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State accountability for violations of EU law by Regions: infringement proceedings and the right of recourse

by

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Abstract

The 2001 constitutional reform in Italy has promoted a more active participation of the Italian Regions in the law-making process and, even more significantly, also in the implementation of EU law. However, the EU system continues to be characterised by the liability of a Member State before the EU institutions for violations of EU obligations even when these violations are ultimately ascribable to its Regions. This paper aims to investigate the Italian domestic legal order to identify the procedures and/or instruments that make infra-State bodies accountable for violations of EU obligations; and to analyse the EU infringement proceeding, its impact on the Italian domestic legal order, the introduction of a right of recourse that allows the State to request damages to non-compliant Regions, its effectiveness and concrete application.

Key-words

Right of recourse, infringement proceeding, liability of State and Regions, violation of EU law

1. Foreword

In the framework of European integration, over the past few years the role of Regions and other sub-State bodies has become more prominent (Bullmann 1997: 3 ss.). This trend is rooted in the institutional and functional transformation of the European Union that has called for greater participation of sub-State governments (Pizzetti 2002: 936). Thus, sub-State bodies are now not only the target of EU policy-making, but also the very instruments of its implementation.

The participation of sub-State levels of government in the law-making and implementation processes is further encouraged through a general tendency towards territorial decentralisation (Mastromarino 2010: 79 ss.) that can be observed in all EU Member States.

It should be noted that the European Union itself partly contributed to this decentralisation process: for example, EU policies concerning Structural Funds – that are allocated to Regions – have contributed, over the past decades, to a progressive decentralisation of States. Also, with regard to compliance with the Copenhagen criteria laid down in 1993 for the accession of new EU Members, the EU Commission has placed special emphasis on territorial decentralisation (that was not, however, a binding criterion).

It appears that the EU is no longer completely and utterly "blind" (Ipsen 1966: 228 ss.) towards a State's internal levels of governments, and it should be acknowledged that the latter have acquired a more active role at EU level. It could be said that today, Member States have a '*duty*' to recognize the more significant role of sub-State bodies.

In this sense, the 2001 constitutional reform in Italy marked an important step forward towards the recognition of Regions in their "EU dimension" (Sardella 2007: 431). As a consequence of the radical changes to Art. 117, paras. I and V, of the Italian Constitution, the relation between EU and domestic law has evolved significantly to comprise the regional level of government as well. From a constitutional perspective, the role of the Regions in terms of relations with the EU has certainly been 'strengthened' through the formal recognition of their 'constitutionally sanctioned right' (*diritto costituzionalmente qualificato*) to participate in the making and implementation of EU law on matters within

regional competence: the participation of Regions in EU processes is no longer "granted" (*ottriata*) but has become "compulsory" (*dovuta*) (D'Atena 2002: 921).

As a result of the more active involvement of Regions in EU law-making and particularly in the implementation phase, Regions have also become accountable – exclusively, from an national viewpoint – for correctly and promptly complying with EU obligations.

From a European perspective, it is a fundamental principle that the responsibility for violations of EU law lies entirely with Member States. Pursuant to Art. 4.3 TEU, States "shall take any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the Union".

Similarly, the obligation to cooperate (Porchia 2008) laid down in Art. 4.3 TEU is now a consolidated tenet of the jurisprudence of the Court of Justice. While the Court has sanctioned the obligation for all the levels of government of the Member States, all the judges, the administration and local institutions[I] to implement EU regulations promptly and efficiently, it has also repeatedly stressed that the only subject accountable for violations of EU law is the State[II]. It is therefore immaterial for the purpose of EU law that any violation may be attributable to other State institutions – be they public or territorial entities[III] – and no relevance is attached to the constitutional distribution of competences within that State. EU law provides for the principle whereby the Union, while recognising the national identities of Member States "inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government" (Art. 4.2 TEU), is indifferent to such distinctions. The responsibility of Regions or other forms of local government does not apply to infringement proceedings started by EU institutions.

However, on the internal level, the question is rather more complex. It is undeniable that, based on Italy's constitutional distribution of competences, particularly pursuant to the amended Art. 117 Const., the principle of cooperation under Art. 4.3 TEU is a binding obligation that applies also to Regions. Therefore Regions, in their areas of competence, are expected to adopt measures that ensure the enforcement of all the obligations arising out of the Treaties and other Community law and to avoid actions that may compromise the achievement of EU objectives.

However, when EU institutions launch infringements proceedings against a Member State, it is interesting to investigate whether, and how, that State is entitled to request compensation, based on domestic law, from its Regions and/or other local institutions that are 'materially' responsible for the non-fulfilment or infringement of EU obligations. This paper aims to investigate the existence, in the Italian domestic legal order, of procedures and/or instruments that, in light of the current distribution of competences at constitutional level, would make sub-state bodies accountable for violations of EU law and obligations.

2. The infringement proceeding in EU Law

EU institutions oversee the fulfilment on the part of Member States of obligations that arise out of EU membership as laid down in Arts. 258-260 TFEU (*ex* Arts. 226-228 TEC). To this end, EU regulations envisage the possibility for the EU Commission or any Member State to launch a special procedure known as 'infringement proceeding' that, with some exceptions, consists of three phases: *prelitigation*, *litigation* and *execution*.

It should be noted that sub-State institutions are not legally entitled to participate in any of these phases, because only the State can be held accountable. EU law does not envisage the possibility for sub-State bodies to appear before the EU Commission or the Court of Justice to justify the adoption of – or failure to adopt – specific measures.

In the *pre-litigation phase*, as laid down in the Treaties, the EU Commission is charged with ensuring "the application of the Treaties, and of measures adopted by the institutions pursuant to them", as well as with overseeing "the application of Union law" (Art. 17.1 TEU). The Commission is therefore entitled to start an infringement proceeding against any Member State and to perform the preliminary judicial investigation required to establish the alleged violation of EU law. Then the Commission shall deliver a reasoned opinion on the matter "after giving the State concerned the opportunity to submit its observations". According to Art. 258 TFEU, at this point "if the State concerned does not comply with the opinion within the period laid down by the Commission, the latter may bring the matter before the Court of Justice of the European Union". Thus the second phase – if necessary – begins: to establish by judicial means the infringement reported in the reasoned opinion issued by the Commission.

The Commission is also in charge when the pre-litigation phase is initiated by a complaint lodged by one Member State against another Member State presumed to have violated EU obligations (Art. 259 TFEU). In fact, before a Member State brings an action against another Member State for an alleged infringement of an obligation under the Treaties, it shall bring the matter before the Commission. The Commission shall deliver a reasoned opinion after each of the States concerned has been given "the opportunity to submit its own case and its observations on the other party's case both orally and in writing". However, "if the Commission has not delivered an opinion within three months of the date on which the matter was brought before it", the absence of such an opinion shall not prevent the matter from being brought before the Court.

It should be stressed that the aim of the pre-litigation phase is not to punish a Member State, but to "restore the violated legality of the EU law" (Fumagalli 2000: 29), in that the State is given the opportunity to remedy the violation, thus preventing a sanction by the Court of Justice and, at the same time, being allowed to justify its position. This point makes clear that EU law does not envisage the possibility for sub-State bodies to address the EU institutions directly to argue in favour of their actions and to motivate their stance with regard to EU obligations.

As regards the *litigation phase*, no specific norms are contained in the Treaties. The Court of Justice shall therefore apply the general norms concerning the role, the make-up and the functioning of the Court.

Conversely, the *executive* phase (Art. 260 TFEU) is regulated in greater detail and some new elements were introduced by the Treaty of Lisbon (Porchia 2009: 224 ss.) that are particularly relevant for the purpose of this paper. If the Court of Justice of the European Union finds that a Member State has failed to fulfil an obligation under the Treaties, "the State shall be required to take the necessary measures to comply with the judgment of the Court".

If subsequently the Commission considers that the Member State concerned has not taken the necessary measures to comply with the judgment of the Court, it may bring the case before the Court "after giving that State the opportunity to submit its observations". It shall specify the amount of the lump sum or penalty payment to be paid by the Member State concerned which it considers appropriate in the circumstances.

Lastly, "if the Court finds that the Member State concerned has not complied with its judgment" it may impose a lump sum or penalty payment on it.

One of the new elements introduced by the Treaty of Lisbon concerns the fact that in case of "double infringement" (Porchia 2009: 224) – that is a violation of EU obligations followed by the failure to comply with the judgement of the Court of Justice – the Commission's reasoned opinion is no longer required, thus significantly speeding up the procedure.

Another provision (Art. 260.3 TFUE) was also introduced whereby, even in the prelitigation phase, when the Commission brings a case before the Court pursuant to Article 258 on the grounds that a Member State has failed to fulfil its obligation to notify measures transposing a directive adopted under a legislative procedure, "it may, when it deems appropriate, specify the amount of the lump sum or penalty payment to be paid by the Member State concerned which it considers appropriate in the circumstances". If the Court finds that there is an infringement "it may impose a lump sum or penalty payment on the Member State concerned not exceeding the amount specified by the Commission". The payment obligation shall take effect on the date set by the Court in its judgment. Consequently, a lump sum or penalty payment may be imposed on a Member State as early as at the end of the prelitigation phase[IV].

The changes introduced by the Lisbon Treaty undoubtedly aim to encourage greater rigour – as requested by the EU Commission[V] – in addressing violations of EU obligations by Member States through speeding up the infringement proceeding, increasing financial sanctions and acquiring greater relevance as deterrents.

3. The effects of the infringement proceeding on the domestic legal order

Given the considerable number of infringement proceedings launched by the EU Commission against Italy – mostly related to violations of EU law on the part of Regions – and considering the more stringent attitude of EU institutions towards non-compliant Member States, over the past few years efforts have been channelled to amend the Italian domestic legal system on two aspects.

First, it was decided to ensure a more active engagement in the pre-litigation phase before the EU Commission so as to prevent and limit the appearance of the State before

the Court of Justice.

Second, the State introduced a right of recourse to be exercised against non-compliant Regions and local institutions mainly for the purpose of creating a deterrent that would encourage prompt adherence to EU obligations by the Regions and other local institutions in terms of promptly enforcing EU norms and preventing violations of EU law in its implementation.

As regards the first measure adopted, it should be noted that several infringement proceedings were started not as a consequence of delay in the implementation of EU law, but with regard to a clear violation of EU norms due to "scarce attention to EU obligations", the "complexity of EU law" (Parodi and Puoti 2006: 12), but also because of the uncertainty generated by the new distribution of competences laid down in the Constitution and the consequent difficulties in coordinating the actions of the State and sub-State bodies, particularly the Regions.

However, it was in the past that the Italian domestic legal order tended to lag behind when implementing EU law and violations of EU obligations were much more frequent. In recent years Italy has shown a growing commitment and greater attention to the enforcement and implementation of EU law.

In the Nineties, Italy was in a state of "*total* non-compliance" (Boncinelli 2008: 203 ss.), when only 67% of EU directives were correctly transposed and enforced in the internal legal order. The number of infringement proceedings against Italy rose exponentially in the following years: 201 proceedings were still open in 2002; 212 in 2003; and 247 in 2005. Starting from 2006, the scenario improved significantly: 226 infringement proceedings were launched in 2006, 159 in 2008, and 136 by 31 December 2011[VI].

This decrease is due, first, to the attempts that were made to improve collaboration between the State and the Regions, setting procedures and processes that would ensure a more timely and comprehensive exchange of *information*, and envisaging the active participation of the Regions in the various phases of the infringement proceeding – especially in the pre-litigation phase.

Significantly, in this sense an Agreement was signed at the Unified Conference (*Conferenza Unificata*) of 24 January 2008[VII], when the Government committed to informing Regions "in a timely and comprehensive manner", "for the duration of the proceeding", every time the EU Commission would launch an infringement proceeding against the State

for aspects that are relevant for the Regions by virtue of their constitutional competence or simply when the Commission requests information on issues concerning the Regions (Art. 2). The Regions, for their part, committed to providing the Government, also "in a timely and comprehensive manner", the information requested by the EU Commission.

More specifically, the Government committed to requesting an extension of the deadline to respond as laid down by the EU Commission if a request in this sense would be filed with the State's European Policy Department by a Region and supported by solid arguments in favour of a postponement. If necessary, the Government would summon the Regions for a "rapid definition of the position to be argued and the actions deemed useful to settle the relevant infringement procedure, considering the competences of each party with regard to the object of the infringement proceeding" (Art. 3). The Agreement also provides for the Regions, after meeting with the European Policy Department and the relevant State Administration, to participate in meetings with EU Commission representatives and to contribute actively to the closing of the proceeding.

Moreover, according to the same Agreement, in cases when the Court of Justice is addressed for violations of EU law (Arts. 258 and 260 TFEU), the Regions can collaborate with the Ministry of Foreign Affairs "for the purpose of drafting a defence strategy, providing elements that fall within their competence that may be relevant to the defence documentation prepared by the State Attorney's Office". A Region may also participate in coordination meetings convened for that purpose by the Regions (Art. 4).

In case the infringement proceeding reaches the executive phase, the Agreement requires the interested Regions to be "promptly notified" and consulted "on which measures they have adopted or intend to adopt to remedy the violation" (Art. 5).

Lastly, the Provinces (*Province*), Municipalities (*Comuni*) and Mountain Communities (*Comunità montane*) also committed to "implementing immediately and in full the actions required with reference to infringement proceedings for actions attributable to them, collaborating loyally and in full with the Government throughout the phases of the infringement proceedings and complying with any formal requirements related to the submission of documents and to communication between the State and the EU Commission" (Art. 6).

The Agreement clearly aims to ensure the participation of Regions and local bodies in the prelitigation and possibly also in the executive phase of an infringement proceeding, in

an attempt to fill a gap of legitimacy at the EU level. In particular, it aims to prevent that measures are undertaken against the State as a consequence of a violation or non-compliance with EU obligations on the part of sub-State bodies.

In this sense it is interesting to note that the recent Law no. 234 of 24 December 2012, concerning "General norms on the participation of Italy in EU policy-making and the implementation of EU law and policies", aims to strengthen the prerogatives of *information* and *control* on jurisdictional procedures and infringement proceedings against Italy, partially sanctioned by Law 11/2005 and the 2008 Agreement.

The recent Law reiterated the need for the Prime Minister (*Presidente del Consiglio dei ministri*) or the Minister of European Affairs to "send quarterly reports to the Chambers, the Court of Auditors", as well as to "the Regions and the Autonomous Provinces" – thus introducing an element of considerable innovation[VIII] – that include information on "infringement proceedings launched against Italy pursuant to Arts. 258 and 260 TFEU, and an outline of the object and the state of the proceeding, as well as on any violations reported against Italy" (Art. 14, para. I, lit. *c*).

Additionally, the Prime Minister or the Minister of European Affairs are required to "inform the Chambers, upon reception of notification from the European Commission, of the decisions adopted by the EU Commission concerning the start of an infringement proceeding pursuant to Arts. 258 and 260 TFEU". This communication shall be notified also to "any other public body whose behaviour makes the object of the action or the infringement proceeding" (Art. 15). Thus, Regions and other local bodies shall be informed so as to allow them to cooperate with the State with reference to the proceeding.

Furthermore, the current Law 234/2012 envisages the possibility for the State to adopt measures, including urgent measures, not only pursuant to "normative measures adopted by the European Union or judgements passed by the Court of Justice", but also in case "infringement proceedings are launched against Italy that entail obligations for the State to ensure compliance" with EU law, if the deadline for compliance predates the date presumed for the coming into force of the 'European delegation law' (*legge di delegazione europea*) or the 'EU law' (*legge europea*)[IX] for the year of reference (Art. 37).

Lastly, as regards improving the information flow between different levels of government, Law 234/2012 provides for the obligation for Regions to "immediately" send by certified mail to the European Policy Department information on the measures that

they have adopted to implement the directives in the sectors that fall within their competence (Art. 40, para. I). Additionally, the State-Regions Conference (*Conferenza Stato-Regioni*) shall provide to the said Department, "in good time and no later than 15 January of every year", the list of regional provisions through which EU directives have been enforced (Art. 29, para. VII, lit. *f*).

There is no doubt that over the past few years the Italian legal order, in spite of the 'silence' of EU law[X], has promoted and increased the cooperation and exchange of information between State, Regions, and local bodies. The participation of sub-State bodies – at least at the national level – has been encouraged and attempts at formalizing it have been put in place with reference to infringement proceedings, thus contributing to a reduction in the number of proceedings brought before the EU Commission and the Court of Justice and to the closing of several ongoing infringement proceedings.

3.1. The 'EU Pilot' project and its outcome

Another useful instrument to reduce, and particularly to prevent, the start of proceedings before the Court of Justice is the 'EU Pilot' project. The project began in April 2008, following a communication by the EU Commission[XI] that recommended the creation of an experimental instrument to ensure greater commitment, closer collaboration and partnership relations between the Commission and the Member States in the application of EU law. The envisaged procedure would be activated promptly to remedy the violation of EU obligations, thus preventing the start of an infringement proceeding. According to the 'EU Pilot' project, every time an infringement proceeding may be launched, a request for clarification is sent to the interested Member State. The national authorities are expected to reply in full and to propose a solution to the problem that is in line with EU law. Member States can apply to the EU Commission for an extension of the deadline to submit their response. Within the next ten weeks, a State's response is examined and the evaluation is then uploaded into the 'EU Pilot' database. If the solution proposed is not compatible with EU law, the infringement proceeding is launched under Art. 258 TFUE.

This procedure has *de facto* replaced another practice whereby the Commission, before launching the infringement proceeding, would send an administrative letter to the national authority to discuss aspects of domestic law that raised doubts about their conformity with EU law.

Fifteen Member States have participated in the project since its inception on a voluntary basis, including Italy. Today, twenty-five Member States participate in the project and the results have been highly satisfactory. In the last project evaluation report[XII], the Commission stated that during the period April 2008 – September 2011 a total of 2'121 files were submitted to EU Pilot. Of these, 1'410 files completed the process in EU Pilot: that means that responses to the files have been provided by Member States and assessed by the Commission as compatible or not with EU law. The issues that were brought up[XIII] under EU Pilot concern sectors in which Member States most often encounter interpretation and enforcement problems: "some 33% of files concerned environmental issues, 15% internal market, 10.5% taxation, 8% mobility and transport and 6% health and consumer protection". As regards the 'success rate', "nearly 80% of the responses provided by the Member States were assessed as acceptable", enabling the file to be closed without the need to launch an infringement procedure.

The impact of EU Pilot has therefore been positive: the project contributes to clarifying aspects related to the application of EU law, particularly in those sectors where EU law is most complex, and to solving problems related to violations of EU obligations without resorting to the infringement proceeding.

Participation in 'EU Pilot' by the European Policy Department requires information to be sent to the interested regional and local administrations, thus allowing the establishment of collaboration between the institutional subjects involved and a more correct implementation of EU law by sub-State levels of government.

4. The State's right of recourse: analysis and critique

Since under EU law the State bears sole liability for violations of or failure to enforce EU regulations, regardless of the domestic distribution of competences between the State and local institutions, the Italian legal order has tried to intervene on a more substantial level of the law, with the introduction and definition of the terms and limitations of contributory fault with reference to the responsibility of the State and the relevant sub-State bodies.

The 2007 financial law[XIV] first introduced the possibility for the State to request indemnities from the Regions and territorial institutions that are responsible for the non-

fulfilment and infractions of EU law. This provision envisaged the possibility for the State to request payments for monetary sanctions imposed by judgements of the Court of Justice, while maintaining the obligation for the territorial entities – including Regions – to remedy their violations in a timely fashion.

The provision thus aimed to provide a deterrent by encouraging regional and local levels of government to take their responsibilities with regard to compliance with the obligations that arise out of Italy's EU membership more seriously, particularly in the light of the greater competences entrusted to them by Title V of the Constitution.

The provision contained in the 2007 financial law was also included in Italy's State Community Law (*legge comunitaria statale*) for 2007[XV], with the addition of Art. 16*bis* to Law 11/2005. Lastly, the right of recourse has been regulated in detail under Art. 43 of the recent Law 234/2012 that repealed in full Law 11/2005. Based on the new norms, the State "has the right to subrogate against Regions, Autonomous Provinces, territorial entities, other public entities and similar bodies that are responsible for violations of obligations related to EU law for the financial penalties imposed by the Court of Justice of the European Union pursuant to Art. 260, paragraphs 2 and 3, TFEU"[XVI].

The amount of the damage payment owed to the State shall not exceed the overall amount to be paid by the State as penalty and is determined through a decree issued by the Ministry of Economy and Finance no later than three months after notification of the enforceable judgement against the Italian Republic.

The ministerial decree is an enforceable order and shall be issued upon agreement on the terms of payment for damages with the interested bodies no later than four months after notification to the interested body of the enforceable judgement passed by the Court. The agreement aims to set the amount to be paid to the State and the terms and timing of that payment (also by instalments). If no agreement is reached with the territorial body the Prime Minister shall issue an executive order within the next four months, after consulting with the Unified Conference (*Conferenza Unificata*).

This provision, while certainly innovative, does raise a number of questions.

First, there are problems concerning the compatibility of the right of recourse with the possibility for the State to act in lieu of sub-State bodies as laid down in the revised Title V of 2001, Arts. 117, para. V, and 120, para. II.

As regards the exercise of the State's 'substitutive power' (*potere sostitutivo*) under Art. 117, para. V Const., the implementing regulation (Art. 10 of Law 11/2005, now Art. 41 of Law 234/2012) provides for the Government to adopt measures, also of an urgent nature, to comply with EU legal obligations on matters of regional competence. The interested Regions shall be informed in advance and a deadline shall be set to allow them to remedy the situation autonomously. If necessary, the question may also be submitted for evaluation to the State-Regions Conference.

In case the substitutive power is exercised by the State under Art. 120, para. II, however, the implementing regulations (Art. 8 of Law 131/2003) allow the State to set a reasonable term for the territorial body to adopt the measures requested or necessary to remedy the violation of EU law. Once the deadline has expired, the Council of Ministers, after consulting with the interested body, may adopt the necessary measures, also of a normative nature, or appoint an *ad hoc* commissioner. In cases of absolute urgency, when the exercise of the substitutive power cannot be delayed, the Council of Ministers may adopt the measures required without delay. However, the State-Regions Conference or the State-Towns and local autonomies Conference (*Conferenza Stato-Città e autonomie locali*) shall be informed promptly and may request a review.

In both cases the substitutive procedure then first requires collaboration with the non-compliant body – which allows the latter to remedy the situation within a set timeframe, according to the distribution of competences and a necessary and greater coordination between different levels of government – and subsequently allows the State to act to prevent non-compliance and therefore to avoid being held responsible for it.

So the right of recourse and the State's substitutive power appear to be in contradiction: the State, by acting in place of Regions and local bodies, has the possibility to prevent non-compliance in the enforcement of EU law (Bientinesi 2008: 170; Bertolino 2009: 1302). Therefore in case of inquiries concerning the violation of EU law by sub-State bodies, the State would not be in a position to request *full* compensation from them: on the contrary, since the State has failed to exercise its substitutive power, it would bear responsibility for the violation according to both EU and domestic law (Bientinesi 2010: 194).

This objection was rejected by legal theorists, who argue that "the State cannot always make up for regional non-compliance, as shown for example with regard to regulations on

public funding to business enterprises" (Porchia 2011: 423). Considering that it is not possible to foresee all the occurrences that may lead to violations of EU law by sub-State bodies, and in the light of the State's responsibility for failure to exercise its substitutive power, it would not be unreasonable to envisage a right of recourse for the latter.

Moreover, while this matter falls outside the scope of this paper, it would be advisable to pre-emptively consider the State's *obligation* to exercise its substitutive power in cases of regional non-compliance. Should this obligation be in force, both EU and domestic law would recognize that the responsibility for violations of EU law rests solely with the State. Consequently, the right of recourse would lose its legitimacy. It could be argued, in addition to the objections above, that the constitutional recognition of a regional competence in the implementation of EU law does not relieve the Regions of their responsibility, therefore a joint responsibility of State and Regions should be envisaged.

Other perplexities arise with regard to the fact that in the pre-litigation phase the State – who bears full liability as regards EU law – is allowed to learn about non-compliance and to adopt the measures that would prevent the start of infringement proceedings and the subsequent judgement (Bini 2010: 853). In the case of litigation with EU institutions, a number of instruments are available to the State to prevent the proceedings from reaching the judgement stage: failure to do so would therefore probably be attributable solely to the State.

In recent years the domestic legal order has introduced a number of provisions that provide for greater participation by and collaboration with non-compliant sub-State bodies also in the pre-litigation phase. These procedures serve to fill, at least in part, the existing gap of legitimacy. In this sense the right of recourse is available only as a measure of last resort.

Another aspect contributes to creating uncertainty on the use and effectiveness of the right of recourse as a deterrent. At a time of financial difficulty such as the one Italy is going through at the moment, how can the State receive payment for damages from Regions and other local bodies whose budgets are already shrinking? Therefore, the 'principle of reality' appears to take primacy over the principles of law, posing significant limitations to the implementation of domestic policies. Furthermore, it can be agreed that until a derivative financial system is in place, it would be difficult "for the State to use the right of recourse as a powerful deterrent tool" (Boncinelli 2008: 225).

Lastly, it is true that the provisions regulating the right of recourse envisage an agreement between the State and the non-compliant body or, in lack thereof, an opinion of the Unified Conference. No matter how desirable this may appear, it is doubtful that an agreement could be reached: in abstract terms it is almost impossible to pre-set the criteria to distribute responsibilities. Given the weakness of such an agreement, the State would always be entitled to 'distribute' responsibilities and, more significantly, to set the amount of damages to be paid by the Region. The non-compliant body, however, may appeal to the competent courts to challenge any such decision.

5. The application of the right of recourse

The instrument available to the State to request compensation from sub-State bodies responsible for non-compliance with EU law for sanctions imposed by the Court of Justice has not attracted much attention among legal theorists and it has remained largely neglected, in spite of its innovative character.

In legal practice this instrument, that functions as a deterrent, has proven scarcely effective since Regions continue to remain largely non-compliant in the enforcement of EU law. Very few Regions have taken on a 'proactive' role in the enforcement of EU law, while most remain non-compliant particularly in the adoption of Regional Community Law (*legge comunitaria regionale*). It is only upon direct 'prodding' by the State that Regions appear to cooperate for an adequate 'transposition' of EU obligations into the domestic legal order.

It should be noted that the State itself has appeared quite cautious in the use of this instrument. In the rare instances in which the State has exercised its right of recourse, the matter concerned compensation from municipalities following a judgement by the European Court of Human Rights (ECtHR) for violations of the European Convention on Human Rights (ECHR) (Art. 43, para. X, Law 234/2012). To date, the State has never exercised the right of recourse for judgements passed by the Court of Justice for violations of EU obligations by sub-State bodies.

Nevertheless, considering the parallels between the two cases, it is possible to examine these cases to draw some preliminary conclusions.

First, in all the instances that have occurred, the State has acted against a municipality – not a Region[XVII] – to request, jointly with the competent Region, the payment of a large sum related to the violation of the ECHR. More specifically, following the judgment by the European Court of Human Rights, the State had been ordered to pay a sum to a private citizen as just satisfaction for violation of Art. 1 of Additional Protocol 1 of the ECHR.

All the local institutions involved have appealed to the Regional Administrative Court (*Tribunale amministrativo regionale*) against this exercise of the right of recourse, claiming excessive power of the State based on "misunderstanding of the facts, wrong assumptions, faults in motivation and patent incongruity". The claimants maintained that before exercising its right of recourse the State should have investigated in detail the actual responsibilities of the individual municipalities involved in violating the rights of an individual as ruled by the ECtHR.

Interestingly, according to the complaint filed by the local institutions, the order of payment issued by the Presidency of the Council of Ministers diverged from the opinion filed by the Unified Conference without justifying that decision. On two occasions, after failing to reach an agreement with the interested local body, the State – under Art. 16*bis*, paras. VIII and IX, Law 11/2005 (now Art. 43, paras. VII and VIII, Law 234/2012) – had been required to request the opinion of the Unified Conference. The latter, in both cases, expressed a negative opinion[XVIII], asking the Government to set up a working group to determine which procedure, if any, should be followed to request compensation payments, possibly through an agreement to be recognised by the Conference itself, in order to determine the actual degree of responsibility of the various entities involved.

It is interesting to note that since the early applications of the right of recourse the Unified Conference has raised perplexities on the possibility to determine the actual responsibility of each body involved and suggested the establishment of a consultation committee with the State. Moreover, the opinion issued by the Conference expresses concern about the fact that the amount to be paid is neither proportional to the size nor the limited financial capacity of the local bodies involved, and this particularly at a time of economic crisis which Italy is going through at the moment.

On 20 April 2011, the State-Regions Conference[XIX] also expressed its doubts on the application of the right of recourse, through the approval of an act that contained an amendment to the then Art. 16*bis* of Law 11/2005. This Conference also recommended a

political meeting with the Government to reach an agreement on the exercise of the right of recourse.

Both proposals were disregarded at the time and have not figured in the recent reform operated through Law 234/2012.

Significantly, all the instances in which the State has claimed the right of recourse have been judged as inadmissible for jurisdictional reasons by the Regional Administrative Courts involved. In the controversies about the exercise of the right of recourse by the Prime Minister, the Courts have ruled that the matter falls within the jurisdiction of ordinary courts.

Thus it appears to be too early to pass a final judgement on this instrument. It is certainly interesting that, so far, it has not been applied against a Region or a local body for violations of EU law to question their responsibility. It is true that, as noted, violations have decreased sharply over the past few years, but it is also evident that this is mostly due to other instruments that ensure a constant flow of information between the different levels of government and a greater participation of infra-State bodies in the prelitigation phase of infringement proceedings. However, there is room for doubts on the effectiveness of the right of recourse as a deterrent in the eyes of sub-State bodies, particularly – as facts have shown – with regard to its application, the way it is regulated, and the lack of preventive and correct concertation with the interested body.

6. Conclusions

Regardless of the greater regional autonomy recognised at EU level through reforms undertaken in recent years, today the Italian domestic legal order is characterised by persistent '*vicious*' practices that lead all too often to the launch of infringement proceedings against Italy by the EU Commission. Several instruments have been made available to the Regions to ensure their participation both in policy-making and the implementation of EU law, but the results remain to be seen.

This situation is partly due to at least two factors. First, the complexity of EU law, particularly in some sectors, that combines with the "physiological elasticity" (Anzon 2002: 232) of matters regulated under the revised Art. 117 of the Italian Constitution. Over the past decade, the Italian State and Regions have been called to discuss – at times quite

heatedly – a new distribution of competences that has often led to violations of EU law as a consequence of jurisdictional doubts and uncertainties on the possibility to exercise certain competences in specific areas.

Secondly, another element that contributed to the 'vicious' circle that appears to have set in concerns the substitutive power of the State. This applies chiefly to the practical level: the exercise of the substitutive power by the State may ultimately have to 'cede' or give way to subsequent measures adopted by the Regions on matters falling within their competence, according to the principle of '*cedevolezza*', thus losing its effectiveness. However, this fact is seldom explicitly mentioned by the State. Consequently, the overall system is characterised by uncertainties that have led Regions not to comply with EU obligations. Several Regions have regulated EU regional law (Bertolino 2009: 1249 ss.) in their regional legal order, but the State's substitutive power has invalidated provisions that have become an ordinary rather than an extraordinary instrument. Most Regions have abstained from approving EU Regional Law annually, which would ensure a timely and efficient implementation of EU law. The Regions continue to appear rather "cold" (Bientinesi 2008: 139 ss.) towards a more active participation in EU law making and implementation.

This analysis has shown that in recent years the EU Commission and the Court of Justice, on the European front, and the State, on the domestic front, have sharpened the instruments available to repress violations of EU obligations by Regions and local bodies.

Many perplexities have been raised on the actual effectiveness of such instruments as deterrents, *in primis* the right of recourse. Therefore, the overall functioning of the system would require a determined and consistent effort to transform this '*vicious*' circle into a '*virtuous*' one. As noted, several steps forward have been taken in this sense, particularly in the form of provisions that require the State, Regions and local bodies to ensure a constant flow of information. Both law making and implementation are "connected in fact to the acquisition of information: the driver of efficiency" (Pastore 2008: 268) depends therefore largely on the quantity and the quality of 'incoming' and 'outgoing' information.

Much remains to be done in this sense. In particular, in light of the territorial decentralisation that has taken place over the past twenty years – in spite of the global economic crisis that is pushing towards re-centralisation – it should be recognized that the State "is no longer the unrivalled king of the hill" (Peters and Pierre 2001: 132), that is has

lost the 'baton of command'. However the State can, and *must*, leverage the 'baton' of dialogue and negotiation. In this sense, special emphasis should be placed upon shared normative provisions and loyal collaboration between the State and Regions not only on the organisational and procedural, but also on political and cultural levels.

It is the only way for Italy – and the territorial bodies that make up the domestic legal system – to achieve 'full maturity' in a European perspective and, particularly, to ensure greater efficiency in Italy's participation in the European integration process and the use of the instruments available for its application.

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[I] See Court of Justice, case C-224/97, 29 April 1999, *Erich Ciola v. Land Vorarlberg*, in *ECR*, I-2517; case C-438/99, 4 October 2001, *Jiménez Melgar*, in *ECR*, I-6915; case C-198/01, 9 September 2003, *Consorzio Ind. Fiammiferi v. AGCM*, in *ECR*, I-8055.

[II] Court of Justice, case C-33/90, 13 December 1991, *Commission v. Italy*, in *ECR*, I-5987.

[III] See Court of Justice, case C-211/91, *Commission v. Belgium*, in *ECR*, I-6757; case C-503/06, 15 May 2008, *Commission v. Italy*, in *ECR*, I-74; case C-516/07, 7 May 2009, *Commission v. Spain*, in *ECR*, I-76; case C-573/08, 15 July 2010, *Commission v. Italy*, in *ECR*, I-95.

[IV] Currently, sanctions against Italy imposed by the European Commission amount to a minimum lump sum of 8,854,000 euros and between 10,880 and 652,800 euros per day in penalty payments. The lump sum is to be paid also when the situation has been remedied while the case was heard before the Court of Justice, while the penalty is applied when violations persist after a judgement is passed; it is calculated on a daily basis starting from the day of the Court's judgement.

[V] See Communications from the European Commission SEC (2005) 1658; SEC (2010) 923/3; SEC (2010) 1371. The first one in particular was adopted following the judgement passed by the Court of Justice on 12 July 2005 (case C-304/02, *Commission v. France*, in *ECR*., I-6263), where for the first time the possibility was envisaged for the cumulative application of a lump sum and a penalty based on delayed compliance. The Court specified that while Art. 260 TFEU provides for lump sums and penalties to be regarded as alternatives, both may be applied by the Court of Justice in case of persistent and ongoing non-compliance.

[VI] See Presidenza del Consiglio dei ministri, Dipartimento per le politiche europee, *La partecipazione dell'Italia all'Unione europea, Relazione programmatica 2012*, 109; European Commission, *Annual report on monitoring the application of EU Law*, 30 November 2012, COM (2012) 714 final, 10.

[VII] Agreement between the Government, the Regions and the Autonomous Provinces, the Provinces, the Municipalities and the Mountain Communities "on the terms of application of obligations arising out of Italy's membership of the European Union and on information guarantees from the Government" dated 24 January 2008, in *Repertorio atti* no. 3/CU of 24.01.2008.

[VIII] This law, which entered into force on 28 January 2013, repealed Art. 15*bis* of the Buttiglione Law no. 11/2005, that required reports to be provided only every six months and did not regulate in any way the terms for the provision of information to Regions and Autonomous Provinces.

[IX] The recent Law 234/2012 aims to reorganise the transposition of EU law, providing in particular for the implementation of EU law into two separate measures (Art. 37): the EU delegation law (*legge di delegazione europea*) concerning delegation provisions required to enforce EU directives; and the EU law (*legge europea*) that, in more general terms, contains provisions to ensure the adherence of domestic law to EU law.

[X] It should be noted that as early as July 2004 the EU Commission issued a Recommendation to provide Member States with "good practices" to facilitate the correct and timely enforcement of EU law into domestic law, particularly directives. These included the recommendation for *close cooperation* not only between the Government and the national Parliaments, but also with "*regional and devolved Parliaments* responsible for transposition" of EU law, particularly through a constant and mutual exchange of information (Recommendation 2005/309/CE of 12 July 2004, in *JO L* of 16.4.2005, on "The transposition into national law of Directives affecting the internal market").

[XI] COM (2007) 502 final, on "A Europe of results – Applying Community Law".

[XII] So far only two evaluation reports have been presented on EU Pilot from the European Commission: the first one on 3.3.2010 (COM (2010) 70 final) and the second one on 21.12.2011 (COM (2011) 930 final).
[XIII] EU Pilot cases have different origins: 49% of these files originated from complaints, 7% were enquiries by citizens or businesses, and a further 44% were files created by the Commission on its own initiative.
[XIV] Law no. 296 of 27 December 2006, Art. 1, paras. 1213-1223.
[XV] Law no. 34 of 25 February 2008, Art. 6, para. I., lit. *e*), and par. II
[XVI] Two other instances are envisaged for the State's right of recourse. The first concerns financial charges "imposed on Italy under the European Agricultural Guarantee Fund (EAGF), the European Agricultural Fund for Rural Development (EAFRD) and other Funds of a structural nature". The second concerns the right of recourse against subjects who are responsible for violations of the European Convention on Human Rights and of the additional Protocols, for "charges paid to enforce judgements passed by the European Court of Human Rights against the State as a consequence of the said violations".
[XVII] See TAR Calabria, Reggio Calabria, judgement 24 May 2012, no. 378; TAR Puglia, Bari, sect. II, judgement 16 July 2012, no. 1461; TAR Veneto, Venice, sect. II, judgement 12 December 2012, no. 1546.
[XVIII] Opinions of the Unified Conference of 16 December 2010 and 29 July 2010.
[XIX] www.regioni.it/upload/Diritto-rivalsa-200411.pdf.

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