# HOW "EUROPEAN" IS THE ITALIAN REGIONAL STATE NOW? A STUDY ON THE EUROPEANIZATION OF THE ITALIAN REGIONAL SYSTEM

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## 1. Overview of the research

To what extent do Italian courts adapt the national legal instruments (principles, rules, techniques, legal concepts) regarding state structure to the requirements of EU law? This paper aims to give an answer to this question by providing an overview of the most emblematic cases of "re-adaptations" operated by the Italian courts in order to ensure the respect of the structural principles of EU law.

This contribution is structured as follows: first, I will explain the reasons why research like this is "difficult", while secondly I will move to the analysis of some legal instruments (principle of competence, substitutive power, "cedevolezza"). Some final remarks will be presented at the end of the paper. Generally speaking, my main idea is that EU law has had a certain impact on the relationship between State and Regions in Italy, especially looking at the seasons of the principle of competence, that has been conceived more and more as referring to the idea of "legislative preference" rather than as to the existence of a "legislative reserved domain".[1]

Article received 05/09/2011; approved 17/10/2011.

1. L. Paladin, *Le fonti del diritto italiano*, Il Mulino, Bologna, 2000, 93 ff.

A preliminary *caveat* should be made before proceeding with the analysis of the instruments and techniques reinvented by the Italian Courts for favouring the respect of the principles of EU law. One should keep in mind the strongly dogmatic nature of the Italian legal system: while the ECJ has been inspired by a strong pragmatism, which gave its case law a certain flexibility, the Italian Constitutional Court is the guardian of a set of principles imbued with the dogmatic flavour of its legal tradition, very refined from a theoretical point of view but also resistant to being reshaped. Bearing this in mind, one can appreciate the efforts made by both courts in their attempt to carry out a sort of convergence, renouncing, at least partly, their original positions (dualism as for the Italian Constitutional Court and monism for the ECJ).

This premise makes clear the focus of the paper. Given the unitary system of courts existing in Italy, and given the particular role of arbiter of conflicts between State and Regions that has to be attributed to the Italian Constitutional Court, I am going to focus on its case law when developing my reasoning in these pages. Obviously, this does not mean that "common" courts (i.e. ordinary and administrative courts) have not readapted legal concepts under pressure from EU law, an example is given by the administrative courts, as pointed out by the domestic literature.[2]

Research like this presents itself as very problematic for at least two reasons: the well known principle of "territorial blindness" of the EU, and the less studied "procedural impermeability" that characterizes the case law of the Italian Constitutional Court.

Territorial blindness refers to the fact that, traditionally, from a "formalistic" point of view, the Regions have been neglected in the EU law context. To express such a situation, German constitu-

2. F. Cortese, "ECJ and Administrative Courts in EU Member States: Towards a Common Judicial Reasoning?" in F. Fontanelli, G. Martinico and P. Carozza (eds.), *Shaping Rule of Law through Dialogue. International and Supranational Experiences*, Groningen: Europa Law Publishing, 2010, pp. 257-271; M. Gnes, "Giudice amministrativo e diritto comunitario" 1999 *Riv. trim diri. pubbl*., 331 ff; N. Pignatelli, "L'illegittimità comunitaria dell'atto amministrativo", *Giur. cost*., 2008, 3635 ff.

tional lawyers use the formula "*Landesblindheit*"[3] (legal blindness towards the territorial subnational entities or simply territorial blindness). This was confirmed in the Treaties (specifically in the former Article 10 ECT), where it can be seen that the subjects of the Community legal order are the states, as holders of the duty to collaborate with each other, which is instrumental for guaranteeing the effectiveness of the supranational law. It could well be argued that this "regional neglect" constitutes just one "element" of the democratic deficit of the EU.

Starting from a "broad" concept of the democratic gap[4] (i.e. focused not only on the question of the EU Parliament's powers) we can in fact conceive the absence of a strong legal *status* for the Regions as one of the most important "constitutional wounds" of the EU, even after the coming into force of the Lisbon Treaty. There are a number of reasons for that: the internationalist origin of the European enterprise, the heterogeneity, in terms of composition, of the Committee of Regions, and the lack of specific remedies for them in order to challenge possible violations of their prerogative.

Despite their unclear status under EU law, Regions play a fundamental role in the implementation of the multilevel policies as the example of the cohesion policies demonstrate.

Procedural impermeability refers to the general reluctance of the Italian Constitutional Court to be involved in interpretative questions that, directly or indirectly, may have to do with EU law.

3. H.P. Ipsen, "Als Bundesstaat in der Gemeinschaft", E. von Caemmerer-H.J. Schlochauer-E. Steindorff (eds.), Probleme des europäischen Rechts: Festschrift für Walter Hallstein, 1966, Bonn, 248.

4. R. Bellamy, "Still in Deficit: Rights, Regulation and Democracy in the EU", *European Law Journal*, 2006, pp. 725-742; B.Crum, "Tailoring Representative Democracy to the European Union: Does the European Constitution Reduce the Democratic Deficit?", *European Law Journal*, 2005, pp. 452-467; A. Follesdal- S. Hix, "Why There is a Democratic Deficit in the EU: A Response to Majone and Moravcsik", *Journal of Common Market Studies*, 2006, pp. 533-562; G. Majone, "Europe's 'Democratic Deficit': The Questions of Standards", *European Law Journal*, 1998, pp. 5-28; A. Moravcsik, "In Defence of the 'Democratic Deficit': Reassessing Legitimacy in the European Union", *Journal of Common Market Studies*, 2002, pp. 603-24; J.H.H. Weiler, "Bread and Circus: The State of European Union", *Columbia Journal of European Law*, 1998, pp. 223-24.

The origin of this doctrine can be traced back to the post-*Granital*[5] scenario, when the Italian Constitutional Court decided to entrust the common judges with the role of natural guardians of the *Simmenthal* doctrine,[6] closing this way the doors (at least in principle)[7] of the constitutional proceedings to the potential conflicts between national law and EU law, since it conceives such potential conflicts as questions of legality and not questions of constitutionality.

## 2. The substantive principles concerning the relationship between State and Regions

### 2.1. The principle of competence

According to the principle of conferral of competences,[8] the State and the Regions can only act within the limits of the competences conferred on them by the Constitution to attain the objectives set out in the fundamental charter. In Italian constitutional law, there are three typologies of competences.[9] The first are competences exclusive to the State, which are listed in Article 117, paragraph 2, of the Constitution. The second are shared (or concurring) competences where State and Regions co-legislate, a "portion" of the matter being acknowledged to each. It is up to the State to give the fundamental principles of the legislative regime by means of legislation known as "framework law" (c.d. "legge-quadro"), and it is up to the Region to

5. Corte Costituzionale, sentenza n. 170/1984. Granital: 1984 CMLRev 756. About this see: M. Cartabia, *Principi inviolabili e integrazione europea,* Giuffrè, Milan 1995.

6. ECJ Case C-106/77 *Simmenthal* [1977] ECR I-62.

7. For this concept and for the exceptions to this scheme see: F.Fontanelli-G.Martinico, "Between Procedural Impermeability and Constitutional Openness: The Italian Constitutional Court and Preliminary References to the European Court of Justice", *European Law Journal*. 2010, pp. 346-364.

8. On the principle of competence in the Italian legal system, see: G. Zanobini, "Gerarchia e parità tra le fonti", in *Studi in onore di S. Romano*, vol. I, Padua, 1939, p. 303; V.Crisafulli, "Gerarchia e competenza nel sistema costituzionale delle fonti", in *Rivista Trimestrale Diritto Pubblico*, 1960, 775 ff; V. Crisafulli, *Lezioni di diritto costituzionale*, II, 1, *L'ordinamentocostituzionale italiano (le fonti normative)*, Padua, 1993, 234 ff; A. Moscarini, *Competenza e sussidiarietà nel sistema delle fonti*, Cedam, Padua, 2003; L. Paladin, *Le fonti del diritto italiano*, Il Mulino, Bologna, 2000, 93 ff

9. A. D'Atena, "Materie legislative e tipologia delle competenze", *Quaderni Costituzionali*, 2003, pp. 15-24.

fill in ("complete") the framework by giving the detailed provisions, which should be consistent with the fundamental principles laid down by the State act. As is evident, this model of "shared competence" differs from the German pattern of *konkurrierende Gesetzgebung*.[10] In Germany, when the State and its *Länder* share a competence, the *Land* "*shall have power to legislate so long as and to the extent that the Federation has not exercised its legislative power by enacting a law*" (Art. 72 Const, *Grundgesetz*). According to the Italian model, instead, the activities of the two actors are conceived of as "complementary". Thirdly, still according to Article 117 of the Constitution,[11]

10. On this distinction, see A. Anzon, "La delimitazione delle competenze dell'Unione Europea", http://www.associazionedeicostituzionalisti.it/materiali/anticipazioni/competenze_ue/index.html.

11. Art. 117 provides:
"Legislative powers shall be vested in the State and the Regions in compliance with the Constitution and with the constraints deriving from EU legislation and international obligations.
The State has exclusive legislative powers in the following matters:
(a) foreign policy and international relations of the State; relations between the State and the European Union; right of asylum and legal status of non-EU citizens;
(b) immigration;
(c) relations between the Republic and religious denominations;
(d) defence and armed forces; State security; armaments, ammunition and explosives;
(e) the currency, savings protection and financial markets; competition protection; foreign exchange system; state taxation and accounting systems; equalisation of financial resources;
(f) state bodies and relevant electoral laws; state referenda; elections to the European Parliament;
(g) legal and administrative organisation of the State and of national public agencies;
(h) public order and security, with the exception of local administrative police;
(i) citizenship, civil status and register offices;
(l) jurisdiction and procedural law; civil and criminal law; administrative judicial system;
(m) determination of the basic level of benefits relating to civil and social entitlements to be guaranteed throughout the national territory;
(n) general provisions on education;
(o) social security;
(p) electoral legislation, governing bodies and fundamental functions of the municipalities, provinces and metropolitan cities;
(q) customs, protection of national borders and international prophylaxis;
(r) weights and measures; standard time; statistical and computerised coordination of data of state, regional and local administrations; works of the intellect;
(s) protection of the environment, the ecosystem and cultural heritage.
Concurring legislation applies to the following subject matters: international and EU relations of the Regions; foreign trade; job protection and safety; education, subject to the autonomy of educational institutions and with the exception of vocational education and training; professions; scientific and technological research and innovation support for productive sectors; health protection; nutrition; sports; disaster relief; land-use planning;

the Regions have legislative powers in all subject matters that are not expressly covered by State legislation (i.e., not included in the list of express powers laid down in the same Article 117), and these competences should be understood as "exclusive" to the Regions. Following the constitutional reform of 2001, the Regions have been invested with a great amount of competence. At least, so it seems on paper looking at the Constitution. The transformation of the Regions into "residual legislators" represents the most important novelty in the constitutional reform of 2001, which has (potentially) contributed to a sort of Copernican revolution. However when looking at the real situation, both some judgments of the Italian Constitutional Court and the presence of "transversal matters" (matters that are not real matters[12] but rather clauses allowing the State to intervene in differ-

civil ports and airports; large transport and navigation networks; communications; national production, transport and distribution of energy; complementary and supplementary social security; harmonisation of public accounts and co-ordination of public finance and taxation system; enhancement of cultural and environmental properties, including the promotion and organisation of cultural activities; savings banks, rural banks, regional credit institutions; regional land and agricultural credit institutions. In the subject matters covered by concurring legislation legislative powers are vested in the Regions, except for the determination of the fundamental principles, which are laid down in State legislation. The Regions have legislative powers in all subject matters that are not expressly covered by State legislation.

The Regions and the autonomous provinces of Trent and Bolzano take part in preparatory decision-making process of EU legislative acts in the areas that fall within their responsibilities. They are also responsible for the implementation of international agreements and EU measures, subject to the rules set out in State law which regulate the exercise of subsidiary powers by the State in the case of non-performance by the Regions and autonomous provinces.

Regulatory powers shall be vested in the State with respect to the subject matters of exclusive legislation, subject to any delegations of such powers to the Regions. Regulatory powers shall be vested in the Regions in all other subject matters. Municipalities, provinces and metropolitan cities have regulatory powers as to the organisation and implementation of the functions attributed to them. Regional laws shall remove any hindrances to the full equality of men and women in social, cultural and economic life and promote equal access to elected offices for men and women.

Agreements between a Region and other Regions that aim at improving the performance of regional functions and that may also envisage the establishment of joint bodies shall be ratified by regional law.

In the areas falling within their responsibilities, Regions may enter into agreements with foreign States and local authorities of other States in the cases and according to the forms laid down by State legislation".

12. F. Benelli, *La "smaterializzazione delle materie". Problemi teorici ed applicativi del nuovo Titolo V della Costituzione*, Giuffrè, Milan, 2007; F. Benelli, "L'Ambiente tra 'smaterializzazione' della materia e sussidiarietà legislativa", www.forumcostituzionale.it/site/index3.php?option=content...; R. Bin, "Materie e interessi: tecniche di individuazione

ent ambits, for example, the so-called legislation on the "*determination of the basic level of benefits relating to civil and social entitlements to be guaranteed throughout the national territory*", which can evidently serve as a Trojan horse for the centralization of competences) a very different picture seems to emerge.

Having recalled the different types of competences, looking at the history of the Italian Regions in relation to Europe one can immediately realize how European commitments have reshaped the original distribution of competences.[13] Many instances of this can be found in the case law of the Constitutional Court as we will see in the next sections of this paper. The engine of this process has been the territorial blindness mentioned above. Since the State is the only entity responsible in case of non-compliance with the requirements of EU law, in many cases the European Court of Justice[14] has been shown not to care about the domestic separation of competences when dealing with cases of non-compliance. This in turn has pushed the Italian actors to force the original distribution of competences in order to avoid sanctions stemming from belonging to the EU.[15]

delle competenze dopo la riforma del Titolo V", paper presented at the workshop organized by the IDAIC – Siena, 25-26 November 2005, 5; P. Carrozza, "Le 'materie': uso delle tecniche di enumerazione materiale delle competenze e modelli di riferimento del 'regionalismo di esecuzione' previsto dal nuovo Titolo V della Costituzione", in G.F. Ferrari and G. Parodi (eds.), *La revisione costituzionale del titolo V tra nuovo regionalismo e federalismo. Problemi applicativi e linee evolutive*, Cedam, Padua, 2003, pp. 69-124.

13. T. Groppi, "L'incidenza del diritto comunitario sui rapporti Stato-regioni in Italia dopo la riforma del Titolo V", http://www.unisi.it/ricerca/dip/dir_eco/grop.htm; M.P. Chiti, "Regioni e integrazione europea", in *Reg. gov. loc.*, 1994, 547 ff.; A.D'Atena, "Il doppio intreccio federale: le regioni nell'Unione europea", *Le Regioni*, 1998, 1401 ff. Recently P. Zuddas, L'influenza del diritto dell'Unione europea sul riparto di competenze legislative fra Stato e Regioni, Padua, Cedam, 2010.

14. See cases 169/82, *Commission v Italy* [1984] ECR 1603 ff. and 168/85, *Commission v Italy* [1986] ECR 2945. On this, see Groppi, "L'incidenza"; G. Guzzetta, *Costituzione e regolamenti comunitari*, Milan, 1994, 171 ff; M. Cartabia and V. Onida, "Le regioni e la Comunità europea", in M.P. Chiti and G. Greco (eds.), *Trattato di diritto amministrativo*, Giuffrè, Milan, 1997, 605 ff.

15. "Regions' activities – or lack of activities – in their areas of competence have sometimes left Italy temporarily out of compliance with EU rules. This is a problem for the national government, as it cannot then plead the existence of provisions, practices or circumstances in its internal legal system in order to justify a failure to comply with EU obligations and time limits (Case C-33/90, Case C-388/01). Indeed, infringement procedures against Italy have been initiated several times over the last decade in fields of regional or concurrent competence; that is, in policy areas where the fulfilment of European obligations requires legislative or administrative acts by the regions. This has been particularly troublesome in envi-

Just to be clear, the Italian Constitutional Court, as we will see, has been always open to the reshaping of the list of competences listed in the different versions of Article 117. We could say that the European mandate has only increased such a predisposition, giving another reason to the Italian Constitutional Court to centralize competences in favour of the State.[16]

When looking at the role of the Regions in the implementation phase, one should distinguish between administrative and legislative activities. As for the administrative side of the implementation, it has been acknowledged that Regions have the power to implement (here implementation should be distinguished from transposition, of course) regulations (Art. 6 D.P.R. no. 616/1977). There is recognition of a general function of address and coordination for the administrative functions performed by the Regions[17] which can be exercised when the requirements of EU law involve the necessity of unitary interest over the whole of the national territory (Art. 9, law no. 86/1989).[18]

ronmental matters (e.g., cases C-225/96, C-87/02C-466/99, C-248/02, C-139/04), but has also affected trade fairs, markets and exhibitions (Case C-439/99). The Eur-infra database (http://eurinfra.politichecomunitarie.it/ElencoAreaLibera.aspx), concerning pending cases at the European Court of Justice, supports this conclusion. Indeed, in at least six cases out of 40 concerning environmental policies, non-compliance was provoked by regional activity. Conflicts between regioni and stato on environmental issues often end up before the Corte Costituzionale. In order to prevent non-compliance with EU obligations, the stato has been vested with the power to execute by substitution in lieu of the regione (Articles 117.5 and 120 Const., Law No. 11/2005). In some cases, the stato is even given the authority to act in a preventive way (for instance, under the Constitutional Court's guidelines (Judgment No. 272/2005), the stato could legitimately adopt an urgency instrument in order to implement EU obligations (such as the milk quota), without involving the Conferenza Stato-Regioni. National acts aimed at avoiding non-compliance are temporary measures, and can be substituted for by properly adopted regional acts" P. Bilancia-F. Palermo-O. Porchia, "The European Fitness of Italian Regions", *Perspectives on Federalism*, Vol. 2, issue 2, 2010, E-122-174, E-167, http://www.on-federalism.eu/attachments/063_download.pdf.

16. Groppi, "L'incidenza".

17. On this function see: L. Paladin, "Sulle funzioni statali di indirizzo e di coordinamento nelle materie di competenza regionale", in *Giur. Cost*., 1971, I, 189 ff.; F. Bassanini, "Indirizzo e coordinamento delle attività regionali", in D. Serrani (ed.), *La via italiana alle regioni*, Giuffè, Milano, 1972, 43 ff.; L. Carlassare, "I problemi dell'indirizzo e coordinamento: le soluzioni giurisprudenziali", *Le Regioni*, 1985, 29 ff; G. Falcon, "Spunti per una nozione della funzione di indirizzo e coordinamento come vincolo di scopo", *Le Regioni*, 1989, 1184 ff.

18. Law 86/89 ("Legge La Pergola") set up a complex mechanism aimed at ensuring the implementation of EU law and introduced an annual Community law ("legge comunitaria"). "Legge La Pergola" has been replaced by law n. 11/2005 ("Legge Buttiglione").

As for the legislative implementation, the issue is much more complicated. Originally the State responsibility in cases of non-compliance (D.P.R. no. 4/1972) convinced it to centralize the competences on State organs, with the consequent alteration of the regional competences. Later (Art. 6 D.P.R. no. 616/1977) the Regions were granted the power to implement EC directives with regional law, but before doing so they had to wait for a State law for the reception of such directives, including the fundamental principles of the matter plus some derogable provisions. We will see this point in the next section when dealing with the issue of *cedevolezza* and the more recent evolutions of the Italian legislation which acknowledge the possibility that the Regions could implement EC directives directly, although with more than one *caveat*.

How did the Italian Constitutional Court react to this shift of competences that occurred in name of EC law commitments? First, the Italian Constitutional Court seemed to admit the possibility that EC law requirements could *de facto* lead to a particular form of shift in the original distribution of competences in the name of the State responsibility for compliance with EC law requirements.[19] In *sentenza* no. 224/1994[20] the Italian Constitutional Court pointed out how the regional competences are subject to limits introduced by EC law, saying that sometimes EC law can render the conditions and prerequisites of the regional competence inoperative. In *sentenza* no. 399/87[21] the Italian Constitutional Court said that Community bodies are not required to respect domestic law fully, even that concerning the distribution of competences between State and Regions (at the same time the Italian Constitutional Court stressed the necessity to respect fundamental principles of the Italian constitutional system- the so-called "counter-limits").[22] In that case, within the frame of the Integrated

19. See *sentenza* no. 382/1993 and *sentenza* no. 632/1988. Groppi, "L'incidenza"; P. Caretti and G.Strozzi, "Luci ed ombre nella più recente giurisprudenza costituzionale in materia di adempimento agli obblighi comunitari", in *Le regioni*, 1988, 196 ff. For a *prima facie* opposite conclusion, see *sentenza* no. 124/1990.

20. Corte Costituzionale, *sentenza* no. 224/1994, www.cortecostituzionale.it.

21. Corte Costituzionale, *sentenza* no. 399/87, www.cortecostituzionale.it.

22. On the counter-limits doctrine, see M. Cartabia, "The Italian Constitutional Court and the Relationship between the Italian Legal System and the European Union", in A. Slaughter, A. Stone Sweet and J. H. H. Weiler (eds), *The European Court and National Courts – Doctrine and Jurisprudence*, Hart, Oxford, 1997, pp. 133-146; P. Ruggeri Laderchi, "Report on Italy", *ibid*., pp. 147-170. The formula "controlimiti" was used for the first time by P.

Mediterranean Programmes, EC legislation has given the Regions functions that differ in part from those included in the catalogue of competences in the national Constitution.

The leading case in this matter is *sentenza* no. 126/1996,[23] where the Italian Constitutional Court pointed out how the implementation of EC norms in the Member States has to take into account their structure (centralized, decentralized, federal). However, in the name of the principle of State responsibility for the implementation of EC law, the Italian Constitutional Court distinguished between a competence of first instance accorded to the Regions in the ambits of their competence and a competence of second instance accorded to the State. Such a competence of second instance permits the intervention of the State but may not create seizure of the competences, rather it justifies supplementary substitutive interventions aimed at defending the State itself from the risk of non-compliance due to regional omissions or actions.[24] This scheme explains why it is also recognized that the State might challenge the constitutionality of regional laws that contrast with EC law obligations, this being an exception to the general rule of procedural impermeability (see *infra*).

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Barile, "Ancora su diritto comunitario e diritto interno", in *Studi per il XX anniversario dell'Assemblea costituente*, VI, Firenze, 1969, 49 and ff.

23. Corte Costituzionale, *sentenza* no. 126/1996, www.cortecostituzionale.it.

24. "*L'attuazione negli Stati membri delle norme comunitarie deve tenere conto della struttura (accentrata, decentrata, federale) di ciascuno di essi, cosicché l'Italia è abilitata, oltre che tenuta dal suo stesso diritto costituzionale, a rispettare il suo fondamentale impianto regionale. Pertanto, ove l'attuazione o l'esecuzione di una norma comunitaria metta in questione una competenza legislativa o amministrativa spettante a un soggetto titolare di autonomia costituzionale, non si può dubitare che…normalmente ad esso spetti agire in attuazione o in esecuzione, naturalmente nell'ambito dei consueti rapporti con lo Stato e dei limiti costituzionalmente previsti nelle diverse materie di competenza regionale..Tuttavia, poiché dell'attuazione del diritto comunitario nell'ordinamento interno, di fronte alla Comunità europea, è responsabile integralmente e unitariamente lo Stato…, a questo – ferma restando, secondo quanto appena detto, la competenza in 'prima istanza' delle regioni e delle province autonome – spetta una competenza, dal punto di vista logico, di 'seconda istanza', volta a consentire a esso di non trovarsi impotente di fronte a violazioni del diritto comunitario determinate da attività positive o omissive dei soggetti dotati di autonomia costituzionale. Gli strumenti consistono non in avocazioni di competenze a favore dello Stato, ma in interventi repressivi o sostitutivi e suppletivi – questi ultimi anche preventivi, ma cedevoli di fronte all'attivazione dei poteri regionali e provinciali normalmente competenti – rispetto a violazioni o carenze nell'attuazione o nell'esecuzione delle norme comunitarie da parte delle regioni*" (*sentenza* no. 126/1996). On this, see Groppi, "*L'incidenza* cit.".

*Sentenza* no. 126/1996 represented the outcome of a long jurisprudential journey, whereby the Italian Court specified, once again, the possibility of an alteration of the normal distribution of competences in the name of unitary reasons connected with the compliance with EC/EU requirements (see, *ex plurimis*, *sentenza* no. 382/1993 and no. 389/1995).[25] At the same time it showed how these alterations should be conceived as the exception and not as the rule, trying to "normalize" the otherwise devastating impact of EC law on the national system. In order to balance the constitutional supremacy (the respect of the constitutional distribution of competences) and the primacy of EC law, the Italian system has been forced to adopt or to invent cooperative instruments that can push State and Regions towards specific agreements in this regard. On the other hand, it has forced the Italian Constitutional Court to declare the unconstitutionality of some State laws adopted without respecting these cooperative procedures:[26]

> "The process of European integration has generally affected the traditionally uncooperative relationship between stato and regioni in a positive way. However, a relatively high number of conflicts remain, especially when compared to other European countries. The main conflict-prevention mechanism is the Conferenza stato-regioni, which brings national and regional governments together to draft general policy guidelines or for specific purposes (by means of specialized sub-conferences on varying subjects). The most relevant conflict-resolution mechanism in the case of tension between the central government and the regioni is still provided by the Corte Costituzionale; many cases heard here indeed regard EU affairs. Overall, the court has safeguarded regional prerogatives against stato interference, in part by ruling that it is unconstitutional for the stato to use its coordination role in EU affairs to take competences away from the regioni (Judgment No. 203/2003), at least without the regioni's consent (Judgment No. 68/2008)".[27]

25. Both available at www.cortecostituzionale.it.

26. *Sentenza* no. 203/2003 and *sentenza* no. 68/2008, both available at www.cortecostituzionale.it.

27. P. Bilancia - F. Palermo - O. Porchia, "The European fitness cit", E-166.

## 2.2. The substitutive powers and *cedevolezza*

Italy has a long tradition of municipal history. The origins of Italian municipalities can be traced back to the Middle Ages (although, of course those "*comuni*" cannot be compared in terms of functions and role to the current municipalities), as a symptom of urban revolt against the feudal system.[28] More recently, further evidence of the long municipal tradition in Italy is that the National Association of Italian Municipalities was set up as early as 1901. Of course the history of Italian municipalities encountered different phases, for instance, their autonomy was largely affected by the fascist centralism, when the National Association of Italian Municipalities was dissolved. In 1946 it was reconstituted and today municipalities represent the basic administrative division in Italy, as provided by Article 118 of the Constitution.

Why am I insisting on Italian *comuni* if this piece is supposed to focus on Regions? Because some of the instruments used in the Italian constitutional system in order to coordinate the unitary principle expressed in Article 5 of the Constitution with regional autonomy find their origin in the legislation concerning municipal autonomy. The best example of this is the substitutive power (or replacement power, sometimes also called subsidiary power, *potere sostitutivo*). Until 2001 there was no express mention in the Italian Constitution of EC/EU law obligations and, as is well known, the Italian Constitutional Court used Article 11 of the Constitution in order to find a constitutional basis for explaining the primacy of European law.[29]

In 2001 a new express mention of EU law obligations was codified in Article 117 of the Constitution, providing: "Legislative power belongs to the State and the regions in accordance with the Constitution and within the limits set by European Union law and international obligations". Soon after the reform, the interpretation of this provision created a division among scholars.[30] According to some, Article 117, paragraph 1, would simply codify the pre-existing situation:

28. See, for instance, M. Ascheri, *La città-Stato*, Il Mulino, 2008.

29. M.Cartabia, "The Italian Constitutional Court and cit".

30. For an overview, see R. Chieppa, "Nuove prospettive per il controllo di compatibilità comunitaria da parte della Corte costituzionale", in *Il Diritto dell'Unione Europea*, 3/2007, 493-511, 499 ff; A. Ruggeri, "Riforma del titolo V e giudizi di "comunitarietà" delle leggi", 2007, http://www.associazionedeicostituzionalisti.it/dottrina/ordinamentieuropei/ruggeri.html.

it would grant a sort of *a posteriori* assent to European primacy[31] as it was developed by the ECJ and accepted across the European Community. Other scholars, on the other hand, emphasized the importance of the constitutional *status* given to European primacy, and asserted that Article 117 paved the way for the acceptance of the Italian monist thesis.[32] However, looking at the wording of Article 117 one can immediately realize how the limitations imposed by EU law obligations apply to both the regional and state legislators, in light of the new distribution of competences carried out by the constitutional reform of 2001.[33]

This express reference to EU law obligations explains the rationale of the substitutive power, which was expressly codified in the Constitution in 2001:

> "…**The Government can act for bodies of the regions, metropolitan cities, provinces and municipalities if the latter fail to comply with international rules and treaties or EU legislation, or in the case of grave danger for public safety and security, or whenever such action is necessary to preserve legal or economic unity and in particular to guarantee the basic level of benefits relating to civil and social entitlements, regardless of the geographic borders of local authorities.** The law shall lay down the procedures to ensure that subsidiary powers are exercised in compliance with the principles of **subsidiarity and loyal cooperation"**[34]

On closer examination, it is possible to find another express reference to the notion of substitutive power in Article 117, par. 5 of the Italian Constitution:

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31. C. Pinelli, "I limiti generali alla potestà legislativa statale e regionale e i rapporti con l'ordinamento comunitario", in *Foro italiano*, V, 2001, 194 ff.

32. F. Paterniti, "La riforma dell'art. 117, 1° co. della Costituzione e le nuove prospettive dei rapporti tra ordinamento giuridico nazionale e Unione Europea", in *Giur. Cost*., no. 2/2004, 2101 ff; A. Pajno, "Il rispetto dei vincoli derivanti dall'ordinamento comunitario come limite alla potestà legislativa nel nuovo Titolo V della Costituzione", in *Le Istituzioni del federalismo*, 2003, pp. 814-842.

33. For a brief overview of Italian regionalism in English, see: M. Keating- A. Wilson, "Federalism and Decentralisation in Italy", http://www.psa.ac.uk/journals/pdf/5/2010/930_598.pdf.

34. Article 120.

> "The Regions and the autonomous provinces of Trent and Bolzano take part in preparatory decision-making process of EU legislative acts in the areas that fall within their responsibilities. They are also responsible for the implementation of international agreements and EU measures, subject to the rules set out in State law which regulate the exercise of **subsidiary powers by the State in the case of non-performance by the Regions and autonomous provinces**".

There has been a huge debate in Italy about the relationship between these two forms of subsidiary powers. They are both forms of substitutive powers, according to scholars, but it is not clear how these two provisions should be coordinated. According to some authors, Article 120 of the Constitution would provide the *genus* of substitutive powers existing in the constitutional system, while Article 117 would refer to one *species* of the *genus*; it would be a mere specification of Article 120. According to other scholars,[35] instead, Article 120 would refer to a form of administrative substitution (this would explain why the provision refers to the government), while Article 117 –devoted to the redistribution of legislative competences– would refer to a form of legislative substitution (and this would explain why it mentions the State rather than the government).

As noted above, this is the first constitutionalization of such an instrument, although traces of this power can be found in the legislative regime regarding the municipalities (namely Art. 193 *Testo Unico* 1898; Art.169 and 174 *Testo Unico* 1889; Art. 210 *Testo Unico* 1908; Art. 216 *Testo Unico* 1915)[36] and confirms how such a power can be traced back to the instruments of control over the activity of municipalities.[37]

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35. For an overview of the debate, see: C.Mainardis, *Poteri sostitutivi statali e autonomia amministrativa regionale*, Giuffrè, Milan, 2007; C. Mainardis, "I poteri sostitutivi statali: una riforma costituzionale con (poche) luci e (molte) ombre", *Le Regioni*, 2001, 1369 ff.; E.C. Raffiotta, *Gli interventi sostitutivi nei confronti degli enti territoriali*, PhD thesis, University of Bologna, 2008, available at http://amsdottorato.cib.unibo.it/748/, 66 ff. L. Buffoni, *La metamorfosi della funzione di controllo nella Repubblica delle Autonomie. Saggio critico sull'art. 120, comma II, della Costituzione*, Torino, Giappichelli, 2007.

36. See Raffiotta, *Gli interventi sostitutivi*, 13 ff.

37. On the relationship between the activity of control and the substitutive power, see: F.G. Scoca, "Potere sostitutivo e attività amministrativa di controllo", in AA.VV. *Aspetti e problemi dell'esercizio del potere di sostituzione nei confronti dell'amministrazione loca-*

Looking at the Republican era, which started with the coming into force of the new Italian Constitution (1948), another codification of the substitutive power –with express regard to the Italian Regions– can be found in some provisions included in the fundamental charters (*"Statuti*) of the Special Regions[38] and by the measures of implementation of such special statutes (see Art. 50 of the *Statuto* of Sardinia and Art. 33 D.P.R. no. 480/1975 concerning Sardinia and Art. 39 of law no. 196/1978; Art. 2, p. 3, D.P.R. no. 182/1982). Just to be clear, all these provisions provide forms of "administrative" substitutive powers or forms of substitution that can be traced back to the relationship between administrations. This is evident especially in view of their municipal origin, while the form of substitutive power governed by Articles 117 and 120 of the Italian Constitution seems to refer to forms of "legislative" substitutive interventions as well but recently the Italian Constitutional Court expressed a different orientation making the picture more complicated.[39] This is confirmed by Article 8 of law no.

*le*, Giuffrè, Milan, 1982, 17 ff; A. de Michele, "Il potere sostitutivo dello Stato e delle Regioni nel Titolo V, Parte II, della Costituzione, nella legislazione attuativa e nella giurisprudenza", PhD thesis, University of Bologna, 2007, http://amsdottorato.cib.unibo.it/122/.

38. In Italy there are two "kinds" of Regions. Fifteen ordinary Regions and five special Regions are listed in Art. 116 of the Constitution: "Friuli-Venezia Giulia, Sardinia, Sicily, Trentino-Alto Adige/Südtirol and Valle d'Aosta/Vallée d'Aoste have special forms and conditions of autonomy pursuant to the special statutes adopted by constitutional law. The Trentino-Alto Adige/Südtirol Region is composed of the autonomous provinces of Trent and Bolzano.
Additional special forms and conditions of autonomy, related to the areas specified in art. 117, paragraph three and paragraph two, letter l) - limited to the organisational requirements of the Justice of the Peace - and letters n) and s), may be attributed to other Regions by State Law, upon the initiative of the Region concerned, after consultation with the local authorities, in compliance with the principles set forth in art. 119. Said Law is approved by both Houses of Parliament with the absolute majority of their members, on the basis of an agreement between the State and the Region concerned". Currently in Italy there a debate about the real "specialty" of these five Regions after the new powers given to the ordinary regions by the constitutional reform of 2001 which gave ordinary regions "exclusive legislative power with respect to any matters not expressly reserved to state law". Important differences between ordinary and special Regions are given by the nature of their fundamental charter (*Statuto*)- because ordinary Regions have fundamental charters approved by their Regional Councils- and by the issue of the financial autonomy, issue connected to the current reform in the field of fiscal federalism. On the Italian reform concerning fiscal federalism, in English, see F. Scuto, "The Italian Parliament Paves the Way to Fiscal Federalism", *Perspectives on Federalism*, Vol. 2, issue 1, 2010, E-67-88.

39. *Contra*, recently, the Italian Constitutional Court: *sentenza* 361/2010, www.cortecostituzionale.it

131/2003[40] (the *legge La Loggia*) which implemented Article 120 by specifying the conditions and the procedure to be followed in case of exercise of the substitutive power.[41]

As for the procedure to be followed, both laws provide similar procedures.[42] The president of the Council of Ministers or the Minister for Community Policy gives a term to comply, and can also ask for the submission of the question to the permanent Conference on relations between the State, the Regions and the Autonomous Provinces of Trento and Bolzano/Bozen in order to arrange the necessary initiatives to be taken. In case of inertia of the interested territorial actors, the president of the Council of Ministers or the Minister for the Community Policies may propose to the Council of Ministers the initiatives to be taken for the exercise of the substitutive power (Art. 10, par. 3, law no. 11/2005; similarly Art. 8 of law no. 131/2003).

Returning to the substantive dimension of the substitutive power, it should be said that, even in the pre-2001 legal scenario –and despite the absence of a constitutional basis– there was room for forms of legislative substitution in spite of the wording of Article 11 of law no. 86/89 which expressly provided the substitutive power of the government in case of the *administrative* inactivity of Regions and Autonomous Provinces (Bolzano/Bozen and Trento). This original provision should be read together with the original wording of Article 6

40. On this, see G. Scaccia, "Il potere di sostituzione in via normativa nella legge n. 131 del 2003. Prime note", available at www.associazionedeicostituzionalisti.it.

41. As for the subsidiary intervention mentioned by Art. 117, the implementing measure is represented by law no. 11/2005 (*legge Buttiglione*), available at http://www.camera.it/parlam/leggi/05011l.htm.

42. Art. 10, par. 3, law no. 11/2005: "*Nei casi di cui al comma 1, qualora gli obblighi di adeguamento ai vincoli derivanti dall'ordinamento comunitario riguardino materie di competenza legislativa o amministrativa delle regioni e delle province autonome, il Presidente del Consiglio dei ministri o il Ministro per le politiche comunitarie informa gli enti interessati assegnando un termine per provvedere e, ove necessario, chiede che la questione venga sottoposta all'esame della Conferenza permanente per i rapporti tra lo Stato, le regioni e le province autonome di Trento e di Bolzano per concordare le iniziative da assumere. In caso di mancato tempestivo adeguamento da parte dei suddetti enti, il Presidente del Consiglio dei ministri o il Ministro per le politiche comunitarie propone al Consiglio dei ministri le opportune iniziative ai fini dell'esercizio dei poteri sostitutivi di cui agli articoli 117, quinto comma, e 120, secondo comma, della Costituzione, secondo quanto previsto dagli articoli 11, comma 8, 13, comma 2, e 16, comma 3, della presente legge e dalle altre disposizioni legislative in materia.*"

of law no. 86/89, which did not provide at that time the possibility for the Regions to implement European directives in a direct manner (this power was granted only to the special Regions within the matter of their exclusive competences). In fact, under Article 6 of D.P.R. no. 616/1977, Regions were allowed to implement EC directives only after the entry into force of a State act containing the fundamental principles that should be followed by the regional legislator. At the same time Article 6 provided for this State act the possibility to give some detailed provisions that would have been waived by the forthcoming regional legislation. These norms were considered necessary to guarantee the compliance of the Italian State in case of legislative inertia by the regional legislator, and their legitimacy was supported by the Italian Constitutional Court.[43]

Later, the Regions were granted the power to implement European legislation directly without waiting for the State act of reception of the directive in the national system (law nos. 183/1987 and 86/1989). However, the Regions were asked to wait for the approval of the first national (annual) Community Act following the notification of the directive before implementing it.

This mechanism again resulted in frustrating the power of direct implementation of the Italian Regions.

Finally, thanks to the novelties that came into force with law no. 128/98, the ordinary Regions have been empowered to implement European directives directly. This partly explains why the letter of Article 11 of law no. 86/89 refers only to cases of administrative inactivity.[44] This reading, in a way, has been supported by the Italian Constitutional Court as well, in its decision no. 425/99.[45]

There is another element that makes this kind of substitutive power in case of non-compliance with the European requirements particular: from the theoretical point of view, the idea of substitution seems to imply the adoption of the substitutive instrument subsequent

43. Corte Costituzionale, *sentenza* 182/87, www.cortecostituzionale.it.

44. On this story, see: G.U. Rescigno, "Attuazione regionale delle direttive comunitarie e potere sostitutivo dello Stato", *Le Regioni*, 2002, 735 and Groppi, "L'incidenza".

45. Corte Costituzionale, *sentenza* 425/99, www.cortecostituzionale.it.

to inactivity by the Region. However, on closer examination, before the coming into force of law no. 128/98, Article 9 of law no. 86/89 referred to a form of "preventive substitution", since it provided for State intervention initially, with a national act composed of two kinds of provisions. A first group of provisions gave the fundamental principles that could not be waived by the regional legislation and a second group of specific provisions ("*disposizioni di dettaglio*") from which Regions could deviate by means of their regional laws. According to this scheme, even in the case of regional inactivity, the requirements of EC law would have been satisfied thanks to the detailed provisions included in the national law.

On the contrary, if the Regions had approved a regional law, these national detailed provisions would have "ceded", giving up their intrusion in that portion of the shared competence belonging to the regional legislator, and the hand of the State legislator would "draw back", leaving room for the new regional regime. This mechanism is called in Italy *cedevolezza*[46] (from the Italian "*cedere*", "to cede") and has represented a *fil conducteur* of Italian regionalism since 1970, the year of the effective birth of the ordinary regions. This mechanism works in the field of shared competences and it can be seen as a technique devised by the Italian State legislator (and supported by the Italian Constitutional Court over the years) in order to avoid the danger of legislative gaps. In order to challenge any possible *horror vacui*, the State legislator has been granted the power to make "temporary" detailed provisions that represent an intrusion in the legislative competences of the Regions. These have been upheld by the Italian Constitutional Court[47] because of their "temporary" and "supplementary" nature, since they are supposed to "disappear" magically once the Regions exercise their portion of legislative competence. In case of regional inactivity, as said above, the *horror vacui* is avoided thanks to the presence of a (State) regulation. As we saw, in the Italian context, by "shared competences" one refers to the sphere of competence

46. On *cedevolezza*, see: M. Motroni, *Le norme cedevoli nel rapporto tra fonti statali e fonti regionali*, PhD thesis, University of Ferrara, 2010, http://eprints.unife.it/323/1/TESI_DEFINITIVA.pdf.

47. Corte Costituzionale, *sentenza* no. 214/1985, www.cortecostituzionale.it. Compare this judgment with *sentenza* no. 40/1972, available at www.cortecostituzionale.it. See also decisions in cases no. 192/ 1987 and no. 729/1988, www.cortecostituzionale.it. For a complete overview in Italian see: Motroni, *Le norme cedevoli*, pp. 63-94.

that has to be completed or filled in by coordination between two legislative actors that participate, according a hypothetical division of labour, in the exercise of the legislative power.

This "division of labour" refers to the fact that the State act intervening in a matter characterized by shared competences was supposed to give, primarily, the "fundamental principles" ("*principi fondamentali*") that should then be followed by the Regional legislator, which should in turn build on these principles by passing detailed legislation. According to this scheme, it is possible to distinguish the idea of shared competences applied in Italy from that experienced in other contexts, like Germany, for instance.

One could connect the emergence of *cedevolezza* to the necessity of guaranteeing legislative continuity in intra-temporal relationships. Since the birth of the Italian (ordinary) Regions implied the transfer of competences, this meant that previously the matters within the new regional jurisdiction were already subject to State legislation. Considering these previous State acts as automatically invalid would have led to the risk of legislative gaps pending the passing of new regional acts. As we can see, according to this logic, *cedevolezza* is justified on the basis of the entry into force of a new constitutional parameter and the necessity of guaranteeing stability in a period of transition.[48] The Constitutional Court followed the same logic soon after the constitutional reform of 2001 which, as we know, changed the distribution of competences between the ordinary Regions and the State. However, what it is evident once we know the evolution of the Italian regional system is the use of *cedevolezza* even from the start of the functioning of the Regional legislatures as the rule to be followed in all the cases of legislation that involve shared competences, a practice upheld by the Italian Constitutional Court in 1985.[49]

The adoption of the technique of *cedevolezza* confirms the rise of a new kind of way of conceiving of the principle of "competence"

48. M.Motroni, *Le norme cedevoli,* cit., pp. 63-94.

49. "*La legge dello Stato [non] deve essere necessariamente limitata a disposizioni di principio, essendo invece consentito l'inserimento anche di norme puntuali di dettaglio, le quali sono efficaci soltanto per il tempo in cui la Regione non abbia provveduto ad adeguare la normativa di sua competenza ai nuovi principi dettati dal Parlamento*", Corte Costituzionale, no. 214/85.

as "legislative" preference rather than as "a legislative reserved domain".[50] According to this scheme, the Italian Constitution, when granting a portion of shared competence to the regional legislator, expressed a preference for this actor but, in order to guarantee the continuity of the legal order, admits the possibility of a temporary and derogable State legislative supply. More pragmatically, *cedevolezza* has permitted an evident centralization and a *de facto* alteration of the distribution of competences over the years, since it has been used frequently in combination with the recall of "unitary principles", finally favouring the centralization of the competences.[51] Even after the coming into force of the new Title V of the Italian Constitution, *cedevolezza* seems to be still alive, despite what the Italian Constitutional Court has seemed to suggest in occasional decisions, like one given in 2002.[52]

Returning to the specific field of the implementation of EU law measures, one could wonder whether the new Article 117 of the Constitution, which expressly codifies the regional competence to comply with EU law requirements, can represent the end of the technique of *cedevolezza* in this specific ambit. Despite the many doubts raised by scholars,[53] this particular kind of *cedevolezza* has to be understood as confirmed in this ambit by the different Community acts – "*leggi comunitarie*" – which have come into force since the constitutional reform.[54] According to this trend, the State legislator is allowed to adopt detailed provisions whose coming into force is delayed pending the deadline provided for the implementation of the directive in case of regional inertia.[55]

Something similar is confirmed in law no. 11/2005, which also provides the State with the possibility to perform the substitutive power by a regulation ("*regolamento*", which is a secondary source)

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50. L. Carlassare, "La 'preferenza' come regola dei rapporti tra fonti statali e regionali nella potestà legislativa ripartita", *Le Regioni*, 1986, 236 ff.

51. Among others, A. D'Atena, *Le Regioni dopo il big-bang. Il viaggio continua*, Milano, 2005, 76 ff.

52. Case 282/2002, www.cortecostituzionale.it.

53. Motroni, *Le norme cedevoli*, 95 ff.

54. Laws no. 39/2002, no. 39, 14/2003 and 306/2003, for instance.

55. On this, see G.U.Rescigno, "Attuazione regionale delle direttive".

even in matters covered by regional legislation (see Art. 11, par. 8, of this law).[56] This applies even in matters of exclusive regional competence, and despite the fact that Article 117 of the Constitution provides: "Regulatory powers shall be vested in the State [only?] with respect to the subject matters of exclusive legislation". In conclusion, despite the change of the letter of the Constitution, the case law of the Italian Constitutional Court and also the Parliament have confirmed many of the principles and practices characteristic of the previous climate of Italian regionalism.

Before moving to the next section it is interesting to point out how the Italian Constitutional Court recently acknowledged the bilateral nature of *cedevolezza* by recognizing the validity of the legislation of the Friuli-Venezia Giulia Region. These norms included some derogable and supplementary fundamental principles introduced to prevent the possibility that the absence of a relevant State act would result in a situation of regional non-implementation. By regional law no. 11/2005, Friuli-Venezia Giulia implemented directive 2001/42/CE without waiting for the national legislation including the fundamental principles of the matter. Since the matter touched many transversal ambits the regional legislator decided to pass regional legislation of principle, which had to be understood as derogable once the State legislation of principle was ready.[57] The Italian Constitutional Court rescued this provision in its *sentenza* no. 398/96.[58]

To conclude this section devoted to the mechanism used by the Italian State in order to deal with the risk of non-compliance due to regional inertia, one should recall that since the State now can ask

56. According to some authors, it is possible to find a basis for this practice in the case law of the Constitutional Court, see the judgment in no. 425/99, www.cortecostituzionale.it. See: M.Motroni, *Le norme cedevoli*, 132.

57. Art. 12 of regional law no. 11/2005: "*1. Le disposizioni contenute nel presente capo e nei regolamenti attuativi sono adeguate agli eventuali principi generali successivamente individuati dallo Stato nelle proprie materie di competenza esclusiva e concorrente di cui all'articolo 117, commi 2 e 3, della Costituzione, con riferimento alla direttiva 2001/42/CE. 2. Gli atti normativi statali di cui al comma 1 si applicano, in luogo delle disposizioni regionali in contrasto, sino alla data di entrata in vigore della normativa regionale di adeguamento*".

58. Corte Costituzionale *sentenza* no. 398/2006, www.cortecostituzionale.it. S. Tripodi, "L'attuazione regionale delle direttive comunitarie e le clausole di cedevolezza. Nota a Corte cost., sent. n. 398/2006", in www.federalismi.it, and M.Motroni, *Le norme cedevoli* cit, 134-137.

the Regions for the reimbursement of any costs connected with their non-compliance with the requirements of EU law.[59]

## 2.3. The principle of subsidiarity

Subsidiarity could be conceived of as an example of a principle that was originally alien to the Italian Constitution which was introduced under the pressure applied by the EU level.

As defined in the *Oxford English Dictionary*, subsidiarity implies the concept "that a central authority should have a subsidiary function, performing only those tasks which cannot be performed effectively at a more immediate or local level".[60] This implies both a constitutional preference for the exercise of a competence by the periphery and a "constitutional restraint on the exercise of those competences"[61] for the centre.

The subsidiarity principle, due to its physiology, requires a system of competences at least tending towards a repartition, and at the same time presupposes an "integrated" system like, for example, a federal system of a cooperative type. As a matter of fact, the principle, as provided in the old Article 5 of the ECT,[62] refers to a rela-

59. Art. 16- bis law no. 11/2005. On this see: P.Bilancia-F.Palermo-O.Porchia, "The European fitness cit", E-167.

60. *Oxford English Dictionary*, entry "Subsidiary" and "Subsidiarity".

61. R. Schütze, *From Dual to Cooperative Federalism. The Changing Structure of European Law*, Oxford University Press, Oxford, 209, 246.

62. As everybody knows the ECJ's case law proves extremely elusive about the principle of subsidiarity.. The Court of First Instance and the ECJ have in fact always preferred not to deal with this ambiguity frontally, solving the cases challenging the legality of Community acts in the light of other arguments (perhaps already tested), without calling into question the issue of subsidiarity.
If taken seriously, control on subsidiarity would lead the ECJ to verify the necessity of higher level substitution by carrying out a costs/benefits test (See P.Mengozzi, "Il principio di sussidiarietà nel sistema giuridico delle Comunità europee", available at www.lumsa.it/Lumsa/Portals/File/.../Mengozzi.pdf*)*. On the contrary the European case law has been ambiguous since the Tribunal of first Instance and the ECJ has almost always avoided dealing with the issue frontally.
It is possible to distinguish several phases within the ECJ's case law in this respect and an important line in this context is represented by the Amsterdam Protocol. A first generation of cases is characterized by a very careful and integration-friendly approach followed by the ECJ in C-84/94 (ECJ, C-84/94 *United Kingdom v. Council*, *ECR*,1996, I-5755)

and C-233/94 (ECJ, C-233/94, *Germany v. Parliament and Council*, *ECR*, 1997, I-2405), especially in the first case, where the Court, in responding to the British and German governments – which had linked the respect of the subsidiarity principle to the necessity of an adequate motivation for an EC act – stated: "Once the Council has found that it is necessary to improve the existing level of protection as regards the health and safety of workers and to harmonize the conditions in this area while maintaining the improvements made, achievement of that objective through the imposition of minimum requirements necessarily presupposes Community-wide action, which otherwise, as in this case, leaves the enactment of the detailed implementing provisions required largely to the Member States. The argument that the Council could not properly adopt measures as general and mandatory as those forming the subject-matter of the directive will be examined below in the context of the plea alleging infringement of the **principle of proportionality**… As to judicial review of those conditions, however, the Council must be allowed a wide discretion in an area which, as here**, involves the legislature** in making social policy choices and requires it to carry out complex assessments. Judicial review of the exercise of that discretion **must therefore be limited to examining whether it has been vitiated by manifest error or misuse of power**s, or whether the institution concerned has manifestly **exceeded the limits of its discretion**" [**emphasis added**] (ECJ, C-84/94 *United Kingdom v. Council*, *ECR*,1996, I-5755).

It is possible to infer at least four fundamental concepts from these sentences:

1. The ECJ conceives the test on subsidiarity to be an application of the proportionality test;
2. The ECJ conceives the control on subsidiarity to be a sort of *extrema ratio*, exploitable just in case of manifest error or misuse of power;
3. The control on subsidiarity touches the sensitive field of the legislative discretion and this reveals the "political" nature of this test;
4. Subsidiarity is a principle rather than a rule.

The control on subsidiarity has a strong procedural nature, it looks like the administrative control on the "*excès de pouvoir*" and this explains why a very important role in this test is played by the analysis of the motivation of the EU acts.

In another case, C-233/94, the ECJ again focused its control on the existence of a motivation:

"Although the Parliament and the Council did not expressly refer to the principle of subsidiarity in Directive 94/19, they complied with the obligation under Article 190 of the Treaty to give reasons, since they explained why they considered that their action was in conformity with that principle, by stating that, because of its dimensions, their action could be best achieved at Community level and could not be achieved sufficiently by the Member States" (ECJ, C-233/94, *Germany v. Parliament and Council*, *ECR*, 1997, I-2405).

After the Amsterdam Protocol something seemed to change, since the ECJ insisted on the procedural elements being taken into account in its control, the best example of this is case C-376/98 (ECJ, C-376/98 *Germany v. Parliament and Council*, *ECR*, 2000, I-8419: "Those provisions, read together, make it clear that the measures referred to in Article 100a(1) of the Treaty are intended to improve the conditions for the establishment and functioning of the internal market. To construe that article as meaning that it vests in the Community legislature a general power to regulate the internal market would not only be contrary to the express wording of the provisions cited above but would also be incompatible with the principle embodied in Article 3b of the EC Treaty (now Article 5 EC) that the powers of the Community are limited to those specifically conferred on it"). This was an important, although ambivalent, decision although it has not been followed in later case law (see, for instance, ECJ, C-491/01 *British American Tobacco (Investments)*

tionship between two institutional actors (a lower actor, the periphery, and a higher actor, the centre) sharing the same power and whose exercise is preferentially given, at first instance, to the actor closer to the citizens (i.e., the local level). Scholars usually label this first instance as the negative side of subsidiarity, since it implies the duty of non-intervention by the centre. At the same time, this principle allows the possibility to substitute the chosen local actor if the same power can be exercised in a better or more efficient way by

*and Imperial Tobacco*, *ECR*,.2002, I-11453). By the way, the ECJ has always insisted on the idea of connecting proportionality, subsidiarity and deference for the legislative branch and that is why some scholars sadly concluded that "despite its literally presence, the principle of subsidiarity has remained a subsidiary principle of European constitutionalism" (R.Schütze*, From dual,* cit., 256).

This case law explains why in the last few years all the attempts to reform the principle of subsidiarity have attempted to emphasize the procedural side of such a control, entrusting a crucial role to the national legislatures as the provisions included in the Constitutional Treaty and in the Lisbon Treaty show. The only way to limit the legislative discretion seems to be to impose procedural guarantees such as those proposed by the Constitutional Treaty and contained in the "Protocol on the application of the principles of subsidiarity and proportionality".

As a result, a form of political monitoring called the "early warning mechanism" was provided in that Protocol. Under this measure, the Commission should transmit a draft legislative act to the national parliaments, giving them six weeks to determine if there is a violation of subsidiarity. If one-third of the parliaments decide there is a violation, the Commission is required to reconsider the proposal. In the Lisbon Treaty, there was some change. (See the new version of the Protocol: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2008:115:0201:0328:EN:PDF), because the time allowed for national parliaments to scrutinize draft law is raised from six to eight weeks. If one-third of national parliaments object to a draft legislative proposal on the grounds of a breach of subsidiarity – the "yellow card" mechanism – the Commission will then reconsider it. In addition, if a simple majority of national parliaments continue to object, the Commission refers the reasoned objection to the Council and Parliament, which will decide the matter – the "orange card". In any case, unlike in the "red card mechanism", the Commission may challenge the national parliaments' position.

This idea confirms the deference shown by the ECJ towards the legislatures: since subsidiarity involves political control, the best thing is entrusting its control to the political/legislative competitors of the European Parliament and Council: the national parliaments, tasked with the mission to be the watchdog of subsidiarity. On this issue see: I. Cooper, "The Watchdogs of Subsidiarity: National Parliaments and the Logic of Arguing in the EU", *Journal of Common Market Studies*, 44, 2, 2006, 281-304. On subsidiarity and EU law see: G.Davies, "Subsidiarity: the wrong idea, in the wrong place, at the wrong time', *Common Market Law Review*, 2006, pp. 63-84; P. Syrpis, "In Defence of Subsidiarity", *Oxford Journal of Legal Studies*, 2004, Vol. 24, pp. 323-334; A. Estrella, *The EU Principle of Subsidiarity and Its Critique*, OUP, 2002; "Subsidiarity and Self-Interest: Federalism at the European Court of Justice", *Harvard International Law Journal*, Vol. 41, No. 1, pp. 1-128; G. Berman, "Taking Subsidiarity Seriously", *Columbia Law Review*, 1994, 331 ff.; P.Kiiver, 'The Early Warning System for the Principle of Subsidiarity: The National Parliament as a Conseil d'Etat for Europe',*European Law Review*, 2011, pp. 98-108.

the higher level. This way subsidiarity works as an elevator with regard to certain fungible acts that can be exercised in abstract by two institutional subjects and the substitution can be caused by the objective impossibility of the preferred actor carrying out the requested action.

Another important fact is that such impossibility of carrying out the functions has to be temporary this way there will be no obstacles to the restitution of the power. In this respect, it has been pointed out that the subsidiarity principle actually works as a criterion for shifting, although not in a definitive way, the level that is supposed to intervene[63] and, because of its constitutional relevance, it works as an element of flexibility in the system.[64] This would explain why, within the EC context, subsidiarity has operated as a "method of policy centralisation"[65] rather than as a factor of valorization of the de-centred realities in the absence of a formal catalogue of competences. subsidiarity and competence are not, nevertheless, in a relationship of identity: in fact, it has been said that the principle of subsidiarity is not intended so much for the *a priori* formal allocation of competences, but rather for the *a posteriori* legitimation of the exercise of competences beyond those formally attributed.[66]

Having recalled the theoretical notion of subsidiarity and mentioned its uncertain nature in EU law, it is useful to see how the Italian Constitution has codified it. The principle of subsidiarity is dealt with by Article 118 of the Constitution both in its vertical and horizontal meaning:

> "Administrative functions are attributed to the Municipalities, unless they are attributed to the provinces, metropolitan cities and regions or to the State, pursuant to the principles of subsi-

63. I. Massa Pinto, *Il principio di sussidiarietà- Profili storici e costituzionali*, Jovene, Naples, 2003, p. 82.

64. R. Bin, "I decreti di attuazione della "legge Bassanini" e la 'sussidiarietà verticale'", in A. Rinella, L. Coen and R. Scarciglia (eds), *Sussidiarietà e ordinamenti costituzionali*, Cedam, Padua, 1999, 169 ff.

65. G. Davies, "Subsidiarity as a Method of Policy Centralisation", Hebrew University International Law Research Paper No. 11-06, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=921454.

66. Massa Pinto, *Il principio di sussidiarietà*, 81.

diarity, differentiation and proportionality, to ensure their uniform implementation.

Municipalities, provinces and metropolitan cities carry out administrative functions of their own as well as the functions assigned to them by State or by regional legislation, according to their respective competences. State legislation shall provide for co-ordinated action between the State and the Regions in the subject matters as per Article 117, paragraph two, letters b) and h), and also provide for agreements and co-ordinated action in the field of cultural heritage preservation.

The State, regions, metropolitan cities, provinces and municipalities shall promote the autonomous initiatives of citizens, both as individuals and as members of associations, relating to activities of general interest, on the basis of the principle of subsidiarity"

The principle of subsidiarity is also recalled at Article 120 of the Constitution, as we saw, and it is understood there as a limit to the indiscriminate use of the substitutive power of the government.

In *sentenza* no. 303/2003 the Italian Constitutional Court reshaped the distribution of competences codified in the Constitution by using the subsidiarity principle as a Trojan horse. The Court stated that the national legislator is allowed to take away the exercise of administrative functions in matters belonging to the regional concurring legislative power when a uniform exercise of these administrative functions is required. It is evident that the Italian Constitutional Court has expanded the original ambit of application of the subsidiarity principle by inventing a mechanism which was associated to the idea of "national interest"[67] present in the wording of the old Title V of the Constitution but which disappeared after the 2001 reform. According to many authors, however, it is still present as an unwritten limit to the Regions' powers:[68]

67. On the national interest ("interesse nazionale") see: A. Barbera, *Regioni e interesse nazionale*, Giuffrè, Milan, 1973.

68. For an account of this debate, see R. Bin, "L'interesse nazionale dopo la riforma: continuità dei problemi, discontinuità della giurisprudenza costituzionale", http://www.robertobin.it/ARTICOLI/interessi%20nazionali.htm; A. Barbera, "Chi è il custode dell'interesse nazionale?", *Quad. cost*. 2001, 345 ff.

> "While the principle of subsidiarity is used to allocate administrative functions, it is also used to introduce an element of flexibility into the constitutional distribution of legislative power. Under the principle of legality (a pillar of the rule of law), functions that are exercised at the national level according to the principle of subsidiarity must be organized and regulated by national law. In this way, one may derogate from the allocation of legislative competences contained in article 117 of the Constitution".[69]

It seems useful to recall the solutions suggested by the Italian Constitutional Court for the relationship between subsidiarity and loyal cooperation: the former requires a "loyal cooperation" ("*leale collaborazione*") between the territorial actors, concerted practices and bodies and, finally, a system of agreements between the institutional actors. When deciding case no. 303/2003,[70] the Italian Constitutional Court adopted "a procedural and consensual approach to the principles of subsidiarity and adequacy, and it denied that such principles can operate as mere verbal formulas capable of modifying, to the advantage of national law, the allocation of legislative powers established by the Constitution".[71]

In doing so, the Italian Constitutional Court fixed a set of conditions under which a derogation to the allocation of competences designed by the Constitution could be possible: the derogation should be "proportionate to the public interest that justifies the exercise of regional functions by the state, it must not be unreasonable in light of strict constitutional scrutiny, and, finally, the derogation should be the result of an agreement with the region".[72]

This episode tells us at least two things. First, it confirms the centrality of the Constitutional Court in the destiny of Italian regionalism. Secondly, it makes the task of tracing the constitutionalized

69. T. Groppi and N. Scattone, "Italy: The Subsidiarity Principle", *International Journal of Constitutional Law*, 2006, 4 (1): 131-137, 134.

70. Corte Costituzionale, *sentenza* no. 303/2003, available at www.cortecostituzionale.it.

71. T. Groppi-N. Scattone, "Italy: The Subsidiarity Principle", 135. See also A. Morrone, "La Corte costituzionale riscrive il Titolo V?", available at http://www.forumcostituzionale.it.

72. *Ibid*.

idea of subsidiarity back to the EC (or German) model more complicated. While the ECJ normally avoids engaging in debates concerning subsidiarity, the Italian Constitutional Court used subsidiarity to reshape Italian regionalism.[73] Of course, looking at the results achieved by the two courts with their respective behaviours, they are analogous: in both cases, despite its original meaning and goal (favouring the decentralized exercise of "constitutional" functions), subsidiarity worked as a factor of centralization. However, the paths followed in these two cases seem to be different.

## 3. Final remarks

Some authors[74] have described EU integration as one of the most important factors that led to the Italian constitutional reform of 2001. This is true, and by itself it gives an exhaustive answer to the research question formulated at the beginning of this paper: all the institutional actors, including the judges, have adapted old mechanisms or existing principles or, alternatively, amended the Constitution in order to guarantee the effectiveness of EU law. As we saw, the Italian Constitutional Court has played a fundamental role both in the history of Italian regionalism and, more particularly, in the European path of Regions, sometimes supporting the centralization of competences other times preserving the regional sphere of autonomy.

The current phase seems to be characterized by a rediscovery of the importance of cooperative instruments and by the procedural principles of subsidiarity and loyal cooperation that, in theory at least, should represent a sort of shield against the (temporary) alteration of the list of competences. However, as we can see by looking at the principles of competence and subsidiarity, the Italian Constitutional Court has demonstrated its openness to broad inter-

73. Several other judgments followed *sentenza* 303/2003, but none of them questioned the strong link between subsidiarity and loyal cooperation, see in particular *sentenza* no. 6/2004 and the more recent *sentenza*. 79/2011, both available at: www.cortecostituzionale.it. For a recent overview on this see: C.Mainardis, "Chiamata in sussidiarietà e strumenti di raccordo nei rapporti stato – regioni", available at: http://www.robertobin.it/REG11/mainardis_def.pdf

74. P.Bilancia-F.Palermo-O.Porchia, "The European fitness cit", E-144.

pretation of the fundamental charter thus making our Constitution more flexible. This factor should be taken into account. My final impression is that of a (still) quite unstable picture where external (i.e., international or European) factors can have a decisive importance in changing, from time to time, the outcome of the never-ending balancing act between the competing interests of the State and the Regions.

## ABSTRACT

To what extent do Italian courts adapt the national legal instruments (principles, rules, techniques, legal concepts) regarding state structure to the requirements of EU law? This paper aims to give an answer to this question by providing an overview of the most emblematic cases of "re-adaptations" operated by the Italian courts in order to ensure the respect of the structural principles of EU law. This contribution is structured as follows: first, I will explain the reasons why research like this is "difficult", while secondly I will move to the analysis of the of some legal instruments (principle of competence, substitutive power, "cedevolezza"). Some final remarks will be presented at the end of the paper. Generally speaking, my main idea is that EU law has had a certain impact on the relationship between State and Regions in Italy, especially looking at the seasons of the principle of competence, that has been conceived more and more as referring to the idea of "legislative preference" rather than as to the existence of a "legislative reserved domain".

**Key words:** Europeanization; Italy; Regions; Italian Constitutional Court; regional blindness.

## RESUM

Fins a quin punt els tribunals italians adapten els instruments legals nacionals (principis, regles, tècniques, concepts legals) pel que fa a l'estructura estatal als requisits de les normes de la UE? Aquest article vol respondre a aquesta pregunta bo i proporcionant una visió de conjunt dels casos més emblemàtics de "readaptacions" efectuades pels tribunals italians per tal d'assegurar el respecte als principis estructurals de la legislació europea. La meva contribució s'estructura de la manera següent: primer explicaré les raons per les quals una investigació com aquesta és "difícil", i en segon lloc analitzaré alguns instruments legals (principi de competència, poder substitut, *cedevolezza*). A les conclusions hi inclouré alguns altres comentaris finals. En general, la idea principal que defenso és que la legislació de la UE ha tingut un cert impacte en la relació entre l'Estat i les regions a Itàlia, sobretot, quant a les raons del principi de competència, el qual ha estat concebut com afí a la idea de la "preferència legislativa" més que no pas a la de l'existència d'una "reserva legislativa".

**Paraules clau:** europeïtzació; Itàlia; regions; Tribunal Constitucional Italià; ceguesa regional.

## RESUMEN

¿En qué medida adaptan los tribunales italianos los instrumentos legales nacionales (principios, reglas, técnicas, conceptos legales) en cuanto a la estructura estatal a los requisitos de las normas de la UE? Este artículo aspira a dar una respuesta a esta pregunta proporcionando una visión de conjunto de los casos más emblemáticos de "readaptaciones" efectuadas por los tribunales italianos para asegurar el respeto a los principios estructurales de la legislación europea. Mi contribución se estructura de la manera siguiente: primero explicaré las razones por las cuales una investigación como esta es "difícil", y en segundo lugar analizaré algunos instrumentos legales (principio de competencia, poder sustituto, *cedevolezza*). En la conclusión realizaré otros comentarios finales. En general, la idea principal que defiendo es que la legislación de la UE ha tenido un cierto impacto en la relación entre el Estado y las regiones en Italia, especialmente con respecto a las razones del principio de competencia, que se ha concebido afín a la idea de la "preferencia legislativa" más que a la de la existencia de una "reserva legislativa".


**Palabras clave:** europeización; Italia; regiones; Tribunal Constitucional Italiano; ceguera regional.