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The Role of the Regions in EU Governance

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Chapter 7
State and Regions Vis-a-Vis European Integration: The "Long (and Slow) March" of the Italian Regional State

Stefano Villamena

A. Introduction

I. The Italian Regional State

The Italian constitutional structure comprises the central State and a complex system of regional and local authorities.[1] Since its entry into force on 1 January 1948,[2] the Italian Constitution established a regional State, divided into Regions endowed with political,[3] legislative,[4] administrative,[5] and financial [6] autonomy. Fifteen Regions (out of 20) are directly governed by constitutional provisions. These Regions are usually called "Regions with ordinary autonomy" or "ordinary Regions" (*Regioni ad autonomia ordinaria*, *Regioni ordinarie*).

In addition to these 15 Regions, there are 5 other Regions (Sicily, Sardinia, Friuli-Venezia Giulia, Trentino-Alto Adige, and Valle d'Aosta), all of which are endowed with a peculiar degree of autonomy, that is to say, with powers which are

[1]Art. 114(1) of the Italian Constitution (amended in 2001) states that "The Republic consists of Municipalities, Provinces, Metropolitan Cities, Regions, and the State".

[2]The Italian Constitution was approved by the Constituent Assembly on 22 December 1947, it was published on the Official Journal of the Italian Republic (*Gazzetta Ufficiale*, hereinafter G.U.) on 27 December 1947, and it entered into force on 1 January 1948.

[3]Power to freely establish their own political direction – even a political direction different from that of the central state.

[4]Power to pass legislation on the matters enunciated by the Constitution (see the original version of Art, 117 of the Constitution).

[5]Power to enact administrative measures in the same matters where the Regions were entitled to pass legislation (see the original version of Art. 118 of the Constitution).

[6]Attribution to the Regions of the financial resources which are required in order to concretely allow them to exercise their legislative and administrative competences (see the original version of Art. 119 of the Constitution).

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wider than those of the ordinary Regions, especially in the legislative and financial fields.[7] The Regions in this second group are usually referred to as "Regions with special autonomy", "special Regions", or "Regions with different autonomy" (*Regioni ad autonomia speciale*, *Regioni speciali*, or *Regioni ad autonomia differenziata*). The powers of these Regions are not provided for by the Constitution, but by individual Statutes (*statuto* means the constitution of a given organization or institution: for instance, the 1848 *Statuto albertino* was the name of the first Italian constitution). In fact, sometimes the special Regions are referred to as *Regioni a statuto speciale* ("Regions with a special Statute"). Furthermore, there are two Autonomous Provinces, Trento and Bolzano, which are part of the special Region Trentino-Alto Adige, and which are themselves endowed with powers and competences very similar to those of the special Regions.[8]

All Regions – irrespective of whether they are ordinary or special – have a Statute called *Statuto regionale*, which is the *statuto* of that Region. However, in the case of Regions with special autonomy, the Statute is adopted with a special procedure which is more complex than that used for the enactment of the Statutes of the Regions enjoying ordinary autonomy. Until 2001, the Statutes of the Regions with ordinary autonomy were approved through an act of the national Parliament; since the 2001 constitutional reform, they are not approved by any national body. The Statutes of the special Regions, instead, are approved and amended through constitutional statutes passed by the national Parliament following the procedure described at Art. 138 of the Constitution.[9]

The Italian Constitution, moreover, recognizes the autonomy of Provinces and Municipalities[10] (these are local authorities, which in Italian are called *enti locali*). These authorities are territorially smaller than the Regions. Apart from that, the most significant difference between the Provinces and Municipalities, on the one hand, and the Regions (and the two Autonomous Provinces of Trento and Bolzano), on the other, is that only the Regions and the two aforementioned Autonomous Provinces have legislative powers. Local authorities only have the power to create subordinate legislation ("regulations", *regolamenti*) and, like the Regions, have political, administrative and financial autonomy. In addition, the Provinces and

[7]See Art. 116(1) of the Constitution.

[8]See the constitutional statute No. 5 of 26 February 1948 approving the special Statute of the Region Trentino-Alto Adige (published on G.U. 13 March 1948, No. 62). Arts. 11 and 12 of that Statute provide for wide-ranging legislative powers of the Provinces of Trento and Bolzano.

[9]Article 138 Constitution "Procedure for Constitutional Amendment: (1) Law amending the Constitution and other Constitutional acts are adopted by each of the two Chambers twice within no less than three months and need the approval of a majority of the members of each Chamber in the second voting. (2) Such laws are afterwards submitted to popular referendum when, within three months of their publication, a request is made by one fifth of the members of either chamber, by 500,000 electors, or by five regional councils. The law submitted to referendum is not promulgated if it does not receive the majority of valid votes. (3) No referendum may be held if the law has been approved by each chamber in the second vote with a majority of two thirds of its members".

[10]Art. 114 mentions also Metropolitan Cities but to date no Metropolitan City is in existence.

Municipalities, and their autonomy, find their definitions and limits in national, ordinary (non-constitutional) statutes,[11] whereas the autonomy of the Regions is defined and finds its limits in the Constitution.

In 2001, the Parliament passed a constitutional reform which significantly strengthened the powers of both the Regions and the local authorities.[12] Until that constitutional reform, the Constitution (Art. 117) gave the Regions the power to pass legislation only in a few enunciated matters and, in these sectors, the legislation issued by the Regions had to comply with basic principles expressly established by special State statutes (so-called "framework acts", *leggi quadro* or *leggi cornice*) or to be derived from the entire State legislation regulating a given sector. This type of legislative competence of the Regions was called "shared" or also "concurrent" legislation (*legislazione ripartita* or *legislazione concorrente*). All non-enunciated legislative powers belonged to the central State.

The 2001 constitutional amendment (see the new Art. 117) overturned this criterion and established the right of the Regions to enact legislation in all fields not enumerated by the Constitution. Therefore, the Italian State – like the federation in some important federal States such as the USA, Austria, or Germany[13] – retains exclusive legislative power only in the areas expressly enumerated by the Constitution (see Art. 117(2) of the Italian Constitution).

As before the 2001 constitutional amendment, Art. 117 contains a list of matters where the legislative power is still shared by the State and the Regions. In those areas, the State sets basic principles and the Regions implement those principles through detailed legal provisions (so-called "normativa di dettaglio").

II. Constitutional Reform and "Regional EU Power"

The relationship between the State and the Regions in making and implementing EU law has undergone profound changes since the foundation of the European Communities in 1957 up until the present.[14] The most important changes were enacted via the constitutional reform passed in 2001,[15] even if there are those who

[11]The most important act regulating local authorities is an act of delegated legislation issued by the National Government in 2000 with the aim to consolidate the complex legislation existing on local authorities: this is the legislative decree No. 267 of 18 August 2000 "Testo unico delle leggi sull'ordinamento degli enti locali" (published in G.U. 28 September 2000, No. 227).

[12]See Constitutional Law No. 3, of 18 October 2001, "Modification to Title V of Part II of the Constitution" (published in G.U. 24 October 2001, No. 248), available at http://www.senato.it/parlam/leggi/01003lc.htm (last time checked on 15 June 2010).

[13]On the Federal Republic of Germany see Panara (2008a).

[14]See Caretti (1979); but also Pinelli (1999), pp. 635–641; finally, Villamena (2004), pp. 14–18.

[15]Constitutional Law No. 3, of 18 October 2001, cit. and comments D'Atena (2002a), pp. 913–939; D'Atena (2002b), pp. 373–379; Caretti (2003), pp. 555–574; Chieffi (2004), pp. 87–114; finally Di Salvatore (2007), pp. 641–672.

say that the reforms were not particularly innovative.[16] It was through this reform that a constitutional basis was established for "regional EU power" (the relationship between the State and the Regions in making and implementing EU-law).

In order to examine the current legal framework, other than the aforementioned constitutional reform, we have to analyse the subsequent ordinary legislation implementing it. Indeed, the ample reference in the new constitutional provisions to the implementation required by the national Parliament has led to two Acts of Parliament being passed: the "La Loggia" Act[17] and the "Buttiglione" Act[18] (both Acts are named after the proposing Minister). They are of great importance in relation to the present discussion. These two Acts regulate regional participation in the EU law-making process (so-called *rising* phase – *fase ascendente*) and in the implementation of EU law (so-called *falling* phase – *fase discendente*). However, in order to more adequately guarantee regional power in EU affairs, the constitutional reform should have indicated in greater detail exactly what this power consists of and bound the resultant national legislation in a *tighter* and *more cogent* way.

Further, we certainly cannot forget that the main limitation regarding the Regions' participation rights is – compared for instance with Germany – the lack of a House of the national Parliament which represents regional interests.[19] The *Conferenza Stato-Regioni*[20] ("State–Regions Conference") is a body which is provided for by the Italian legal system; it is the only tool which seeks to *connect* the State and the Regions. However, this body is inadequate in protecting the interests of the Regions because it has a somewhat modest *weight* and, moreover, it is also *unbalanced* in that it is biased in favour of the State (and, particularly, of the Government).

Any study which deals with the relationship between the State and the Regions within the Italian legal system, should take into account the aforementioned distinction between Regions with *ordinary* autonomy and Regions with *special* autonomy (as well as Autonomous Provinces Trento and Bolzano). However, for

[16]See especially Costanzo (2010); see also Pinelli (2004), pp. 57–61.

[17]Law No. 131, of 5 June 2003, "Provisions for the Adjustment of the Republic to the Constitutional Law, 18 October 2001, No. 3", available at http://www.senato.it.

[18]Law No. 11, of 4 February 2005, "General Rules on the Participation of the EU Regulatory process and Procedures of Implementation of Community obligations", available at http://www.senato.it (last checked on 15 June 2010).

[19]See Di Salvatore (2008).

[20]According to Art. 12, paragraph 2, Act No. 400 of 23 August 1988, "Disciplina dell'attività di Governo e Ordinamento della Presidenza del Consiglio dei Ministri" (published in Supplemento Ordinario, G.U. No. 214 of 12 September 1988): "The State-Regions Conference is composed of the President of the Council of Ministers (and chaired), the Presidents of the Regions and the Presidents of the Autonomous Provinces of Trento and Bolzano)". See, also, Legislative Decree No. 281 of 28 August 1997 on definition of the powers of the State-Regions Conference. According Italian Constitutional Court (sentence No. 116 of 1994, available at http://www.giurcost.org, last checked on 15 June 2010) State-Regions Conference "is the privileged forum for the discussion and negotiation of policy between the State and the Regions". See especially Marini (2003), p. 163.

the purposes of the present discussion, the two types of regions are analysed together in a unitary format for two reasons. Firstly, there is a need to maintain an expositive coherence in carrying out the investigation and to avoid the excessive complications which would result from frequent reference to many legal sources. Secondly, and substantially, if we look closely indeed, whenever we are dealing with making and/or enforcing EU law, there are not any really important distinctions between Regions *with* ordinary autonomy and Regions (and Provinces) with special autonomy. Indeed, the fundamental aim of the entire national (constitutional and sub-constitutional) regulation is that of avoiding the non-fulfilment of EU obligations, regardless of the character of the Region in question.

In the Italian Constitution, the most important references to the EU framework are contained in Art. 117. This is not only concerned with the State–Regions relationship *in the context* of EU law, but rather, more generally, it is concerned with the distribution of legislative competences – as well as relating limitations – within the national legal system.

The role of the Italian Regions in EU law varies in connection with the degree of autonomy recognised by the Constitution on a particular matter: if it is within its competence, a Region will only be able to exercise a certain prerogative.[21] For example, social security (*previdenza sociale* [22]) is exclusively the domain of the central State which explains why the Regions would find it difficult to influence the political decisions of the central State at national as well as at EU level. Or, conversely, consider "land-use regulation and planning" (*governo del territorio*[23]), which is a shared competence of the State and the Regions.[24] Here, the Regions may exercise their powers in making and implementing EU law, although, as will be shown below, there is little scope for such intervention.

As mentioned earlier (see Sect. A.I. above), with the constitutional reform of 2001, three different criteria for the distribution of legislative competences between the State and the Regions have been introduced into the Italian Constitution.

In accordance with Art. 117 of the Italian Constitution, the first criterion is based on a *list* of matters that are the exclusive competence of the State (that is, attributed to the national Parliament[25]). The second criterion, the so-called *shared* or legislative competence, in accordance with Art. 117 of the Constitution, is based upon a list of matters that are the competence of both national and regional legislative bodies.[26] On these subjects, the national Parliament has the right to establish the

[21]See Vesperini (2008), pp. 1427–1452.

[22]See Art. 117, paragraph 2, lit. *o*), Constitution.

[23]See Chiti (2003), pp. 91–107.

[24]See Art. 117, paragraph 3, Constitution.

[25]See Art. 117, paragraph 2, Constitution: "The State has exclusive legislative power in the following matters: (...)".

[26]See Art. 117, paragraph 3, Constitution: "The following matters are subject to the shared competence of both the State and Regions (...)".

basic principles,[27] whereas the regional Councils (which are the regional legislative bodies – in a sense they can be described as regional parliaments in that they consist of representatives elected by the people) – implement the State legislation by means of *detailed rules*. Finally, the third criterion, as provided for in Art. 117(4) of the Constitution,[28] states that matters not included in any of the two aforementioned lists fall within the sphere of the Regions and the national Parliament does not have any right to intervene. Indeed, as stated verbatim in the aforementioned provision: "The Regions have legislative power with respect to any matter not expressly reserved to State Law" (so-called "residuary" or "exclusive" regional powers).

Art. 117 of the Constitution makes several references to the EU. First and foremost, the State has exclusive competence vis-à-vis relations of the State with the EU.[29] Matters which concern the international or EU relations of the Regions are the shared competence of the State and the Regions. But these two allocations of competence do not exhaust the points of contact between the Regions and the EU in Art. 117. Indeed, the *lists* of subject areas included in the quoted article also concern: "protection of competition",[30] "protection of the environment",[31] "harbours and civil airports",[32] and "health protection".[33] These are all matters which are directly influenced by EU law, in the sense that corresponding European legal norms exist and are contained in the EU Treaty or in EU secondary law.[34] Among these matters, some are reserved for the exclusively for the central State, others for the shared competence of the State and the Regions, and yet others are the exclusive competence of the Regions. An example of the latter is "public contracts", notwithstanding that it also relates to "protection of competition", which is the exclusive competence of the State. It is axiomatic that whenever the State or the Regions regulate one of these *areas* by law, they have to consider, in order to avoid an infringement of EU law, the legislation issued by the EU institutions on the same area.

By the same token, a Region has participation rights in the EU law-making process when EU measures relate to a matter of its competence. This is the so-called *fase ascendente* of EU law (literally meaning "*rising* phase") will be discussed in the Sects. B.I and B.II. The enforcement and implementation of EU law by the Regions, the so-called *fase discendente* of EU law (literally meaning "*falling* phase") will be approached in Sect. D.

It is also appropriate to mention that the principle provided by Art. 117, paragraph 1 of the 2001 constitutional reform: "Legislative power belongs to the

[27]See Art. 117, paragraph 3, Constitution (last period): "In matters of concurrent legislation, the Regions have legislative power except for basic principles which are reserved to State law".

[28]See Art. 117, paragraph 4, Constitution.

[29]See Art. 117, paragraph 2, lit. *a*), Constitution.

[30]See Art. 117, paragraph 2, lit. *e*), Constitution.

[31]See Art. 117, paragraph 2, lit. *s*), Constitution.

[32]See Art. 117, paragraph 3, Constitution.

[33]See Art. 117, paragraph 3, Constitution.

[34]See, for example, Abbondante (2006), pp. 109–146.

State and the Regions in accordance with the Constitution and within the limits set by European Union law and International Obligations". It has been maintained by leading scholars that this principle does not add very much to the existing legal framework. Indeed, the Italian Constitutional Court has in the past decided that EU law prevails over the domestic law inclusive of the Constitution.[35] This was made possible through a broad construction of Art. 11 of the Constitution.[36] This provision, even though it does not directly concern European integration, has traditionally formed the *constitutional basis* for Italian participation in the European integration process, as it is the vindicating foundation of direct applicability and direct effect of EU law within the Italian legal system.[37]

The only limit, still in force today, to the prevalence of EU law over Italian domestic law is that of the inviolability of the "fundamental principles of the constitutional system" (*principi fondamentali dell'ordinamento costituzionale*) and of the "inalienable rights of the human person" (*diritti inalienabili della persona umana*), which the same Constitutional Court upheld.[38] It is for this reason that the prevailing opinion as to the relationship between EU law and domestic law is that the 2001 constitutional amendment was limited to the codification of the already existing *acquis*.

It has nevertheless to be remembered that the Constitutional Court with its ruling No. 406 of 3 November 2005,[39] declared (for the first time) the unconstitutionality of a statute, a regional one, owing to the violation of EU law (that is, owing to the violation of the "limits set by European Union law", *vincoli derivanti dall'ordinamento comunitario*, referred to by Art. 117, paragraph 1, of the Italian Constitution). Therefore, the Court now will judge on the validity of national statutes according to whether they comply with EU obligations. It is the first time, indeed, that a statute has been declared void by the Constitutional Court because it is in breach of EU law.[40] The topic is of great interest, but, in keeping with the ambit of this work, at this juncture of our discussion, we need to analyse the relationship between State and Regions in making and implementing EU law.

[35]See D'Atena (2002c). See also Panara (2006), pp. 796–799.

[36]See Art. 11 Constitution ("Repudiation of War"): "Italy repudiates war as an instrument offending the liberty of the peoples and as a means for settling international disputes", and especially "it agrees to limitations of sovereignty where they are necessary to allow for a legal system of peace and justice between Nations, provided the principle of reciprocity is guaranteed; it promotes and encourages international organizations furthering such ends".

[37]See Cassese (1975), pp. 565–591; but also Bartole (2004), p. 276.

[38]This is the "controlimiti" doctrine elaborated by the Italian Constitutional Court. See the decisions on the case *Frontini* No. 183 of 27 December 1973 and above all on the case *Granital* No. 170 of 8 June 1984 (point 7 of the reasoning), available at http://www.giurcost.org (last checked on 15 June 2010). In the literature see Sorrentino (2002), p. 1355. See also Tizzano (2007), pp. 734–744, and Panara (2008b), pp. 158–159.

[39]Available at http://www.giurcost.org (last checked on 15 June 2010).

[40]See Napoli (2010); Celotto (2010); and finally Calvano (2006).

B. Regional Participation

According to the Italian leading legal scholar Antonio D'Atena, regional participation in the formulation of the *Italian position* for the making of EU law may be defined as the "rising phase" (*fase ascendente*) of EU-law.[41]

The involvement of the Regions at any point preceding the creation of EU legislation is important, especially in terms of the democracy of EU law.[42] As noted above, indeed, EU legislation influences matters which at the national level may be assigned to the Regions. If the Regions are not involved in the EU law-making process, one of the risks would be the debasing of the political worth of the regional legislators.[43] The second appreciable result of regional participation is that it acts like a sort of *cooling chamber* (*camera di raffreddamento*) *combining* different positions, resolving – or at least trying to resolve – potential conflicts between State and Regions right at the very start, as well as those between Regions and the European Union. Last but not least, such participation results in a greater inclination of the Regions to *more closely observe* (*stretta osservanza*) EU legislation throughout the process of its national implementation and enforcement.

The Italian Regions equipped with legislative power, play a major role in the implementation of EU law at the domestic level (see Sect. D below). However, notwithstanding this, they do not significantly influence the EU law-making process, they effectively *execute* decisions taken by others (the central Government).

The law-making process has both *internal* and *external* phases.

In the *external* phase, Regions' representatives participate, in the meetings organised at the EU level, with the aim of explaining and *protecting* their own interests.

In the same way, and with the same purpose, the Regions also take part internally by way of the meetings organised at the national level, and in this substantiates what we have defined above internal phase (see Sect. B.I below).

The constitutional basis of the law making process (both *internal* and *external*) can be traced back to the *new* Art. 117(5) of the Constitution, which provides for the participation of the Regions in the making of EU law.[44] This constitutional provision is further detailed by two "ordinary" (sub-constitutional) national parliamentary statutes. The first one, dealing with the *external* participation of the Regions, is known as the "La Loggia" Act (Act No. 131 of 5 June 2003, published in G.U. No. 132 of 10 June 2003). The second one, dealing with *internal* participation, is known as the "Buttiglione" Act (Act No. 11 of 4 February 2005, published in G.U. No. 37 of 15 February 2005).

[41] See D'Atena (1981), p. 110.

[42] See Ridola (2002), pp. 75–91.

[43] See Paladin (1996), pp. 1031–1040.

[44] See Art. 117, paragraph 5: "Regarding the matters that lie within their field of competence, the Regions and the Autonomous Provinces of Trento and Bolzano participate in any decisions about the formation of community law. The Regions and Autonomous Provinces also provide for the implementation and execution of international obligations and of the acts of the European Union in observance of procedures set by State law (...)". See, also, Mastroianni (2006), pp. 423–442. See Tufarelli and Rollè (2005), p. 139.

I. Internal Participation

Participation of the Regions in the EU law-making process is useful in order to achieve a "unitary position" that can be presented in the various EU bodies and organs. Even before the 2001 constitutional reform, Italian law provided for the obligation of the Government to communicate EU legislative proposals to the Regions so that they could make "observations".[45]

The first significant intervention regarding this area is that of the so-called "Fabbri" Act[46] (so-named after the proponent), which established certain information duties in favour of the Regions in relation to EU matters.[47] However, various circumstances contributed to the overall very poor performance of this instrument. In particular, there was no deadline setting a time by which EU draft acts should have been communicated to the Regions, with the inevitable risk of making eventual observations of the Regions late and useless.[48]

There were numerous attempts to alleviate this *deficiency*. In particular, the State–Regions Conference was introduced, but had little impact.[49]

Ultimately, in order to implement the new version of Art. 117, paragraph 5, of the Constitution, as amended in 2001, the so-called "Buttiglione" Act was passed.[50] This Act repealed the earlier so-called "La Pergola" Act[51] and – together with the aforementioned "La Loggia" Act – it completed the legal framework relating to the law-making process.

In order to improve regional participation in making EU law at the *internal* level (so-called *internal* rising phase), the "Buttiglione" Act provides for a number of *communication mechanisms*, aimed at making the *point of view* of the Regions known to the Government. It is important to note that the *protagonist* of EU law-making process within the context of the Italian legal order is certainly the national Government (the Council of Ministers); other organs and bodies, especially

[45] See strozzi (1988), p. 354

[46] Statute No. 183, of 16 April 1987 ("Coordination of policies related to membership of the European Communities and the adaptation of the internal Community legislation").

[47] See Arts. 9 and 10, Statute No. 183, of 16 April 1987, cited.

[48] See tesauro (1989), pp. 11–26.

[49] See Bifulco (1997), pp. 101–141.

[50] See Bientinesi (2007), pp. 967–998; Mastroianni (2006), pp. 423–442; Cannizzaro (2005), pp. 153–156; finally Contaldi (2005), pp. 515–527.

[51] Statute No. 86 of 9 March 1989 "General rules on the participation of the Community regulatory process and procedures of implementation of Community obligations". See Tizzano (1997), pp. 795–809; and critics of Strozzi (1992), pp. 111–123.

national Parliament and Regions, perform a secondary role.[52] However, a significant result of the "Buttiglione" Act is that the content of the rules stipulating the participation of the Parliament and of the Regions is almost identical. This demonstrates that the national Government is privileged to the detriment of the powers of intervention of organs of great importance (national Parliament, Regional Executives and Regional Councils). It goes without saying that this situation compounds the participation problem which can be seen at the EU level by adding problems at the national level, perhaps termed an 'Italian democratic deficit'.

It does not escape our attention that the national Parliament could recuperate some of the power lost by virtue of the so-called *legge comunitaria*, which is a special statute passed by the Parliament every year in order to conform the Italian State to all EU directives and regulations issued the year before (see further Sect. D below). However, the *legge comunitaria* concerns the implementation of EU law, whereas the real issue is the formation of such a law. Moreover, we must remember that the bill of *legge comunitaria* is drafted by the Government and that such a bill rarely undergoes significant alteration by the national Parliament. This is compounded because of the rather brief period of time which is permitted for discussion.

In relation to those activities which are directed towards the making of EU law, Arts. 3 and 5 of the "Buttiglione" Act provide for a substantially analogous system of rules for the Parliament and the Regions which is resolved in the possibility of expressing "observations" – or at most – a "reservation of examination by the Parliament" (*riserva di esame parlamentare*). In accordance with Art. 3 of the "Buttiglione" Act, the Government must submit EU legislative proposals to the two Houses of the Italian Parliament (*Camera dei Deputati* and *Senato della Repubblica*) in order for the Parliament to be able to formulate its "observations" (Art. 3, paragraph 7).

In addition, during the EU Council of Ministers, the National Government may set a "reservation of examination by the Parliament" regarding a EU legislative proposal, in order to allow the Parliament to express its position on it. However, this is a *weak* constraint because the effects of an eventual negative outcome are not clarified. Furthermore, whenever such a parliamentary pronouncement is not adopted within a brief period of time, the national Government may proceed even in the absence of observations or a statement of reservation.[53] It is doubtful that this mechanism measures up to EU law. According to a Protocol annexed to the Treaty of Lisbon, EU legislative proposals must be forwarded to national Parliaments at least eight weeks prior to being adopted.[54] At the end of eight weeks, the EU

[52]See Baroncelli (2008), pp. 151–179.

[53]See Art. 4, paragraph 3, "Buttiglione" Act: "On expiry of the period of 20 days of Communication, the Government may proceed even without parliamentary pronouncement [..]".

[54]See Art. 4 Protocol (No. 1) on the "Role of National Parliaments in the European Union", adopted on 9 May 2008, available at http://www.issirfa.cnr.it/4719,46.html?PHPSESSID=5b909da245614997b17af9df2bc9d867 (last checked on 15 June 2010), which provides for a period of eight weeks instead of six weeks (see Art. 4). See also Salmoni (2005), pp. 16–19.

Council of Ministers may make a decision. Moreover, in the generality of cases, the EU Council of Ministers shall decide by qualified majority voting, so that non-participation of one State shall certainly not impede the functioning of the Council. Therefore, the reservation of examination by the Parliament only has the effect of blocking the activity of the Italian Government, without placing constraints on the EU Council of Ministers.

At the national level, such reservations of examination by the Parliament produce effects only in the relationship between the Parliament and the Government, and not between the State and the Regions. In the Italian constitutional setting, in fact, only the Parliament is equipped with real powers to control the work of the Government and may invoke political liability of the latter through a vote of confidence.[55]

A system similar to that provided for in Art. 3 of the "Buttiglione" Act also operates in favour of the Regions (see Art. 5 of the "Buttiglione" Act).[56] Here too – so that, within a brief period,[57] the Regions may transmit "observations" – Art. 5 provides that the Government must inform the Regions of EU legislative proposals which fall within the subject areas of the regional legislative competence. By the same token as for the Parliament, but this time upon request of the State–Regions Conference, the "Buttiglione" Act provides for the possibility of raising a "reservation of examination" before the EU Council of Ministers (and this, obviously, in the case of Union legislative proposals relating to matters attributed to regional legislative competence). Such a "reservation", also for organisational reasons, given the high number of Regional Councils, is placed before the State–Regions Conference, the only body able to represent the Italian Regions in a unitary way.[58] However, as previously seen, the regional "reservation of examination" is *weak*, because of the fact that the Government may decide to proceed in its absence.[59] Therefore, in a case where a Union legislative proposal concerns a matter within the regional legislative competence, the Government, upon the request of the Regions, is obliged to convene the State–Regions Conference in order to try to reach an "agreement" as to which position to adopt.[60] This agreement, too, has to be reached within a short period of time, upon the expiry of which the Government may proceed anyway, just as it may proceed when there is lack of agreement in cases

[55]See Art. 94 Italian Constitution, paragraphs 1 and 5: "Government has to enjoy the confidence of both Houses. [...]. The request for a vote of no-confidence requires the signatures of at least one-tenth of the members of either House and is not debated until three days after it has been filed".

[56]See Carbone and Ivaldi (2005), pp. 701–743.

[57]See Art. 5, paragraph 3, "Buttiglione" Act, cit.: "For the position of the Italian Regions (...) within twenty days from the date of receipt of documents (...) may submit comments to the President of the Council of Ministers or the Minister for Community Policies".

[58]See Spadacini (2007), pp. 353–430.

[59]See Art. 5, paragraph 5, "Buttiglione" Act, cit.: "On expiry of the period of twenty days (...), the Government may proceed even without the delivery of the Conference".

[60]See Art. 3, Legislative Decree No. 281 of 28 August 1997, "Definition and extension of the powers of the State–Regions Conference".

of "unexpected and motivated urgent need" (*casi di urgenza motivata sopravvenuta*).[61] Mastroianni has pointed out that there is a direct correlation between a "reservation of examination" and the procedure for reaching an "agreement".[62] The right to ask the Government to raise a "reservation of examination" (parliamentary or regional) before the EU Council of Ministers may in fact have the consequence of slowing down the EU procedure while an agreement is reached at the national level.

By way of summary, even in the internal phase, we have to point out that the participatory tools available to both the Parliament and the Regions are relatively unimportant compared to the power of the Government. Therefore, D'Atena's longstanding criticisms are confirmed in that the Conference-based system ends up being a *weak* tool, whereby the "agreements" are really "camouflaged opinions" (*pareri camuffati*) which in no way contribute to, or reinforce, the regional position.[63]

Internal regional participation in the EU law-making process is, finally, enriched by the introduction of a new body: the *Comitato Interministeriale per gli Affari Comunitari Europei* (Interministerial Committee for EC/EU Affairs, hereinafter referred to as CIACE"), which is convened and chaired by the Prime Minister, or the Minister for European Affairs.[64] Within a framework for the general strengthening of the principle of "loyal collaboration" (*leale collaborazione*) between the levels of governance,[65] the CIACE reinforces the coordination and the link between the national Government and the Regions in the EU law-making process. As established by Art. 2 of the "Buttiglione" Act, the negotiating position of Italy in the EU law-making process is agreed by the Government and the Regions within the CIACE. In light of the various functions of this body, the Regions may request to be allowed to participate in the meetings of the CIACE in order to express their *point of view*.[66]

There is, however, in relation to the CIACE, a problem in that there is a risk of encroachment and overlapping with the powers of the State–Regions Conference.[67] Looking at this issue more closely, though, we can see an important and substantial difference between the CIACE and the State–Regions Conference: this is the fact that the activity undertaken in the State-Regions Conference finds expression in formal acts, such as, especially, the aforementioned "observations" and "agreements". The State–Regions cooperation within the CIACE does not take place in

[61] See Art. 5, paragraph 4, "Buttiglione" Act, cit.

[62] See Mastroianni (2006), pp. 423–442.

[63] See D'Atena (1988), p. 343; but also D'Atena (1991), pp. 3908–3909. To this criticism, besides, it is to add that concerning the costs of the information system.

[64] See Art. 2, paragraph 1, "Buttiglione" Act, cit.: "Participating Foreign Minister, one for Regional Affairs (now 'for Regional Affairs and Local Autonomy') and Ministers with responsibility for matters that are the subject of the topics covered in individual CIACE meetings".

[65] See Anzon (1986), pp. 1039–1042.

[66] See Art. 2, paragraph 2, "Buttiglione" Act, cit.

[67] See Parodi and Puoti (2006).

the form of "observations" and "agreements", nor does it lead to the adoption of any other formal act. The CIACE is instead limited to the functions of *link*, *reflection*, *study and discussion* between those organs and bodies involved in the making of EU law. To conclude, the role and activities of the CIACE, are distinct from the typical acts of the State–Regions Conference.[68] Rather, it could be said that there is a *functional connection* between the two bodies and one could argue that the CIACE carries out a "subservient" role (that is, an auxiliary role) to the State–Regions Conference. In sum the CIACE defines the position of the Government, which – in cases where the matter is of regional competence – will then confront the Regions in the State–Regions Conference.

The overall impression is that the "Buttiglione" Act offers a truly *statist* point of view (*lettura statalista*) – that is, in favour of the *central State* and not of the *Regions* – of the constitutional reform of 2001, since it recognises that Regions only have consultative powers with respect to decisions taken by the national Government.[69]

II. External Participation

It will be recalled that even in the absence of a specific legislative provision, some Italian Regions have traditionally held "direct contacts" with the EU institutions (especially with regard to economic and cultural issues).

These "contacts" were later covered by the *legge comunitaria* 1994 (Act No. 52 of 6 February 1996), which provides the option for the Regions (and Autonomous Provinces) to set up special liaison offices (*uffici di collegamento*) in Brussels. According to Art. 58, paragraph 4, of the cited act, the specific purpose of these offices is to "maintain relations with the EU institutions on matters within their competence". The cited act does not specify the duties of those offices. In this regard, however, it can be said that their main function is to promote – especially through information and documentation – EU initiatives in favour of interests sponsored by the Regions. In essence, the liaison offices have the task of "lobbying" with the EU institutions to protect the interests of one or more Regions. Also in the same cited act, an additional direct link is expected (*collegamento diretto*) between Regions and EU. Indeed, in paragraph 2 of Art. 58, we find that among the "experts" from the Permanent Representation of the Italian Ministry of Foreign Affairs to the European Union, there shall be four regional officers (or officers of the Autonomous Provinces) designated by the Conference of Presidents of Regions and Autonomous Provinces (*Conferenza dei Presidenti delle Regioni e delle Province Autonome*).[70]

[68] See "Buttiglione" Act, cit. and also Decree of President of the Council of Ministers (of 9 January 2006) "Regulations for the Interministerial Committee for European Affairs Committees (CIACE) working".

[69] See Cannizzaro (2005), pp. 153–156.

[70] See Rivello (1995), p. 265.

Article 5 of the "La Loggia" Act, relating to "enforcement of Art. 117, paragraph 5, of the Constitution", provides for the participation of the Italian Regions in the Union institutions. This is, more specifically, about participation in the meetings of the EU Council of Ministers, as well as working groups and committees of the Council and of the Commission. Therefore, in light of this provision, "participation rights" of the Regions in the external phase of EU law-making are recognised. The true and actual weight of such participation is restricted by the *indivisibility* of the Italian delegation before EU bodies. This is due to the need to guarantee the unitary position (*posizione unitaria*) of the Italian Republic by way of the Chief representative designated by the Government.[71] This unitary position is a response to the national interest as referred to by Art. 5 of the Italian Constitution.[72] It seems evident that the duty of guaranteeing the unitary position noticeably reduces the degree to which regional participation may be influential.

Indeed, such limitation was at the core of a State–Regions litigation settled by the Constitutional Court with its ruling No. 239 of 19 July 2004.[73] The Regions challenged the constitutionality of Art. 5 of the "La Loggia" Act, because it endows the Regions with participation rights which in practice are ineffective.[74] Moreover, according to the claimants – that is: the Sardinia Region, which is a Region with special autonomy, and the Autonomous Province of Bolzano – Art. 5 was in breach of the new Art. 117, paragraph 3, of the Constitution, which assigns "international relations and relations of the Regions with the European Union" to the shared legislative competence of the State and the Regions (see also above). Indeed, according to the claimant Regions, the new constitutional system would have allowed for the national legislator to exclusively adopt a general legal framework, reserving detailed regulation for the regional legislature. The Constitutional Court, however, made it clear – justifying the constitutional legitimacy of the "La Loggia" Act – that the system contained in Art. 5 is the expression of a *further* and *exclusive* legislative power of the State, which can be traced back to the fifth paragraph of Art. 117 Italian Constitution.[75]

Art. 5 of the "La Loggia" Act – after declaring that the Regions (and the Autonomous Provinces) have a right of *direct* participation in the EU decision-

[71]See Cannizzaro (2003), pp. 3–11; but also Diverio (2005), pp. 1153–1165.

[72]See Art. 5 Italian Constitution: "The Republic, one and indivisible, recognizes and promotes local autonomy (...)"; and also Parodi (2003), p. 41.

[73]Available at http://www.cortecostituzionale.it (last checked on 15 June 2010); see Cerulli Irelli and Luciani (2007), pp. 859–891; Violini (2005), pp. 226–236; finally Diverio (2005), pp. 1153–1165.

[74]See point 1, "Part in law", case No. 239 of 19 July 2004, available at http://www.giurcost.org (last checked on 15 June 2010).

[75]Indeed, according to the paragraph 5 of Art. 117, "Regarding the matters that lie within their field of competence, the Regions and the Autonomous Provinces of Trento and Bolzano participate in any decisions about the formation of Community Law. The Regions and Autonomous Provinces also provide for the implementation and execution of international obligations and of the acts of the European Union in observance of procedures set by State act".

making process and that, in matters of exclusive legislative competence of the Regions, a President of a Region (or of an Autonomous Province) can be the head of the Italian delegation to the Council – also establishes that it shall be for the State–Regions Conference to set up the "methods" (*modalità*) of regional participation in the EU institutions.[76] Almost three years after the approval of the "La Loggia" Act, the State-Regions Conference defined the methods of participation of the Regions in the activities of the EU bodies in Brussels in the "General Cooperation Agreement" of 16 March 2006.[77] Regarding the composition of the Government delegation that takes part in the activities of the Council, the 2006 Agreement establishes, at Art. 2, that the regional representation within the Government delegation is constituted by a Region President[78] (designated by the Regions with ordinary autonomy) and a President of a Region with special autonomy or of an Autonomous Province (designated by the five Regions and the two Provinces concerned). Furthermore, Art. 4 of the Agreement sets out criteria for the choice of the head of the Italian delegation to the Council. It establishes that, in matters of exclusive legislative competence of the Regions, a central Government representative will normally be the head of delegation; however, the Government and the Regions may agree within the State-Regions Conference to adopt "a different solution". This statement implicitly paves the way to the appointment of a President of a Region (or of an Autonomous Province) as head of the Italian delegation. However, this will be possible *only if* an agreement will be reached within the State-Regions Conference.

The aforementioned provisions need to be compared with Art. 16, paragraph 2, TEU (ex Art. 203 EC). Indeed, according to this article: *The Council shall consist of a representative of each Member State at ministerial level, who may commit the government of the Member State in question and cast its vote*. Therefore the State representatives in the Council must be of "ministerial level" and the Presidents of the Regions acting as head of the Italian delegation must be considered as being of "ministerial level" even at the price of a juridical misrepresentation. In fact the Italian constitutional law does not confer ministerial status to the Presidents of the Regions or of the Autonomous Provinces. In practice, it was never the case that a regional representative was appointed head of the Italian delegation to the Council. It must be highlighted, however, that the presence of Region delegates in the EU Council does not suitably guarantee Regional *interests*, since the duty to ensure the "unitary position" of the State remains paramount, which as we have already stated previously, is bound up with the need for Italy to speak with a *single voice* in the international arena.[79]

[76]See Posillipo (2006), pp. 155–199.

[77]The text of the agreement is available at http://notes1.regione.vda.it/dbweb/rapist/rapist.nsf/(apri)/2D27EC66FBD9A44CC12572E5003A0051/$file/accordo%2016marzo2006.pdf?OpenElement (last checked on 15 June 2010).

[78]See Art. 121 ("Regional Organs"), paragraph 4, Constitution: "The President of the Regional Cabinet represents the Region".

[79]See Ruggeri (2005).

Finally, it is necessary to say something on the selection of Italian members of the Committee of the Regions. Italy has 24 members.[80] The selection of the members is regulated by the recent Act No. 88 of 7 July 2009 (*legge comunitaria 2008*).[81] This Act, at Art. 6, provides that the Italian members of the Committee are not only the representatives of the Regions and of the Autonomous Provinces of Trento and Bolzano, which, as noted above, have legislative powers, but also of the other authorities that constitute the Italian Republic, including all other Provinces (i.e. other than Trento and Bolzano) and Municipalities. The appointment of the Italian members of the Committee is proposed to the EU Council by the Italian President of the Council of Ministers (i.e. the Italian Prime Minister) with the agreement of the Unified Conference State–Regions and State–Cities and Local Autonomies (a Conference where regional and local authorities are represented vis-à-vis the central government). More specifically: the Regions and the Autonomous Provinces of Trento and Bolzano have the right to be represented by 14 Committee members, the other Provinces by 3 members, and, finally, the Municipalities by 7 members. It is possible to observe that the composition of the Italian delegation to the Committee does not seem to particularly favour the representation of the Regions. In fact there are 20 Regions in Italy (plus 2 Autonomous Provinces) and some Regions do not have their own representative in the Committee.[82]

C. The Procedure Before the European Court of Justice

We have to remember that the "La Loggia" Act establishes a new power in favour of the Regions which is substantiated by the right to bring a direct claim for judicial review before the European Court of Justice.

Traditionally, the Regions can directly challenge EU measures before the European Court of Justice as simple "legal persons". Differently from Member States, Regions are not privileged applicants. Unless they are the direct addressee of a decision, they will have to prove their standing, that is to say, that they have been "directly and individually" affected by the European measure.[83]

All this taken into consideration, the "La Loggia" Act states that the Italian Government *must* bring a claim for judicial review if the relative request comes from the State-Regions Conference and is supported by an absolute majority of the Regions' and Autonomous Provinces' votes.[84] This provision is of great interest in

[80]See the recent Protocol No. 36, published in the Official Journal of the European Union of 9 May 2008, C 115/322).

[81]Published in G.U. No. 161 of 14 July 2009. The matter was previously regulated by a sub-legislative act: Decree of the President of the Council of Ministers of 19 December 2006 (published in G.U. No. 302 of 30 December 2006).

[82]See D'Atena (2000), pp. 555–562.

[83]See Adinolfi (2002) , pp. 309–328; Cartabia (2001), pp. 238–241.

[84]See art. 5, paragraph 2, "La Loggia" Act., cit.

that it partly compensates for the limitations which result from the EU Treaty regarding the Regions' ability to directly access the Union courts. The provision would seem to resolve the problems which regional bodies face in attempting to challenge Union action, which result from the European Court of Justice's traditional standpoint regarding this issue.[85]

This limitation, was confirmed recently in the case of the Sicily Region, which had tried (unsuccessfully) to gain *direct* access to the Union courts.[86] In detail, the controversy centred on the inadmissibility of a claim that a EU measure interrupted funding from the European Regional Development Fund (ERDF). On this occasion, the European Court of Justice confirmed, once again, that: "[...] an action by a local or regional entity cannot be treated in the same way as an action by a Member State, the term Member State within the meaning of the second paragraph of Art. 230 EC [current Art. 263 TFEU] referring only to government authorities of the Member States. That term cannot include the governments of regions or other local authorities within Member States without undermining the institutional balance provided for by the Treaty".[87]

This provision of the "La Loggia" Act,[88] is causing a sort of salvage operation of the power of the Italian Regions via *domestic channels*. In other words, in the event of Union *encroachment*, the Regions could attempt to compensate for the little weight they enjoy at EU level, through the legal device just mentioned. Considering that the EU Treaty does not contemplate the division of the competences within the Member States, it is *indifferent* to the fact that there exist Regions with and Regions without legislative powers (and this, obviously, disadvantages the former ones): so much so that Hans Peter Ipsen was used to speak of *Landes-Blindheit*, that is of an EU *blindness* with reference to the internal structure (federal or regional) of the Member States.[89]

D. The Implementation of EU Law

The State and the Regions are under the duty to implement EU law in a timely manner. The specific aim of the whole State (and constitutional) regulation is that of avoiding *infringements* brought about by breaches of EU law.

There is no doubt that in matters of regional competence[90] implementation of EU law is the responsibility of the Regions.[91] In this regard, we need to remember

[85]See Villamena (2006), pp. 25–27.

[86]See the ruling of the ECJ C-417/04 [2006], *Regione Siciliana v. Commission*, in: ECR I-3881.

[87]See point 21 of the aforementioned case.

[88]See art. 5, paragraph 2, "La Loggia" Act, cit.

[89]See Ipsen (1966), pp. 248–265; and also D'Atena (1998), pp. 1401–1425.

[90]See Furlan (2005), pp. 125–151.

[91]See Odone (2007), pp. 327–352.

an essential point, which is represented by the structure of Italy as a regional State. Indeed, if there were no Regions in the Italian context, the central State would be the sole body having to deal with the timely and punctual fulfilment of obligations deriving from EU law. However, with Italy being a regional State, quite the opposite applies. Sharing responsibility with regional authorities for the implementation of EU law results in a complex system which risks *confusion* in the correct implementation of EU obligations. In addition, the State is the sole body responsible to the European institutions for all breaches of EU law, including those which are exclusively attributable to inertia or bad implementation by the Regions.[92]

Attention to this profile came into being especially with the passing of the 1989 "La Pergola" Act,[93] through which the annual *legge comunitaria* mechanism was introduced.[94] Since the enactment of the "La Pergola" Act, the old issue of delays in implementing EU legislation has largely been overcome.[95] According to recent studies, the infringements of EU law that are attributable to sub-state entities are, in a large number of cases, the result of positive action which leads to *violations* of EU law. Fewer cases of infringement are caused by *omitted* implementation of EU law by the Regions.[96] A final and interesting factor which arises from the aforementioned studies is that the Italian Regions, especially because of normative complexity, are responsible for the infringement of EU obligations to a large degree in those matters relating to the "internal market" (and, above all, with public procurement)[97] and the "environment".

The Italian authorities have tried to tackle this issue. This has led, for example, to the very recent introduction of a particularly *strong* tool against regional breaches of EU law, which consists of the "right of redress"[98] ("diritto di rivalsa") for *damages* sustained by the State. The right of redress serves, in particular, to keep the attention of the Regions *alive* regarding the implementation of EU obligations in those areas of their competence and carries with it the payment by the Regions of a sum of money for "financial damages" resulting from judgments of the European Court of Justice[99]: in practice the "right of redress" is a deterrent tool which confers relief for the loss suffered by the State. An initial criticism of this normative system

[92]See Manfredi (2000), pp. 843–848; and Parodi and Puoti (2006).

[93]See Tizzano (1999), pp. 303–310.

[94]See Caretti (1991), pp. 331–350; and De Rose (1994), pp. 81–90.

[95]See Bientinesi (2005), pp. 849–910.

[96]See Parodi and Puoti (2006).

[97]See De Maio (2006), pp. 147–182.

[98]See Art. 16 *bis*, "Buttiglione" Act, cit.; and see also Sterpa (2010). Art. 16 *bis* has been added to the "Buttiglione" Act by Art. 6, paragraph 1, of the Act No. 34 of 25 February 2008 (*legge comunitaria 2007*), in G.U. No. 56, Supplemento ordinario, of 6 March 2008.

[99]See Art. 16 *bis*, paragraph 4, "Buttiglione" Act, cit. Paragraph 5 of the same Act establishes that the State has a similar "right of redress" against the Regions (and other public bodies) responsible for a violation of the European Convention on Human Rights (ECHR). On this point see Spadea (2009), pp. 263–271.

is that the "right of redress" seems to be classified not as an *obligation* but as a *right*. To guarantee the effectiveness of the tool, the legislature should have considered an obligatory action. Having provided a "right" in favour of the State, however, seems to have allowed for a certain amount of discretion in the proposition of the action. This may result in decreasing the effectiveness of this new tool.

All this considered, we have to remember the main tool for implementing EU obligations: the aforementioned *legge comunitaria*.

This is a statute enacted every year by the national Parliament in order to update the national legal system with the EU legislation of that year, with the aim of preventing infringements of EU obligations.[100] This statute has two principal purposes: the first is *informative* in nature, the other *operational*. As to the former, the *legge comunitaria*, *looking into the past*, considers whether Italian law is fully compliant with EU law.[101] To this end, the national Government is given the task to report to the Parliament on existing infringement actions against the Italian State for non-fulfilment of EU law and on the outcome of cases decided by the European Court of Justice against Italy. As to the latter, the *operational* purpose, in order to ensure conformity with EU law, the *legge comunitaria* itself, *looking at the future*, identifies the future actions that provide for implementation of EU law. This increasingly comes about by way of acts of the Government, through the mechanism of legislative delegation (Art. 76 of the Constitution[102]) or via Government regulations.[103] In other words, the Government is entitled to implement the EU directives in *all* areas (including the areas falling within the sphere of legislative competence of the Regions). This is an *ex ante* substitution power exercisable by the Government via delegated legislation. However, the substitution norms issued by the State are characterised by the "pliability" (*cedevolezza*). This means that, if the State substitutes its norms for those of the Regions, then at a later stage the Regions may repeal such norms by means of their own statutes and regain control over the areas of their competence.

Several other points are noteworthy vis-à-vis State-Regions relations regarding the approval of the *legge comunitaria*.

The first is that by means of a *legge comunitaria* the "basic principles"[104] (in matters of shared legislative competence) for exercising regional legislative competences are established (see also Sect. A.II above).[105] Secondly, on the basis of the *legge comunitaria* the national Government may adopt legislative provisions

[100]See Art. 8, paragraph 4, "Buttiglione" Act, cit.: "by January 31 of each year the bill should be presented to the Parliament".

[101]See Art. 8, paragraph 5, lit. *a*), "Buttiglione" Act, cit.

[102]Which states: "Legislative power may not be delegated to the Government unless Parliament specifies principles and criteria of guidance, and only for limited time and well-specified subjects".

[103]See Art. 9, paragraph 1, lit. *c*) and lit. *d*), "Buttiglione" Act, cit.

[104]See last period Art. 117, paragraph 3, Constitution cit., states: "In matters of concurrent legislation, the Regions have legislative power except for basic principles which are reserved to State law" (see above, Art. 117, paragraph 3, Constitution, last period).

[105]See Art. 9, paragraph 1, lit. *f*), "Buttiglione" Act, cit.

(legislative decrees) providing for *criminal penalties* for the event of a violation of EU provisions implemented by the Regions.[106] This is justified by the fact that the Regions do not have legislative power as regards "criminal law" ("ordinamento penale"). Indeed, the matter[107] belongs to the exclusive competence of the State (Parliament). Finally, the written introduction by the Government to the Bill of the *legge comunitaria* should provide a list of all the acts by means of which the Regions have implemented EU laws in their areas of competence.[108]

This regional implementation of EU law, clearly in matters of shared or exclusively regional competence (see Sect. A.II above), may also occur by means of the not much used *leggi comunitarie regionali* (lit. regional Community acts).[109] The regional Community act is a compact mechanism, that is, an annual regional statute, which imposes clear and tight deadlines for the implementation of EU obligations by the Region, so as to avoid the risk of delays in implementation and, therefore, of fines.

E. The Substitution Power

In the part of the *legge comunitaria* of the State which we have called *informative*, the events are provided for where the substitution power shall be exercised.[110] This power represents the main tool of the central State against the inertia or *violations committed by the Regions* in implementing EU law. In this regard, we have first of all to consider the two hypotheses of *substitution* regulated by Art. 117, paragraph 5, and Art. 120, paragraph 2, of the Constitution.[111] Both provisions have been rewritten by the aforementioned 2001 constitutional reform.

Art. 117, paragraph 5, establishes the methods of exercising the substitution power; a "regional breach of EU law", will be rectified by means of a State act. Art. 120, paragraph 2, establishes instead a series of specific hypotheses where the exercise of the substitution power is possible; among those hypotheses there is the "violation of international rules or treaties or of Community Law". Other cases, in which the national Government may exercise its substitution power for the Regions, are: "whenever there is a serious danger for public safety and security, and whenever such substitution is required in order to safeguard the legal or economic unity of the Nation, and particularly in order to safeguard the basic standards of

[106]See Art. 9, paragraph 1, lit. *g*), "Buttiglione" Act, cit.

[107]In accordance with Art. 117, paragraph 2, lit. *l*), of the Constitution. See Romano (2008), pp. 538–558.

[108]See Art. 8, paragraph 5, lit. *e*), "Buttiglione" Act, cit.

[109]See Art. 8, paragraph 5, lit. *e*), "Buttiglione" Act, cit. See Vipiana (2007), pp. 449–480 and Villamena (2007), pp. 259–288.

[110]See Art. 9, paragraph 1, lit. *h*), "Buttiglione" Act, cit.

[111]See Fontana (2005); and Villamena (2002), p. 231.

welfare relating to civil and social rights, irrespective of the boundaries of the local authorities".

The existence of two constitutional provisions dealing with the same matter creates a certain amount of confusion.[112]

The "La Loggia" Act does not dedicate a great deal of attention to this issue; on the contrary, it is concerned mainly with the *external* law-making process (see Sect. B.II above). The "La Loggia" Act exclusively regulates the regime of the State substitution power in the particular situations provided for in Art. 120 of the Constitution. This system (Art. 8) is not very detailed because it establishes only that, in the situations envisaged by Art. 120 – that is, in every case and not just the ones relating to EU matters – the national Government, after having assigned a proper timescale to allow the Regions to act, and in the absence of their activity, adopts the necessary measures.[113]

It is interesting to note that the "La Loggia" Act also requires consideration of the principle of proportionality.[114] The State measure ("due" and/or "necessary") by means of which the substitution is carried out, must respect the limit of the "mildest possible means" towards the Region undergoing the substitution. The above outlined normative framework makes implicit but clear reference to the constitutional (and administrative) case law, according to which an evaluation of the proportionality of the measure adopted shall be carried out on a *case by case* basis depending on the particular circumstances of each case. Such a measure, as it has been recently noted, should be adopted with the participation of the relevant regional body, which is competent in the matters regarding which the substitution takes place.[115]

The "Buttiglione" Act deals with substitution in more detail. This is not surprising, since this Act, in contrast to the "La Loggia", is entirely devoted to adopting legal measures in order to comply with "Community obligations" (in addition to the system of participation in the EU legislative process).

The "Buttiglione" Act contains a number of legal provisions which regulate substitution power.[116] The fundamental provision is Art. 16 *bis*, paragraph 2, according to which "The State exercises the necessary substitution powers against those sub-state entities that are responsible for violation of obligations deriving from EU law or that do not provide timely implementation of the rulings of the European Court of Justice, according to the principles and procedures established by Art. 8 of the Act No. 131, 5 June 2003 [so-called 'La Loggia' Act], and by Art. 11, paragraph 8, of the present act". Art. 11, paragraph 8, of the "Buttiglione"

[112]See Rescigno (2002), pp. 729–752; and Caranta (2002), pp. 828–833.

[113]It is interesting to recall that, in this case, the President of the of the Region concerned has the right to take part in the meeting of the Council of Ministers deciding on the measure.

[114]See Art. 8, paragraph 5, "La Loggia" Act, cit.

[115]See Villamena (2008), p. 127.

[116]See above all Art. 9, paragraph 1, lit. *h*), of the "Buttiglione" Act and Art. 13, paragraph 2, of the same act.

Act contains a rather controversial method of substitution. In the title of this article, reference is made to the implementation of EU law "by means of regulations [subordinate legislation issued by bodies within the executive branch]", but, if we look at paragraph 8, we notice that the terminology used by the legislator is much wider in scope. It is affirmed that – so as to remedy possible inactivity of the Regions in implementing EU law – State substitution powers may be exercised by means of a "normative act". Therefore, the substitution power may be exercised by means of a mere regulation (ministerial decree) or by means of legislation. In fact, the category of "normative act" includes not only subordinate legislation but also those in a hierarchical position higher than mere sub-legislative measures. However, the main legal problem with this article remains that of the admissibility of State (sub-legislative) regulations for those matters that the Constitution attributes to regional legislative competence in accordance with Art. 117.[117]

Such an issue can be resolved by resorting to primary legislation for the substitution. Otherwise, it may be resolved by means of another tool that to a certain extent overcomes the problems with the hierarchy of legal sources in the relationship between statutes and regulations. The substitution norms issued by the State are characterised by an explicit *safety-valve rule* consisting in the "pliability" (*cedevolezza*) of the State rules. As previously noted, if the State substitutes its norms for those of the Regions, at a later stage the Regions may repeal such norms by means of their own legislation.[118] In this way, by exercising the legislative competence which they had not exercised before, the Regions, or better, those Regions that had not fulfilled all their duties, may *regain control* of their sphere of legislative competence: for example, in the case provided for by Art. 11, paragraph 8, of the "Buttiglione" Act, it is established that "State normative acts" *shall cease to be effective* in that Region from the date of the entry into force of the regional statute which implements EU law. It is obvious that the *substitution system* determines a *multivariate* situation. In certain Regions which have not implemented EU law, there may be State substitution norms in place. In others, State norms will not find application, given that these Regions implemented (rightly and within the deadline) EU law through their own norms.

To date, the only example of the exercise of the State substitution power (apart from the *ex ante* substitution taking normally place on the basis of the *leggi comunitarie*, normally through legislative decrees of the Government "authorized" by a *legge comunitaria*: see Sect. D above), is the suspension in 2006 of the

[117]See Salerno (2000), p. 307, and Guzzetta (1999), pp. 3746–3752; finally, Di Cosimo (2003), pp. 268–275.

[118]The Regions do not properly "repeal" the State law. In actual fact they "derogate" from it. Should the Region repeal its own statute without replacing it with a new one, then the State law previously in force would be brought back into effect and fill the gap (this phenomenon is known as the "*reviviscenza*", i.e. "reviviscence", of the State law).

application of a statute of the Liguria Region by a Government decree law.[119] This was in order to prevent an infringement of EU law due to the non-execution of a decision of the European Court of Justice.[120]

F. Conclusions

The *suit* tailored by recent national legislation in favour of the Regions indeed appears to be very *tight* for regional autonomy.

For the reasons detailed above, the complexity of the Italian regional system is likely to have resulted in a fear that an approach excessively in favour of regional participation may increase the risk of infringements of EU obligations. Our analysis fully confirms the that the Member States are the *Masters* of EU law[121] both in relation to *external* and the domestic issue.[122] Yet we also envisage that a stronger or weaker national approach in favour of the Regions in EU matters probably depends on the State–Regions balance of powers within each legal system.

This standpoint is further confirmed by the Treaty of Lisbon. This Treaty introduces into the Protocol on the application of the principles of subsidiarity and proportionality[123] a very interesting mechanism for the protection of sub-state entities. In particular, Art. 8 of the Protocol, states that the European Court of Justice decides on complaints regarding the violation of the principle of subsidiarity, even when such claims are filed by a national Parliament or a House thereof.

This innovation is of great importance for the Member States of the European Union that have a House of the Regions. In contrast, in the case of Italy, this innovation does not imply any advantage for the Regions, because none of the two Houses of the national Parliament represents them.

[119]See the Decree Law No. 297 of 27 December 2006 (in G.U. No. 299 of 27 December 2006) suspending the regional statute No. 36 of 31 October 2006. The Decree Law has been confirmed by the Act of the Parliament No. 15 of 23 February 2007 (in G.U. No. 46 of 24 February 2007). After about 2 months of suspension, the Liguria Region repealed its statute of 31 October 2006 by means of regional statute No. 4 of 2 February 2007.

[120]See Calini (2006); Diverio (2007), pp. 61–67; finally Arconzo (2007), pp. 618–621. The Government had previously made another attempt at exercising its substitution power on the basis of Art. 8 of the "La Loggia" Act through the Decree Law No. 251 of 16 August 2006 in order to ensure the implementation of the Directive 79/409/EEC on the protection of wild birds. However this Decree Law, lost effect given that the Parliament did not confirm it within the term of 60 days provided for by Art. 77 of the Constitution.

[121]See Ferrara (2004); and Mangiameli (2010).

[122]See Segni (2007), pp. 371–376; but also Savino (2007), pp. 433–471.

[123]Available at http://www.issirfa.cnr.it/4719,46.html?PHPSESSID=5b909da245614997b17af9df2bc9d867 (last checked on 15 June 2010).

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