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**The meta-national dimension of solidarity in EU law.  
On the impact of the EU cohesion policies on the “form  
of Union”**

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**The meta-national dimension of solidarity in EU law.  
On the impact of the EU cohesion policies on the “form of Union”.**

Deliverable

**GIUSEPPE MARTINICO**

**Short bio of the Researcher**

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He is also member of the editorial board of Perspectives on Federalism (<http://www.on-federalism.eu/>) and affiliated with the Centre for Judicial Cooperation (CJC) recently set up at the European University Institute, Florence (<http://www.eui.eu/Projects/CentreForJudicialCooperation/Home.aspx>).

## Introduction to the deliverable

This work is part of a broader project generously funded by the Institut d'Estudis Autònoms, Barcelona (“becas para la investigación sobre las autonomías políticas territoriales. C) En la modalidad 3: Becas para la realización de trabajos individuales en Cataluña y/o en el resto del Estado”. Convocatoria 2012) and represents the deliverable presented at the IEA at the end of my investigation.

In the following pages I shall present the main findings of my research and will try to sum up the output of my research.

This paper does not represent the only product of my research period (October 2012-January 2013). During my research I also finalised other articles or chapters written for edited volumes and forthcoming or already published as autonomous publications.

In these works I developed some of the aspects present in the original project presented at the IEA:

- **C. Cantore-G. Martinico**, “Asymmetry or Dis-integration? A few considerations on the new ‘Treaty on Stability, Coordination and Governance in the Economic and Monetary Union’”, forthcoming in *European Public Law*, 2013.
- **G. Martinico**, “What lies behind Article 4.2 TEU?”, forthcoming in A. Saiz Arnaiz (ed.), *National constitutional identity and European integration*, Intersentia, Oxford-Antwerp.
- **G. Martinico-A. M. Russo** “La influencia de la UE en la distribución del poder entre Estados y regiones en tiempo de crisis”, forthcoming in *Cuadernos Europeos de Deusto*.

Intermediary results of this research were presented at the Universitat de Barcelona, in a seminar organised by Prof. Josep Maria Castellà Andreu and held on 11<sup>th</sup> December 2012.

Parts of this deliverable will also be presented at the University of Deusto, in a seminar organised by Luis Gordillo Pérez and to be held on 7<sup>th</sup> March 2013 and in a workshop organised by Prof. Andreu Olesti Rayo at the University of Barcelona on 8<sup>th</sup> March 2013.

When writing this deliverable I built on a previous article of mine, entitled “The Impact of the Cohesion Policies on the 'Form of Union”” (14<sup>th</sup> August, 2009), published in *Perspectives on Federalism*, Vol. 1, Single issue 2009, ([www.on-federalism.eu](http://www.on-federalism.eu)).

Finally, I wish to thank Josep Maria Castellà Andreu, Xavier Arbós Marín, Giuseppe Bianco, Natalia Caicedo Camacho, Carlo Maria Cantore, Roberto Castaldi, Giacomo Delledonne, Filippo Fontanelli and Anna Margherita Russo for their help and comments.

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**The meta-national dimension of the solidarity in EU law.  
On the impact of the EU cohesion policies on the “form of Union”.**

**GIUSEPPE MARTINICO**

**0. Goals and structure of the paper**

The **goal** of this work is to study the implications of the European Union (EU) cohesion policies from a constitutional-comparative perspective.

In this paper I shall deal with, among others, the following **research questions**:

- What does solidarity mean in a context, like the EU, which is not provided by a cultural homogeneous substratum?
- Can we compare the EU with other legal contexts in this respect?
- Can we conceive EU cohesion policies as a part of the European supranational social model?
- What is the impact of the EU cohesion policies on the relationship between centre (the EU) and periphery (regions)?
- What will change in this respect with the coming into force of the Lisbon Treaty?

As for the **structure** of this work, I will proceed as follows: firstly I shall introduce my understanding of solidarity in EU law (**Section I**), treating it as one of the constitutional principles of EU law. In this section, after having recalled some comparative studies on solidarity and multiculturalism in Canada, I shall deal with different sources of EU law (the EU fundamental Treaties, the Charter of Fundamental Rights of the EU (CFREU), the case law of the Court of Justice of the EU – CJEU - and the common constitutional traditions).

Secondly, I will present EU cohesion policies as an expression of this solidarity principle and as a part of the European Social Model (**Section II**).

In order to do so in Section II I shall reconstruct the legal basis of the European Social Model and the EU cohesion policies.

Finally, in **Section III**, I shall investigate the impact of these kinds of policies on the relationship between periphery and centre (understood as the “form of union” in this work) in the EU.

The main intuition behind this work can be summarised as follows: regions have been traditionally neglected by EU treaties (the famous principle of the “territorial blindness” of the EU) in spite of their importance for the functioning of the EU (the point according to which, for instance, in UK: “*approximately 80 per cent of the policies which have been devolved are also policies for which the EU has a competence – e.g. fisheries, agriculture, environmental policy, economic development*”, Carter, 2003).

This has created an evident gap between their political importance and the poverty of their legal status in EU law and such a gap might be seen as one of the aspects of the EU democratic deficit.

Against this background, my **hypothesis** is that the EU cohesion policies may have a role in contributing to overcome the EU territorial blindness, leading to an improvement of the constitutional status (i.e. emergence of a set of “rights” and “duties”) of those constitutional actors.

As is clear from the bibliographical references of this work, when carrying out this research I dealt with a massive and multi-disciplinary literature (political science, sociology, law and economics). This is consistent with a research that can be approached from different (but complementary) perspectives.

However, the view proposed here is that of a scholar interested in EU and comparative constitutional law.

## **SECTION I**

### **1.1. Solidarity in multi-national contexts: a framework of analysis**

Many scholars (f.e., from a legal perspective, Carrozza, 1994) have already stressed the importance of welfare policies from a nation-building (and political identity-building) perspective, but always assume the state-condition as the reference field of research. Traditionally, in fact, the redistribution policies are founded on a common sense of belonging, a spirit of solidarity in a homogeneous community: a confirmation of this could be found in the history of state-building according to Rokkan's theory (Rokkan, 1999).

According to this author the development of the welfare state – in a context of growing social citizenship rights for the culturally homogeneous national communities – is aimed at providing a substantive complement to political democracy.

As scholars have pointed out:

*“Theories about solidarity have traditionally been developed in view of the nation state. The nation is considered a Gemeinschaft (community). The members of the community are united by a lien social (social bond). This social bond, grounded in a common language and a common cultural heritage of a people, is seen as the basis for social solidarity. From a legal point, the community or Solidargemeinschaft is often regarded as something prior to law. Conceptually, a nation is considered to be an entity that exists independently of the state and its legal regulations. It is thus the idea of the nation that provides the conceptual framework for the development of legal concepts of solidarity embodied in particular welfare regulations, social rights and institutions at the level of a Member State...In the context of European law, the discussion about solidarity seems to draw on the very same conceptual foundations. Accordingly, solidarity is considered a common value which unites Member States and the people of the Member States. But can the concept of solidarity be simply transferred from the nation state to the European Union?...The European Union is, above all, a community of law, a Rechtsgemeinschaft. It is not a community united by solidarity in the traditional sense but, primarily, a community united by law. The discussion of solidarity in the European Union may therefore not simply revert to the theoretical foundations of national solidarity but has to reinvestigate the question about the philosophical foundations of social solidarity. Does social welfare rely on a community in the traditional sense or are there other possible explanations for solidarity and mutual assistance? Is solidarity a legal concept or is it a moral concept? Does it emanate from self-interest or from altruism? Is it based on reason or on emotion?” (Ottmann, 2008, p. 36 ff).*

When looking at those lines one could question the very existence of solidarity in a context, like the EU or other pluri-cultural contexts, not characterised by the same

features present in the nation state arena and wonder if there is a sort of trade-off between multiculturalism policies and solidarity policies.

Recently, scholars like Kymlicka, Banting and Alesina have analysed the tension between redistribution and heterogeneity in multicultural contexts in order to understand if multiculturalism policies - which recognise or accommodate ethnic groups - tend to exacerbate any underlying tension between diversity and social solidarity, further weakening the support for redistribution.

This point has been analysed in multicultural contexts such as that of Canada by Banting and Kymlicka.

In their study they demonstrate the non-exclusive relationship between solidarity and cultural homogeneity.

Those who support the opposite vision identify three kinds of trade-off effects between multiculturalism policies (MCPs) and welfare policies (WPs):

1) The misdiagnosis effect, by which *“MCPs lead people to misdiagnose the problems that minorities face. It encourages people to think that the problems facing minority groups are rooted primarily in cultural ‘misrecognition’, and hence to think that the solution lies in greater state recognition of ethnic identities and cultural practices. In reality, however, these ‘culturalist’ solutions will be of little or no benefit, since the real problems lie elsewhere”* (Banting-Kymlicka, 2004).

2) The corroding effect, by which: *“MCPs weaken redistribution by eroding trust and solidarity amongst citizens, and hence eroding popular support for redistribution. MCPs are said to erode solidarity because they emphasize differences between citizens, rather than commonalities”* (Banting-Kymlicka, 2004).

3) The crowding out effect, by which: *“MCPs weaken pro-redistribution coalitions by diverting time, energy and money from redistribution to recognition. People who would otherwise be actively involved in fighting to enhance economic redistribution, or at least to protect the WS from right-wing retrenchment, are instead spending their time on issues of multiculturalism”* (Banting-Kymlicka, 2004).

Cultural heterogeneity would, in fact, weaken trust and national solidarity across ethnic/racial lines (Banting, 2005) then “*multiculturalism policies that recognize or accommodate ethnic groups tend to exacerbate any underlying tension between diversity and social solidarity, further weakening support for redistribution*” (Banting, 2005).

As Banting concludes, “*there is a tension between the ethnic diversity of one’s neighbourhood and levels of trust in neighbours, even when one controls for all the other factors that might influence trust, such as economic well-being, education, gender, age and so on*”, but: “*Many analysts simply stop at this point, and assume that diminished trust necessarily weakens support for redistribution... There is no statistically significant negative relationship between multiculturalism policies and growth in social spending across OECD countries*” (Banting, 2005).

Relying on this research devoted to the Canadian context, in this paper it is suggested here that these conclusions can be used in order to support the possibility of a supranational principle of solidarity. Despite the differences between Canada and the EU, expressed by, among others, Weiler (2004), one can argue that the former can be a good comparative term for the latter as I have tried to show elsewhere.<sup>i</sup>

## **2.1 Solidarity in EU law**

Some constitutional readings (D’Aloia, 2002) of the social policies of the EU provided so far emphasised the role of the principle of equality as key to reading the welfare dimension of the EU. Other scholars (De Burca, ed., 2005), instead, have focused on solidarity without giving a precise content to this concept. I agree with the second reading of EU social dimension but in my opinion it is necessary to add something.

First of all: what does solidarity mean in a supranational context? Then: why do we not include the cohesion policies in the content of EU social policies? Despite the absence of a fully-fledged European Nation, it is possible to speak of solidarity even in the EU context.

EU Treaties (current and former versions<sup>ii</sup>) employ this word in their texts.

Limiting our attention to the reforms introduced to the Lisbon Treaty in the main text of the TFEU it is possible to find references to solidarity:

- In the Preamble of the TFEU one can read: “intending to confirm the solidarity which binds Europe and the overseas countries and desiring to ensure the development of their prosperity, in accordance with the principles of the Charter of the United Nations”.
- Art. 67, par. 2, TFEU, for instance reads that the Union “shall ensure the absence of internal border controls for persons and shall frame a common policy on asylum, immigration and external border control, based on solidarity between Member States, which is fair towards third-country nationals. For the purpose of this Title, stateless persons shall be treated as third-country nationals”.
- Art. 80 TFEU recalls that: “The policies of the Union set out in this Chapter [**policies on border check, asylum and immigration**] and their implementation shall be governed by the principle of solidarity and fair sharing of responsibility, including its financial implications, between the Member States. Whenever necessary, the Union acts adopted pursuant to this Chapter shall contain appropriate measures to give effect to this principle”.
- Art. 122, par. 1, TFEU states that: “Without prejudice to any other procedures provided for in the Treaties, the Council, on a proposal from the Commission, may decide, in a spirit of solidarity between Member States, upon the measures appropriate to the economic situation, in particular if severe difficulties arise in the supply of certain products, notably in the area of energy”.
- Art. 194, par. 1, TFEU reads that: “In the context of the establishment and functioning of the internal market and with regard for the need to preserve and improve the environment, Union policy on energy shall aim, in a spirit of solidarity between Member States, to:
  - (a) ensure the functioning of the energy market;
  - (b) ensure security of energy supply in the Union;
  - (c) promote energy efficiency and energy saving and the development of new and renewable forms of energy; and
  - (d) promote the interconnection of energy networks”.

- Art. 222 TFEU enunciates the famous “solidarity clause” according to which: “1. The Union and its Member States shall act jointly in a spirit of solidarity if a Member State is the object of a terrorist attack or the victim of a natural or man-made disaster. The Union shall mobilise all the instruments at its disposal, including the military resources made available by the Member States, to:
  - (a) — prevent the terrorist threat in the territory of the Member States;
    - protect democratic institutions and the civilian population from any terrorist attack;
    - assist a Member State in its territory, at the request of its political authorities, in the event of a terrorist attack;
  - (b) assist a Member State in its territory, at the request of its political authorities, in the event of a natural or man-made disaster.
- 2. Should a Member State be the object of a terrorist attack or the victim of a natural or man-made disaster, the other Member States shall assist it at the request of its political authorities. To that end, the Member States shall coordinate between themselves in the Council.
- 3. The arrangements for the implementation by the Union of the solidarity clause shall be defined by a decision adopted by the Council acting on a joint proposal by the Commission and the High Representative of the Union for Foreign Affairs and Security Policy. The Council shall act in accordance with Article 31(1) of the Treaty on European Union where this decision has defence implications. The European Parliament shall be informed.
 

For the purposes of this paragraph and without prejudice to Article 240, the Council shall be assisted by the Political and Security Committee with the support of the structures developed in the context of the common security and defence policy and by the Committee referred to in Article 71; the two committees shall, if necessary, submit joint opinions.
- 4. The European Council shall regularly assess the threats facing the Union in order to enable the Union and its Member States to take effective action”.

Massive references are also included in the TEU, for instance:

- In the Preamble: “desiring to deepen the solidarity between their peoples while respecting their history, their culture and their tradition”.

- Art. 2 TEU: “The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail”.
- Art. 3, par. 3, TEU: “The Union shall establish an internal market. It shall work for the sustainable development of Europe based on balanced economic growth and price stability, a highly competitive social market economy, aiming at full employment and social progress, and a high level of protection and improvement of the quality of the environment.  
It shall promote scientific and technological advance. It shall combat social exclusion and discrimination, and shall promote social justice and protection, equality between women and men, solidarity between generations and protection of the rights of the child.  
It shall promote economic, social and territorial cohesion, and solidarity among Member States.  
It shall respect its rich cultural and linguistic diversity, and shall ensure that Europe’s cultural heritage is safeguarded and enhanced”.
- Art. 3 TEU, par. 5: “In its relations with the wider world, the Union shall uphold and promote its values and interests and contribute to the protection of its citizens. It shall contribute to peace, security, the sustainable development of the Earth, solidarity and mutual respect among peoples, free and fair trade, eradication of poverty and the protection of human rights, in particular the rights of the child, as well as to the strict observance and the development of international law, including respect for the principles of the United Nations Charter”.
- Art. 21 TEU, par. 1: “The Union’s action on the international scene shall be guided by the principles which have inspired its own creation, development and enlargement, and which it seeks to advance in the wider world: democracy, the rule of law, the universality and indivisibility of human rights and fundamental freedoms, respect for human dignity, the principles of equality and solidarity, and respect for the principles of the United Nations Charter and international law”.
- Art. 24 TEU, par. 2-3: “Within the framework of the principles and objectives of its external action, the Union shall conduct, define and implement a common foreign and security policy, based on the development of mutual political solidarity among

Member States, the identification of questions of general interest and the achievement of an ever-increasing degree of convergence of Member States' actions.

The Member States shall support the Union's external and security policy actively and unreservedly in a spirit of loyalty and mutual solidarity and shall comply with the Union's action in this area.

The Member States shall work together to enhance and develop their mutual political solidarity. They shall refrain from any action which is contrary to the interests of the Union or likely to impair its effectiveness as a cohesive force in international relations.

The Council and the High Representative shall ensure compliance with these principles”.

- Art. 31, par. 1, TEU: “1. Decisions under this Chapter shall be taken by the European Council and the Council acting unanimously, except where this Chapter provides otherwise. The adoption of legislative acts shall be excluded.

When abstaining in a vote, any member of the Council may qualify its abstention by making a formal declaration under the present subparagraph. In that case, it shall not be obliged to apply the decision, but shall accept that the decision commits the Union. In a spirit of mutual solidarity, the Member State concerned shall refrain from any action likely to conflict with or impede Union action based on that decision and the other Member States shall respect its position. If the members of the Council qualifying their abstention in this way represent at least one third of the Member States comprising at least one third of the population of the Union, the decision shall not be adopted”.

- Art. 32 TEU: “Member States shall consult one another within the European Council and the Council on any matter of foreign and security policy of general interest in order to determine a common approach. Before undertaking any action on the international scene or entering into any commitment which could affect the Union's interests, each Member State shall consult the others within the European Council or the Council. Member States shall ensure, through the convergence of their actions, that the Union is able to assert its interests and values on the international scene. Member States shall show mutual solidarity”.

Finally, another source of legal provisions concerning solidarity is, of course, the Charter of Fundamental Rights of the EU (CFREU),<sup>iii</sup> whose Preamble reads: “Conscious of its spiritual and moral heritage, the Union is founded on the indivisible, universal values of human dignity, freedom, equality and solidarity; it is based on the principles of democracy and the rule of law. It places the individual at the heart of its activities, by establishing the citizenship of the Union and by creating an area of freedom, security and justice”. Moreover, an entire Chapter (Chapter IV) is devoted to solidarity and basically includes provisions concerning workers’ rights, social security and health care, environmental and consumer protection. It is a very heterogeneous set of provisions.

Summing up, when looking at the fundamental EU Treaties and the Charter, one can find different meanings of the word “solidarity”. Ottmann once proposed the following conceptual map when reconstructing the legal meaning of the principle of solidarity at EU Treaties level:

“– *Solidarity as a common value and an objective of the Union*  
– *Social rights*  
– *Solidarity as mutual loyalty*  
– *Solidarity as mutual support in case of terrorist attack or other disasters*  
(*Solidarity clause*)” (Ottmann, 2008)

I agree with this classification although something more will be written on this later on in the paper when recalling other sources of EU law (case law of the CJEU and common constitutional and national traditions). These were the literal references to the word “solidarity” but of course EU Treaties and EU legislation are also rich in direct references to the idea of solidarity. A recent example of this is offered by the discipline governing the Euro-zone crisis, *in primis* the Treaty on Stability, Coordination and Governance (TSCG) and the Treaty Establishing the European Stability Mechanism (ESM). They do not refer to solidarity (except for the Treaty on the ESM in the Preamble<sup>iv</sup>), but they are indeed relevant in this ambit.<sup>v</sup>

Another important source is given by Art. 6 TEU when referring to the common constitutional traditions of the EU.

Can we conceive solidarity as a common constitutional tradition of the EU? The considerations made by Pizzorusso (2002, p. 69) with regard to the impossibility of tracing the principle of substantial equality back to the European constitutional heritage could perhaps lead to a similar conclusion, even in the case of the solidarity principle. According to a reconstruction carried out by Somma (2003, pp. 179-213), it is nevertheless impossible to ignore the several references to a solidarity dimension (read not only as a framework for duties justifiable in the light of superior interests) present in the European constitutions (Art. 16, 22 and 24 of the Greek Constitution; Art. 81 of the Portuguese Constitution, Art. 9 of the Spanish Constitution). Somma also adds all those constitutional provisions related to the substantial side of the equality principle, disconnecting the notion of solidarity from the constitutional duties dimension (see, for example, Art. 2 of the Italian Constitution). One can also stress further elements present in the Constitutions of the new EU Member States: Art. 28 Const. of Estonia; Art.35 and following of the Const. of Slovakia; Art. 64 and following of the Const. of Poland). Another important source of this supranational principle is given by the case law of the CJEU. There is a long list of cases where the CJEU referred to solidarity (for instance in the area of citizenship, Kostakopoulou, 2011).<sup>vi</sup>

Starting from these assumptions and looking at national constitutions, European Treaties and other “forms” of EU Law (CJEU case law, normative acts, including soft law and the EU Charter of fundamental rights), it is possible to provide some content to the supranational dimension of solidarity:

- a) Solidarity as framework of rights of subjects characterised by situations of asymmetry (the reference to consumers as “weak subjects” ceases therefore to be a surprising one). This is solidarity according to the CFREU.
- b) Solidarity as a framework of duties (a key example being the second part of Article 2 of the Italian Constitution regarding binding duties) invoking a common belonging (former Art. 10 TEC, whose content is now partly present in Art. 4 TEU). The positive

side of this “community building” is given by Article 308 of the Treaty establishing the European Community.

c) Solidarity as a principle aiming to characterise the Union (Preambles of the TEU, TFEU and CFREU).

If the first version of solidarity is admittedly vague, the second one is particularly relevant due to the fact that it testifies to the particular nature of the Community. The positive side of this “community building” with aims other than national aims is given in Art. 352 TFEU<sup>vii</sup> (former Art. 308 TEC). This is a genuine “catch-all clause” that provides for the possibility of the Council, acting unanimously upon a proposal from the Commission and after consulting the European Parliament, to take the necessary measures for the realisation of any one of the aims of the Union, should the Treaty not have provided the necessary powers for the Union.<sup>viii</sup>

### **3.1. The European Social Model: An introduction to the relevant supranational legal provisions**

After having recalled the relevant supranational provisions concerning the principle of solidarity, it is time to move to the “European Social Model”, a complex phenomenon that, as we saw earlier, is sometimes reconstructed in light of the solidarity principles.

“European Social Model” is one of the most ambiguous formulae existing in EU studies, as it refers to a jungle of sources and acts (EU Treaties, secondary EU legislation, *soft law*):

“One of the fastest growing European catchwords at the present time - the ‘European Social Model’ (ESM) - is used to describe the European experience of simultaneously promoting sustainable economic growth and social cohesion. The use of the concept of European Social Model in academic and political debate is characterized by two main and interconnected features: on the one hand, the usually taken-for-granted assumption of the reality of the concept (the reality called ‘Europe’ becomes a naturally occurring phenomenon); on the other hand, the highly ambiguous and polysemic nature of this concept” (Jepsen-Pascual, 2005).

The European Social Model is described “in terms of values that include democracy and individual rights, free collective bargaining, the market economy, equal opportunities for all, and social protection and solidarity” (European Commission, 1994).

It is based on “*good economic performance, a high level of social protection and education and social dialogue. An active welfare state should encourage people to work, as employment is the best guarantee against social exclusion*” (European Council, 2002).

As for the legal basis of this phenomenon, one could recall:

- Art. 8 TFEU stating that: “In all its activities, the Union shall aim to eliminate inequalities, and to promote equality, between men and women”.
- Art. 9 TFEU saying: “In defining and implementing its policies and activities, the Union shall take into account requirements linked to the promotion of a high level of employment, the guarantee of adequate social protection, the fight against social exclusion, and a high level of education, training and protection of human health”.
- Art. 10 TFEU according to which: “In defining and implementing its policies and activities, the Union shall aim to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation”.
- Art. 152 TFEU: “The Union recognises and promotes the role of the social partners at its level, taking into account the diversity of national systems. It shall facilitate dialogue between the social partners, respecting their autonomy”.
- Art. 154-155 TFEU (governing the so-called “Social Dialogue”)<sup>ix</sup>
- Art. 145 -150 TFEU (governing the European Employment Strategy).<sup>x</sup>
- Chapter on Solidarity included in the CFREU.
- Secondary legislation concerning labour law (among others, Council directive 2002/14, Council directives 94/45 and 2009/38).

The necessity to stress the link between the principle of solidarity and the European Social Model has been pointed out, among others, by Ottmann:

*“The reference to solidarity in these European legal texts underlines a continuous process of addressing social policy issues in the European Union throughout the past decades: Whereas the emphasis of the*

*European Social Model lies, above all, in the creation of common labour law standards which are ultimately designed to enhance the European common market, solidarity is also considered one of the common values and objectives of the Union. In this respect, solidarity relates to the cohesion between Member States and their people(s) in a way that transcends the notion of a mere common market. This concept of solidarity is intended to create and enhance cohesion in a community – a European community. However, it has to be born in mind that the concept of community at the level of the European Union has to be distinguished from the concept of community at national level. The European Union is, above all, a community of law. Therefore, the discussion of solidarity in the European Union can not simply revert to theoretical foundations in national solidarity; the discussion has to revisit periodically the universal philosophical foundations of social solidarity” (Ottmann, 2008).*

One of the main reasons for scepticism towards the European Social Model is the high diversity in terms of welfare policies present at national level, almost never questioned by the EU because of the original “social frigidity” (Mancini, 1988) present in the original Treaties.

In their works on welfare policies, Esping Andersen (1990) and Ferrera (1998) have distinguished at least three or four worlds of welfare coexisting in Europe.

This is one of the reasons for the difficulty of harmonisation in the field of social policies, and partly explains why more recently the EU has resorted to soft law instruments and to the Open Method of Coordination (with questionable results in the majority of the cases, Hatzopoulos, 2007), defined as “*an experimentalist approach to EU governance based on iterative benchmarking of national progress towards common European objectives and organized mutual learning*”,<sup>xi</sup> based on the idea of complementarity to the national action and policies.<sup>xii</sup>

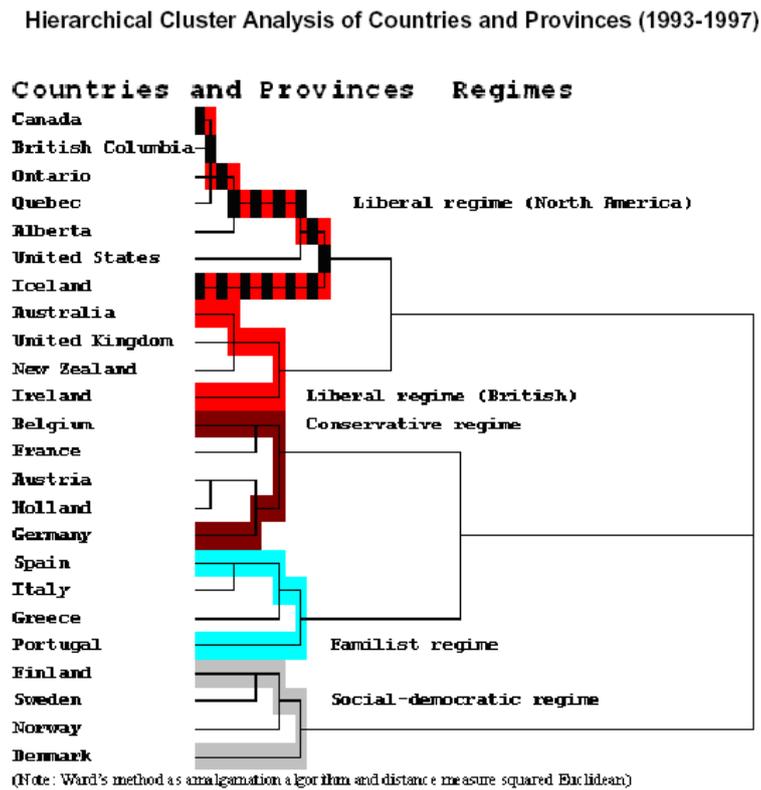
Actually, the argument of the absence of a unique welfare system in Europe does not impede - *per se* - the existence of a common sense of solidarity at supranational level.

On the contrary, asymmetry, in this respect, is common even in other contexts (plurinational-federal systems) characterised, like the EU, by a high level of social (in terms of policies) and constitutional differentiation.

A similar variety can be found in Canada, according to the studies by Bernard and Saint Arnaud (2004). Remarkable differences exist among the Canadian Provinces and in this respect the Provinces of Alberta and Québec (Morel, 2002) represent two extreme points which can be traced back to the European patterns of welfare identified by

Bernard and Saint Arnaud; the liberal, the familist, the social-democratic and the conservative regimes.

**Figure 1**



Source: Bernard-Saint Arnaud, 2004

**Table 1**

Indicators for which Provinces are Similar to the Various Regimes (Except for the Liberal Regime, which They Belong To)

Characteristics for which the Province Is Similar to the Regime			
	Social-democratic	Conservative	Familist
Quebec	<ul style="list-style-type: none"> <li>Final government consumption expenditure</li> <li>Payroll taxes as % of GDP (trend*)</li> <li>Education expenditure</li> <li>Rate of government employment (trend)</li> <li>Infant mortality rate</li> <li>Proportion of scientists and technicians</li> </ul>	<ul style="list-style-type: none"> <li>General government expenditures</li> <li>General government receipts</li> <li>Percentage of public expenditure on health and public expenditure as % of total health expenditure</li> <li>Female labour participation rate (trend)</li> </ul>	<ul style="list-style-type: none"> <li>Social security transfers</li> <li>Debt interest payments</li> <li>Unemployment rate</li> <li>Percentage of voter turnout</li> <li>Daily newspapers read</li> </ul>
Ontario	<ul style="list-style-type: none"> <li>Employment rate</li> <li>Proportion of scientists and technicians</li> </ul>	<ul style="list-style-type: none"> <li>Final government consumption expenditure (trend)</li> <li>Rate of government employment</li> </ul>	<ul style="list-style-type: none"> <li>Debt interest payments (trend)</li> <li>Rate of union membership</li> </ul>
Alberta	<ul style="list-style-type: none"> <li>Public expenditure on vocational training</li> <li>Female labour participation rate</li> </ul>		<ul style="list-style-type: none"> <li>Debt interest payments (trend)</li> <li>Rate of union membership</li> </ul>
British Columbia	<ul style="list-style-type: none"> <li>Education expenditure (trend)</li> <li>Employment rate</li> <li>Female labour participation rate</li> </ul>	<ul style="list-style-type: none"> <li>Public expenditure as % of total health expenditure</li> <li>Unemployment rate</li> </ul>	<ul style="list-style-type: none"> <li>General government receipts</li> <li>Daily newspapers read</li> <li>Rate of union membership</li> </ul>

\* The use of the word trend indicates that the province's level on this indicator diverges from the level of the liberal model in the direction of another regime, but does not reach the latter level.

Source: Bernard-Saint Arnaud, 2004

The coexistence of different worlds of welfare can be explained keeping in mind the identity implications of welfare policies as confirmed by several studies on Québec nationalism (Béland-Lecours, 2006). Welfare is a matter of identity and culture; the social policies in Québec are seen as a distinctive element of the local identity: “Solidarity conceptualised in terms of equality and social justice ties nationalism to the welfare state”, (Béland-Lecours, 2006,79), as Béland and Lecours powerfully pointed out. Indeed the “jealousy” of Québécois for their social policies explains the reactions to

some judgements of the Canadian Supreme Court – like *Chaoulli v. Québec*<sup>xiii</sup> for instance – perceived as imperialistic attempts to jeopardise the local specificity or the reluctance to participate in the *Social Union Framework Agreement*.

A similar variety of worlds of welfare can be found in Switzerland, as the studies by Armingeon, Bertozzi and Brogli show (Armingeon-Bertozzi-Brogli, 2000), focusing on social security, education, taxation and employment regimes (“The term denotes the patterns of employment and unemployment and the patterns of wage regulation”, Armingeon-Bertozzi–Brogli, 2000). The results of their research can be summarised in the two following tables:

**Table 2**

SUMMARY OF THE OPERATIONALISATION OF VARIABLES FOR THE DIFFERENT ASPECTS OF THE CANTONAL WELFARE STATE

	Dimension 1	Dimension 2	Outcomes
Employment (a)	Level of public employment	Continuity of female employment	
	<i>High</i>	<i>High</i>	<i>Social democratic</i>
	<i>Low</i>	<i>Low</i>	<i>Conservative</i>
	<i>Low</i>	<i>High</i>	<i>Liberal</i>
	<i>High</i>	<i>Low</i>	<i>Unclear (statist-conservative)</i>
Taxation (b)	Level of taxation	Progressivity of taxation	
	<i>High</i>	<i>High</i>	<i>Social democratic</i>
	<i>High</i>	<i>Low</i>	<i>Conservative</i>
	<i>Low</i>	<i>Low</i>	<i>Liberal</i>
	<i>High</i>	<i>High</i>	<i>Unclear (redistributive-liberal)</i>
Education (c)	Education expenditure and share of diplomas		
	<i>High</i>		<i>Unclear (social democratic or liberal)</i>
	<i>Low</i>		<i>Conservative</i>
Social Security (d)	Number of cantonal social security schemes and per capita social security benefits paid by canton and municipalities	Degree of familism (birth grants, child benefits to 4th child minus expenditure on pre-school facilities)	
	<i>High</i>	<i>Low</i>	<i>Social democratic</i>
	<i>High</i>	<i>High</i>	<i>Conservative</i>
	<i>Low</i>	<i>Low</i>	<i>Liberal</i>
	<i>Low</i>	<i>High</i>	<i>Unclear (liberal-conservative)</i>

Source: Armingeon-Bertozzi-Brogli, 2000

**Table 3**

WORLDS OF WELFARE IN SWITZERLAND: CLASSIFICATION OF THE 26 SWISS CANTONS (EMPLOYMENT, EDUCATION, TAXATION AND SOCIAL SECURITY)

List of Cantons		Employment	Education*	Taxation	Social Security
AG	Argovia	2	2	1	1
AI	Appenzell Inner-Rhodes	2	2	1	1
AR	Appenzell Outer-Rhodes	1	2	2	1
BE	Berne	1	2	2	1
BL	Basle-Country	1	4	4	3
BS	Basle-Town	4	4	3	3
FR	Fribourg	3	4	3	2
GE	Geneva	3	4	3	3
GL	Glarus	1	2	1	1
GR	Grisons	4	2	1	1
JU	Jura	3	4	3	1
LU	Lucerne	2	2	2	4
NE	Neuchâtel	3	4	2	2
NW	Nidwalden	1	2	1	4
OW	Obwalden	1	2	2	4
SG	St Gall	1	2	2	1
SH	Schaffhausen	3	4	1	3
SO	Solothurn	1	2	4	4
SZ	Schwyz	1	2	1	4
TG	Thurgovia	2	2	3	1
TI	Ticino	4	4	4	3
UR	Uri	4	2	1	4
VD	Vaud	1	4	3	2
VS	Valais	1	2	2	2
ZG	Zug	2	4	1	2
ZH	Zurich	4	4	1	3

Notes:  
 1 = liberal  
 2 = conservative  
 3 = social democratic  
 4 = unclear, in case of employment 'statist-conservative', in case of education either 'liberal' or 'socio-democratic', in case of taxation 'redistributive-liberal', in case of social security 'liberal-conservative'.  
 \*only category 2 and 4 are possible under this dimension.

Source: Armingeon-Bertozzi-Brogli, 2000

According to these findings, it is not possible to trace back to any canton a precise univocal welfare pattern.

This variety in welfare models can also explain the social tourism which is due to the different quality and level of services performed by the cantons (Tabin–Keller-Hofmann-Rodari-Du-Pasquier-Knüsel-Tattini, 2004). Some scholars argue that the strong autonomy of the 26 sub-systems has produced a series of inter-cantonal differences both in terms of financial effort and legal discipline passed (Filippini-Crivelli-Mosca, 2006). The welfare state of Switzerland is based on:

*“strong social security systems while also being coupled with a decent system of social assistance. The Swiss welfare state system does not apply large systems of general universal benefits, or social savings accounts. The Swiss health care insurance system is rather unusual, in the sense that public, subsidized private and fully private elements have been intertwined. Also, the decentralization of the health care system has been given rise to significant differences between cantons in terms of health care spending and provision”* (Wang-Aspalter, 2006).

In Switzerland such a welfare differentiation is also caused by the fact that the role of cantons and communes in social policies is essential and has favoured the emergence of different systems of welfare (Filippini-Crivelli-Mosca, 2006; Crivelli-Filippini, 2003).<sup>xiv</sup> In other words: when looking at comparative law, one can see that the mere co-existence of different conceptions and models of welfare does not exclude the possibility of speaking of solidarity.

Indeed the above mentioned researches by Banting and Kymlicka, when looking at Canada, tried to explain that there is no trade off between diversity and solidarity. There is undoubtedly a tension between solidarity and diversity but instead of resulting in a trade off effect, it rather generates forms of asymmetry, in this case, social asymmetry. As we saw earlier (endnote I), asymmetry is another element shared by the EU and Canadian constitutional experiences and, actually, it is also present in the Swiss context. Switzerland is often described as an example of symmetric federalism but on closer examination it is characterised by strong asymmetries, given the important role acknowledged to the cantons in many key sectors (education, fiscal federalism – each canton has its own fiscal regime) and a confirmation of its asymmetrical nature is given by the *Réforme de la péréquation financière et de la répartition des tâches entre la Confédération et cantons* (RPT)<sup>xv</sup> approved in 2004, and by the importance of the equalisation payments mechanism based on Article 135 of the Swiss Constitution.<sup>xvi</sup> Further evidence of the asymmetric nature of Switzerland’s federalism can be found in the wording of the Constitution which acknowledges great organisational autonomy (Art. 37 Const.)<sup>xvii</sup> with the only limitation being the necessity to have a Constitution (Art. 51 Const.)<sup>xviii</sup> and to guarantee the exercise of political rights (Art. 39 Const.)<sup>xix</sup> and by the constitutionalisation of the Communes (Art. 50 Const.).<sup>xx</sup>

## **SECTION II**

### **1.2. The role of the EU cohesion policies: An introduction to the relevant legal provisions**

The aim of this section is to introduce the main legal provisions concerning the function, scope and goals of the EU cohesion policies under the EU fundamental Treaties.

Then, I shall move to the analysis of the connections existing between the provisions concerning cohesion policies and the EU social policy, by presenting the former as part of the EU welfare system.

As for the relevant EU Treaties provisions, one can include:

- the Preamble of the TEU: “determined to promote economic and social progress for their peoples, taking into account the principle of sustainable development and within the context of the accomplishment of the internal market and of reinforced cohesion and environmental protection, and to implement policies ensuring that advances in economic integration are accompanied by parallel progress in other fields”;
- Art. 3 TEU, according to which the EU: “shall promote economic, social and territorial cohesion, and solidarity among Member States”.
- Art. 15 TEU, par. 6 according to which the President of the Council: “(c) shall endeavour to facilitate cohesion and consensus within the European Council”.

However, the most important provisions concerning the EU cohesion policies are included in the TFEU.

- Art. 4 TFEU, defining “(c) economic, social and territorial cohesion” as an area of shared competences;
- Art. 14 TFEU, reading: “Without prejudice to Article 4 of the Treaty on European Union or to Articles 93, 106 and 107 of this Treaty, and given the place occupied by services of general economic interest in the shared values of the Union as well as their

role in promoting social and territorial cohesion, the Union and the Member States, each within their respective powers and within the scope of application of the Treaties, shall take care that such services operate on the basis of principles and conditions, particularly economic and financial conditions, which enable them to fulfil their missions. The European Parliament and the Council, acting by means of regulations in accordance with the ordinary legislative procedure, shall establish these principles and set these conditions without prejudice to the competence of Member States, in compliance with the Treaties, to provide, to commission and to fund such services”.

- Art. 171, par. 1, TFEU stating: “1. In order to achieve the objectives referred to in Article 170 [**Trans European-Networks**], the Union:

— shall establish a series of guidelines covering the objectives, priorities and broad lines of measures envisaged in the sphere of trans-European networks; these guidelines shall identify projects of common interest,

— shall implement any measures that may prove necessary to ensure the interoperability of the networks, in particular in the field of technical standardisation,

— may support projects of common interest supported by Member States, which are identified in the framework of the guidelines referred to in the first indent, particularly through feasibility studies, loan guarantees or interest-rate subsidies; the Union may also contribute, through the Cohesion Fund set up pursuant to Article 177, to the financing of specific projects in Member States in the area of transport infrastructure.

The Union’s activities shall take into account the potential economic viability of the projects”.

-Art. 174-178 (Title XVIII devoted to “Economic, social and territorial cohesion” (see below)

-Art. 192 TFEU, par. 5<sup>xxi</sup>

- Art. 326 TFEU: “Any enhanced cooperation shall comply with the Treaties and Union law.

Such cooperation shall not undermine the internal market or economic, social and territorial cohesion. It shall not constitute a barrier to or discrimination in trade between Member States, nor shall it distort competition between them”.

A few comments on these provisions: the first one concerns the terminology employed in the EU fundamental Treaties.

Even in the previous Treaties, cohesion was one of the tasks of the Community, as was obvious from former Art. 2 TEC (now Art. 3 TEU) and Article 3, k)<sup>xxiii</sup> of the TEC.

Another important provision was Art. 16 TEC regarding services of general economic interest, which spoke of “*promoting social and territorial cohesion*”, leaving out the term “economic” and replacing it with “*territorial*”.

In this sense, it is interesting to stress the choice expressed in the Constitutional Treaty and in the Reform Treaty where the word constantly accompanies the notion of economic and social development: e.g. Art. I-14 (Art.4 TFEU). Another example is provided by Art. III-416 (Art. 326 TFEU), which identifies a limit to the actions of reinforced cooperation in economic, social and territorial cohesion (together with the common market). This confirms the importance of this area, belonging to the untouchable core of EU life since cohesion may not be undermined by asymmetric integration.

The second point concerns the connection between the EU cohesion policies and the European Social Model.

In spite of the undeniable still market-friendly spirit of the EU fundamental Treaties, it is necessary to point out the presence of some collaborative clauses between the reasons of the market and those of welfare in their wording.

One also needs to mention here the provisions of Article 151 TFEU, c.3, where a functional common market is seen as a prerequisite for the harmonisation of social systems. Free and common market and social objectives are therefore joined together, without viewing the former as an “obstacle” for the realisation of general welfare objectives.

Indeed, to overcome the presumed weaknesses of the European social dimension, it is necessary to complete the framework by including in this EU social model the cohesion policies as well.

As we saw in the TFEU, an entire Title (the XVIII) is devoted to social and economic cohesion and in Article 174 TFEU one can find a definition of economic, social and territorial cohesion, being understood as instrumental for the aim of pursuing the “*overall harmonious development*” of the Union. The TFEU specifies that “*Union shall aim at reducing disparities between the levels of development of the various regions and*

*the backwardness of the least favoured regions. Among the regions concerned, particular attention shall be paid to rural areas, areas affected by industrial transition, and regions which suffer from severe and permanent natural or demographic handicaps such as the northernmost regions with very low population density and island, cross-border and mountain regions*". Article 175 TFEU recalls that Member States must coordinate their economic policies, enumerating the instruments of the cohesion policy (European Agricultural Guidance and Guarantee Fund, Guidance Section; European Social Fund; European Regional Development Fund); the European Investment Bank and the other existing Financial Instruments are also mentioned).

Among the structural funds, a special role should be recognised to the Social Fund.

In the TEC it was regulated in Title XI ("Social policy, education, vocational training and youth") by Articles 146, 147 and 148 of the TEC. The "geography" of the provisions regarding the ESF proved the close connection between social policies (Art. 136 and Art. 137 TEC) and cohesion instruments.

Relevant to this argument was Title XV of the TEC regarding trans-European networks, given the reference made by Article 154 to the aims spelled out in Article 158, which opens the Title on economic and social cohesion. This sheds light on the particular connection between market, infrastructure networks and social and economic cohesion and, in certain respects, it was also present in the Delors White Paper of 1993 on "*Growth, competitiveness, employment: the challenges and ways forward into the 21st century*" ([http://europa.eu/documentation/official-docs/white-papers/pdf/growth\\_wp\\_com\\_93\\_700\\_parts\\_a\\_b.pdf](http://europa.eu/documentation/official-docs/white-papers/pdf/growth_wp_com_93_700_parts_a_b.pdf)).

The connection between economic, social and territorial cohesion and infrastructure networks is confirmed in Art. 170 TFEU which refers to current Art. 174 TFEU.

With the Lisbon Treaty, the previous Title XI ("Social policy, education, vocational training and youth") was divided into three different titles: Title X ("Social policy", Art. 151-161 TFEU), Title XI (devoted to the "European Social Fund" as such) and Title XII (devoted to "Education, vocational training, youth and sport").

However, as we saw, the European Social Fund is recalled by Art. 175 TFEU, included in the Title devoted to economic, social and territorial cohesion and defined as one of the instruments of the EU cohesion policies. Indeed, still today, despite the slightly

different “geography” of the Treaties, the European Social fund represents the legal bridge connecting the provisions governing EU social policy and EU cohesion policies (for instance the Regulation (EC) No 1081/2006 of the European Parliament and of the Council of 5th July 2006 on the European Social Fund and repealing Regulation (EC) No 1784/1999 on the European Social Fund expressly recalls the European Social Model in its Preamble.<sup>xxiii</sup>

This part of the paper deals with the reductive vision according to which the cohesion policies cannot be brought back to the constitutional principle of solidarity. The possibility of including the cohesion policies in the welfare dimension of the EU depends on this.

In fact, the argument that “Title XVII [**today Tile XVIII**]... exclusively expresses an objective in terms of the narrowing of the gaps between various levels of economic development” (Balboni, 2001, p. 53) is questionable for five main reasons.

The first reason is the wealth redistribution factor (similar to the one characterising social dynamics within the Member States), even if limited (at least directly) to the territorial level (similar to the principle of Article 119 of the Italian Constitution<sup>xxiv</sup>). Another important example of this argument is provided by the Canadian experience of the equalisation payments founded on section 36 of the Constitution Act of 1982.<sup>xxv</sup> Traditionally, redistribution policies are founded on a common sense of belonging, a spirit of solidarity in a homogenous community: a confirmation of this could be found, for example, in the history of state-building according to Rokkan’s theory.

According to Rokkan the ethnic, religious, social and economic disparity of pre-modern Europe has been reduced by the creation of the relatively homogeneous Western European states.

The development of a welfare state presumes the building of a strong national community and provides a substantive complement to political democracy.

Recently, scholars like Kymlicka, Banting and Alesina (2001) have studied the “tension” between redistribution and heterogeneity in a multicultural context, in order to understand if multiculturalism policies that recognise or accommodate ethnic groups tend to exacerbate any underlying tension between diversity and social solidarity, further weakening support for redistribution.

The limitation of the redistribution factor to the individual targeting policies is a big mistake, which does not find confirmation in comparative experience. Another clear proof of the link between social policies and cohesion is given by the rules of the TFEU regarding the European Social Fund, as was discussed above. The third point is the change of the EU context. It seems evident that the latest phase of supranational constitutionalism is characterised by the proclamation of the CFREU. It is impossible to analyse here the several theories advanced in order to give it a strong legal value, but one can recall that it codifies many principles contained in CJEU's case law, or in the common constitutional traditions of Art. 6 TEU. Although the Charter does not represent an earthquake in the constitutional background of the EU - since it mainly presents a codification nature - it does show its political attempt to overcome the economic-only version of the Union's life.

Deep implications for the form of the Union (understood as the relation between centre and periphery) come from the horizontal clauses of this document. In this sense, with the coming into force of the Reform-Treaty the shift toward a strong supra-nationalism has been evident. A part of this has been undoubtedly the language of rights (social rights specifically) which characterises this phase of the EU life, and it is important to take care of this aspect when analysing the dynamics of the protection of European entities (citizens or states). This language will probably increase the national divergences present on the social question and characterise the future of the Union's life (as the aftermath of the *Laval and Viking* - C-438/05, *Viking Line*, 2007 I-10779; C-341/05, *Laval und Partneri Ltd*, ECR, 2007 I-11767 - cases seems to confirm, Azoulai, 2008; on social conflicts see Dani, 2012).

Last but not least, there are two other "theoretical" points.

The argument in question here shows a reductionist vision of the notion of "development", because it neglects Sen's intuition about the link between development and human rights.<sup>xxvi</sup>

Finally, the view which questions the existence of a supranational welfare, reveals a Manichean (black or white) vision of social sovereignty as it seems to condition the existence of a supranational welfare to the complete exhaustion of the national welfare

state (this idea reflects the dissatisfaction with a pure negative integration in this field. On the concept of negative integration see Scharpf, 1999, p. 51).

However, such an approach cannot see a positive integration because it looks for an exclusive actor of this integration, while positive integration has a multilevel dynamic and it is articulated in a multilevel way: in this sense the state could play a fundamental role in social policies and, at the same time, the EU does not need to centralise this field of public activity.

After having recalled the main legal bases of the EU cohesion policies, it is time to move to the third part of this work, whereby I shall try to stress the important contribution that EU cohesion policies may have on the form of the Union.

## **SECTION III**

### **1.3. The *Landesblindheit* and the possibilities offered by cohesion policies**

The aim of this section is to show the impact of the EU cohesion policies for a new and better role of regions in the EU multilevel governance.

In order to do so I shall proceed as follows: first, I will reconstruct the essence of what scholars call the “territorial blindness” (Weatherill-Bernitz, 2005) of the EU, by presenting it as a part of the broader EU’s democratic deficit.

Secondly, I shall stress the importance regions have to the functioning of the EU cohesion policies.

Finally, I will try to emphasise the contribution the EU cohesion policies may have to the improvement of the legal status of regions.

Traditionally, the history of the EU has been ungenerous towards the sub-national entities, but more recently something new has happened thanks to a progressive improvement of the regions in the EU context.

Cohesion policies, in fact, make regions very important actors in the economic dynamics of the EU and this could contribute to overcoming the *Landesblindheit*.

The first proof of the impact of social policies on the form of the Union could be the reevaluation of regions usually neglected in the legal dynamics in Europe.

The “legal” territorial blindness (*Landesblindheit*) of the Union towards the regions finds its confirmation in the wording of the Treaties (specifically in former Art. 10, TEC), where it is noted that the subjects of the Community legal order are the states, holders of the duty to collaborate with each other, which is instrumental for guaranteeing the effectiveness of supranational law.

In this respect, the debate on the democratic deficit has always been characterised by one great simplification: the reduction to the question of the lack of the European Parliament’s powers.

This approach is questionable because it tends to isolate the question from other connected issues: the weakness of the European parties, the composition of the other European institutions, the restrictions to the access to the CJEU for actors such as the regions, the perennial violation of the principles of conferral and subsidiarity and the lack of a clear system of legal sources.

As one can infer, several of these issues are strongly interrelated: for example, the problem of the violation of subsidiarity is linked to that of the lack of the regions’ “direct access” before the CJEU (Dani, 2004, p. 181 ff).

In this part of the paper I will try to connect the role given to the regions by the cohesion policies to some of these democratic issues.

In order to do so I shall employ the notion of “form of Union”.

This notion recalls the formula “form of State” by which Costantino Mortati (Mortati, 1973) meant, on the one hand, the relationship among the classical elements of the state (sovereignty, territory and people) and, on the other, the fundamental goals of the State. In this sense, the notion of “form of State” is connected to the concept of fundamental high policy goals (i.e. “political lines”). Under the formula “form of State” Mortati grouped classifications related both to the vertical separation of powers (e.g. unitary versus de-centralised state, with regard to the relationship between the territorial entities; liberal state versus welfare state, with regard to the relationship between market and state), as well as to the horizontal separation of powers (e.g. democratic versus authoritarian state). As Mortati himself pointed out, the notion of “form of State”

represents the teleological moment of the form of government (that is, the whole of relationships between the state powers)

By further developing this polysemy, Palermo (Palermo, 2005) concludes that the “form of State” concerns both the (vertical and horizontal) distribution of powers and the axiological dimension of a legal order.

In this paper I am going to employ the first meaning of this formula, understanding the “form of Union” (Mezzetti, 2006) as the relationship between the centre and the periphery in the multilevel context.

The regional lack of “voice” is present both at substantive level (regions do not participate - if not in an indirect manner - to the decision making phase) and procedural (they are not privileged applicants, Thies, 2011).

This phenomenon has been explained by scholars in different ways; here I can, for instance, summarise three (sometimes competing) main reasons:

1. According to authors like Skoutaris, this can be explained because the regional issue is not a real issue shared at supranational level. Not all the EU Member States present a regional or federal system; in many of them regions are just administrative units (Skoutaris, 2012).
2. Another explanation might be connected to the fact that they (regions) do not have a common position or common interests: this also explains the difficulties of the Committee of the regions and the reasons why the regions provided with legislative powers created the Conference of European Regional Legislative Assemblies (CALRE, from its French acronym). This is a confirmation of the existence of a sort of two speed (regional) European Union (legislative regions versus administrative regions, two actors with different priorities and interests).
3. Finally, and cohesion policies are emblematic from this point of view, this can be explained keeping in mind that regions are crucial in the implementation of EU policies but are excluded from the decision making phase of them (Vida, 2005). This will make their efforts to change the system particularly hard.

It is possible to find many confirmations of this approach of the EU towards the domestic territorial organisation. This is also connected to the public international law origin of the EU. For instance, once the CJEU argued that:

*“it is apparent from the general scheme of the treaties that the term 'Member State', for the purposes of the institutional provisions and, in particular, those relating to proceedings before the courts, refers only to government authorities of the Member States of the European Communities and cannot include the governments of regions or autonomous communities, irrespective of the powers they may have. **If the contrary were true, it would undermine the institutional balance provided for by the Treaties, which govern the conditions under which the Member States, that is to say, the States party to the Treaties establishing the Communities and the Accession Treaties, participate in the functioning of the ; Community institutions. It is not possible for the European Communities to comprise a greater number of Member States than the number of States between which they were established**”<sup>xxvii</sup>*

Since the founding Treaties were signed by the Member States, they are the reference mark of the EU legal system and the holders of duties and rights according to the Treaties. This is in a nutshell the reasoning of the CJEU in that case. The “indifference” of the EU towards the domestic territorial organisation of their Member States (a piece of the territorial blindness) presents two sides, as Lenaerts pointed out:

*“EU law does not interfere with the internal division of powers between national and regional authorities within a Member State. Regions exercising their own constitutional powers must however do so in a manner consistent with EU law. ...”* (Lenaerts, 2011).

This is the good side, which results in a sort of respect of the internal vertical division of powers between centre and periphery; we could call it “territorial autonomy”.

However, there is also a negative side of the coin, represented by the impossibility of using the domestic separation of powers as a way to justify non-compliance with EU law:

*“A Member State is thus not entitled to hide behind the domestic division of powers or federal structure in order to avoid the CJEU making a finding of an infringement or to escape its obligation to bring such infringement to an end”* (Lenaerts, 2011).

This indifference for the territorial organisation established by domestic constitutional law may be linked to the need for a uniform interpretation and application of EU law, as expressed in the famous (and ambivalent) *Internationale Handelsgesellschaft* decision. I am referring to the very famous point in which the CJEU argued that: “*The validity of a Community measure or its effect within a Member State cannot be affected by allegations that it runs counter to either fundamental rights as formulated by the constitution of that State or the principles of its constitutional structure*” (11/70, *Internationale Handelsgesellschaft*, 1970. ECR 1125).

The CJEU (EC at that time) law clarified that there was (and there still is, to a certain extent) no room for a sort of constitutional immunity for Member States. In other words, Member States may not use their constitutional provisions to justify an infringement of EU law.

This makes sense if considered from the CJEU’s perspective, which has always tried to present EU law as autonomous and thus as non-dependent on what national constitutions say.

The alternative option would have condemned the CJEU to be the judge of a highly diversified law, whose authority would have depended on what the single national constitution admits.

The *Solange* (BVerfGE 37, 271 2 BvL 52/71 *Solange I-Beschluß*) saga originated from the unacceptability of this position if compared to that of national Constitutional Courts in the specific area of fundamental right protection.<sup>xxviii</sup>

The *Solange* judgement paved the way for a long-lasting confrontation between the CJEU and the national Constitutional Courts. Over the years, the CJEU seemed to get the point by incorporating the concept of the fundamental rights as a premise of the primacy of EU law. For example, in *Omega* (C-36/02 *Omega*, 2004, ECR I-9609, par. 41) the Court said that: “*It should be recalled in that context that, according to settled case-law, fundamental rights form an integral part of the general principles of law the observance of which the Court ensures*”. In this judgement the CJEU also acknowledged the necessity, for the EU law primacy, to stop in front of values codified in a national constitution.<sup>xxix</sup>

This judgement should be regarded as the culmination of a long process, starting with *Solange I* and paving the way for *Dynamic Medien* (C-244/06, *Dynamic Medien*, 2008, ECR I-505) or *Sayn-Wittgenstein*, (C-208/09, *Sayn-Wittgenstein*, 2010, I-13693) which seemed to show greater deference towards those principles embodying the national constitutional identity of the Member States. The *Omega* judgement intends to demonstrate (not by coincidence, before a German judge) the maturity of the EU legal system and, in general, the outcome of the constitutional dialogue with national interlocutors.

This process of convergence between the languages of the (national and supranational) courts has contributed to the creation of a common axiological field between the different (constitutional) legal orders. This common axiological field can be described as the “heart” of multilevel constitutionalism and as the most evident product of that constitutional exchange (*synallagma*) defined elsewhere as the efficient secret of the European Constitution (Martinico, 2012, pp. 198-226).

This is a very well known story, but one should not forget that principles on fundamental rights are just one parts of a domestic constitution (as, for instance, the eternity clause - Art. 79<sup>xxx</sup> - of the German *Grundgesetz* confirms).

While looking at the convergence on the issue of fundamental rights, scholars have neglected the impact of the “no constitutional immunity” argument on the recognition of the territorial autonomy of Member States.

As the CJEU stated:

*“It is, however, settled case-law that a Member State cannot rely on provisions, practices or circumstances existing in its internal legal order in order to justify its failure to respect the obligations and time-limits laid down by a directive”* (C-144/97, *Commission/France*, pag. I-613, punto 8)” (p. 42).

*“A Member State cannot rely on provisions, practices or circumstances existing in its internal legal order”* or, in other words, as the CJEU said in *Internationale Handelsgesellschaft*, the effects of EU law *“within a Member State cannot be affected by allegations that it runs counter to ...the principles of its constitutional structure”*. These two extracts offer evidence of the analogy between the *Internationale*

*Handelsgesellschaft* approach and that taken by the CJEU in its case law concerning the territorial structure of the EU Member States.

Nevertheless, the CJEU has partially reconsidered its own position following the increase in importance of decentralisation processes within domestic systems with a series of cases. The first example is given by the *Konle* case, concerning a disagreement between a citizen and the Austrian administration, which was the outcome of a preliminary ruling ex 267 TFEU (at that time 234 TEC).

The Luxembourg Court also added that: “*subject to that reservation, Community law does not require Member States to make any change in the distribution of powers and responsibilities between the public bodies which exist on their territory*”<sup>xxxix</sup>. The only condition imposed by the Community judge was that “the procedural arrangements in the domestic system enable the rights which individuals derive from the Community legal system to be effectively protected, and it is not more difficult to assert those rights than the rights which they derive from the domestic legal system”. In its reasoning, the CJEU admitted that “*in Member States with a federal structure, reparation for damage caused to individuals by national measures taken in breach of Community law need not necessarily be provided by the federal State in order for the obligations of the Member State concerned under Community law to be fulfilled*”<sup>xxxix</sup>. In the *Haim* case, the Court restated that “*Community law does not preclude a public-law body, in addition to the Member State itself, from being liable to make reparation for loss and damage caused to individuals as a result of measures which it took in breach of Community law*”<sup>xxxix</sup>. As was pointed out in the case law commentary (Saggio, 2001, pp. 223-242) it still remains to be clarified whether it would eventually be possible to talk of an exclusive liability of a sub-state public entity or whether this liability will always be concurrent with the one of the State. Moreover, the relationship between the two liabilities remains to be clarified as well.

If these two cases concern the liability of the State (so, the side of the duties), the CJEU has recently demonstrated that it is disposal to tear the veil of the national constitutional impermeability to verify either the presence or the absence of an infringement of EU law.

This is the case of the *Horvath* decision, whereby the CJEU said that:

*“Where, as in the main proceedings, it is the devolved administrations of a Member State which have the power to define the GAEC minimum requirements within the meaning of Article 5 of and Annex IV to Regulation No 1782/2003, divergences between the measures provided for by the various administrations cannot, alone, constitute discrimination. Those measures must, as is clear from paragraph 50 of this judgment, be compatible with the obligations on the Member State in question which stem from that regulation.*

*In the light of the foregoing, the answer to the second question is that, where the constitutional system of a Member State provides that devolved administrations are to have legislative competence, the mere adoption by those administrations of different GAEC standards under Article 5 of and Annex IV to Regulation No 1782/2003 does not constitute discrimination contrary to Community law” (C-428/07 – Horvath, ECR, 2009 I-06355).*

On this point the CJEU followed the Opinion released by the Advocate General, which represents a fresh account of the doctrine of the Luxembourg Court on the issue of domestic autonomy in the allocation of their internal powers.<sup>xxxiv</sup> This implies that, like in the discussed case, a differentiated implementation (within the territory of the same Member State, UK in this case) caused by the regional competence to implement an EU measure (in this case a *sui generis* regulation) does not create - *per se* - a form of discrimination.

When excluding the existence of a violation of EU law the CJEU demonstrated paying attention to the domestic separation of powers.

Similar attention was paid by the General Court (at that time Court of First Instance) when recognising the access of a Region before itself:

*“Furthermore, a regional authority has a separate interest in challenging the decision, distinct from that of the Member State addressed, where it possesses rights and interests of its own and the aid in question constitutes a set of measures taken in the exercise of legislative and financial autonomy vested in the authority directly under the constitution of the Member State concerned” (T-288/97, Regione autonoma Friuli Venezia Giulia/Commission ECR., 2001 II-01169).*

However, the apex of this new attention to the national constitutional structure is represented by a series of decisions concerning the burning issue of the regional tax power.

The premise of the reasoning of the CJEU in these cases is that: “*Although, as Community law stands at present, direct taxation does not as such fall within the purview of the Community, the powers retained by the Member States must nevertheless be exercised consistently with Community law*” (C-279/93 Schumacker, par.21, ECR 1995, I-00225).

In order to verify whether forms of regional tax power may be consistent with the EU Treaties, the CJEU started considering the degree of autonomy enjoyed by the regional entity in a series of cases. Moreover, when doing so, it does not limit itself to the mere analysis of the constitutional role played by regions in a given national context but devised some criteria to assess the degree of autonomy enjoyed by the sub-national unit. As in fact the CJEU said in *Presidente del Consiglio dei Ministri* the mere regional nature of a tax does not necessarily result in a violation of the free movement of services.<sup>xxxv</sup>

In order to concretely understand when a violation of the Treaties occurs is necessary to look at the degree of autonomy and the impact of a given measure on the territorial context.

This reasoning has also been applied to other areas of EU law.

For instance, when verifying the compatibility with Art. 107 TFEU, for instance, the CJEU said:

*“It is possible that an infra-State body enjoys a legal and factual status which makes it sufficiently autonomous in relation to the central government of a Member State, with the result that, by the measures it adopts, it is that body and not the central government which plays a fundamental role in the definition of the political and economic environment in which undertakings operate. In such a case it is the area in which the infra-State body responsible for the measure exercises its powers, and not the country as a whole, that constitutes the relevant context for the assessment of whether a measure adopted by such a body favours certain undertakings in comparison with others in a comparable legal and factual situation, having regard to the objective pursued by the measure or the legal system concerned”* (C-88/03, Portugal v. Commission (Azores), 2006, ECR. I-711).

To measure such autonomy, the CJEU devised three criteria: the institutional, procedural and financial autonomy.

*“The first requirement concerns the autonomy of the infra-State body from an institutional point of view. The tax measure must have been taken by a regional authority which has, from a constitutional point of view, a political and administrative status separate from that of the central government. The second requirement has regard to the autonomy from a procedural point of view. The tax measure must have been adopted without the central government being able to directly intervene as regards its content. Finally, the third requirement concerns the autonomy from an economic and financial point of view. The financial consequences of a reduction of the national tax rate for undertakings in the region must not be offset by aid or subsidies from other regions or the central government”* (Lenaerts, 2011).

In the absence of one of these forms of autonomy the measure will be selective and thus result in a State aid.

The same test was developed in two other important cases: *Rioja* (Joined Cases C-428/06 to C-434/06 *Unión General de Trabajadores de la Rioja*, 2008, ECR I-6747) and *Gibraltar* (C-106/09 P e C-107/09 P, not yet published).

A detailed analysis of this case law goes beyond the purpose of this paper; what I wanted to emphasise here was the progressive attention paid by the CJEU to the constitutional autonomy of sub-national entities.

After having defined the most important trends in the case law of the CJEU and having stressed the increasing attention given by the Luxembourg Court to the domestic legal position of regions when they implement or breach EU law, in the next chapter I shall go back to the EU cohesion policies and its governance, in order to highlight the crucial importance these sub-national actors have in their functioning.

### **2.3. Regions as fundamental actors in the governance of the EU cohesion policies**

In this part of the paper I will briefly recall the progressive decentralisation in the governance of EU cohesion policies.

When doing so I shall primarily rely on works by political scientists and scholars interested in multi-level governance (Vida, 2005). Since this is not a work on the history of the EU cohesion policies, I do not intend to reconstruct all the progressive waves of reforms in a detailed manner (for a brief account of the EU cohesion policies' transformation see: Vida, 2005; Manzella-Mendez, 2009).

Going through the analysis of the governance of these EU policies, Vida (2005) and Manzella-Mendez (2009) have emphasised that the crucial role played by regions within the EU cohesion policies' governance finds its roots in the reform that occurred between 1988 and 1993.

In fact a new package of measures (Council Regulations (EEC) No. 4253/88 to 4256/88, of 19th December 1988) established four new fundamental principles: concentration, programming, partnership and additionality.<sup>xxxvi</sup>

Among them, the partnership principle is of particular importance, since it requires “*the involvement of relevant regional and local authorities in programme formulation and implementation*” (Manzella-Mendez, 2009).

Thanks to this reform (a real turning point in this area) since then the governance system of the EU has presented a curious example of a mix between new and old techniques of governance:

*“To sum up, by the end of the Delors I package, the Treaty-based cohesion policy had become a classic Community policy governed mainly with old modes (in terms of decision-making and the legal instruments used), though with a dash of new mode emerging with the partnership principle and leading to multi-tier governance or the possibility of it. The Commission played a key role in this multi-tier system and sub-national actors became important too for the first time, even if this importance varied between member-states”* (Vida, 2005).

Since then the aim of the European cohesion policies has been to create a system of multi-level governance that would have included at least three levels: Union, Member States and regions, with the possibility for the latter to involve the local level too, further inserted into the cohesion policies as a genuine fourth level. Private actors, stimulated to invest by structural interventions, can produce a sort of multiplication factor that has an impact on the private sector, setting in motion a cycle of endogenous

development that includes production innovation and generates employment in underdeveloped areas. This virtuous circle would be, nevertheless, unimaginable without a programming activity acting as a framework for structural intervention. As Leonardi (1995, p. 222) recalls, one of the main advantages of the partnership consists in ending the State administrations' exclusivity in the implementation of the programs in strongly decentralised contexts. Obviously, not all the states have responded in a similar manner. For instance, in Italy, it is possible to identify three different patterns of response (Boccia et al., 2003, p. 23 ff.) to these new concepts at a national and regional level, and different outcomes are consequently attributable to every category of response.

According to the findings of the research carried out by Boccia et al. (2003) the first type of reaction lies in the “rejection” of suggested procedures and models, having as a consequence a lack of growth (Lazio and Veneto); the second is a mere formal adaptation, with a consequent incomplete utilisation of the programs' potentials and resources (Marche, Liguria and Friuli). The third kind, instead, implies a thorough understanding of the opportunities for the renewal of professional skills, for the socialisation of procedures and rules, for not only a formal, but also substantial (and also large-scale) understanding of the suggested concepts, rules and procedures, with the consequent full utilisation of resources and a maximum-growth result (Toscana) (see Fargion, 2006, p. 150 ff). Since 1988, the involvement of regional authorities has been a constant element in the reforms of the EU cohesion policies (for a fresh look at their history see: Manzella-Mendez, 2010), thanks also to the importance acquired by the principle of subsidiarity in this field.

The attention paid in the governance of these policies to territorial actors reveals the “operational denouncing” of the territorial blindness (*Landesblindheit*) that has long characterised the history of European Communities. Nevertheless, there is the risk of overlooking the problems encountered by many federal legal orders: the differences in their respective performances or, in the case of cohesion policies, the varying reaction times of the regions.

The history of these policies has been characterised by a progressive shift towards new soft models of governance, without abandoning the old and traditional basis furnished

by the binding legal acts and the involvement of the classical institutions (Parliament, Commission, Council).

According to Vida's research dated 2005 the following elements are expressions of the old governance: the Treaties based on the structural funds policies (former Art. 2 TEC, Art. 158-162 TEC); the European Commission's right of proposal since 1987 and its duty of implementation; the unanimity voting on the project and the financial package in the Council of Ministers; the competencies of the European Parliament (its assent on fundamental decisions on structural and cohesion funds; the co-decision on ERDF - European Regional Development Fund - and ESF (European Social Fund); the consultation on EAGGF - European Agricultural Guidance and Guarantee Fund/Guidance and FIFG - Financial Instrument for Fisheries Guidance); the possibility to give opinions for the ESC and the Committee of regions; the competence on the jurisdiction for the CJEU and the control of the Court of Auditors for the financial aspects; and the use of classic binding sources to give legal bases in this field (Council regulation and Commission decisions) (Vida 2005).

As already stated, over the years a new governance entered the procedures of these policies (most of all after 1987), consisting in the “intrusion” of the Commission into national development programmes and the assertion of the principle of partnership and conditionality.

As we will see the novelties introduced by the Lisbon Treaty have partly corrected the exclusions of regions from the decision making process.

Another factor of novelty has been the system of relationships (before non-existent) between Commission and regions (directly thanks to the Commission initiatives, and indirectly thanks to the partnership); another fundamental element has been the increase of sub-national actors' involvement in the implementation phase. This was connected with the more frequent use of soft instruments (e.g. Commission's communications; target-based tripartite agreements). The consequence of such policies has been the growing awareness and the increasing role of the regions, via the Committee of regions. In any case, the percentage of the opinions accepted does not reach particularly relevant percentages if compared with those in other fields (De Micheli, 2006, pp. 348-352).

On this last point, we can recall that the composition of the Committee does not correspond exactly to the notion of Region adopted by the NUTS (“Nomenclature of territorial units for statistics”, [http://epp.eurostat.ec.europa.eu/portal/page/portal/nuts\\_nomenclature/introduction](http://epp.eurostat.ec.europa.eu/portal/page/portal/nuts_nomenclature/introduction)), because of the lack of correspondence between the legal notion of region (usually mentioned in the Constitution of a country such as Italy) and the economic notion of Region.

All this confirms the schizophrenic nature of the system: the Committee has an important role, but it is not an effective representative body of the actors that should be represented.

This issue is also connected to the ambiguous terminology employed in EU cohesion policies. The terms “*Region*” or “*regionalism*” are used in several contexts: *regional community*, *regional society*, *region-state*, *regional complex* (Hettne-Söderbaum, 2002, pp. 33-47).

Nevertheless, it must be said that a very interesting process is touching the new candidates states and the new Member States: it is possible to note a progressive process of adaptation of the internal territorial configuration of the legal order to the criteria used by the NUTS to identify the regions (Brusis, 2002, p. 535 ff).

However, these incentives have been only partially accepted in the new Member States (for the difficulties connected to the affirmation of federalism in the new Member States, see Palermo, 2012).

As in fact other research shows, that:

*“The distinctive feature of EU Cohesion policy management in the new Member States is the degree of centralization... In the new Member States, sub-national participation in the management and implementation of EU Cohesion policy is generally limited to a few key areas, including inputs during programme development and activities as end beneficiaries of funds.... Notable exceptions are the Czech Republic, Hungary and Poland, which have some form of joint, or integrated Regional Operational Programmes (ROPs). In Slovakia, the OP for Basic Infrastructure also incorporates a regional element. In these cases, regional administrations have a slightly greater involvement in programming activities”* (McMaster-Novotný, 2005).

This again is the product of the constitutional heterogeneity at national level (see Russo, 2012a), where regions have a strong constitutional status in some legal orders while they are mere administrative units in others; this is a consequence of that respect for territorial autonomy defined by Lenaerts (Lenaerts, 2001). This is what we call the good side of the EU territorial blindness:

*“However, the influence of the EU on sub-national participation in the management and delivery of Cohesion policy is not uniform. First, EU legislation does not compel the Member States to decentralise decisions to regions and municipalities. Indeed, in the larger new Member States expectations of a significant decentralisation in the implementation of EU Cohesion policy have not been fulfilled so far. National governments rather than sub-national bodies of the new Member States are largely responsible for management of the Cohesion funds in the programming period 2004-2006. Second, in countries with weak, or non-existent, regional administrative structures, centralised, sectoral policy-making offers a more robust platform from which to develop and deliver EU programmes. Even in countries with comparatively well-established regions, the administration of highly complex EU Funds could easily overload regional administrations, undermining what authority they have” (McMaster- Novotný, 2005).*

Following the outcome of the research of an Italian group of scholars in public policies and political sciences (Fargion et al., 2006, pp. 757-783), one can see the effects of “Europeisation” (especially with regard to the Italian regions) on the sub-national (regional) level. First of all, the complexity of the procedures would give a very important role to the non-elected/bureaucratic actors at the disadvantage of the representative actors, but the latter can instead be fundamental in the bargaining phases of the cohesion policies procedures thanks to their political skills:

*“Due to their strong focus on problem solving and effectiveness, structural funds clearly appear to privilege the ‘output’ phase of the representation process, rather than the ‘input’ phase” (Fargion et al., 2006, p. 760).*

In conclusion, one can generally say that the cohesion policies contribute to the improvement of the regional dimension of the European Union, with an evidently positive outcome to counter the democratic deficit. At the same time, the mechanism of such policies undeniably contributes towards bolstering the technocratic side at the

regional level, spreading one of the most important viruses of the democratic deficit at the supranational level.

Another factor which should be stressed is the lack of sufficient transparency and accountability in the cohesion policies procedures, which is a negative side of partnership and the involvement of several actors, and of the softness of the instruments used:<sup>xxxvii</sup>

*“First of all, do the mechanisms of representation embodied in and promoted by Cohesion Policy contribute to the export from the European Union to the sub-national level the well known problem of a democratic deficit? Or again, in broader terms, is the European ‘governance model’ a real solution for solving the problem of such a deficit? In this regard, our research revealed the difficulties for less organised/powerful interests in gaining access to the decisional process and the implications – in terms of democratic accountability – of the dominance of non-elected actors in representation activities. In the new procedural context the responsibility for decisions is dispersed and the chain of control becomes unclear” (Fargion et al., 2006, p. 779).*

As we saw, cohesion policies give regions a crucial role.

The key importance of these sub-national actors has induced important changes even at the level of the EU Treaties that have partly paved the way for a better legal status of these actors.

EU cohesion policies have also helped bring (or at least, try to bring) the “direct concern in regional policy” before EU courts, since the growing importance acquired by this sector.

As recently pointed out by Caruso:

*“EU courts have recently engaged more directly with cohesion policy...at...a more systemic level, the judicial engagement of EU courts with territorial policy is bound to affect the relative weight of such policies in legal discourse. It is well known that the entire body of EU law centres upon judicial pronouncements, that the role of the ECJ in shaping the substance of legal integration has gone way beyond the limits of the founding fathers’ imagination, and that the methods used in Luxembourg have subverted the Napoleonic idea of judicial subservience to legal text. Over the years, the ECJ has become a key player in the elaboration of rules for the Community. What the ECJ does not deal with is not really ‘law’ in the perception of legal practitioners and scholars. And because the business of the court still revolves around the realisation of the four freedoms and its two corollaries—competition and protection*

*of fundamental rights—textbooks, academic writings and symposia continue to centre upon such issues. For being a policy that employs over one third of the EU budget, cohesion is still strikingly minor in judicial discourse. The recent escalation of encounters between the ECJ and the periphery in matters of structural funds may change this state of affairs. The new cases may bring the implementation of cohesion policy closer to what counts as law proper in the legal community. A third reason for investigating these cases is that the judicial engagement with cohesion blurs the taxonomic lines separating, within the EU legal order, old from new governance, central from local law-making, and ultimately law from redistribution. Cohesion policies involve focusing on welfare, which is a matter of political choice and, most importantly in EU legal discourse, a traditional prerogative of State sovereignty. Cohesion policy is therefore too often treated as peripheral to supranational matters”* (Caruso, 2011, pp. 806-807).

These points are key and again reveal the “subversive” potential of EU regional policies, since they contribute towards gathering attention and shedding light on the gap between the political importance of regions in the multi-level governance and their poor legal status.

When looking at the case law of the CJEU it is not possible - for now - to appreciate a new trend, as the Luxembourg Court has always kept a very formalistic approach to the issue of direct concern in this area.

The General Court instead (former Court of First Instance) has tried to challenge this case law in the first moment, accepting the more conservative view of the CJEU in the second phase.

An emblematic example of this ambivalent jurisprudence has been given by a series of decisions concerning the Sicilian Region.

Referring to other works on the punctual aspects of this saga (Caruso, 2011) it is interesting to notice here the different approach taken by the two EU Courts.

In the case *Regione Siciliana/Commission* (T-60/03, Regione Siciliana/Commission, ECR.,2005, II-4139) - a case concerning the annulment of a decision of the Commission aiming at withdrawing financial assistance - the General Court had said:

*“With regard first of all to the alteration of the applicant’s legal situation, the **contested decision has had the initial direct and immediate effect of changing the applicant’s financial situation by depriving the applicant of the balance of the assistance (approximately EUR 39.8 million) remaining to be paid by***

*the Commission. The unpaid balance of the assistance will not be paid to the Italian Republic by the Commission, for the assistance has been cancelled. The Italian authorities will not, therefore, be able to pay it on to the applicant...the contested decision also directly alters the applicant's legal situation with regard to the duty to repay the sums paid by way of advances (approximately EUR 39 million). In point of fact, the effect of the contested decision is directly to change the applicant's legal status from that of unarguably being a creditor in respect of those sums to that of debtor, at least potentially"* (T-60/03, Regione Siciliana/Commission, Racc.,2005, II-4139).<sup>xxxviii</sup> [emphasis added]

As one can infer from these lines, the approach chosen by the General Court was a very pragmatic one: in spite of the fact that the decision of the Commission was not addressed to a sub-national applicant, it had an evident financial impact on its condition, resulting in the emergence of a direct concern.<sup>xxxix</sup>

In contrast, the CJEU has always kept a more formalistic point of view, which looks at the addressee of the decision and this of course led the CJEU to a completely different conclusion on the appeal of the decision of the General Court (C-15/06P, Regione Siciliana/Commission, ECR, 2007, pp. I-2591):

*"As the Court of Justice has already held at paragraphs 29 and 30 of its judgment in Regione Siciliana v Commission, the designation of a regional or local entity such as the Regione Siciliana as the authority responsible for the implementation of an ERDF project does not imply that that entity is itself entitled to assistance. According to the Court, nothing in the documents in the case giving rise to that judgment supports the conclusion that the appellant was directly concerned within the meaning of the fourth paragraph of Article 230 EC in its capacity as the authority responsible for the implementation of the project... They are in no way called into doubt by the Regione Siciliana's argument that in the Italian legal system it enjoys more extensive competences in those matters to which the dam project across the Gibbesi relates than in the sphere of the motorway network, to which the project concerned by the judgment in Regione Siciliana v Commission relates. In fact, that distinction drawn from domestic law cannot have any effect on whether the appellant is directly concerned"* (C-15/06P, Regione Siciliana/Commission, ECR, 2007, pp. I-2591). [emphasis added]

This decision was indeed a confirmation of the old fashioned approach followed by the CJEU in its case law on regions. The CJEU shows an evident disinterest in the national constitutional context, by confirming that the vertical division of power provided for at national constitutional level does not matter for the solution of the case.

Similar tensions are present in another case, the *Ente per le Ville Vesuviane v. Commission* case (T-189/02, *Ente per le Ville Vesuviane v. Commission*, 2007 ECR II-89) whereby the General Court acknowledged the direct concern of the sub-national actors by also making a distinction from the Sicilian case,<sup>xi</sup> also for an alleged violation of the right to defence.<sup>xli</sup>

In its decision (C-445/07 P e C-455/07 P. On this see Thies, 2011), however, the CJEU still demonstrates inflexibility in denying direct concern to Regions; it may be argued that in the future the concurring pressures coming both from the growing importance of regional policy at EU level and the different approaches taken by the General Court may help change this judicial trend:

*“The fact that the day-to-day life of structural funds is something the ECJ tends not to talk about, by holding firmly the reins of standing, has important repercussions beyond the technical sphere of regional policy. Judicial silence, in a court-centred discipline, confirms the impression of legal scholars that cohesion policy may be crucial to political science or macroeconomics but hardly qualifies as law. Cohesion policy, if taken seriously at all institutional levels, reveals with no shade of doubt that ‘the division of labour between an EU level taking care of markets . . . and Member States taking care of welfare is under increasing pressure.’<sup>163</sup> But old taxonomies survive against all odds<sup>164</sup> and may ultimately hinder the understanding of what the EU, at law and in fact, is about”* (Caruso, 2011, p. 827).

The present author shares this conclusion but it is also true that, although the CJEU is crucial in this story, the need for a better place for regions in EU law also passes through the action of the supranational political actors and some possible reforms to be introduced at a more general level.

That is why in the concluding pages I shall try to sum up the potential contribution of regions in EU law in light of the relevant novelties introduced by the Lisbon Treaty.

### **3.3 The constitutional principles of the form of Union: what role for regions?**

The Lisbon Treaty offers some insights to scholars interested in the role of regions in the EU multi-level governance (for an overview see INNET 16, 2010).

Schematically, one can recall the following:

-As we saw earlier, now “territorial cohesion” (with economic and social cohesion) is a general political goal of the EU (see above). Indeed, according to Art. 174 TFEU:

“In order to promote its overall harmonious development, the Union shall develop and pursue its actions leading to the strengthening of its economic, social and territorial cohesion.

In particular, the Union shall aim at reducing disparities between the levels of development of the various regions and the backwardness of the least favoured regions.

Among the regions concerned, particular attention shall be paid to rural areas, areas affected by industrial transition, and regions which suffer from severe and permanent natural or demographic handicaps such as the northernmost regions with very low population density and island, cross- border and mountain regions”.

According to a reading of this provision: *“This means that any region in one of the above-cited conditions is by definition considered entitled to benefit from EU investment under the regional policy of the EU. Hence, recent tendencies to limit regional and cohesion policies to only the poorest areas of the EU should be considered inconsistent with the Lisbon Treaty - an important indication for the ongoing controversial debate on Cohesion policy after 2013”* (INNET 16, 2010).

This also implies a more stringent connection between the provisions concerning the services of general economic interest and all the three dimensions of cohesion.

Similarly, cohesion as a whole belongs to the untouchable core of EU law as confirmed by the provisions concerning enhanced cooperation (see above, Art. 326 TFEU).

-A slightly new formulation of the subsidiarity principle at Art. 5 TEU. Particularly relevant in this respect is Art. 5, par. 3, TEU:

“Under the principle of subsidiarity, in areas which do not fall within its exclusive competence, the Union shall act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States, **either at central level or at regional and local level**, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level”.

The previous version of Art. 5 TEC did not mention the regional and local level when introducing the scope and function of the subsidiarity principle.

- New Art. 4, par. 2 TEU, reading “The Union shall respect the equality of Member States before the Treaties as well as their **national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government**. It shall respect their essential State functions, including ensuring the territorial integrity of the State, maintaining law and order and safeguarding national security. In particular, national security remains the sole responsibility of each Member State” (emphasis added).
- Art. 263 TFEU, par. 1, concerning the possibility of the Committee of the Regions to go before the CJEU as a semi-privileged applicant: “The Court shall have jurisdiction under the same conditions in actions brought by the Court of Auditors, by the European Central Bank and by the Committee of the Regions for the purpose of protecting their prerogatives”.<sup>xlii</sup>
- Art. 8 of Protocol n. 2 on “The application of the principles of subsidiarity and proportionality”, reading:

“The Court of Justice of the European Union shall have jurisdiction in actions on grounds of infringement of the principle of subsidiarity by a legislative act, brought in accordance with the rules laid down in Article 263 of the Treaty on the Functioning of the European Union by Member States, or notified by them in accordance with their legal order on behalf of their national Parliament or a chamber thereof. In accordance with the rules laid down in the said Article, the Committee of the Regions may also bring such actions against legislative acts for the adoption of which the Treaty on the Functioning of the European Union provides that it be consulted”.

Other novelties, concerning the governance of the cohesion policies have been introduced. They are indirectly relevant for the purpose of this research.

Among them, one can recall:

1. The new role of the EP. It is now a fully fledged legislator, put on equal footing with the European Council. This also applies to EU cohesion policies. The EP also got new budgetary powers.
2. The novelties aimed at involving national parliaments, especially those giving national parliament a role in the so-called early warning mechanism (see below), Art. 12 TEU.
3. Relevant is also the reference made in Art. 107, par.3 TFEU (concerning State aids) to the outermost regions (Art. 349 TFEU):

“1. Save as otherwise provided in the Treaties, any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the internal market...

..3. The following may be considered to be compatible with the internal market:

(a) aid to promote the economic development of areas where the standard of living is abnormally low or where there is serious underemployment, and of the regions referred to in Article 349, in view of their structural, economic and social situation”.

In the following pages I will focus on what I consider to be the relevant constitutional principles that may help regions improve their role in light of the Reform Treaty.

### **4.3. The chances offered by the principle of subsidiarity**

Subsidiarity has a very important role in the functioning of the EU, working as an elevator in the relationship between the EU's centre and the periphery, which constitutes the heart of the notion of the “form of Union”.

In a multi-level system subsidiarity works as an element connecting the different levels of governance and government and as a technique of making flexible the map of competences drawn by the Treaties or the Constitutions. As we know, despite the importance, from a formal point of view, of the application of such a principle, it has encountered many difficulties and the CJEU's case law has remained, over the years, extremely ambiguous. Confirmation of such ambiguity may be found in the European legislation.

When looking at the language used in the documents concerning the EU structural funds, for example, the subsidiarity principle seems to be limited to its “negative” aspect: the preference conferred upon the subjects closest to the citizen.

At an economic level, it has been said that “*the principle of subsidiarity means that the production of public goods should be attributed to the level of government that has jurisdiction over the area in which that good is public*” (Padoa Schioppa, 1995). Starting from this definition, which seems to neglect the “activist” side of the principle (that is, the one postulating the intervention of the central level for the realisation of the mentioned conditions), we can appreciate the remark made with regard to additionality and to partnership that implies collaboration among the European, national and regional administrations.

However, 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*” (Oxford English Dictionary, entry “Subsidiary” and “Subsidiarity”). 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*” (Schütze, 2009) for the centre. In accordance with a preference for the local level, subsidiarity has been conceived as acknowledging “*responsibility [to the EU] only for those matters which the Member States are no longer capable of dealing with efficiently*” (European Commission, 1975).

This reference to efficiency is important since it paves the way to a control on the possible EU recall of the competence that cannot be adequately performed at local level, making subsidiarity justiciable and verifiable. This conception of subsidiarity is also present in the European Parliament’s Draft Treaty (1984) whose Preamble aimed to “*entrust common institutions, in accordance with the principle of subsidiarity, only with those powers required to complete successfully the tasks they may carry out more satisfactorily than the States acting independently*” (“Draft Treaty, Last Recital”, quoted by R. Schütze, 2009, p. 248).

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 Art. 5 of TEC, refers to a relationship 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 subject who is 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 in a more efficient way by the higher subject. This way subsidiarity works as an elevator with regard to certain fungible acts that can be exercised by two institutional subjects and the substitution can be caused by an objective impossibility to carry out the requested action for the preferred actor.

Another important fact is that such an impossibility to carry out the functions has to be temporal; 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 works, actually, as a criterion for shifting, although not in a definitive way, the level that is supposed to intervene (Massa Pinto, 2003) and, because of its constitutional relevance, works as an element of flexibility in the system (Bin, 1999).

This would explain why, within the Community context, subsidiarity has operated as a “*method of policy centralisation*” (Davies, 2006) rather than as a factor of valorisation 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 (Massa Pinto, 2003).

Subsidiarity has successfully operated in a context such as the German one, which does not define competences in the finalistic manner (on the enumeration techniques, see Carrozza, 2003) as the TEC does (following to the French model). This worrying mingling of legal styles explains the destabilisation factor that could be introduced by the subsidiarity principle, and that is why when it was introduced Toth described it as “totally alien” to the EU since it “*contradicts the logic, structure and wording of the*

*founding treaties and the jurisprudence of the European Court of Justice*” (Toth, 1993, p. 1079 ff). This is mainly because of its “surreptitious” substitution of the flexibility clause, which has allowed the Union (and before it the Community) to acquire “slices of competence”, transversally instrumental to the achievement of the declared objectives, without the procedural guarantee of unanimity.

What is a matter of discussion is the high level of political discretion which would characterise the application of such a principle, because of the political nature of the control base and on the difficult verification of the efficiency and opportunity of the action.

However, as everybody knows the CJEU’s case law proves extremely elusive about the principle of subsidiarity. The General Court and the CJEU 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 CJEU to verify the necessity of higher level substitution by carrying out a cost/benefit test (see Mengozzi, 2002). In contrast, the European case law has been ambiguous since the General Court and the CJEU has almost always avoided dealing with the issue head on.

It is possible to distinguish several phases within the CJEU’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 characterised by a very careful and integration-friendly approach followed by the CJEU in C-84/94 (C-84/94 *United Kingdom v. Council*, ECR, 1996, I-5755) and C-233/94 (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 EU 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 powers, or whether the institution concerned has manifestly exceeded the limits of its discretion**" [emphasis added] (C-84/94 *United Kingdom v. Council*, ECR, 1996, I-5755).*

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

1. The CJEU conceives the test on subsidiarity to be an application of the proportionality test;
2. The CJEU 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 CJEU 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" (C-233/94, *Germany v. Parliament and Council*, ECR, 1997, I-2405).*

After the Amsterdam Protocol something seemed to change, since the CJEU insisted on the procedural elements being taken into account in its control. The best example of this is case C-376/98:

*“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, C-491/01 *British American Tobacco (Investments) and Imperial Tobacco*, ECR, 2002, I-11453)”. (C-376/98 *Germany v. Parliament and Council*, ECR, 2000, I-8419)

By the way, the CJEU 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, 2009, p. 256).

This case law explains why in the last few years all the attempts to reform the principle of subsidiarity have attempted to emphasise the procedural side of such a control (for a fresh overview see Craig, 2012b), 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](http://lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2008:115:0201:0328:EN:PDF)),

because the time allowed for national parliaments to scrutinise 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.

The yellow-card mechanism recently knew its first application with regard to the Monti II-regulation (i.e. the Proposal of the Commission for a Council regulation on the exercise of the right to take collective action within the context of the freedom of establishment and the freedom to provide services “<http://portal.cor.europa.eu/subsidiarity/pages/documentdetails.aspx?docnum=130&docyear=2012&docpart=COM>”).

This idea confirms the deference shown by the CJEU 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 (Cooper, 2006). Very much will depend on how Member States will implement this provision which however opens important windows of opportunity for those parliaments provided with a regional chamber.

However, in the new context, the CJEU has less grounds for a prudent approach: indeed a more active role for the CJEU in this field is possible, trying to connect subsidiarity and sincere cooperation between the levels of government better.

The Lisbon Treaty offers some important elements that might represent a stronger basis for the CJEU’s intervention in this field: the codification of a list of competences (although it is not a hard list) and that of the principle of sincere cooperation.

As we saw, subsidiarity and competence are two distinct yet strongly related concepts and, in this respect, a detailed distribution of powers in the form of Union might be

useful for the CJEU, since it might help the latter to implement the constitutional nature of the subsidiarity principle under less political pressure.

However, perhaps the most important innovation is represented by the principle of sincere cooperation (Art. 4, par. 3, TEU),<sup>xliii</sup> especially looking at how national Constitutional Courts have understood the relationship between cooperation and subsidiarity in their own case law.

The principle of sincere cooperation has been codified as a fundamental element of the form of Union in Art. I-5 of the old Constitutional Treaty and Art. 4 of the EU Treaty after the new Lisbon Treaty. When looking at these provisions we can appreciate the strong connection between the respect of constitutional identity of the Member States (Art. 4 TEU) and the principle of cooperation (Art. 4, par. 3, TEU), since the Court is also the guarantor in this respect, it will be forced to take cooperation seriously, abandoning its *administrative* approach to subsidiarity, based on its manifest error standard - and serving as a more neutral arbiter in relations between national and European institutions, otherwise mere parliamentary monitoring might be insufficient, as the recent *Lisbon Urteil* case shows.

Even before such a codification, the CJEU well knew this principle, making it autonomous from the mere internationalist principle of the *pacta sunt servanda* (see Ferraiuolo, 2006, p. 718 ff). The CJEU recalled this principle for referring to different obligations: to give full implementation and application to the EU law<sup>xliv</sup> to provide information to the Commission,<sup>xlv</sup> avoid adopting measures in contrast with the EU acts coming into force<sup>xlvi</sup>). The CJEU stressed its binding nature for all the State members' bodies, including national judges<sup>xlvii</sup> and, of course, for all the European institutions.<sup>xlviii</sup> Obviously this principle was already present in the wording of Art. 10 TEC but in that case the provision focused much more on the loyalty duty of the States while according to this new text the loyalty duty is bi-lateral, involving the necessity to respect the national identities “*inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government. It shall respect their essential State functions, including ensuring the territorial integrity of the State, maintaining law and order and safeguarding national security*” (Art. 4, par. 2, TEU).

In conclusion, it seems useful to recall the solutions suggested by the Italian Constitutional Court about the relationship between subsidiarity and sincere cooperation: the former requires a “sincere cooperation” (*“leale collaborazione”*) between the territorial actors, concerted practices and bodies and, finally, a system of agreements between the institutional actors.

When deciding the case n. 303/2003 (Corte Costituzionale, sentenza 303/2003, available at [www.cortecostituzionale.it](http://www.cortecostituzionale.it)), 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*” (T. Groppi-N. Scattone, 2006, p. 135).

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*” (T. Groppi-N. Scattone, 2006, p. 135).

Is it possible to transplant institutional solutions already experimented within national contexts to the supranational level?

Despite the clarity of this Italian judgement, the real problem is to apply and enforce such principles, and many solutions were proposed, including the creation of new committees and institutional actors or the improvement of already existing institutions.

To be clear: I am not advocating the “Italian way” to solve the EU’s problems but this judgement gives just an example of the new interpretive possibilities offered to the CJEU thanks to the introduction of the principle of sincere cooperation in the European Treaties.

A clearer application of this principle would result in an improvement of the constitutional status of regions at EU level even with regard to their role in the EU cohesion policies (whose sources recall this principle) and pave the way for a change in the case law of the CJEU. In this respect, another important novelty is given by the fact that thanks to Art. 5, par. 3, TEU, even the Committee of the Regions is now vested

with a new prerogative and has the right to go before the CJEU in order to claim a violation of this principle (Art. 8 of the Protocol No 2 on the application of the principles of subsidiarity and proportionality). To this aim it has recently changed its rules of procedure (Art. 53<sup>xlix</sup> <http://cor.europa.eu/en/documentation/Documents/Rules-of-Procedure-of-the-Committee-of-the-Regions/EN.pdf>).

### **5.3. Final remarks**

In this study I tried to analyse the relationship between diversity and welfare in the supranational context.

After having included the cohesion policies in the supranational dimension of welfare, I pointed out the consequences of the structural funds' functioning on the form of Union: empowerment of the role of the Regions, involvement of several non-state actors in the phase of implementation, strengthening of the bureaucratic actors at local and regional level because of the complexity of the procedures, despite the important role of the elected actors in the phases of political bargaining; limited possibility of intervention for the CJEU, due to the spreading of new governance techniques and the soft legal instruments used.

Regions are essential in order to create a common substrate for the decision-making processes and policies. If a society is cohesive, public choices are simpler and, above all, there are weaker resistances towards the common policies – although this does not produce uniformity nor signifies the end of constitutional tolerance. In short, regional cohesion and integration are two sides of the same coin.

As I tried to stress EU cohesion policies have had the merit to gather attention, money and energies on the regional question but still today their “place” in Treaties is not clear. The case law of the CJEU has partly overcome the territorial blindness described as one of the parts of the EU's democratic deficit but much work has to be done.

In this respect the case law of the General Court may induce in the future the CJEU to change its established jurisprudence.

However, courts cannot do too much in this field without a clear legal basis.

The Lisbon Treaty offers new intriguing provisions that increase the democratic nature of the procedure concerning EU policies and new blood for a different interpretation (and application) of the principle of subsidiarity.

Arguably in the long run this set of rules will give more and more visibility to sub-national actors (also thanks to Art. 4, par. 2, TEU) but for the time being the principle of territorial blindness continues – unfortunately - to inspire EU law.

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I have elsewhere explained why the Canadian and EU constitutional experiences are comparable. Traditionally the word federalism has been seen as an “infamous f-word” (Puder, 2003) in European Studies and similar ostracism has been opposed to all those studies characterised by a comparative approach to the EU. Recently, this tendency seems to have been abandoned thanks to the works of Schütze (2009), Howse and Nikolaidis (2001), Burgess (1991) and Laursen (2010) which can be understood as attempts to recover a comparative approach to the EU’s integration process. A similar approach will be followed in this paper, aware of the useful results that can be achieved through the comparison, since – as the authors of the “Integration through Law” project emphasised – comparison serves as a laboratory which permits us to test and verify the theoretical constructions and the risks connected to the absolutisation of the EU.

With specific regard to the subject of this paper, undoubtedly the works by Fossum (2004) about the comparability between Canada and the EU are fundamental in order to expand the concept of “constitutional odyssey” beyond the Canadian boundaries. Fossum explained the reasons that allow us to compare Canada and the EU: among others, a high level of complexity in both cases, different coexisting conceptions of “belonging” (which caused the emergence of different forms of nationalism – from that in Québec to that of the “aboriginal people”). Fossum seems to compare what Russell called “mega constitutional politics” (Russell, 1992) with what de Witte defined as the semi-permanent Treaty revision process (de Witte, 2002), by showing their common features; lack of legitimacy and constitution making processes driven from the top, and exclusion of some actors from the constitutional dynamics (aboriginal people in the Canadian case): *“In a similar manner, albeit not portrayed as constitutional by the key actors involved, just since the mid 1980s, the EU has gone through three major treaty changes, the Single European Act of 1985, the Maastricht Treaty of 1991 and the Amsterdam Treaty of 1997 and is in the process of ratifying the fourth, the Nice Treaty 2000. At present the EU is preparing further reforms to make itself ready for enlargement. This lengthy and continuous effort at polity-building is now explicitly referred to as constitution making”* (Fossum, 2004).

These constitutional processes thus display similarities: the necessity to involve citizens and national parliaments in order to overcome the democratic deficit of the Union, the difficulty of finding “a satisfactory and comprehensive constitutional settlement”, (Kay, 2005) and the important role played by courts in reshaping the relation between centre and periphery. Moreover, both Canada and the EU have discovered the importance of alternative sources of constitutional update: intergovernmental agreements for Canada (see the importance of the Social Union Framework Agreement) and new governance products in the EU (de Búrca, 2003). The importance of these alternative and non-legally binding sources of constitutional update produced another common feature; the asymmetry and flexibility that characterises the two constitutional experiences. This explains why Bruno Theret (2002), for instance, described Canada and the EU as two examples of multinational and asymmetrical federalisms.

Before analysing such analogies, we need to challenge any possible objection concerning the possibility of comparing the EU with federal experiences, by starting from a brief overview of the factors that make the EU and other pluricultural contexts (namely Canada and Switzerland):

- The coexistence of different languages, cultures and even legal systems

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- The coexistence of different patterns of welfare
  - The important asymmetries characterising the respective integration processes

**(a) The coexistence of different languages and cultures**

This point does not need to be explained in detail since it is self-evident. It refers not only to the factual co-existence of different languages and cultures in Canada, Switzerland and in the EU but also to the existence of particular forms of disciplines aimed at ensuring respect for and disciplining the use of such language diversity. This set of constitutional provisions makes a linguistic and cultural pluralism one of the fundamental principles of the constitutional core of these contexts.

As for Canada, such a multiculturalism has an impact on the nature of the domestic legal system, which has been often described as an example of mixed jurisdiction. The classical definition of mixed jurisdiction is that given by Walton, according to whom “mixed jurisdictions are legal systems in which the Romano-Germanic tradition has become suffused to some degree by Anglo-American law” (Walton, 2000). The debate about the possibility of defining mixed jurisdictions in a clear and univocal manner is a very live one. According to Palmer, for instance, a mixed jurisdiction is characterised by the presence of three factors: a mix of elements of the civil and common law traditions that co-participate in founding the core principles of a given legal system (Palmer 2001, pp. 7-8.); and the legal actors’ awareness of the dualist character of the law in a given legal system or, rather, the existence of these dual elements should be obvious to the ordinary observer (Palmer 2001, p. 8). Thirdly, the last element is the structural one, namely the predominance of the civil law tradition in the private law domain and that of the common law tradition in the public law domain. As for the Canadian case the roots of this particular system can be found in the Québec Act of 1774 the real starting point of the dual nature of the Canadian legal system. This acknowledged that “in matters of property and civil rights (private law), the civil law tradition, inspired by French civil law, applied in Quebec in the same way that the common law tradition, inspired by British common law, applied in such matters of property and civil rights outside of Quebec” (Cuerrier-Hassan-Gaudreault, 2003). The bi-systemic nature of Canada has a great impact on the activity of the federal legislator as the example of bijuralism confirms. Bijuralism requires that “*Canadian legislation must not only be drafted in both official languages (bilingualism) but it must also respect the duality of two Canadian legal traditions: common law and civil law (bijuralism)*” (Cuerrier-Hassan-Gaudreault, 2003). In order to do that, a Legislative Committee of Bijuralism has been set up whose specific task is to “*ensure the application and unfettered accessibility of federal legislation in a country in which two official languages and two distinct traditions of private law serve as a backdrop. The goal of legislative bijuralism is to ensure respect for the essence of each legal tradition in both language versions of the Act*”. One could perceive how a similar necessity inspires provisions like Article 345 of the TFUE or even Article 4 of the TEU, concerning the national (here understood as national-legal) identity of the Member States and is present in all the debates about the possibility of a European Civil Code. The necessity to deal with these diversities has forced all the European institutions to devise mechanisms aimed at respecting both the linguistic and the legal peculiarities of the Member States: examples of this can be found in the legislation regulating the publication of the official acts of the EU and even in the interpretative activity of the European Court of Justice.

Of course there also some differences between Canada and the EU, but the possibility to hazard the extension of the formula of “mixed jurisdiction” in order to define the EU has been endorsed by one of the major scholars of the notion, William Tetley: “*Mixed jurisdictions and mixed legal systems, their characteristics and definition, have become a subject of very considerable interest and debate in Europe, no doubt because of the European Union, which has brought together many legal systems under a single legislature, which in turn has adopted laws and directives taking precedence over national laws. In effect, the European Union is a mixed jurisdiction or is becoming a mixed jurisdiction, there being a growing convergence within the Union between Europe’s two major legal traditions, the civil law of the continental countries and the common law of England, Wales and Ireland*” (Tetley, 1999).

**b) The coexistence of different patterns of welfare.** I am going to develop this point later on in the main text.

**c) Important asymmetries characterising the respective integration processes**

Flexibility and asymmetry are two of the most important features of Canadian federalism, elements partly explicable by taking into account the cultural and economic diversity present in the territory: “*‘Federal symmetry’ refers to the uniformity among Member States in the pattern of their relationships within a*

*federal system. 'Asymmetry' in a federal system, therefore, occurs where there is a differentiation in the degrees of autonomy and power among the constituent units*" (Watts, 2005). However, asymmetry does not refer to the mere differences of geography, demography or resources existing among the components of the federation or to the variety of laws or public policies present in a given territory.

The debate on the importance of asymmetry in federal contexts is also a live one and the word asymmetry has acquired a variety of meanings. When talking about asymmetries one can distinguish between de jure and de facto asymmetries, or between financial and constitutional – some arrangements, in order to combine the particular needs of some components of the federations and the principle of equality, are recognized in the constitutional text –, and between necessary or optional asymmetry (“... *which stems from the different relations that develop between the federal government and the other governments within the federation. Some may choose to exercise all of their constitutional responsibilities, while others prefer to assign some of them to the federal government*” (Dion, 1999).

Canada presents all these three forms of asymmetry. The following table offers an overview of the different forms of asymmetry present in Canada.

**Table 4**

Constitutional Asymmetry in Law: Selected Examples		
<i>Subject of Provision</i>	<i>Section</i>	<i>Notes</i>
<i>Constitution Act, 1867</i>		
denominational education	93(2)	extends minority education rights in Ontario to Quebec
language and civil law	133 129	bilingual legislative regime and civil law system only in province of Quebec
uniformity of laws in certain provinces (opting-in)	94	Ontario, New Brunswick, and Nova Scotia (but <i>not</i> Quebec) are invited to unify laws on property and civil rights and court procedure by opting for federal control
Senate representation	22, 23	unequal representation of provinces, different qualifications for senators from Quebec
judges' qualifications	97, 98	section 98 applies only to Quebec; different system of appointment of judges from other provinces if section 94 is activated
<i>Provincial Constitutions</i>		
natural resources	109	Alberta, Saskatchewan, and Manitoba are not given this jurisdiction until 1930
language	23 (Manitoba Act)	Manitoba joins Quebec with bilingual regime in its legislature
subsidies	118, 119	differential direct grants
denominational education rights	various	different denominational rights (some in section 93, others in provincial constitutions)
terms of union (British Columbia, Prince Edward Island, Newfoundland)	various	different constitutional commitments to provinces (e.g., P.E.I. steamship & telegraph service)

Source: Milne, 2005.

**Table 5**

Constitutional Asymmetry in Practice: Selected Examples

<i>Subject of Provision</i>	<i>Section (Act)</i>	<i>Form of Asymmetry</i>
pensions	94A (1964)	concurrency with provincial paramountcy permits QPP and CPP asymmetry
amending procedure	38 (3), 40 (1982)	opting-out of constitutional amendments increases asymmetry
notwithstanding clause	33 Charter (1982)	provincial overrides permit unequal applications of the Charter
mobility	6(4) Charter (1982)	limit to mobility rights of Canadians in provinces with high unemployment

**Source:** Milne, 2005.

As Watts pointed out, “cultural, economic, social and political factors in combination have in all federations produced asymmetrical variations in the power and influence of different constituent units” (Watts, 2005), and this makes asymmetry a constant element present in all the federalising processes, even in Switzerland and the EU.

<sup>ii</sup> “The Maastricht Treaty refers several times to the notion solidarity. The preamble expresses the desire “to deepen the solidarity between their peoples while respecting their history, their culture and their traditions”. Article 1 stipulates that the task of the Union “shall be to organise, in a manner demonstrating consistency and solidarity, relations between the Member States and between their peoples”. Article 11 (2) stipulates that the Member States “shall support the Union’s external and security policy actively and unreservedly in a spirit of loyalty and mutual solidarity” and that they “shall work together to enhance and develop their mutual political solidarity”. Article 23 stipulates that Member States shall act in “a spirit of mutual solidarity” in relation to Union action even when they abstain in a vote” (Ottmann, 2008).

<sup>iii</sup> Art. 27: “Workers’ right to information and consultation within the undertaking  
Workers or their representatives must, at the appropriate levels, be guaranteed information and consultation in good time in the cases and under the conditions provided for by Union law and national laws and practices”.

Art. 28: “Right of collective bargaining and action  
Workers and employers, or their respective organisations, have, in accordance with Union law and national laws and practices, the right to negotiate and conclude collective agreements at the appropriate levels and, in cases of conflicts of interest, to take collective action to defend their interests, including strike action”.

Art. 29 “Right of access to placement services  
Everyone has the right of access to a free placement service”.

Art: 30: “Protection in the event of unjustified dismissal  
Every worker has the right to protection against unjustified dismissal, in accordance with Union law and national laws and practices”.

Art. 31: “Fair and just working conditions  
1. Every worker has the right to working conditions which respect his or her health, safety and dignity.  
2. Every worker has the right to limitation of maximum working hours, to daily and weekly rest periods and to an annual period of paid leave”.

Art. 32: “Prohibition of child labour and protection of young people at work

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*The employment of children is prohibited. The minimum age of admission to employment may not be lower than the minimum school-leaving age, without prejudice to such rules as may be more favourable to young people and except for limited derogations.*

*Young people admitted to work must have working conditions appropriate to their age and be protected against economic exploitation and any work likely to harm their safety, health or physical, mental, moral or social development or to interfere with their education”.*

Art. 33:” *Family and professional life*

1. *The family shall enjoy legal, economic and social protection.*

2. *To reconcile family and professional life, everyone shall have the right to protection from dismissal for a reason connected with maternity and the right to paid maternity leave and to parental leave following the birth or adoption of a child”.*

Art. 34: “*Social security and social assistance*

1. *The Union recognises and respects the entitlement to social security benefits and social services providing protection in cases such as maternity, illness, industrial accidents, dependency or old age, and in the case of loss of employment, in accordance with the rules laid down by Union law and national laws and practices.*

2. *Everyone residing and moving legally within the European Union is entitled to social security benefits and social advantages in accordance with Union law and national laws and practices.*

3. *In order to combat social exclusion and poverty, the Union recognises and respects the right to social and housing assistance so as to ensure a decent existence for all those who lack sufficient resources, in accordance with the rules laid down by Union law and national laws and practices”.*

Art. 35: “*Health care*

*Everyone has the right of access to preventive health care and the right to benefit from medical treatment under the conditions established by national laws and practices. A high level of human health protection shall be ensured in the definition and implementation of all the Union's policies and activities”.*

Art. 36: “*Access to services of general economic interest*

*The Union recognises and respects access to services of general economic interest as provided for in national laws and practices, in accordance with the Treaties, in order to promote the social and territorial cohesion of the Union”.*

Art. 37: “*Environmental protection*

*A high level of environmental protection and the improvement of the quality of the environment must be integrated into the policies of the Union and ensured in accordance with the principle of sustainable development”.*

Art. 38: “*Consumer protection*

*Union policies shall ensure a high level of consumer protection”*

<sup>iv</sup> “*This Treaty and the TSCG are complementary in fostering fiscal responsibility and solidarity within the economic and monetary union. It is acknowledged and agreed that the granting of financial assistance in the framework of new programmes under the ESM will be conditional, as of 1 March 2013, on the ratification of the TSCG by the ESM Member concerned and, upon expiration of the transposition period referred to in Article 3(2) TSCG on compliance with the requirements of that article”*

<sup>v</sup>I elsewhere dealt with the content of the TSCG (Cantore-Martinico, 2013). At the beginning of March 2012, 25 European leaders signed the new TSCG. What will change with the entry into force of this new Treaty? The issue has been disputed among scholars and it refers to the innovative contents introduced in EU law by means of this international Treaty. This section recalls the main contents of this agreement. We will dwell on four points: its structure, its relation with EU law, its nature (whether innovative or not) and, eventually, the role to be played in this context by the EU institutions. This Treaty is divided into six parts: Purpose and Scope (Art. 1), Consistency and Relationship with Law of the Union (Art. 2), Fiscal Compact (Art. 3-8), Economic Policy Coordination and Convergence (Art. 9-11), Governance of the Euro Area (Art. 12-13), General and Final Provisions (Art. 14-16). From a constitutional law viewpoint, the most important clauses are represented by Art. 1 (devoted to the aim of the Treaty, namely “to strengthen the economic pillar of the economic and monetary Union by adopting a set of rules intended to foster budgetary discipline through a fiscal compact, to strengthen the coordination of economic policies and to improve the governance of the euro area, thereby supporting the achievement of the European Union’s objectives for sustainable growth, employment, competitiveness and social cohesion”), Art. 2- concerning

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the relationship with EU law and reaffirming the precedence of EU law over the Treaty, a point which is present in many other parts of the Treaty (for instance Art. 3) - Art. 3.2 - providing for the necessity for the States to codify the budget rule in national law “through provisions of binding force and permanent character, preferably constitutional, or otherwise guaranteed to be fully respected and adhered to”. It is debatable whether this last provision (Art. 3.2) is inconsistent with Art. 4.2 of the TEU stating the necessity to respect the national identity and constitutional structure of the EU Member States. Things are even more complex in countries whose fundamental laws are written in more than one document (see Sweden, for instance). Another reference to EU law is included in Art. 5 which requires that: “A Contracting Party that is subject to an excessive deficit procedure under the Treaties on which the European Union is founded shall put in place a budgetary and economic partnership programme including a detailed description of the structural reforms which must be put in place and implemented to ensure an effective and durable correction of its excessive deficit. The content and format of such programmes shall be defined in European Union law. Their submission to the Council of the European Union and to the European Commission for endorsement and their monitoring will take place within the context of the existing surveillance procedures under the Stability and Growth Pact”. Also, Art. 5 expressly refers to EU law. In fact, it requires contracting parties that are subject to excessive deficit procedures to put in place recovery programmes whose content and format needs to be defined in EU law. Another problematic provision is Art. 8, which gives the CJEU the jurisdiction to rule on the parties’ compliance with the requirements of Art. 3.2 of the Treaty. Is this provision compatible with the TFEU? The Preamble of the international agreement refers to Art. 273 TFEU and Art. 260 TFEU, but Art. 273 TFEU seems to be very clear in anchoring the jurisdiction of the CJEU to the EU Treaties. As the Court said, the extension of the competences of the Court is possible always provided that the core of the Treaties will be respected. This point, again, led the commentators to take into account the very finality of this new international agreement in order to assess its compatibility with the EU Treaties. As it is clear from the wording of these articles, the TSCG aims at getting a certain degree of bindingness, which was missing in the previous instruments of the European economic governance. This also explains the concern for the role to be played by the political institutions in the new contexts. The debate about the alleged loss of power of the European Parliament is emblematic from this point of view: it might look paradoxical that now many scholars have started worrying about the role of the European Parliament in the economy of this new Treaty since its position is relatively stronger than it was in the past, especially if one compares the position of this institution in the TSCG to that it had in the previous Stability and Growth Pacts.

This sounds as a paradox but is not a paradox at all, since it may be explained by the new binding nature of the TSCG. Indeed, according to Fasone: “*Without doubt the EP is stronger now than it was at the time of the previous regime of the Stability and Growth Pact (1997 and reformed in 2005), when the name of this institution was not even mentioned in Regulations 1466/97 and 1467/97. However, at that time, the weak enforcement of the Stability and Growth Pact did not make the lack of involvement on the part of the EP particularly problematical. On the contrary, nowadays, in principle, the mechanism does not admit derogations, except for exceptional circumstances: compared to the past, warnings and sanctions have become semi-automatic because the system is based upon the reverse qualified-majority voting (warnings and sanctions proposed by the Commission are deemed to be adopted unless the qualified-majority in the Council rejects it). Furthermore, the co-ordination of economic policy has also become binding by the embedding the European Semester within the EU legislation*” (Fasone, 2012). In order to find the exact “place” of EU institutions in the TSCG, it would be necessary to clarify the exact “scope” of this new international agreement and here again scholars are divided. According to Peers, 2012 (and to a certain extent Craig, 2012a), the new international agreement would add “*very little to the measures already set out in EU law or which have been or could be proposed as part of EU law*” (House of Lords, 2012). A confirmation of this can be found even in the words pronounced at the end of last year (December 2011) by Guy Verhofstadt: “*it is for political, symbolic reasons that they want to do this agreement*” (Mahoney, 2011). On the other hand, as the UK Minister for Europe said: “there is no provision in the European Union treaties to make a balanced budget rule binding in a Member State’s national law or subject to the jurisdiction of the European Court of Justice. There is no provision in the existing treaties for an automatic correction mechanism where a Member State deviates from that balanced budget path” (House of Lords, 2012). Moreover, those who argue that this international agreement would add something new, tend to recall that this new treaty would confer new powers on

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some EU institutions, in primis the Commission.

<sup>vi</sup>For instance C-184/99, *Grzelczyk v. Centre Public d'Aide Sociale d'Ottignies-Louvain-la-Neuve* 2001 ECR I-6193, para 31; In the words of Advocate General Mazak with regard to Case C-158/07, *Förster* (ECR 2008 I-8507): “Thus, whereas rights to social benefits were originally linked to the pursuit of economic activities (in particular in the form of paid employment, which underpins the concept of a worker), they may now also be available to economically inactive citizens on the basis of the principle of non-discrimination. Whereas a Member State was previously required to assume full social responsibility and provide welfare for those who had already entered its employment market (26) and who thus made some contribution to its economy, such financial solidarity is now in principle to be extended to all Union citizens lawfully resident on its territory” (Kostakopoulou, 2011).

<sup>vii</sup> “1. If action by the Union should prove necessary, within the framework of the policies defined in the Treaties, to attain one of the objectives set out in the Treaties, and the Treaties have not provided the necessary powers, the Council, acting unanimously on a proposal from the Commission and after obtaining the consent of the European Parliament, shall adopt the appropriate measures. Where the measures in question are adopted by the Council in accordance with a special legislative procedure, it shall also act unanimously on a proposal from the Commission and after obtaining the consent of the European Parliament.

2. Using the procedure for monitoring the subsidiarity principle referred to in Article 5(3) of the Treaty on European Union, the Commission shall draw national Parliaments’ attention to proposals based on this Article.

3. Measures based on this Article shall not entail harmonisation of Member States’ laws or regulations in cases where the Treaties exclude such harmonisation.

4. This Article cannot serve as a basis for attaining objectives pertaining to the common foreign and security policy and any acts adopted pursuant to this Article shall respect the limits set out in Article 40, second paragraph, of the Treaty on European Union”.

<sup>viii</sup> Art. 352 TFEU: “1. If action by the Union should prove necessary, within the framework of the policies defined in the Treaties, to attain one of the objectives set out in the Treaties, and the Treaties have not provided the necessary powers, the Council, acting unanimously on a proposal from the Commission and after obtaining the consent of the European Parliament, shall adopt the appropriate measures. Where the measures in question are adopted by the Council in accordance with a special legislative procedure, it shall also act unanimously on a proposal from the Commission and after obtaining the consent of the European Parliament.

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<sup>ix</sup> Art. 154: “1. The Commission shall have the task of promoting the consultation of management and labour at Union level and shall take any relevant measure to facilitate their dialogue by ensuring balanced support for the parties.

2. To this end, before submitting proposals in the social policy field, the Commission shall consult management and labour on the possible direction of Union action.

3. If, after such consultation, the Commission considers Union action advisable, it shall consult management and labour on the content of the envisaged proposal. Management and labour shall forward to the Commission an opinion or, where appropriate, a recommendation.

4. On the occasion of the consultation referred to in paragraphs 2 and 3, management and labour may inform the Commission of their wish to initiate the process provided for in Article 155. The duration of this process shall not exceed nine months, unless the management and labour concerned and the Commission decide jointly to extend it”.

Art. 155: “1. Should management and labour so desire, the dialogue between them at Union level may lead to contractual relations, including agreements.

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2. Agreements concluded at Union level shall be implemented either in accordance with the procedures and practices specific to management and labour and the Member States or, in matters covered by Article 153, at the joint request of the signatory parties, by a Council decision on a proposal from the Commission. The European Parliament shall be informed.

The Council shall act unanimously where the agreement in question contains one or more provisions relating to one of the areas for which unanimity is required pursuant to Article 153(2)".

<sup>x</sup>Art. 145: "Member States and the Union shall, in accordance with this Title, work towards developing a coordinated strategy for employment and particularly for promoting a skilled, trained and adaptable workforce and labour markets responsive to economic change with a view to achieving the objectives defined in Article 3 of the Treaty on European Union".

Art. 146: "1. Member States, through their employment policies, shall contribute to the achievement of the objectives referred to in Article 145 in a way consistent with the broad guidelines of the economic policies of the Member States and of the Union adopted pursuant to Article 121(2).

2. Member States, having regard to national practices related to the responsibilities of management and labour, shall regard promoting employment as a matter of common concern and shall coordinate their action in this respect within the Council, in accordance with the provisions of Article 148".

Art. 147: "1. The Union shall contribute to a high level of employment by encouraging cooperation between Member States and by supporting and, if necessary, complementing their action. In doing so, the competences of the Member States shall be respected.

2. The objective of a high level of employment shall be taken into consideration in the formulation and implementation of Union policies and activities".

Art. 148: "1. The European Council shall each year consider the employment situation in the Union and adopt conclusions thereon, on the basis of a joint annual report by the Council and the Commission.

2. On the basis of the conclusions of the European Council, the Council, on a proposal from the Commission and after consulting the European Parliament, the Economic and Social Committee, the Committee of the Regions and the Employment Committee referred to in Article 150, shall each year draw up guidelines which the Member States shall take into account in their employment policies. These guidelines shall be consistent with the broad guidelines adopted pursuant to Article 121(2)

3. Each Member State shall provide the Council and the Commission with an annual report on the principal measures taken to implement its employment policy in the light of the guidelines for employment as referred to in paragraph 2.

4. The Council, on the basis of the reports referred to in paragraph 3 and having received the views of the Employment Committee, shall each year carry out an examination of the implementation of the employment policies of the Member States in the light of the guidelines for employment. The Council, on a recommendation from the Commission, may, if it considers it appropriate in the light of that examination, make recommendations to Member States.

5. On the basis of the results of that examination, the Council and the Commission shall make a joint annual report to the European Council on the employment situation in the Union and on the implementation of the guidelines for employment".

Art. 149: "The European Parliament and the Council, acting in accordance with the ordinary legislative procedure and after consulting the Economic and Social Committee and the Committee of the Regions, may adopt incentive measures designed to encourage cooperation between Member States and to support their action in the field of employment through initiatives aimed at developing exchanges of information and best practices, providing comparative analysis and advice as well as promoting innovative approaches and evaluating experiences, in particular by recourse to pilot projects.

Those measures shall not include harmonisation of the laws and regulations of the Member States".

Art. 150: "The Council, acting by a simple majority after consulting the European Parliament, shall establish an Employment Committee with advisory status to promote coordination between Member States on employment and labour market policies. The tasks of the Committee shall be:

- to monitor the employment situation and employment policies in the Member States and the Union,
- without prejudice to Article 240, to formulate opinions at the request of either the Council or the Commission or on its own initiative, and to contribute to the preparation of the Council proceedings referred to in Article 148.

In fulfilling its mandate, the Committee shall consult management and labour.

Each Member State and the Commission shall appoint two members of the Comité”.

<sup>xi</sup>On the OMC see Dawson, 2011; Zeitlin, 2005.

<sup>xii</sup>The OMC is frequently associated to soft law but actually some scholars pointed out the existence of some differences between the two see this table taken from Borràs-Jacobsson, 2004, p. 188.

**Table 6**

Differences between the OMC and the traditional soft law	
<i>The open method of co-ordination</i>	<i>The traditional soft law</i>
Intergovernmental approach: the Council and the Commission have a dominant role	Supranational approach: the Commission and the Court of Justice have a dominant role
Political monitoring at the highest level	Administrative monitoring
Clear procedures and iterative process	Weak and ad-hoc procedures
Systematic linking across policy areas	No explicit linking of policy areas
Interlinking EU and national public action	No explicit linking of EU/national levels
Seeks the participation of social actors	Does not explicitly seek participation
Aims at enhancing learning processes	No explicit goal of enhancing learning is stated

**Source:** Borràs-Jacobsson, 2004

<sup>xiii</sup>*Chaoulli v. Québec (Attorney General)* [2005] 1 SCR 791, 2005 SCC 35, Bateman, 2006. See also Maioni, 2006, p. 135.

<sup>xiv</sup>More info available at [www.socialinfo.ch](http://www.socialinfo.ch).

<sup>xv</sup>On this see: Mottu, 1997; Cornevin-Pfeiffer, 1992, pp. 185-263; Dafflon-Della Santa, 1995; Departement federal des finances, 1996; Frey-Spilmann-Dafflon Jeanrenaud-Meier, 1994; Bullinger, 2007; Dafflon, 1999.

<sup>xvi</sup> “*The Confederation shall issue regulations on the equitable equalisation of financial resources and burdens between the Confederation and the Cantons as well as among the Cantons.*

2. *The equalisation of financial resources and burdens is intended in particular to:*

- a. *reduce the differences in financial capacity among the Cantons;*
- b. *guarantee the Cantons a minimum level of financial resources;*
- c. *compensate for excessive financial burdens on individual Cantons due to geo-topographical or socio-demographic factors;*
- d. *encourage intercantonal cooperation on burden equalisation;*
- e. *maintain the tax competitiveness of the Cantons by national and international comparison.*

3. *The funds for the equalisation of financial resources shall be provided by those Cantons with a higher level of resources and by the Confederation. The payments made by those Cantons with a higher level of resources shall amount to a minimum of two thirds and a maximum of 80 per cent of the payments made by the Confederation.”*

<sup>xvii</sup> Art. 47: “*Autonomy of the Cantons. “The Confederation shall respect the autonomy of the Cantons.*

*It shall leave the Cantons sufficient tasks of their own and respect their organisational*

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autonomy. It shall leave the Cantons with sufficient sources of finance and contribute towards ensuring that they have the financial resources required to fulfil their tasks”.

<sup>xviii</sup>Art. 51: “Cantonal constitutions. “Each Canton shall adopt a democratic constitution. This requires the approval of the People and must be capable of being revised if the majority of those eligible to vote so request.

Each cantonal constitution shall require the guarantee of the Confederation. The Confederation shall guarantee a constitution provided it is not contrary to federal law”.

<sup>xix</sup>Art. 39 “Exercise of political rights. The Confederation shall regulate the exercise of political rights in federal matters, and the Cantons shall regulate their exercise at cantonal and communal matters”.

<sup>xx</sup>Art. 50 “Communes. The autonomy of the communes shall be guaranteed in accordance with cantonal law. The Confederation shall take account in its activities of the possible consequences for the communes. In doing so, it shall take account of the special position of the cities and urban areas as well as the mountain regions”.

<sup>xxi</sup> Stating that: “Without prejudice to the principle that the polluter should pay, if a measure based on the provisions of paragraph 1 involves costs deemed disproportionate for the public authorities of a Member State, such measure shall lay down appropriate provisions in the form of:

— temporary derogations, and/or

— financial support from the Cohesion Fund set up pursuant to Article 177”.P. 1 states: “The European Parliament and the Council, acting in accordance with the ordinary legislative procedure and after consulting the Economic and Social Committee and the Committee of the regions, shall decide what action is to be taken by the Union in order to achieve the objectives referred to in Article 191 [**Union policy on the environment**]”.

<sup>xxii</sup>“For the purposes set out in Article 2, the activities of the Community shall include, as provided in this Treaty and in accordance with the timetable set out therein:

k) the strengthening of economic and social cohesion;”

<sup>xxiii</sup>“This is all the more important in the light of the challenges arising from the enlargement of the Union and the phenomenon of economic globalisation. In this connection, the importance of the European social model and its modernisation should be acknowledged”.

<sup>xxiv</sup> “...The State shall allocate supplementary resources and adopt special measures in favour of specific municipalities, provinces, metropolitan cities and regions to promote economic development along with social cohesion and solidarity, to reduce economic and social imbalances, to foster the exercise of the rights of the person or to achieve goals other than those pursued in the ordinary implementation of their functions.”, Art. 119 Const.

<sup>xxv</sup> “Parliament and the government of Canada are committed to the principle of making equalization payments to ensure that provincial governments have sufficient revenues to provide reasonably comparable levels of public services at reasonably comparable levels of taxation”, Subsection 36(2) of the Constitution Act, 1982.

<sup>xxvi</sup>Sen’s conception of development as the possibility to choose freely, as “something” connected with immaterial goods, can be taken as a reference point. It reveals the “ethical and cultural dimensions of development” (Guan, 2008).

As already noted, “the Sen conception of ‘development as freedom’ represents a departure from previous approaches to development that focused merely on growth rates or technological progress” (Chimni, 2008, p. 1). Sen at one point describes development “as a process of expanding the real freedoms that people enjoy” (Sen, 2000, p. 3).

According to Sen, poverty is “a deprivation of basic capabilities” (Sen, 2000, p. 20) and not merely a low income. This implies that “an adequate conception of development must go much beyond the accumulation of wealth and the growth of gross national product and other income-related variables” (Sen, 2000, p. 14). Against this background a fundamental role is played by the substantive freedoms which are “constituent components of development.” Sen stresses “the freedom of individuals as the basic building blocks of the development process” because, as he pointed out, “political unfreedom can also foster economic unfreedom” (Sen, 2000, p. 8).

It is also interesting to look at Sen’s conception of the market: according to him “markets can sometimes be counterproductive” and “there are serious arguments for regulation in some cases” (Sen, 2000, p. 112). He also stresses “the need to pay attention simultaneously to efficiency and equity aspects...” (Sen,

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2000, p. 120). Since “the overall achievements of the market are deeply contingent on political and social arrangements”, Sen stresses the importance of democratic institutions in the search of development: “developing and strengthening a democratic system is an essential component of the process of development” (Sen, 2000, p. 157).

Sen’s influence can be appreciated by looking at the UN’s adoption of a multi-dimensional approach that does not limit itself to an economy-oriented, single-dimension paradigm:

*“This multi-dimensional development approach reflects the latest development perspective of the United Nations (UN). The 1986 UN Declaration on the Right to Development incorporates human rights in the development concept and identifies both individuals and peoples as the holders of the right to development. The human person is the central subject of development and should be the active participant and beneficiary of the right to development. The 1995 UNDP Human Development Report defines development as a process of “enlarging people’s choices,” and claims that “[t]here are four major elements in the concept of human development—productivity, equity, sustainability and empowerment.” The 1997 UN Agenda for Development maintains that “[d]evelopment is a multidimensional undertaking to achieve a higher quality of life for all people,” and identifies five dimensions of development: peace, economic growth, the environment, social justice, and democracy”* (Guan, 2008). Guan cited the UN, Declaration on the Right to Development (A/RES/41/128, 4th December 1986) Art. 1, 2. and the United Nations Development Program (UNDP), Human Development Report 1995 at 1, 12.

<sup>xxvii</sup>C-95/97 - Région wallonne v. Commission, ECR, 1997 I-01787.

<sup>xxviii</sup> What was the essence of the German Constitutional *diktat* in *Solange*? In *Solange* – a judgement delivered a few years after *Internationale Handelsgesellschaft* – the German Constitutional Court stated that ““As long as [Solange] the integration process has not progressed so far that Community law receives a catalogue of fundamental rights decided on by a parliament and of settled validity, which is adequate in comparison with the catalogue of fundamental rights contained in the Basic Law, a reference by a court in the Federal Republic of Germany to the Bundesverfassungsgericht in judicial review proceedings... is admissible and necessary” (BVerfGE 37, 271 2 BvL 52/71 Solange I-Beschluß). In other words, the German Court asked for a Bill of Rights and a strong Parliament in a context of separation of powers, the two main ingredients of the most famous definition of Constitution present in the history of European constitutionalism: that of Article 16 of the Declaration of the Rights of Man and of the Citizen (1789). Such a chemistry was conceived as the right mix to overcome the democratic deficit characterising the European Communities.

<sup>xxix</sup>“As the Advocate General argues in paragraphs 82 to 91 of her Opinion, the Community legal order undeniably strives to ensure respect for human dignity as a general principle of law. There can therefore be no doubt that the objective of protecting human dignity is compatible with Community law, it being immaterial in that respect that, in Germany, the principle of respect for human dignity has a particular status as an independent fundamental right. Since both the Community and its Member States are required to respect fundamental rights, the protection of those rights is a legitimate interest which, in principle, justifies a restriction of the obligations imposed by Community law, even under a fundamental freedom guaranteed by the Treaty such as the freedom to provide services (see, in relation to the free movement of goods, Schmidberger, paragraph 74).

However, measures which restrict the freedom to provide services may be justified on public policy grounds only if they are necessary for the protection of the interests which they are intended to guarantee and only in so far as those objectives cannot be attained by less restrictive measures (see, in relation to the free movement of capital, *Église de Scientologie*, paragraph 18). It is not indispensable in that respect for the restrictive measure issued by the authorities of a Member State to correspond to a conception shared by all Member States as regards the precise way in which the fundamental right or legitimate interest in question is to be protected. Although, in paragraph 60 of *Schindler*, the Court referred to moral, religious or cultural considerations which lead all Member States to make the organisation of lotteries and other games with money subject to restrictions, it was not its intention, by mentioning that common conception, to formulate a general criterion for assessing the proportionality of any national measure which restricts the exercise of an economic activity”. Omega (par.34-47).

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<sup>xxx</sup> “(1) This Basic Law may be amended only by a law expressly amending or supplementing its text. In the case of an international treaty respecting a peace settlement, the preparation of a peace settlement, or the phasing out of an occupation regime, or designed to promote the defense of the Federal Republic, it shall be sufficient, for the purpose of making clear that the provisions of this Basic Law do not preclude the conclusion and entry into force of the treaty, to add language to the Basic Law that merely makes this clarification.

(2) Any such law shall be carried by two thirds of the Members of the Bundestag and two thirds of the votes of the Bundesrat.

(3) Amendments to this Basic Law affecting the division of the Federation into Länder, their participation on principle in the legislative process, or the principles laid down in Articles 1 and 20 shall be inadmissible”.

<sup>xxxii</sup> C-302/97, Konle, ECR, 1999 I- 3099.

<sup>xxxiii</sup> C-302/97, Konle, ECR, 1999 I- 3099.

<sup>xxxiiii</sup> C-424/97, Haim, ECR, 2000 I-05123.

<sup>xxxv</sup> “...the devolved implementation of Community law is consistent with the consistent case-law of the Court, according to which each Member State is free to allocate powers, including legislative powers, internally as it sees fit and to implement Community acts which are not directly applicable by means of measures adopted by regional or local authorities, provided that that allocation of powers enables the Community legal measures in question to be implemented correctly. Under that case-law, the question as to which part of a Member State is to transpose a directive is not an issue of Community law, but is a matter which falls to be governed by the domestic allocation of competences.

The reverse side of this neutrality of the Community legal order vis-à-vis the organisational structure of the Member States is that to the same extent as a Member State is entitled to allocate its powers internally as it sees fit and as prescribed by its constitutional order, it is prevented from relying on domestic circumstances in order to circumvent its obligations under Community law.

It is true that the Treaty makes express provisions for a system of devolved transposition and implementation of Community law in the third paragraph of Article 249 EC only as regards the legal form of the directive; however, that system also applies in the case of the implementation of other Community legal acts, such as a regulation, which needs to be given substance by national legislation. As has already been stated, Regulation No 1782/2003 is to be classified in this category of Community legal acts.

Therefore it is not contrary to Community law for a Member State’s internal constitutional arrangements to provide that different devolved administrations shall have legislative competence in relation to different constituent parts of that Member State and, by virtue of the rule-making powers conferred on them, those administrations themselves define standards of good agricultural and environmental condition under Article 5(1) of and Annex IV to Regulation No 1782/2003.” Opinion, Advocate General Trstenjak to case C-428/07 – Horvath, ECR, 2009 I-06355.

<sup>xxxvi</sup> “In the present case, it is common ground that the regional tax on stopovers is imposed on operators of aircraft or recreational craft having their tax domicile outside the territory of the region and that the chargeable event for tax purposes is the stopover of the aircraft or recreational craft in that territory. Even though, admittedly, that tax is applicable only in a particular part of a Member State, it applies to stopovers by the aircraft and recreational craft in question irrespective of whether they come from another region of Italy or from another Member State. In those circumstances, the regional character of the tax does not mean by definition that it cannot impinge on the freedom to provide services (see, by analogy, Case C-72/03 Carbonati Apuani [2004] ECR I-8027, paragraph 26)”. C-169/08 Presidente del Consiglio dei Ministri, ECR, 2009 I-10821.

<sup>xxxvii</sup> “In theory, sub-national participation in EU Cohesion policy programmes can involve several functions.

**Programme development:** Sub-national levels are generally expected to input into national programming documents through formal consultation processes. In some cases, regional administrations coordinated the development of individual operational programmes.

**Programme management:** For example, sub-national bodies participate in the management of regional elements of programming documents or regional operational programmes.

**Implementation:** Sub-national administrations may act as implementing bodies, administering regional

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grant schemes.

**Beneficiary:** *Sub-national authorities have potentially important roles to play as project applicants and end beneficiaries of EU Cohesion policy*” (McMaster-Novotný, 2005).

<sup>xxxvii</sup> “Evaluation and monitoring mechanisms – which are supposed to guarantee greater transparency – are not a solution to this problem, as they leave the initial phases of the process largely in the dark precisely when critical decisions are taken on who will benefit and who will be left out from the structural funds game”, Fargion et al., 2006, p. 779).

<sup>xxxviii</sup> As Caruso (Caruso, 2011) emphasized it is interesting to compare this decision with other taken by the same court: Case T-341/02, Regione Siciliana v. Commission [2004] ECR II-2877 and T-190/00, Regione Siciliana v. Commission [2003] ECR II-5015.

<sup>xxxix</sup> “Direct concern, by contrast, is difficult to establish for two reasons: first, funds are given primarily to the State, and in the legislative framework of structural funds, the State remains the pivotal interlocutor to the Commission; second, even after EU funds have been revoked, it is still theoretically possible for the State to continue to fund the project until completion out of its own pocket, and to neutralise the adverse impact of the Commission’s decision on the finances of local entities” (Caruso, 2011, p. 807)

<sup>xl</sup> “En l’espèce, au regard de l’application des critères de l’affectation directe retenus par la Cour dans les deux arrêts précités, force est de constater que la situation juridique de la requérante se distingue de manière significative de celle de la Regione Siciliana dans les affaires ayant donné lieu à ces deux arrêts. En premier lieu, tandis que dans les décisions d’octroi des concours communautaires en cause dans les deux affaires ayant donné lieu à ces arrêts, la Regione Siciliana avait uniquement été mentionnée en qualité d’autorité responsable de la demande ou d’autorité responsable de la réalisation du projet, la requérante a, dans la présente affaire, été nommément désignée en tant que « bénéficiaire » du concours communautaire, au troisième considérant et à l’article 3 de la décision d’octroi.

En second lieu, il importe de relever que, lors de l’adoption de la décision attaquée, il ne faisait pas de doute que la République italienne n’entendait pas prendre en charge le coût financier correspondant au financement communautaire supprimé par la Commission. En effet, à la suite de la communication par cette institution de la proposition de clôture du concours financier du FEDER, les autorités italiennes avaient notamment indiqué, par lettre du 21 novembre 2001, que « [l]’incidence financière de [la récupération d’une partie des deux premières tranches du concours à concurrence de 4,6 milliards de ITL], sur le budget du bénéficiaire final [s’avérait] être très onéreuse, étant donné que celui-ci [avait] utilisé les ressources déjà versées par la Commission aux fins de la réalisation complète des travaux prévus, cela dans la conviction que la demande [...] de prorogation des délais [pour la présentation des demandes de paiement définitif] serait accueillie favorablement ». Par ailleurs, aucun élément du dossier ne permet de présumer que les entités publiques, regroupées au sein du consortium que constitue la requérante, étaient susceptibles de suppléer à la réduction du concours du FEDER.

Il est vrai que, ainsi qu’il a déjà été relevé (voir point 16 ci-dessus), dans la décision attaquée, la Commission n’imposait pas la récupération des avances versées auprès du bénéficiaire final ni ne réduisait la faculté de la République italienne de lui octroyer une somme correspondant au montant du solde du concours communautaire désengagé.

Toutefois, cette considération ne suffit pas pour exclure que la requérante soit directement concernée par la décision attaquée, dès lors que d’autres éléments objectifs du dossier permettent de conclure qu’elle a été directement affectée au sens de l’article 230, quatrième alinéa, CE (voir, en ce sens, arrêts Piraiki-Patraiki e.a./Commission, précité, point 7 ; Dreyfus/Commission, précité, point 47 ; du 2 mai 2006, Regione Siciliana/Commission, précité, point 30, et conclusions de l’avocat général M. Ruiz-Jarabo Colomer sous cet arrêt, Rec. p. I-3883, points 77 et 78).

En l’occurrence, il résulte de la prise de position susmentionnée des autorités italiennes (voir point 44 ci-dessus) que la requérante, nommément désignée par la Commission, dans la décision d’octroi, comme le bénéficiaire du concours communautaire, a été privée du montant du concours supprimé par la décision attaquée, dans la mesure où la possibilité que la République italienne assume à charge de son budget le coût financier correspondant au montant du financement communautaire supprimé était purement théorique, lors de l’adoption de la décision attaquée.

À cet égard, les circonstances de l’espèce se distinguent de celles en cause dans les affaires ayant conduit aux arrêts Regione Siciliana/Commission, précités. En effet, il ne ressort pas de l’ordonnance Regione

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*Siciliana/Commission, précitée, et de l'arrêt du Tribunal du 18 octobre 2005, Regione Siciliana/Commission (T-60/03, Rec. p. II-4139), annulé par l'arrêt du 22 mars 2007, Regione Siciliana/Commission, précité, que la République italienne avait exprimé son intention de répercuter sur la Regione Siciliana ou sur les bénéficiaires finaux les conséquences financières d'une éventuelle suppression par la Commission du concours communautaire ou d'une éventuelle réduction du montant de ce concours. En particulier, dans ses conclusions, précitées (points 77 et 78), sous l'arrêt du 2 mai 2006, Regione Siciliana/Commission, confirmant l'ordonnance Regione Siciliana, précitée, l'avocat général M. Ruiz-Jarabo Colomer a souligné qu'il ne s'avérait pas que la Commission connaissait ou aurait pu connaître au préalable l'intention des autorités italiennes en ce qui concernait la récupération des montants indûment obtenus par la requérante. En l'espèce, en revanche, l'intention des autorités italiennes de ne pas intervenir à cet égard était parfaitement connue. En outre, les circonstances de l'espèce diffèrent également de celles ayant conduit à l'ordonnance SLIM Sicilia/Commission, précitée, invoquée par la Commission. Aux points 48 et 49 de cette ordonnance, le Tribunal a jugé que SLIM Sicilia – à qui l'autorité responsable de la réalisation du projet considéré, à savoir la commune de Syracuse, avait confié la réalisation de celui-ci – n'était pas directement concernée par la décision litigieuse de la Commission qui clos le concours communautaire. Il s'est fondé sur la constatation selon laquelle, avant l'adoption de cette décision de la Commission, SLIM Sicilia avait reçu de la commune de Syracuse le paiement des sommes correspondant aux concours communautaire et national pour l'intégralité des dépenses du projet. L'intégralité de ces dépenses avait, en effet, été reconnue par un décret du ministère du Trésor italien, sans attendre la décision de la Commission se prononçant sur la demande de prorogation du délai pour déposer la demande de paiement définitif en raison d'une suspension pour raison judiciaire, conformément à l'article 12 du règlement n° 4254/88" (T-189/02, Ente per le Ville Vesuviane v. Commission, [2007] ECR II-89)*

<sup>xli</sup> *"Ans ces conditions, en l'espèce, en dépit du fait que la République italienne était l'interlocuteur du FEDER, un lien direct s'est établi entre la Commission et la requérante, en sa qualité de bénéficiaire du concours communautaire (voir également, en ce sens, arrêt de la Cour du 24 octobre 1996, Commission/Lisrestal e.a., C-32/95 P, Rec. p. I-373, points 24 à 28).*

*Au surplus, il convient d'ajouter que, en l'espèce, la requérante, à l'appui du présent recours, invoque, en outre, la violation de ses droits de la défense. Sans préjuger l'appréciation à porter sur le bien-fondé de ce moyen, qui sera examiné ultérieurement (voir points 87 à 95 ci-après) il y a lieu de relever que, sur ce point également, la situation de la requérante diffère non seulement de celle de la Regione Siciliana, dont les observations avaient été communiquées à la Commission, dans les affaires ayant donné lieu aux arrêts du 2 mai 2006 et du 22 mars 2007, Regione Siciliana/Commission, précités, mais également de la situation de SLIM Sicilia dans l'affaire ayant donné lieu à l'ordonnance SLIM Sicilia/Commission, précitée. Comme l'a relevé le Tribunal au point 57 de cette ordonnance, SLIM Sicilia, qui était l'un des cocontractants de l'autorité responsable de la réalisation du projet, n'était pas désignée nommément dans les décisions de la Commission relatives au concours litigieux. Elle ne pouvait donc se prévaloir d'un droit d'être entendue avant l'adoption de la décision litigieuse, laquelle était fondée sur des raisons procédurales indépendantes de son comportement et ne lui imposait aucune obligation. En revanche, en l'espèce, la requérante est nommément désignée dans la décision d'octroi comme le bénéficiaire du concours communautaire et elle est expressément habilitée par l'article 4 de cette décision à soumettre ses observations dans un délai prévu à cet effet par la Commission, avant toute décision portant réduction ou suppression du concours communautaire. En outre, c'est la requérante, qui a été constituée en vue d'assurer la sauvegarde et la mise en valeur des trois villas vésuviennes considérées et qui était d'ailleurs propriétaire de deux de ces villas (voir points 4 et 5 ci-dessus), qui a engagé les procédures judiciaires nationales invoquées par les autorités italiennes devant la Commission puis par la requérante devant le Tribunal, pour justifier le retard des demandes de paiement définitif par des raisons judiciaires au sens de l'article 12 du règlement n° 4254/88. Dans ce contexte, la nécessité d'assurer la protection juridictionnelle des garanties procédurales conférées à la requérante, en sa qualité de bénéficiaire du concours communautaire, confirme qu'elle doit se voir reconnaître qualité pour agir contre la décision de la Commission réduisant ou supprimant ce concours" (T-189/02, Ente per le Ville Vesuviane v. Commission, [2007] ECR II-89).*

<sup>xlii</sup> Art.175: "Member States shall conduct their economic policies and shall coordinate them in such a

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way as, in addition, to attain the objectives set out in Article 174. The formulation and implementation of the Union's policies and actions and the implementation of the internal market shall take into account the objectives set out in Article 174 and shall contribute to their achievement. The Union shall also support the achievement of these objectives by the action it takes through the Structural Funds (European Agricultural Guidance and Guarantee Fund, Guidance Section; European Social Fund; European Regional Development Fund), the European Investment Bank and the other existing Financial Instruments.

The Commission shall submit a report to the European Parliament, the Council, the Economic and Social Committee and the Committee of the Regions every three years on the progress made towards achieving economic, social and territorial cohesion and on the manner in which the various means provided for in this Article have contributed to it. This report shall, if necessary, be accompanied by appropriate proposals.

If specific actions prove necessary outside the Funds and without prejudice to the measures decided upon within the framework of the other Union policies, such actions may be adopted by the Council acting in accordance with the ordinary legislative procedure and after consulting the Economic and Social Committee and the Committee of the Regions". Art. 177: "Without prejudice to Article 178, the European Parliament and the Council, acting by means of regulations in accordance with the ordinary legislative procedure and consulting the Economic and Social Committee and the Committee of the Regions, shall define the tasks, priority objectives and the organisation of the Structural Funds, which may involve grouping the Funds. The general rules applicable to them and the provisions necessary to ensure their effectiveness and the coordination of the Funds with one another and with the other existing Financial Instruments shall also be defined by the same procedure.

A Cohesion Fund set up in accordance with the same procedure shall provide a financial contribution to projects in the fields of environment and trans-European networks in the area of transport infrastructure".

Article 178: "Implementing regulations relating to the European Regional Development Fund shall be taken by the European Parliament and the Council, acting in accordance with the ordinary legislative procedure and after consulting the Economic and Social Committee and the Committee of the Regions.

With regard to the European Agricultural Guidance and Guarantee Fund, Guidance Section, and the European Social Fund, Articles 43 and 164 respectively shall continue to apply".

<sup>xliii</sup> Art. 4 TEU: "Pursuant to the principle of sincere cooperation, the Union and the Member States shall, in full mutual respect, assist each other in carrying out tasks which flow from the Treaties.

The Member 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.

The Member States shall facilitate the achievement of the Union's tasks and refrain from any measure which could jeopardise the attainment of the Union's objectives".

<sup>xliiv</sup> C-71/76 *Thieffry v. Council de l'ordre des avocats de la Cour de Paris*, ECR.1977, 765; C-54/81 *Fromme v. BALM*, ECR.1982, 449; C-68/81 *Commission v. Greece*, ECR. 1989, 2965.

<sup>xliv</sup> C-30/90 *Commission v. United Kingdom*, ECR,1992, I-829; C-82/03 *Commission v. Italy*, ECR,2004, I-6635.

<sup>xlvi</sup> *Commission v. United Kingdom*, ECR. 1981, 1045.

<sup>xlvii</sup> C-94/00 *Roquette Frères*, ECR 2002, I-9011; C-344/98 *Masterfoods and HB*, ECR 2000, I-11369.

<sup>xlviii</sup> C-99/02 *Commission v. Italy*, ECR, 2004, I-3353; C-344/01 *Germany v. Commission*, ECR.2004, I-2081.

<sup>xlix</sup> Art. 53, Rules of procedure Committee of the Regions: "The President of the Committee or the commission responsible for drawing up the draft opinion may propose bringing an action before the Court of Justice of the European Union for infringement of the subsidiarity principle by a legislative act on which the Treaty on the Functioning of the European Union provides that the Committee be consulted. 2. The commission shall take its decision by a majority of the votes cast, having verified the existence of the quorum referred to in Rule 59(1). The commission proposal shall be sent for decision to the Plenary Assembly in accordance with Rule 13(g) or to the Bureau in the cases referred to in Rule 36. The commission shall state the reasons for its proposal in a detailed report, including, where appropriate, the reasons for the urgency of the decision on the basis of Rule 36".

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