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**Federalism, Fiscal Federalism and Health Federalism:
Standard Costs in Legislative Decree No. 68 of May**

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Abstract

This paper analyses the regulation of standard costs in Legislative Decree No. 68/2011. It begins with an examination of some concepts that are often confused in the scientific and political debate, such as federalism, fiscal federalism and health federalism (see first section). Then, in the second section, it investigates the main differences between the regional and federal State and verifies whether references to federalism are made in the Italian Constitution under the new Title V. The third section focuses on the notion of fiscal federalism in Law No. 42/2009 and in Legislative Decree No. 68/2011 regarding the standard requirements of Municipalities, Metropolitan Cities and Provinces. The fourth section examines the close relationship between fiscal federalism and health federalism in Legislative Decrees No. 229/1999 and No. 56/2000 while also trying to understand the historical context in which the two concepts were initially envisaged. Finally, with the firm belief that federalism and health protection must go hand in hand, especially after the constitutional reform of 2001, the fifth section examines the procedure laid down by Legislative Decree No. 68/2011 in order to identify the benchmark Regions and consequent standard costs that will be applied from 2013 on in all the other Italian Regions. In the conclusion of this paper, some critical points, such as the age factor, the only criteria of calculation employed by Legislative Decree No. 68/2011, are highlighted, leading us to propose some minor amendments to the text of the Decree.

Key-words

Federalism, fiscal federalism, health federalism, standard costs, essential levels of care



1. Introduction

The reading of Legislative Decree No. 68 of May 6th, 2011, “Provisions of autonomy of tax incomes of the ordinary statute Regions and Provinces, as well as determination of standard costs and standard requirements in the health sector”¹, offers some remarks about federalism, fiscal federalism and health federalism (in the order in which they are presented in this paper) which are more and more frequently alluded to in politics and by the Parliament.

These expressions, which are sometimes used casually (see Balduzzi, 2012), are elusive and can be confused, though they are markedly different from one another. Above all, in addition to being purely terminological, and also for the specific purpose of this paper, they are definitions that must be measured against elusive concepts such as that of standard cost, a fundamental feature of Law No. 42 of May 5th, 2009, “Delegation to the Government on fiscal federalism in the implementation of Article 119 of the Constitution”.

In the light of this, anticipating some conclusions, it may be argued that the concrete ways in which so-called fiscal federalism will be implemented in the health sector could be an ideal gauge of future constitutional reform introducing federalism in Italy. In other words, if fiscal federalism was applied in an area like health care, which accounts for an average of eighty percent of regional budgets (see, for example, *Relazione sul federalismo fiscale*, 2010, 7), thus truly guaranteeing all constitutional values, particularly those referred to in Articles 2, 3, 5, 32, 117, paragraph 2, letter m, and 119 of the Constitution, it would be a good “calling card” for those wanting to create a federal State in Italy, by also trying to import some models used in federal Countries.

2. Are there elements of federalism in Title V (and in Article 5) of the Constitution?



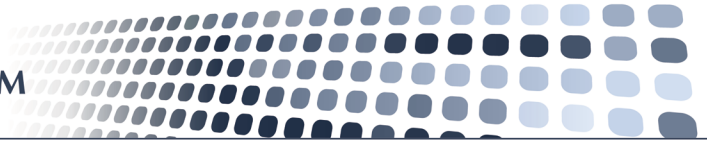
a) *A de jure condito* perspective

An easy (but not obvious) starting point for reflection is that currently Italy is not a federal State. The reasons why are well-known as well as the differences between our regional State and the traditional rules of the most authentic experiments in federalism, such as the United States of America, Switzerland and Germany (for a study of the criteria for differentiation between the regional and federal State see Grasso 2009, 1 ff.), even following the constitutional reform of 2001 using the residual clause of powers in favour of regional legislation, which seems to indicate the first substantial—step towards the construction of a federal State.

Moreover, once the Italian Constitution is placed into the regional State category, it is necessary to investigate whether it already contains some elements of a federal system or whether the Constitution actually forbids the transformation of Italy in a federal State. In Article 5 of the Constitution it is easy to find the maximum value of autonomist demands appropriately listed among its fundamental principles, whereas the constitutional text provides for all forms of distribution of power between the centre and the periphery, never interfering with the unity and indivisibility of the Republic. Therefore, *prima facie*, federalism cannot be contrary to the logic of our Constitution, unlike the idea of secession, which would be completely incompatible because it interrupts the unity and indivisibility of the Republic. If anything, Article 5 of the Constitution already contains a potential complication for the future evolution of the introduction of federalism in our State since the Constitution encourages the development not only of Regions but also of intra-regional local authorities (specifically Metropolitan Cities, Provinces and Municipalities).

This dual level of the constitutional decentralisation of powers is not so marked in other countries with federal Constitutions. Only Regions can aspire to become the pillars of a federal system, like the States in the USA, the Cantons in Switzerland, the *Länder* in Germany, but the other local authorities have (and should have) their own unlimited space within the structure of the future federal State, with some possible (but not insurmountable) anomalies with respect to the rules implemented in federal contexts (see for example Lupo, 2009, 28; Groppi 2009, 44).

However, it is evident that, despite Article 5 of the Constitution, federalism may contain a kind of diversity that recklessly emphasises the unity and



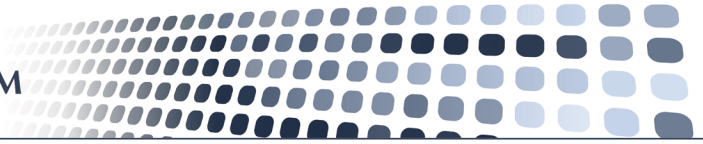
indivisibility of the Republic as well as the equality and solidarity among people (Articles 3 and 2 of the Constitution, see Balboni, 2012). Nevertheless, the Constitution (see Luciani, 2010, who also cites Article 53, paragraph 2 of the Constitution on the principle of progressivity in the tax system) seems to link federalism, a process of moving resources and functions from the centre to the periphery, to equality before the law, substantive equality and the solidarity principle.

In this context, we must now verify whether it is possible to interpret the provisions of the Constitution contained in Part II Title V, in the light of the principles of federalism.

Therefore, the idea of equal order among all the territorial authorities in the Republic, including the State, as laid down in Article 114, paragraph 1, may provide another element for our discussion and paragraph 2 of Article 114 does not constitute an obstacle. It is worth noting that paragraph 2 of Article 114 defines Municipalities, Provinces, Metropolitan Cities and Regions as autonomous bodies—without referring to the State of course, which is a sovereign entity.

Given the different paths followed, the reference to federal models does not seem to hold to the contrary. A federal system, such as Switzerland, has a Constitution which states that “the Cantons are sovereign insofar as their sovereignty is not limited by the Federal Constitution”, even if it establishes that the federal government shall respect the autonomy of the Cantons.

Another support to this argument is the tendency of the 2001 reform of Title V of the Constitution to put Municipalities before all the other territorial authorities, including the State (Article 114, paragraphs 1 and 2, above cited; Article 117, paragraph 2, letter p, related to basic functions; Article 117, paragraph 6, concerning regulatory power; Article 118, paragraphs 1 and 2, concerning administrative tasks and the principle of vertical subsidiarity; Article 119, paragraphs 1, 2, 4, 5 and 6, concerning fiscal autonomy). Despite the above-mentioned relationship of equality between Regions and other territorial authorities, this seems to be a sign, or rather the first sign of a shift towards an unusual structure of federalism, with the exception of Article 118, paragraph 4 (principle of horizontal subsidiarity) and Article 120, paragraph 2 (substitutive power of the Government), wherein Municipalities are, however, placed last among the entities involved.



Nevertheless, these two exceptions may provide further support to these reflections: in the case of horizontal subsidiarity, the idea of federalism means that, first of all, it is the States', then respectively the Regions', the Metropolitan Cities', the Provinces' and the Municipalities' responsibility to promote autonomous citizens' initiatives, both as individuals and as members of associations, in order to fulfil activities of general interest¹¹.

Similarly, another element that is quite consistent with the spirit of federalism is that the subsidiary powers of the Government, i.e., the State (Article 120, paragraph 2), are in decreasing order: Regions, Metropolitan Cities, Provinces and Municipalities, and not the contrary. Therefore, if a Region is in default only the Government may intervene, but if a Province is in default the Region should be the first to intervene, if a Municipality is in default the Province should be the first to intervene, and so on.

The recognition of statutory regional powers and the discipline of the financial autonomy of Regions and other local authorities are other elements that indicate additional efforts to approach federalism.

The second topic will be discussed later (see section 3), while the first leads to the examination of Article 123, which gives the regional statute the power to define the form of regional government and the basic principles of regional organisation and operation in accordance with the Constitution.

In fact, if we compare this wording with the provisions of federal Constitutions, such as Article 51 of the Swiss Constitution which states that “every Canton has a democratic Constitution” and “the federal government provides a guarantee if the cantonal Constitution is not contrary to federal law”, we find some similarities and differences. It is easy for supporters of federalism to focus on the fact that in federal systems we refer to constitutions rather than regional statutes, as is the case in Italy. However, it is also easy to see (particularly considering the Swiss case) that the obligation to be in accordance with the Constitution seems less penetrating than the obligation not to contradict the (whole) federal law, whether constitutional or not.

Perhaps these two issues can be reconciled by focusing on the subject of regional statutory power, dealing specifically with the discipline of the form of government of the Region. In fact, giving regional statutes the power to choose the form of government, even considering the limited significance attributed to regional statutes by the Constitution, means strengthening the decision-making power of the Region, since the form of



government denotes the relationship among the regional political bodies (it is important to highlight that the term “the internal organisation of the Region” was used in the previous text of the Constitution, before the constitutional amendment to Article 123 of 1999). A substantial consolidation of the political role of the Regions is certainly not too far from the essence of federalism as regards the regional statute, with the knock-on effect that has accompanied the approval of new regional statutes, starting from that of Calabria in 2004.

Nevertheless, of all the new provisions of Title V, Article 117 is dedicated to State and regional legislative power and, as aforementioned, it has more potential than the others to overlap with the themes of the federal State.

One list of issues is predicted to fall under the exclusive legislative power of the State and another under a concurrent legislative power. In addition, a provision is foreseen that gives the regional legislation authority in all matters not expressly covered by State legislation. This prediction evokes the clause regarding residual powers that is typical of federal Constitutions.

In reference to this point, the reform of Article 117, already anticipated by Law No. 59 of March 15th, 1997, as far as administrative functions are concerned, marks a very strong break with the past and the previous wording of the rule because this rule was limited to assigning to the legislative power a handful of regional matters, leaving the rest under State jurisdiction.

It is true that the most significant matters fall under State jurisdiction. Not only those in which sovereign power is exercised but also many others, including those that, given their cross-cutting nature, tend to compress the sphere of regional competence (competition protection, environmental protection, at least before the 2007-2009 overturning of constitutional jurisprudence, essential levels of benefits relating to civil and social rights), but this element of residual power is crucial to a pro federalist reading of the constitutional reform.

However, against this background, it is marginal to define this regional legislative power as exclusive (according to the “devolution reform” that was rejected by the constitutional referendum of June 25th-26th, 2006), while Article 116, paragraph 3, could be used to extend the range of regional residual matters through the mechanism of differentiated regionalism or asymmetrical regionalism.



b) *A de jure condendo* perspective

Any effort to find elements of federalism in the Constitution is clearly useless, if it is never accompanied by an initiative to create a constitutional amendment, pursuant to Article 138 of the Constitution. On the one hand, the aim is to make the Senate an authentically federal Chamber and, on the other, to assign the Regions a key role in the process of creating a constitutional amendment^{III}.

Regarding the first aspect (but concerning the second criteria, see Grasso, 2009, p. 3), there has never been any serious attempt to give the second Chamber the power to directly, fully and firmly represent the interests of the individual territories. Without this effort, it is quite useless to talk about federalism. Therefore, it is necessary to agree whether to choose the American and the Helvetian models, based on the equal representation of all member States (genuine federalism for many scholars, see Balduzzi 2009), or the model of the German *Bundesrat*, composed by members of the 15 *Länder* governments, which appoint and dismiss them and in which the position of each *Land* is expressed by one vote per unit, as we all well know^{IV}.

3. Federalism and fiscal federalism in Law No. 42 of May 5th, 2009 (and in the first Legislative Decrees of implementation)

The ambiguity of the relationship among the reform of Title V, the prospect of federal constitutional reform and fiscal federalism is especially evident in Law No. 42/2009 and its implementing provisions.

First, fiscal federalism must be depoliticised because Law No. 42/2009 is substantially in keeping with the past (see Balduzzi, 2009; De Fiores 2010, 436) and belongs to “the long history of this Country” (see again Balduzzi, 2009).

In fact, it should be stressed that Law No. 42/2009 implements Article 119 of the Constitution and Legislative Decree No. 56 of February 18th, 2000, “Provisions relating to fiscal federalism, in accordance with Article 10 of Law No. 133 of May 13th, 1999”, which already contains some elements of federalism even anticipating the constitutional



amendment of 2001 (during those years there was a very different government majority in Italy).

So, following this trend the issue of fiscal federalism has not just recently emerged and cannot be considered the exclusive domain of the government majority or of one political party because Law No. 42/2009 is the result of a process involving different institutional actors: the government majority, the opposition parties, the regional and local communities and the Constitutional Court, which has urged its approval in many decisions (see De Fiores, 2010, 431-432; Antonini, 2009).

Therefore, Law No. 42/2009 was approved by a large majority^V, even if the Legislative Decrees implementing this Law have not always been supported by the same large majority^{VI}. The paradox, however, was (and still is today) that some of the political forces that supported Law No. 42/2009 are now challenging the reform of Title V, while the new Article 119 of the Constitution is the fundamental basis of the Law (see also *Relazione sul federalismo fiscale*, 2010, 5).

Article 1, paragraph 1 of Law No. 42/2009 summarises the objectives of fiscal federalism very well: local authorities' autonomy over revenue and expenditures and the protection of the principles of solidarity and social cohesion, in order to gradually replace the criteria of historical expenditure for all levels of government and ensure the maximum accountability of elected officials and the effectiveness and transparency of democratic controls.

Within this context (see again Article 1, paragraph 1 of Law No. 42/2009), the Law also contains the provisions to establish the fundamental principles of the coordination of public finance and the taxation system to regulate the equalisation fund and the use of additional resources and special measures by pursuing the development of underdeveloped areas to overcome the economic dualism of the Country. The Law then regulates the general principles concerning the allocation of the assets of all the local authorities and establishes transitional rules on the organisation of Rome as the capital of Italy. The Law has finally established a 24 month delegation by defining more than fifty principles and criteria in accordance with Article 76 of the Constitution.

For the purpose of this paper (for an in-depth analysis of Law No. 42/2009, see, for example, Foglia, 2012), the main keywords of fiscal federalism are territoriality and standard costs (and standard requirements). However, even the aforementioned term



solidarity must also be included (in Law No. 42/2009 the word territoriality is mentioned four times, while solidarity is mentioned eight times).

Law No. 42/2009 attempts to implement the principle of territoriality^{VII} in Article 2, paragraph 2, letter p, which states the “trendy correlation between taxation and benefits, linked to the functions exercised on the territory in order to facilitate the link between financial and administrative responsibility” (but see also Article 7, paragraph 2, letter d), while making the Legislative Decrees implementing the Law, including the one this paper focuses on, responsible for determining the content of the standard costs and standard requirements (see Article 2, paragraph 2, letter f, which simply refers to the “cost and requirement which, by maximising efficiency and effectiveness, is the indicator against which public action may be compared and evaluated”)^{VIII}.

However, the regulation of standard costs (and of standard requirements) seems to be a very curious “matryoshka” (see Balduzzi, 2012). It also poses some problems regarding the legitimacy of the delegation of Law No. 42/2009 both for Legislative Decree No. 216 of November 26th, 2010, concerning the setting of standard requirements for Municipalities, Metropolitan Cities and Provinces and for Legislative Decree No. 68/2011 incorporating the provisions on standard costs and requirements in the health sector. These Decrees only regulate the articulation of the processes for the (future) setting of standard costs and requirements, but not the extent of their (numerical) values of reference.

Legislative Decree No. 68/2011 will be analysed in the following sections. In short, Legislative Decree No. 216/2010 is significant because it regulates the fundamental functions of Municipalities and Provinces^{IX}, but does not seem entirely convincing because it may give too much power to the Society for the Study of the Field (“S.o.s.e. S.p.A.”), mentioned in the Decree as a purely technical body.

In fact, this organisation must develop the methods to identify standard requirements and determine their values through statistical techniques, emphasising the individual features of individual Municipalities and Provinces according to a range of criteria specified under Law No. 42/2009 and Legislative Decree No. 216/2010^X. Furthermore, this structure must monitor the application phase and update the process for the determination of standard requirements.



Other technical bodies collaborate with S.o.s.e. S.p.A., for example, the Institute for Finance and Economics, the National Institute for Statistics and the Joint Technical Committee for the Implementation of Fiscal Federalism.

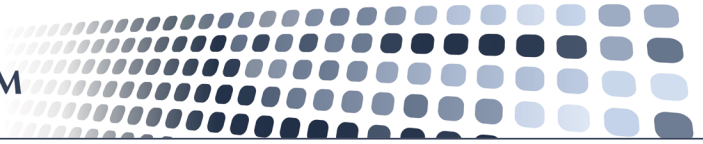
The political bodies (the State-Cities and local Government Conference, the Committee for the Implementation of Fiscal Federalism and the Parliamentary Committees responsible for Financial Consequences) play an advisory role in the drafting of the Decree of the President of the Council of Ministers, which must use methodological notes to calculate standard requirements and, above all, the standard requirements for each Municipality and Province.

The impression is that there is a great lack of balance between the technical and the political decision-makers, all in favour of the former^{XI}. This is worrisome because the success of fiscal federalism is based on the capability of standard costs and requirements to ensure the coverage of the most basic functions of Municipalities and Provinces as well as the essential levels of performance that Regions must ensure in the health, education and welfare sectors. In this context, the political representative bodies must maintain a leading role and should not give an overly broad scope of action to some technical bodies, which, however, are not entirely neutral^{XII}.

Here it is also clear how the use of an expression like “fiscal federalism” can be tricky. Law No. 42/2009 and its implementing provisions may have permanently left this concept to constitutional analysis without completely defining all its multiple meanings, those of the name and the thing (see Balduzzi, 2012).

4. Fiscal federalism and health federalism in Article 19-ter of Legislative Decree No. 229/1999 and in Legislative Decree No. 56/2000. Some of the problems of the health governance system under the new Title V of the Constitution

Continuing on this subject, the deeper meaning of the relation between fiscal federalism and health needs to be understood. This relationship should also be assessed by



trying to understand the overall context in which the two notions were initially designed by the Parliament, the time period being immediately prior to the reform of Title V of 2001.

In fact, “health federalism” is mentioned for the first time in a legislative text, in the title of Article 19-ter of Legislative Decree No. 229 of June 19th, 1999, “Health federalism, the stability pact and interventions to ensure the cohesion and effectiveness of the National Health Service”. It is a very pompous reference that significantly conceals the content of the article, which aims at establishing some measures to contain the costs of regional health services with respect to the anomalies in their management. All this occurs while almost subtly anticipating the subsequent regulation regarding the so-called financial recovery plans in a manner that makes it easy to understand why this Article has been considered a mere statement of principle or even a slogan, more political than legal in nature (see Jorio, 2008, 2).

The reference to fiscal federalism using a title that is more consistent with its meaning is contained in Law No. 133 of May 13th, 1999, “Provisions for equalisation, rationalisation and fiscal federalism”, and especially in its executive Decree, the aforementioned Legislative Decree No. 56/2000. It is well-known that, since 2001 with this measure a series of public tax transfers in favour of the Regions with ordinary statute have been ordered to cease. These transfers were offset by providing the Regions with a regional partnership to VAT, an excise on petrol and the increase of the tax rate of the additional regional tax.

For the purposes of this paper, it is worth mentioning some of the transfers abolished by Legislative Decree No. 56/2000 specifically concerning the financing of health expenditures in current and capital accounts. The Decree established that the share of funding to be paid to each Region, in particular in order “to enable all Regions with ordinary statutes to carry out their functions” and “to deliver services within their competence, at essential and uniform levels throughout the Country”, was determined “according to parameters related to the resident population, fiscal capacity (...), health requirements and the size of each geographic Region”, as defined and determined by the technical specifications attached to Legislative Decree (see Article 7, paragraph 2, of Legislative Decree No. 56/2000).

In addition, Legislative Decree No. 56/2000 prescribed an earmarking bond for health care costs to ensure essential and uniform levels of care in each Region and



established procedures to monitor the health care provided in each Region, also by invoking the formal procedure between the Region and the Ministry of Health, as stated in the aforementioned Article 19-ter of Legislative Decree No. 229/1999 (see Articles 8 and 9, Legislative Decree No. 56/2000).

Cautiously, but with significant consequences, the two disciplines shared some features and it is rather doubtful whether this was truly federalism, with or without the adjectives (fiscal federalism or health federalism)! This was also entirely a consequence of the history of Italian regionalism and, despite the approximations discussed so far, the fact that fiscal federalism and health federalism had to come together not only because the Regions have been involved in health, according to the previous wording of the Constitution (“health care and hospital”) since their actual introduction in the early 1970s, but mainly because “the implementation of the social right to health and the implementation of regional autonomy” (see Balduzzi, 2006) have systematically proceeded together since then.

In this context it is useful to briefly examine some of the problems of the health care governance system under the new Title V of the Constitution.

Article 117, paragraph 3 of the Constitution lists “health protection” among the matters under the concurrent legislative power. As a result, the State establishes the fundamental principles of health care legislation as well as the essential levels of care (see the aforementioned Article 117, paragraph 2, letter m of the Constitution), which are not the lowest levels, but rather the appropriate ones (see, for example, Cosulich-Grasso, 2012, 344). In turn, the Regions make laws concerning the organisation and functioning of each regional health system. Every Region has developed different models of organisation for public and private hospitals, but health costs vary greatly from Region to Region (for example, the same TAC 64 slice in Emilia Romagna costs € 1,027,000, while in Lazio it costs € 1,397,000, see *Relazione sul federalismo fiscale*, 2010, 12) and the levels of care for citizens are not equal (see again *Relazione sul federalismo fiscale*, 2010, 12).

Moreover, since the National Health Service was established in 1978, the connection between regionalism and health protection has influenced it (see Law No. 833 of December 23rd, 1978; see also Legislative Decree No. 502 of December 30th, 1992 and Legislative Decree No. 229/1999) and this will intensify if Italian constitutional system is strongly oriented towards a federal model. While waiting to achieve this possible



constitutional reform, the discussion concerning the relationship between fiscal federalism and health protection has finally led us to examine the regulation of standard costs in Legislative Decree No. 68/2011, which has already been mentioned several times.

5. Standard costs of health care in Legislative Decree No. 68/2011: An overview

According to the observations made so far, it is no coincidence that, even in the definition of standard costs and standard requirements, the health sector is a forerunner, although Legislative Decree No. 68/2011 made a completely separate Decree responsible for determining the standard costs associated with the essential performance levels set out by State law for areas not related to health, i.e. social care, education and local public transport in particular, and established an initial mechanism for the determination of the essential levels for these areas. This process is similar to the methodologies and procedures used by the aforementioned Legislative Decree No. 216/2010, as far as the standard requirements of Municipalities and Provinces are concerned (see Article 13 of Legislative Decree No. 68/2011)^{XIII}.

In the health field the solution proposed by Legislative Decree No. 68/2011 aims at gradually but definitively overcoming the financing mechanism of health spending, based on the criteria of allocation required by the law in force (see Article 1, paragraph 34, Law No. 662 of December 23rd, 1996), by using the instrument of standard costs and standard requirements instead.

The Decree specifically sets the thresholds of the percentage of health expenditure financing for the three traditional macro levels of health care (see the Decree of the President of the Council of Ministers of November 29th, 2001, “Definition of essential levels of care”), at 5% for collective health care in the living and working environment, 51% for district assistance and 44% for hospital care, specifically referring to the Pact for Health from 2010 to 2012. The Decree also establishes a special procedure for the determination of standard costs and standard requirements, all focused on the selection of a group of virtuous Regions, defined in the draft Decree as benchmarks^{XIV} that will serve as

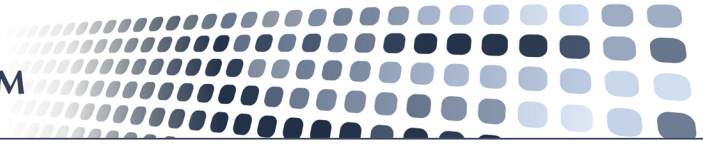


a guide to other Regions, since the cost values reported in the three Regions of reference, finally identified with respect to the five previously selected, will be applied to all other Italian Regions^{xv}.

A fundamental aspect of this procedure is the way in which standard cost is quantified. The Legislative Decree establishes, *inter alia*, that: a) the “value of standard cost [is] given for each of the three macro levels of care, which are provided in a position of effectiveness and appropriateness, by the average *per capita* weighted cost recorded by the Regions of reference”; b) “the weights [are] carried out with weights for age classes, considered in the determination of health requirements, for the second year preceding the year of reference”; c) in the original text, before the agreement during the Joint Conference, the level of spending in the three macro levels of the benchmark Regions is “applied, for each Region, relative to regional population, weighted according to the criteria established by the agreement in the permanent State-Regions Conference, which also contemplates the indicators related to specific local situations which are considered useful to defining health needs”.

However, this procedure leads to some concerns. First of all, the reason why the adjective “weighted” is used along with the average *per capita* cost of benchmark Regions^{xvi} is not persuasive. Secondly, using the age factor as the only criteria of calculation is not satisfactory (see also Antonini, 2010) because it does not take into account any other variables that also affect health care needs. For example, in the aforementioned Article 1, paragraph 34, Law No. 662/1996, a list of these variables is indicated as follows: resident population, frequency of health care use by age and sex, population mortality rates, indicators related to specific local situations deemed useful to defining the health needs of Regions and epidemiological regional indicators. It is also important to take into account the variables indicated in Legislative Decree No. 56/2000, already mentioned several times, such as the resident population, fiscal capacity, health needs and geographical size of each Region.

Regarding these profiles, Legislative Decree No. 68/2011 has not taken into account a parliamentary resolution approved unanimously by the Health and Hygiene Committee of the Senate of the Republic in November 2010, which, in order to determine the percentage of resources for each Region, suggested adopting a procedure that “corresponds to certain objective criteria and does not seem to be the result of confused



calculations and messy compromises, in order to determine the percentage of resources for each Region. The criteria must consider the actual number of inhabitants in the Region and the number of incidences by age in order to determine the care needs and weight of factors like poverty and cultural and social deprivation as well as any other factors which could significantly effect variations in the health care needs of different areas of the population identified in an agreement with the Regions” (see XII Commissione permanente del Senato della Repubblica, 2010). Legislative Decree No. 68/2011 has also disregarded an important document drafted in the Spring of 2010 by the National Agency for Regional Health Services to investigate the issue of the financing of the health care system and the allocation of resources to the various different Regions. This document widely criticises the idea of standard costs in the health field (see AGE.NA.S, 2010). Finally, Legislative Decree No. 68/2011 has ignored the long debate on this issue within the Parliamentary Committee for the Implementation of Fiscal Federalism^{XVII}.

Nevertheless, in addition to this debatable issue, the regulation of standard costs may have a feature that goes back many years and that is cause for even greater concern regarding the allocation of health care funds to the Regions concerning the method of historical expenditure that fiscal federalism would permanently set aside.

In fact, in health care the mechanism of historical spending was overturned at least a decade ago and has since been replaced (see AGE.NA.S. 2010, 15; Caruso-Dirindin, 2011, 7 ff.; Moirano, 2011) by the “principle by which funding should be proportional to the needs of the individual Regions”.

However, if the “new” standard cost is applied to all Regions as recommended by the Legislative Decree in the form of weighted average *per capita* of the recorded cost by the benchmark Regions, the real risk is that funding will end up being “nothing more than the weighted average of the previous funding, and this would mean proposing “historical funding” again, i.e., the method of historical spending” (see AGE.NA.S., 2010, 15 and Belisario, 2010).

If this actually happened, the breakdown in funding in the health care sector would subside. Despite numerous proclamations, even more than in the past, standard costs would be “top-down formulas” (see Relazione sul federalismo fiscale, 2010, 17, which stresses that standard cost “is not a number, but rather a method, the formula to determine standard requirements”; see also PISAURO 2010, who talks about an “excess of rhetoric on



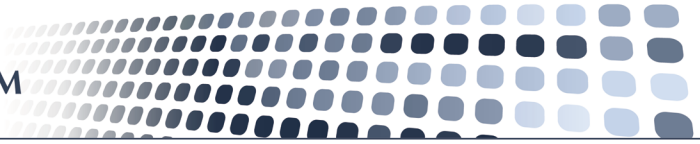
the role standard costs actually play”) and it might not suffice to emphasise that “the great leap forward, which the Legislative Decree on regional standard costs allows, is to remove the expectation of balancing regional deficit” (see Antonini, 2010)^{xviii}.

Furthermore, Article 26 of Legislative Decree No. 68/2011 is very problematic in that it states that “starting from 2013 the national standard requirement in health care will be determined in line with the overall macroeconomic framework and within the constraints of public finance and the obligations imposed by the Community Law”. With the aforementioned agreement of the Joint Conference of December 16th, 2010, the provision was completed by adding these words: “through the agreement and consistent with the requirement arising from the determination of the essential levels of care provided in conditions of efficiency and appropriateness”. Finally, to strengthen the meaning of this rule, Article 25, paragraph 2 was added by the Parliamentary Committee for the Implementation of Fiscal Federalism and states that, “as determined according to Article 26 and subject to the constraints of public finance and the obligations imposed by the Community Law, the standard requirement in health care is equal to the amount of resources needed to ensure the essential levels of care in terms of efficiency and appropriateness”.

It is easy to note that this provision is different from the discipline of Article 1, paragraph 2, of Legislative Decree No. 502/1992, as amended by Legislative Decree No. 229/1999 which states that “the identification of essential and uniform levels of care provided by the National Health Service is carried out along with the identification of the financial resources for the National Health Service”.

In turn, the use of the words “along with”, “consistent” and “according to” highlights a distinction that is not merely terminological, because only the first of the three words refers to time (“along with” also means “simultaneously”) in order to ensure adequate financing and, therefore, the effective coverage of the essential levels of care, because the essential levels are not the lowest levels (see also Bordignon-Dirindin, 2010, 1; Cuocolo, 2012, Pezzini 2012 and Politi, 2012).

However, the second word (the adjective “consistent”) expresses an essentially negative constraint, i.e., a formal constraint, as if financial conditioning, which undeniably exists, was only a numerical limit, against which the amount of the essential levels may be measured.



All of this seems to undermine the delicate balance between the fundamental right to health care (Article 32 of the Constitution) and the financial and budgetary constraints established in health care in recent years. This happens without substantially solving the problem of balancing regional deficit.

In fact, the Regions that have a structural standard deficit in health care or have had to activate regional financial recovery plans have not been able to fully comply with the spending threshold, which is based on standard costs starting from 2013, the year when the reform of health federalism will become effective in the absence of a temporary provision in the Legislative Decree, which refers to balancing regional deficit only in order to identify the benchmark Regions.

Nevertheless, the choice to eliminate the prospect of a State financial recovery plan, prepared *ex-post* via the Legislative Decree, could possibly evolve into a betrayal of the universal principle of our National Health Service.

If this is fiscal federalism, the difficult synthesis of the principles of territoriality and solidarity attempted by Law No. 42/2009 would hardly be realised and the constitutional right to health protection and the constitutional principle of formal and substantial equality would be compromised. Finally, it would hardly be considered a strategic move towards creating constitutional reform in line with federalism (see section 2).

Yet, as has already been argued in this paper, the destiny of federalism and health care is necessarily shared. Therefore, to start concluding, we must continue to think about Legislative Decree No. 68/2011 and the notion of standard cost regulated by the Decree.

In this context, we must analyse the Legislative Decree and try to make it more closely adhere to the content of Law No. 42/2009 and the constitutional principles underlying fiscal federalism in health care (see also Pezzini, 2012 and Politi, 2012) in order to indicate what “remedial work” must be done on the critical elements emphasised here, with no intention of completely abandoning the standard cost “philosophy”, which may be even abstractly supported (see above all AGE.NA.S., 2010).

It is worth remembering Article 2, paragraph 7, of Law No. 42/2009 that makes it possible to adopt some Legislative Decrees containing supplementary and corrective provisions within two years after the entry into force of the first Decrees implementing the Law. It seems unlikely that there could be any corrective action taken just a few months after the adoption of the Decree and its subsequent entry into force, but it is not



impossible (if, for example, the new government headed by Mr. Monti is going to make some amendments).

In this regard, an initial and easy amendment should concern Articles 25 and 26 regulating the determination of the national standard requirements in health care, with the inclusion of a simple rule safeguarding the contextual identification of the essential and uniform levels of care and the financial resources that must be allocated to the National Health Service (see the above-mentioned Article 1, paragraph 2, of Legislative Decree No. 502/1992 and the subsequent amendments).

Therefore, the discipline of Article 27 and the method described for the determination of regional standard costs and regional standard requirements should be modified in this way: a) regional standard costs should better reflect the actual estimate of health needs so as to abandon the idea that the same benchmark Regions are virtuous only because their spending indices have exceeded the funding received during the reporting period (see AGE.NA.S. 2010, 15)^{XIX} by neglecting the standards of efficiency, effectiveness and appropriateness specified by the Decree^{XX}; b) regional standard costs should be calculated by adding other significant variables to the weight by age of the regional population. These variables are especially based on socio-economic indicators of social deprivation (such as education, employment status, type of dwelling) in order to correct the potentially distorting profiles resulting, as aforementioned, from a weighing based on a mere correlation between age and health needs (see also AGE.NA.S., 2010, 33; Bordignon-Dirindin, 2010, 1; Caruso-Bordignon 2011, 21; for an opposite opinion regarding the inclusion of socio-economic variables, see Pammolli-Salerno, 2010, 12).

Now, this second amendment proposal appears to be a losing game, according to the discussion that has developed within the Parliamentary Committee for the Implementation of Fiscal Federalism, also because the political majority and Berlusconi's Government had expressed strong opposition to the use of deprivation indices.

Yet, even in this regard, it would probably be enough to introduce in Article 27, and in particular in paragraph 6, letter e, an explicit reference to the socio-economic indicators reported in this paper, or, more generally, to the determinants of economic and social deprivation, all to be defined in an agreement to be made during the State-Regions Conference.



Therefore, among other things, a foundation should be provided for implementing Article 29 of Legislative Decree No. 68/2011, which is actually the result of poor wording, and in particular of dubious constitutionality, as has already been noted.

However, we cannot compensate for the lack of these indicators with Article 28, included in the debate in the Parliamentary Committee for Fiscal Federalism, which states that, for the implementation of Article 119, paragraph 5 of the Constitution, according to the principles established by Law No. 42/2009 “there are specific interventions to remove structural weaknesses in certain geographical areas which are likely to affect the cost of benefits”. These structural weaknesses “are identified based on specific socio-economic and environmental indicators, taking into account their link with special financial measures for the sanitary building industry, provided by the law”.

Apart from the fact that we cannot confuse special structural measures, which will be made *ex post*, with the predetermined criteria, which are made *ex ante* and are usually designed to better quantify standard costs, it is very clear that this provision is applicable only to the sanitary building industry^{xxi}.

* A different version of this paper is forthcoming in Balduzzi, 2012. The author sincerely thanks Moris Foglia, Gabriella Franchi, Francesca Sabatelli and Paolo Zuddas for their support and for their final reading of this paper.

^I The draft Legislative Decree was approved by the Council of Ministers on October 7th, 2010; on December 16th, 2010 during the Joint Conference an agreement was reached which also changed the original text. On March 24th, 2011 the Parliamentary Committee for the Implementation of Fiscal Federalism approved a favourable recommendation, provided that, however, the Government reformulates the text of the draft Legislative Decree on the basis of a different text adopted by the Committee. On March 31st, 2011 the Council of Ministers approved the final text of the Decree.

^{II} Vertical subsidiarity, on the other hand, suggests that administrative competencies are allocated to the territorial authorities (i.e. the Municipalities, under article 118, paragraph 1, of the Constitution) which are closer to citizens.

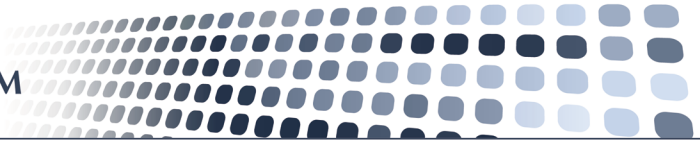
^{III} However, reflections on possible regional participation (even indirectly) seem rather less important in the choice of one or more members of the renewed composition of the Constitutional Court since it is not a decisive element in the construction of a federal system. Moreover, even if it did not change the rules regarding the election of constitutional judges, the creation of a genuine federal Senate already meets this need, thanks to the participation of senators in Parliament via a joint session—electing five members of the Constitutional Court.

^{IV} However, the Austrian model, in which the election of the members of the *Bundesrat*⁷ is attributable to the provincial Diets corresponding to the legislative power, must be rejected since this method of appointment makes the position of the second Austrian Chamber weaker: see Luther 2009.

^V Di Pietro's IDV voted in favour of the bill, the PD abstained and only Casini's UDC voted against the bill.

^{VI} In particular, in the Parliamentary Committee for the Implementation of Fiscal Federalism, the PD abstained, while the IDV, the UDC, Rutelli's API and Fini's FLI voted against the draft Legislative Decree No. 68/2011.

^{VII} A political key to the interpretation of the principle of territoriality is the slogan “everybody is the owner at home”, which was a winning formula yet lacked solidarity during a (past?) political season in Italy.



^{VIII} Concerning the links between fiscal federalism and health federalism discussed in this paper, see also Article 8, paragraph 3, of Law No. 42/2009, which includes health expenses among those related to Article 117, paragraph 2, letter m of the Constitution.

^{IX} See also the aforementioned Article 21, paragraphs 3 and 4, of Law No. 42/2009. Regarding the list of fundamental functions, the main objection seems to be related to the setting of a percentage limit at seventy percent of expenses, as certified by the last account of the budget available on the date of entry into force of Law No. 42/2009, as regards the general functions of directors and the management and control of Municipalities and Provinces. In fact, the risk is that the distinction between what is essential and what is not essential only depends on its financial sustainability.

^X Legislative Decree No. 216/2010 would guarantee a “shared process” in order to make the criteria politically acceptable for Municipalities and Provinces (see *Relazione sul federalismo fiscale*, 2010). Nevertheless, the Legislative Decree does not really enable Municipalities and Provinces to communicate to S.o.s.e. s.p.a. the functions deemed particularly worthy of consideration in the area of their jurisdiction and the list of particularly critical public services, which gives priority to the allocation of resources.

^{XI} Therefore, it is uncertain whether the mechanism of field studies can be effectively used in the public field by correcting the alterations sometimes produced regarding the accounting data of firms and the self-employed, for example, by overestimating or underestimating revenue values and taxable income.

^{XII} In particular, S.o.s.e. s.p.a. is a public corporation established with 88% participation in the share capital of the Ministry of Economy and Finance and 12% participation of the Bank of Italy, entitled to carry out all the activities related to the construction, use and updating of sector studies, and any other methodological supports to the Administration on tax and financial business economy. This organisation is considered neutral and able to operate in an impartial way (see *Relazione sul federalismo fiscale*, 2010), but it certainly does not enjoy the independence of other bodies such as administrative agencies or administrative independent authorities, because the Ministry can choose S.o.s.e. s.p.a.’s members and interfere with its activity. From this perspective, if the structure of Italian public finances has become a “crooked tree” (see again *Relazione sul federalismo fiscale*, 2010, 1), in any case, only political bodies (Municipalities, Provinces and Regions) have been and will be accountable to it, without considering the kind of technical methods used and their authors (in particular S.o.s.e. s.p.a.).

^{XIII} The introduction of this provision was strongly supported by the PD during the work of the Parliamentary Committee for the Implementation of Fiscal Federalism.

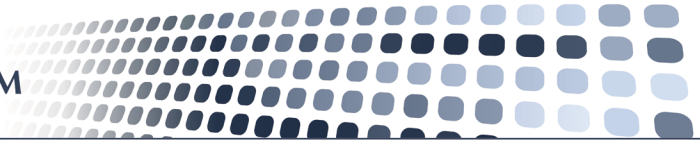
^{XIV} This word, which characterised the draft Legislative Decree, was removed during the work of the Parliamentary Committee for the Implementation of Fiscal Federalism, but it is only a purely formal amendment because it is a benchmark.

^{XV} Article 27, Paragraph 5, states that the State-Regions Conference chooses three out of five benchmark Regions. The five Regions are selected by the Minister of Health in consultation with the Minister of Economy and Finance after consulting with the Minister for Relations with the Regions. The five Regions must ensure the delivery of the essential levels of care in conditions of economic equilibrium, must not be subject to financial recovery plans and must be identified according to the criteria of quality, appropriateness and efficiency. The provision, compared to the draft Decree of October 7th, 2010, also states that “in the identification of the Regions the need to ensure the geographical representation of the North, Centre and South, with at least one small geographic Region, should be taken into account”. Nevertheless, it is easy to understand how this provision, mainly dictated by political motivation, complicates the selection of the benchmark Regions because the selection could be in conflict with the above-mentioned conditions of quality, efficiency and appropriateness.

^{XVI} A weighted average is certainly not by definition a mathematical average but, if the only relevant element is the distribution of regional population according to the age factor, a (further) weighting, required by the Legislative Decree, could probably simply involve the relationship between the high number of those belonging to a particular age group and the high number of those belonging to all the other age groups (for a different approach see Pammolli-Salerno, 2010, 11, and Pammolli-Salerno, 2011, who propose an algorithm that finds the arithmetic mean of the values of *per capita* expenditure by age group).

^{XVII} In particular, we must highlight the numerous interventions by members of the PD, the advice of this parliamentary group and the intervention of Felice Belisario (IDV), in which he stresses the “lack of any reference to demographic characteristics, topography, infrastructure and the distribution of hospitals in relation to those characteristics”.

^{XVIII} Nevertheless, during the hearing of March 2nd, 2011 in the Parliamentary Committee for Fiscal



Federalism, the same Antonini pointed out, with reference to the standard costs in health care, the conservative nature of the Decree that “does not intend to distort the law in force”. A way out for the matters discussed in this paper could be represented by Article 29 of Legislative Decree No. 68/2011, according to which the criteria referred to under Article 27 must be updated every two years and subject to agreement in the State-Regions Conference. However, in the draft Decree agreed upon on December 16th, 2010, purely political reasons prevailed that aimed at preserving the previous proportions between large and small Regions and among the Regions located in the South, the Centre or the North of our Country. Moreover, the constitutionality of this rule, which literally assigns the task of changing the provisions of an act having the force of law (an entire Article of the Decree) to an agreement in the State-Regions Conference, seems very problematic.

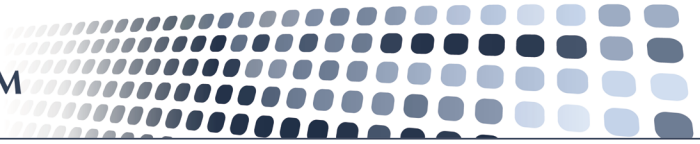
^{XIX} See also Belisario, 2010, 2, who stresses that, “in theory, the requirement of a balanced budget can be found both in the Regions with high levels of spending and in the Regions with low levels of spending”. As a consequence, the standard cost would be “a multiplicative constant of weighing population” and would be “irrelevant to the allocation of funds and boosting the efficiency of the Regions”.

^{XX} Article 27, Paragraph 4, of Legislative Decree No. 68/2011, could be amended by adding a clause stating that in the Regions of reference cost values receive funding that is proportional to the requirements of individual Regions.

^{XXI} According to what has been argued in this essay, we must rapidly analyse some recent contributions by scholars who have tried to calculate standard costs pursuant to Legislative Decree No. 68/2011, even given the broad design of this provision. From this perspective, Pammolli-Salerno, 2011, 3 ff., carried out a simulation and shared the National Health Fund for 2011, which represents the reference for 2013, the year in which the reform will be applied using three Regions considered benchmarks (Umbria, Emilia-Romagna, Lombardia). The percentages obtained from the simulation differ only marginally from those of the apportionment of 2010. The limit of this exercise is that it is not perfectly in line with the final text of the Decree: in fact, there is a small Region, which is also in the Centre of Italy, but there is no Southern Region. Caruso-Dirindin 2011, 11 ff., instead used the following Regions in their simulation based on Legislative Decree No. 68/2011: Lombardia (North), Toscana (Centre) and Basilicata (South and small Region), and by comparing the old and the new methodologies they argued that the result of the distribution is independent from the Regions identified as benchmarks. In turn, through a research that temporally precedes Legislative Decree No. 68/2011, Nuti-Vainieri, 2011, 113 ff., chose four different areas with a set of indicators measuring the performance of all the Regions, and then for each level identifying the Regions of reference. These indicators obviously do not correspond to the discipline of the Decree. Finally, see also Gallazzi, 2012, who estimates the standard costs by using deprivation indices and then selecting Lombardia, Umbria and Puglia as benchmark Regions.

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