few years. The 2010 deadline for the submission of lists of transferable assets does not complete the process because, as mentioned, as from 2012 other assets can be transferred with Assignment Decrees issued every two years.

The number and standard of the assets made immediately available for transfer will make it clear whether this first step is important or if it will only be an initial experiment which will need to be supplemented by the two-yearly decrees.

The final text of the present decree contains many important modifications compared to the text initially submitted by the Government. Amendments have completed and improved the text, making the transfer of assets easier and less confused than it originally was. The changes to the text introducing changes to protect transferred assets are to be considered positively, as transferred resources need to be managed to the advantage of the community and not seen as easy revenue to be raised by disposing of the property to third parties. However, more could have been done in this direction, with more and stricter constraints and disincentives so that the disposal of assets by territorial administrations could be considered very much the exception to the rule.

The success of this reform is unquestionably linked to the good management of public assets assigned to territorial bodies. The duty to manage and develop assets to the advantage of the local communities is a way to limit the risk of the progressive privatization of public assets<sup>XXXI</sup>. However, for the process to succeed transferred property must be of a 'high' standard and have a good use potential as otherwise the risk of State 'federalism by neglect' remains looming round the corner. Decree 85 has outlined the legal framework which makes it possible to transfer assets to territorial bodies although, at this point, it is crucial to know which and how many properties will actually be transferred. The first major step in the process has been taken but a second one is required and is just as important: it concerns the actual implementation process.

The identification of the assets to transfer falls to the national Government, which has to draw up the lists following an agreement with the Unified Conference: this should enable territorial bodies to participate from the beginning in the implementation of "Public



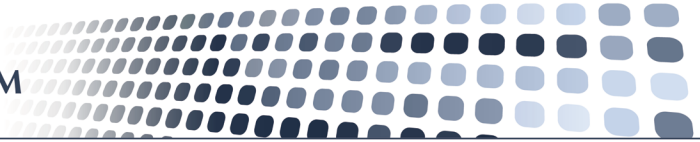
Property Federalism”. The list of transferable assets is a key step because it will establish which assets the State actually intends to make available for assignation.

The success or failure of the operation depends entirely on the role Regions and Local Authorities will have. Decree 85 requires a good degree of involvement of territorial bodies to identify assets and then actually transfer them in practice. Another extremely important consideration is that the transfer of a property requires the relevant territorial body to request it, and makes no provision for the State to impose a mandatory transfer of assets or property which might not be of interest to the Local Authority concerned. This means Regions and Local Authorities have an active role to play in selecting the assets they actually believe might be useful to them. At the same time, this freedom of choice should favour the commitment to appreciate and develop the assets and property the territorial bodies requested since one can reasonably presume they believe the assets have potential and investment in them is viable.

In July 2010 the Italian Public Property Agency published a first list of assets and property that could potentially be transferred consistently with the need for transparency of the actual size of the public assets and property held by the State. The first reactions from Local Authorities to the list have not been over-enthusiastic. The first criticism to the list is related to the ‘quality’ of many assets. As the President of the “Association of Italian Municipalities” (ANCI) stated, they look more like a problem than an opportunity<sup>xxxii</sup>. Other criticisms were raised by the Head of the Department for Public Property and Assets of the City of Milan who considered the assignment of the University or of the Conservatoire as useless given it is impossible for the Municipality to use them in any other way than their current employment. Another series of criticisms focussed on the fact that many territorial bodies lack the funds to manage assets and develop them.

The implementation of “Public Property Federalism” in Italy has thus entered onto the political agenda. Territorial bodies will put their demands forward on the basis of the lists the Government has published in the Decrees and it will be a matter of seeing which assets the State is prepared to transfer and how Regions and Local Authorities will react.

When territorial bodies make their applications for the acquisition of transferred properties, a first assessment of the Decree’s impact can be made. Subsequently, the focus will be on how territorial bodies manage their assets and properties, and on whether and if they have the funds to manage and develop them, and even gain revenue from them. The



process we are facing will be a long one, complicated and made up of a number of different steps. The outcome cannot be taken for granted.

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<sup>I</sup> For a comprehensive commentary on the Law approved on May the 5th, 2009 n. 42, “*Delega al Governo in materia di federalismo fiscale, in attuazione dell’art. 119 della Costituzione*”, in particular see Martines T., Ruggeri A., Salazar C., 2009; Nicotra V., Pizzetti F., Scozzese S. (ed), 2009; Jorio E., Gambino S., D’Ignazio G., 2009.

<sup>II</sup> Pursuant to article 19 of Law 42 approved on May the 5th, 2009 concerning, as will be mentioned further in the text some of the directive principles for the guidelines governing the assignment of public property to Regions and LAs.

<sup>III</sup> See Franson G. and Della Cananea G., 2006.

<sup>IV</sup> Sentence 427/ 2004 of the Italian Constitutional Court

<sup>V</sup> On art 19 of Law . 42 see Antonini L. and Greco A., 2009.

<sup>VI</sup> Letter *a*) in art. 19, Law n. 42 /2009.

<sup>VII</sup> Art. 19, letter *b*), Law 42/ 2009.

<sup>VIII</sup> Art. 19, letter *c*), legge n. 42/2009.

<sup>IX</sup> Art. 19, letter *d*), Law. 42/ 2009.

<sup>X</sup> The Commission, pursuant to art. 3 of Law 42/2009, is responsible for expressing opinions on the draft Legislative Decrees prepared and verifying implementation according to provisions in the Laws themselves .

<sup>XI</sup> The procedure is governed by art 2 .para 3, of Law . 42 /2009. The provision allows the Government following parliamentary opinions to disagree with the decisions of the Joint Conference: in this case the government will have to present a report containing the motivations for differing with the agreement.

<sup>XII</sup> Decree 281 /1997 at art . 3 states that the agreement has to be reached within 30 days counting from the first session of the conference where the issue is an item on the agenda.

<sup>XIII</sup> On the issue see Nicotra V. and Pizzetti F., 2010.

<sup>XIV</sup> See Scuto F., 2009.

<sup>XV</sup> Decree 58 was published in the Official Gazette (N . 134 dated 11/06/2010) and was implemented on June the 26<sup>th</sup>, 2010.

<sup>XVI</sup> On this issue, see Paragraph 5.

<sup>XVII</sup> With the exception of the “automatic transfer” of the public goods of the Maritime Public Property and of the Public Water-ways’.

<sup>XVIII</sup> See. art. 58 of LD 112 dated June 25<sup>th</sup>, 2008, amended by Law 133 dated August the 6<sup>th</sup> 2008

<sup>XIX</sup> As defined by 822 of the Civil Code and art 28 of the Maritime Code of Navigation (*Codice di Navigazione*) .

<sup>XX</sup> As defined by art 698 of the Code of Navigation (*Codice di Navigazione*) .

<sup>XXI</sup> Reference is made to para 27 and following of art. 2, Legge December 23<sup>rd</sup> 2009, n. 191, “2010 Budget”.

<sup>XXII</sup> “*Ivi compresi i beni appartenenti al patrimonio culturale nazionale*”, according to letter d of art 19 of law. 42/ 2009.

<sup>XXIII</sup> Information must be given within 90 days from the entry into force of the LD.

<sup>XXIV</sup> Art. 19, lett. *d*), of Law . 42 /2009.

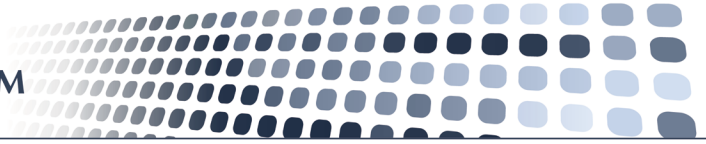
<sup>XXV</sup> Reference is made to art 54 of LD 42 dated January the 22<sup>nd</sup> 2004 on the country’s heritage (“*Codice dei beni culturali e del paesaggio*”, pursuant art 10 of law 137 of July 6<sup>th</sup> 2002). The first two paragraphs of the article list a series of publicly owned properties including real estate and areas of archaeological interest, buildings considered national monuments with deeds enforced by law, museum collections, art galleries, galleries, libraries, and archives. The third paragraph makes provision for the properties on that list to be transferred to the LAs .

<sup>XXVI</sup> Art. 112 of LD 42 dated January the 22<sup>nd</sup>, 2004

<sup>XXVII</sup> Through the procedures for the adoption of the amendments to the Master Plan (article 4.3)

<sup>XXVIII</sup> The *Cassa depositi e prestiti* is a State controlled body (the State holds 70% of the shares and the rest is held by banking foundations. It supports public investment and other projects of public interest .

<sup>XXIX</sup> See Antonini L., 2009. The Author believes this model of PPF avoids risks of a federalism by neglect as it



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is a federalism by good management.

<sup>xxx</sup> The Stability Pact (*patto di stabilità*) stems from the need of every EU Member State to attain targets and the level of indebtedness of the Public Sector is the main parameter to be monitored. One of the main aims of the fiscal regulation underlying the domestic stability pact is the monitoring of LA debt.

<sup>xxxI</sup> See V. Nicotra and F. Pizzetti, *Federalismo demaniale*, op cit., 24.

<sup>xxxII</sup> *E i Comuni non vogliono i beni del demanio: per molti solo spese*, in the *Corriere della Sera*, July the 30<sup>th</sup>, 2010.

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