



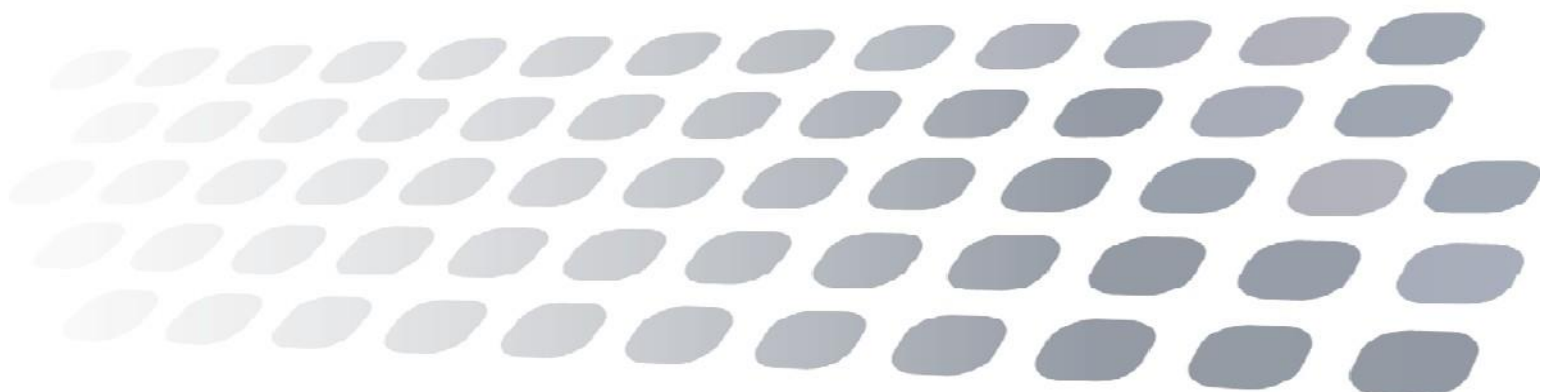
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# Refocusing Europe on growth and employment: the citizens' initiative for an extraordinary European plan

by

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## Abstract

Following the European elections, which confirmed the expected increase in support for the Eurosceptic parties in most European Union countries, both President Hollande and the French Prime Minister, Manuel Valls, declared that Europe needed to refocus on growth and employment. This demand had been expressed as early as 7 January 2014 by numerous civil society organisations (Federalist and European movements, several trade unions and other representative organisations) when they submitted to the European Commission a citizens' initiative for an extraordinary European plan for sustainable development and employment.

The aim of this citizens' initiative, presented pursuant to article 11 of the Treaty of Lisbon, is to collect one million signatures in at least seven European countries in order to request the European Commission, as the European institution that has the right of legislative initiative, to present a legislative proposal for the adoption of an extraordinary European public investment plan and to create a solidarity fund to reduce unemployment, in particular youth unemployment which has reached unacceptable levels in most European Union countries.

## Key-words

European Union, economic crisis, European citizens' initiative, sustainable development, employment



## 1. Premise

Following the European elections, which confirmed the expected increase in support for the Eurosceptic parties in most European Union countries, both President Hollande and the French Prime Minister, Manuel Valls, declared that Europe needed to refocus on growth and employment. This demand had been expressed as early as 7 January 2014 by numerous civil society organisations (Federalist and European movements, several trade unions and other representative organisations) when they submitted to the European Commission a citizens' initiative for an extraordinary European plan for sustainable development and employment.

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## 2. Reminder of the citizens' initiative

The citizens' initiative is an instrument of participatory democracy introduced by the Treaty of Lisbon. It is a major innovation in the functioning of the European Union, since only thirteen of the twenty-eight Member States recognise the right of a significant number of their citizens to submit a legislative proposal to their national parliament<sup>II</sup>. This would therefore appear to suggest that the European Union has gone further than its own Member States as regards citizens participating directly in the legislative process. However, there is a vast difference between the "right of initiative" granted by the Treaty of Lisbon to European citizens and that in force in the aforementioned thirteen Member States. In the said Member States, the citizens' right of legislative initiative enables citizens to submit a legislative proposal directly to the legislator, namely the national parliament. In the case of the European Union, citizens can ask the European Commission – which, pursuant to the



European treaties, has the almost exclusive right to legislative initiatives – to present a legislative proposal, but they do not have the legal certainty that the European Commission will comply with their request and that, accordingly, the European legislator (namely the European Parliament and/or the European Council of Ministers) will actually be called upon to examine the legislative proposal requested by citizens. The aforementioned article (RDUE n° 4-2012) explains in detail the reasons for this distinctive feature of the institutional system of the European Union in which the European Parliament also lacks a right of legislative initiative. However, the same article explains the reasons why, in practice, the European Commission grants approximately 90% of the legislative requests submitted to it by the other European Union institutions, the Member States and pressure groups. Consequently, the citizens' initiative could be as effective in practice as the citizens' right of legislative initiative in the aforementioned thirteen Member States.

### 3. The first citizens' initiatives

At the end of April 2014, forty-two citizens' initiatives had been presented to the European Commission. Eighteen of those forty-two initiatives were rejected by the Commission on the grounds that they fell outside the remit of the European Union or, in any event, were outside the scope of the tasks entrusted to the Commission by the Treaties (for example, the initiatives intended to eliminate nuclear power plants, abolish the legalisation of prostitutions and translate the European hymn into Esperanto).

Among the twenty-four citizens' initiatives considered eligible by the Commission because they were based on the relevant legal foundations of the Treaty, three have obtained the quorum of one million signatures (the right to safeguard water as a public good; the blocking of funding for research in which human embryos are destroyed; the fight against animal testing). The Commission has already expressed its opinion on the initiative regarding water security, which alone collected one million, six hundred thousand signatures.

The Commission has reacted by drawing attention to existing European legislation on the subject of the protection and quality of water and by proposing a series of recommendations and soft law initiatives addressed to the Member States. On the other hand, the Commission lacks the legal means to give priority to public water since the



Treaty's rules require it to remain neutral in relation to national decisions governing the ownership regime.

Ten of the twenty-four initiatives deemed eligible have not succeeded in reaching the threshold of one million signatures (for example, the initiative seeking to increase funding for student exchange programmes and the initiative in favour of a minimum wage). Three initiatives have been withdrawn by the promoting committee and eight initiatives are currently pending. In total, the initiatives already closed have collected around five and a half million signatures, which may be considered as constituting the beginnings of a European public forum.

#### 4. The “NEW DEAL FOR EUROPE” citizens’ initiative

The citizens’ initiative presented on 7 January 2014 by a large number of federalists, pro-Europeans, trade unions, environmental groups and other civil society organisations stems from the observation – shared by most economists – that the austerity policy implemented by the European Union since the start of the recession has not produced the expected results: the gross national products of most European Union countries has fallen, whereas unemployment has increased significantly to an unprecedented level of approximately 26 million people.

Furthermore, the national debt in most European Union countries has increased despite the measures adopted to cut government spending in said countries. In other words, the austerity measures have reduced consumption and exacerbated the economic recession in Europe. In acting in this way, the governments of the European Union countries have failed to heed the warning given several years ago by the Italian Minister of Finance, Tommaso Padoa-Schioppa, that “budgetary rigour is the responsibility of the States, but responsibility for growth lies with the European Union”. Indeed, while the Member States need to control their national spending to avoid an excessive deficit which might spark speculative attacks against the single currency, the counterpart of such restrictive policies at national level necessarily has to be an expansionary policy at European level, since the European budget is debt-free and cannot therefore be subject to speculative attacks. In other words, it is for the European Union to finance a public investment programme in order to boost growth and reduce unemployment, since most



Member States are not in a position to finance such a programme because of the need to comply with the criteria of the Stability Pact and the Fiscal Compact.

That is why a large number of civil society organisations launched the “New Deal for Europe” citizens’ initiative on 7 January 2014 after having set up a European committee (as provided for in the implementing regulation of article 11 of the Treaty of Lisbon) and national committees to collect signatures in several European Union countries (Belgium, France, Spain, Italy, Greece, Luxembourg, the Czech Republic and Hungary) to which other committees have been added successively (Germany, Austria and Cyprus).

The “New Deal for Europe” citizens’ initiative calls on the European Union institutions to adopt an extraordinary public investment plan for the production and financing of European public goods (renewable energy, infrastructure networks, high-speed telecommunication, protection of the environment and cultural heritage, ecological agriculture, etc.), and the establishment of a European Solidarity Fund for the creation of new jobs, in particular for young people. This programme would be financed from the new budgetary resources raised for the European Union by way of, for example, a financial transactions tax and a carbon tax.

## 5. The core elements of the “NEW DEAL FOR EUROPE” initiative

### 5.1. The European nature of the plan

On the basis of the abovementioned principle, namely: “Budgetary rigour is the responsibility of the States, but responsibility for growth lies with the European Union”, it would hardly be possible to consider kick-starting economic growth in Europe by means of national programmes. The public debt of most European countries is too high for them to allocate significant resources to a sufficiently vast public investment programme to emerge from the current recession. The need to comply with the criteria of the Stability Pact and the Fiscal Compact (3% of GDP for the annual deficit and structural parity of the national budget from 2015; the gradual reduction of public debt to 60% of GDP over the next 20 years) prevents most European Union countries, unless the aforementioned criteria are changed, from earmarking tens of billions a year in order to finance the necessary public investment.





The recent experiences of certain Member States (for example Italy) show just how difficult it is to allocate sufficient resources and/or reduce the tax burden in order to enhance the purchasing power of citizens and boost consumer spending.

Even if the European Union decides to relax the Stability Pact criteria (for example, by exempting from the calculation of 3% of GDP the expenditure needed to finance productive investment), there is a real risk that the financial markets would sanction the countries which increase their budget deficit in this way by requiring them to pay higher interest rates, which would cancel out many of the benefits expected of such a financial operation. Moreover, expansionary measures adopted solely at national level would be ineffective, since much of their economic impact would be offset by an increase in imports from other European countries.

The implementation to date of the “Growth and Employment Pact” approved in principle by the European Council of June 2012 broadly confirms the above scenario. This Pact provided for a financial contribution from the European budget of 60 billion euros, including only 5 billion of fresh funds and 55 billion from the recycling of appropriations intended for the EU’s Structural Funds. For the remainder, the European Investment bank (EIB) should have allocated 60 billion euros to financing investments and infrastructure projects in EU countries. To date, the appropriations intended for the Structural Funds have only been partly used and the financing of micro-projects in most countries has neither reversed the recessionary trend nor led to the creation of a significant number of new jobs. Moreover, the EIB has not been able to allocate the 60 billion euros intended to finance investments and infrastructure projects because of a lack of national co-financing from the beneficiary countries (which confirms the lack of available national resources). It follows that only a European plan financed by the European Union’s budgetary resources and by “eurobonds” would have the financial capacity needed to help Europe emerge from the economic crisis and create new jobs.

## 5.2. The extraordinary nature of the plan

The multiannual financial framework for the period 2014–2020 lacks the necessary resources to finance a public investment programme sufficiently vast to finance the creation of new energy, transport and telecommunication infrastructures, stimulate consumer demand for European public goods and create new stable jobs.



On the one hand, the reductions made to the financial framework established by the European Commission have above all affected the appropriations intended for research and innovation, and on the other, funding earmarked for youth employment (“Youth Guarantee”), which amounts to around nine billion for the period 2014–2015, is clearly inadequate to achieve a significant reduction in youth unemployment in most Member States.

Very substantial investment is needed to finance the creation of new infrastructures in Europe. According to the European Commission’s preliminary estimates, an amount of between 1,500 and 2,000 billion euros needs to be invested over the next thirty years in the transport, energy and telecommunication sectors (including 550 billion for the Trans-European Transport Network (TEN-T), 400 billion for electricity grids and the so-called smart grids, 500 billion for the modernisation and construction of new energy production capacities, etc.). Lastly, it is estimated that the amount required to provide all families with high-speed and ultra-fast Internet access by 2020 would be between 180 and 270 billion euros<sup>III</sup>.

Accordingly, the appropriations currently available in the European budget are clearly inadequate to finance a public investment programme on the scale needed to develop the abovementioned infrastructures and to significantly reduce unemployment, especially among young Europeans. That is why it is essential to launch an extraordinary development plan, financed by new resources.

The multiannual financial framework for the period 2014–2020 provides for a midterm review at the end of 2016/start of 2017; this period could coincide with the adoption by the European institutions of an extraordinary development plan. This timescale would not necessarily be too late since, according to a European Commission document, Europe will not emerge from the current economic crisis before the end of the decade. Assuming that the midterm review is unable to free up sufficient resources to finance the plan because of the need for the unanimous agreement of all 28 Member States, it would still be possible for the eurozone countries, or those countries that want to implement the development plan on the basis of “strengthened cooperation”, to decide to create a specific eurozone financial instrument or to allocate new resources via an intergovernmental agreement (along the lines used to create the European Stability Mechanism) (see also point c below).



### 5.3. The creation of new own resources for the European Union's budget

The “New Deal for Europe” citizens’ initiative recognises, as noted in the report<sup>IV</sup> of the “Notre Europe” Foundation, that the recovery of the European economy requires a significant trend reversal, with new public investment of around 1% of European GDP, i.e. at least 100 billion euros a year. Given the impossibility of finding this amount within the framework of the current budget, the “New Deal for Europe” ECI proposes the creation of two new own resources, namely a financial transactions tax and a carbon tax. The income generated by the aforementioned taxes would enable the European budget to issue “Eurobonds” (European Project bonds) and stimulate additional private investment in order to implement the abovementioned infrastructure projects and produce European public goods.

The financial transactions tax should be used to make the transition of the economic system socially sustainable and to transfer at least part of the tax burden from precarious employment to financial income. According to the European Commission this should generate between 30 and 40 billion euros every year. At the current time, a proposed directive on the introduction of this tax (FTT) at European level is being discussed by the Council on the basis of the “strengthened cooperation” formula, which enables a group of Member States to adopt a European legislative act in the absence of unanimity. The European Court of Justice considers that the conditions for the use of “strengthened cooperation” have been met and has rejected an appeal by the British government. The key question is whether the eleven Member States which are currently ready to introduce this new tax are willing to allocate at least part of the resources raised by the FTT to the European budget (prerequisite for financing part of the public investment plan advocated by the “New Deal for Europe” citizens’ initiative).

The carbon tax would be part of a general review of the system for the taxation of energy products in order to reduce the level of fossil fuel imports and boost the appeal of energy products with lower CO<sub>2</sub> emissions.

Moreover, this approach had been recommended by the European Commission in its communication dated 13 April 2011 on smarter energy taxation in the European Union<sup>V</sup>. The introduction of a carbon tax should generate around 50 billion euros a year for the European budget. This amount would also be used to guarantee the Eurobonds (European Project bonds) needed to finance the aforementioned investment plan. Accordingly, this



plan could have access to a total of around 130 billion a year, making a total amount of around 400 billion euros over three years<sup>VI</sup>.

The adoption of a European development programme involving significant public investment and the use of European taxation should, of course, be accompanied by cuts in the spending currently planned at national level in the sectors falling within the scope of the European Union's actions.

Naturally, it is important to be aware that the creation of new own resources for the European Union requires the unanimous agreement of the 28 Member States, followed by ratification at national level (article 311 TFUE). Therefore, such a decision is unlikely to be adopted within a reasonable timeframe (especially as the Member States will wait until they have received the own resources report entrusted to the group of experts chaired by Mr Monti). An amendment to the "own resources" decision – with the same procedural requirements – would also be necessary to introduce a development plan financing obligation or any other financial instrument binding on solely the eurozone Member States. Consequently, a possible alternative solution would be that outlined in the European Commission document entitled "Blueprint for a genuine EMU" of 28 November 2012. According to this document, it is possible to create a new financial instrument within the EU budget to support European economic growth.

The legal basis of this financial instrument could be article 136(1) TFUE, which provides for the possibility of adopting measures concerning only the eurozone countries or, in a more solid legal way, article 352 TFUE. If it is not possible to finance this financial instrument via an amendment to the own resources decision because of the aforementioned procedural requirements, this would require a commitment by the participating Member States, outside the Treaties and on an intergovernmental basis, to transfer the necessary "allocated resources" to the EU budget.

#### **5.4. The necessary legal basis for the adoption of the European plan for development and employment**

The "New Deal for Europe" initiative has identified the articles of the Treaty concerning most of the sectoral policies (common agricultural policy, employment policy, trans-European networks, cohesion policy and research policy) as possible legal bases for the adoption of the European plan. The advantage of these legal bases, to be used partly or



in full depending on the concrete measures that might be proposed by the European Commission, is that they would enable a European development plan to be adopted in accordance with the ordinary legislative procedure (qualified majority within the Council and codecision with the European Parliament).

However, if these legal bases were to be deemed insufficient for the adoption of the plan, the “New Deal for Europe” citizens’ initiative considers that the flexibility clause of article 352 TFUE could be invoked on an ancillary basis. The use of this clause, in this case as an alternative to the other legal bases (in accordance with Court of Justice case-law), would be possible insofar as article 3 of the Treaty refers to the objective of sustainable development and full employment, without, however, providing the necessary means of action to achieve the said objective. The use of article 352 would require the agreement of all the Member states for the adoption of the plan: however, unanimity among the Member States would in any event be necessary for the creation of new own resources, which represent a “condition sine qua non” for the financing of the plan. A unanimous agreement would also be required if the participating countries were to decide to transfer to the EU budget the resources needed to finance the plan via an intergovernmental agreement (see above under point c). Consequently, even if the development plan could be adopted on a majority legal basis or by means of any “strengthened cooperation”, the agreement of the participating countries for the financing of the plan is dependent in any event on unanimity.

## 6. Conclusions

If the results of the European elections are to be fully heeded, as stressed by the French President and Prime Minister, it is necessary to refocus the European Union’s policies on growth and employment. The German Chancellor has also called for growth and employment to be made one of the EU’s top four priorities. The Italian and British Prime Ministers have also expressed similar views. It would be paradoxical if all the politicians who have called for the result of the elections to be respected as regards the choice of the President of the Commission were to disregard the call from the vast majority of European voters for the EU to do away with its austerity measures. Moreover,



despite being very cautious in his public comments, even the President of the European Council supported a change of course in his acceptance speech for the Charlemagne Prize.

Furthermore, in recent weeks the press and media have been “flooded” with analyses and declarations by economists and other European integration experts in favour of the launch of a vast public investment programme as a preferred method of boosting growth and reducing unemployment. The European Trade Union Confederation adopted, in November 2013, a document calling for an even more ambitious additional investment plan than that advocated by the “New Deal for Europe” citizens’ initiative, namely a plan providing for an increase in investment of around 2% of the European Union’s GDP every year for the next ten years.

According to the ETUC, this investment plan would create over the medium term up to 11 million new full-time jobs. For its part, DGB, the powerful German trade union, has proposed a “Marshall Plan” to boost growth and employment in Europe.

Some forty eminent Europeans (including the economists Michel Aglietta and Michel Albert, the sociologist Ulrich Beck, the MEPs Alain Lamassoure, Jo Leinen, José Bové and Sylvie Goulard, Romano Prodi (former President of the European Commission), Pascal Lamy (former WTO Director-General, Henri Malosse (President of the European Economic and Social Committee), the historian Tzvetan Todorov, the journalist Barbara Spinelli and others) have signed a Manifesto calling for the adoption of an extraordinary European plan for sustainable development and the creation of jobs, namely the “New Deal for Europe” ECI.

Four of the candidates for the position of President of the European Commission are backing this citizens’ initiative (Mr Verhofstadt, Mr Tsipras, Mr Bové and Mrs Franziska Keller), while Martin Schulz, without adhering formally to the ECI, has expressly lent his support to the content of the initiative and the instrument<sup>VII</sup>.

The only difference of approach between analysts and political leaders is the choice between European financing and national financing for the investment and job creation plans. As already described under point 5 a) above, the lack of available national resources means that it is not possible at national level, owing to the constraints of the Stability Pact and the Fiscal Compact, to adopt sufficiently wide-ranging public investment plans to restore sustainable growth and cut unemployment substantially. Political leaders who consider that they can rapidly obtain an easing of the criteria of the Stability Pact (for



example by excluding public investment from the calculation of the 3% of GDP for the annual deficit) fail to take account of increasing public debt would negatively impact rating agency ratings and, therefore, on the interest rates imposed by the markets (above all in the countries having a very high public debt level).

Therefore, the theme of growth and employment will be at the centre of the European debate in the coming months and, most likely, of the initiatives that governments and the European institutions will take during the next European legislature.

However, that does not guarantee that the “New Deal for Europe” initiative will reach the necessary threshold of one million signatures in at least seven Member States. The experience of the first ECI (see above under point 3) shows that the three citizens’ initiatives which have reached the threshold of one million signatures are those that have been promoted and supported by well-structured, largely representative organisations (the European Public Services Union, affiliated to the ETUC, for the ECI on public water; Catholic Church organisations for the protection of human embryos; environmental and animal welfare organisations in the case of the fight against animal testing). On the other hand, other initiatives which communicated a relevant, readily understandable message (for example, the “Fraternity 2020” initiative for increased funding for student exchange programmes and the “Let me vote” initiative for the extension of the right to vote to the country of residence) fell considerably short of the required threshold.

Therefore, the close involvement of the promoting organisations in disseminating information on the campaign and collecting signatures (especially those that have a high level of representativeness) seems, in the light of initial experiences, to be a “condition sine qua non” in order to reach the threshold of one million signatures in at least seven Member States. It would be ironic if the representative organisations such as trade unions, which have proposed very ambitious public investment plans for the creation of jobs at European level (ETUC) and nationally (DGB), did not actively support the “New Deal for Europe” initiative. This not only translates into practice the principle that “budgetary rigour is the responsibility of the States, but responsibility for growth lies with the European Union”, but also represents the first concrete response to the results of the European elections which demand, as several political leaders have emphasised, a shift in focus from simply austerity towards growth and employment.



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<sup>I</sup> The documents relating to this citizens' initiative are available on the website <http://www.newdeal4europe.eu/>.

<sup>II</sup> See Ponzano 2012.

<sup>III</sup> Data drawn from Majocchi 2013.

<sup>IV</sup> See Haug, Lamassoure, Verhofstadt, Gros and De Grauwe 2011.

<sup>V</sup> See the European Commission Communication dated 13 April 2011 (doc. COM(2011) 168): "Smarter Energy Taxation for the EU".

<sup>VI</sup> See Longo 2014 and Majocchi 2012.

<sup>VII</sup> Some forty MEPs are backing the "New Deal for Europe" citizens' initiative.

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# National Supreme Courts and the EU Legal Order: Building a European Judicial Community through Networking

by

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## Abstract

This article discusses the role of national supreme courts in the development of the European legal order, moving from a hierarchical to an interaction account of the relationship between legal systems. It first focuses on supreme courts' self-perception as European courts. For that purpose, it analyzes the loose understanding by national courts of the obligation to refer a question according to article 267 TFUE. This is done by looking not just at actual judicial practice, but more in general at the elaboration of a common understanding on the matter within transnational judicial networks. The article then contends that for national courts to assume responsibility in the development of the European legal order, extra-judicial interaction is necessary. It describes the contribution of judicial networks to the potential development of European judicial communities as a precondition for an integrated European legal order. It concludes by stressing the need for stronger empirical accounts in this field of research.

## Key-words

European Union, Legal Integration, European judicial system, National Courts, CILFIT



## 1. Introduction: the role of national courts in the development of EU law

This article is grounded on the premise that still scarce attention is given to the effects of Europeanization on national courts of general jurisdiction (excluding, therefore, Constitutional Courts). In particular, it touches upon the following central issue: what is, and should be, the role of national courts with regard to the development of EU law? According to a widespread view, national courts are European courts when they apply EU law. However, this does not tell much about their relation with the European legal order. Roughly speaking, a traditional narrative understands this by referring to two aspects, both largely based on ECJ case law. First, national courts have to apply EU law and must not apply conflicting national law, as a consequence of the principles of supremacy and direct effect established at the beginning of the 1960s.<sup>I</sup> As former Director in the Directorate-General for Competition of the European Commission (and former member of the Legal Service of the European Commission), John Temple Lang put it as follows: «every national court, whatever its powers, is a Community court of general jurisdiction, with power to apply *all* rules of Community law. [...] [It] must apply Community law even when (indeed, *especially* when) it is inconsistent with existing national law» (Temple Lang 1997, 1 and 4). Second, in carrying out this task, national courts cannot interpret EU law, because interpretation of EU law is the exclusive domain of the ECJ *via* the preliminary reference procedure (while interpretation of national law is up to national courts). These two aspects outline the basics of the mandate of national courts showing, at the same time, their very much theoretical character, based on the idea of the European and the national legal orders as two separate areas.

A couple of observations can be made on this traditional, theoretical narrative. On one hand, the “constitutional” principle of supremacy has been historically contested (think for example of its belated acceptance by the French *Conseil d'Etat*<sup>II</sup>), is still contested (above all by Constitutional Courts, but also by administrative and ordinary judges<sup>III</sup>) and, even where accepted, different interpretive choices can be and are actually made on the actual content of law. On the other hand, the preliminary reference has been largely used by lower courts as a strategic tool to overcome judicial hierarchies, allowing “judicial empowerment”



(Weiler 1999, 33); nonetheless, one can find much heterogeneity from one country to the other, while higher courts – with some exceptions – have been less prone to resort to this procedure. The traditional narrative of the national courts’ mandate – along with a certain idea of the “good” European judge – shapes indeed an ideal-type of national courts as European courts. This ideal-type is based on “political” options regarding the European/national balance (Jaremba 2012, 64; Vauchez 2013b) and on abstraction from general principles that need to be reconciled with reality (Bobek 2013). The Treaty does not mention any kind of national courts’ mandate, referring explicitly to national courts only with regard to the preliminary reference procedure. A “duty” for national courts is indirectly inferred from article 4 TEU (former article 5 EC Treaty) according to which «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» (Temple Lang 1997, 2; Tatham 2012, 580; Nowak 2011, 25).<sup>IV</sup>

Starting from these sketchy observations, in this article I contend not only the need to acknowledge the role of national courts in the development of EU law, but also that current trends show that such a role is already a reality, leaning on an expanding communicative web within the European judicial space (Claes and de Visser 2012). For that purpose, I consider the case of national supreme courts by looking at two facets of the same issue. On the one side, I discuss their self-perception as European courts involved in the development of the European legal order, through the prism of their understanding of the obligation to submit a preliminary reference to the ECJ according to article 267(3) of the Treaty on the Functioning of the European Union (TFUE). I first sketch the rationale behind the preliminary reference mechanism. I then focus on the related ECJ case law<sup>V</sup> and its understanding by supreme courts as it can be observed in the debate within the Network of the Presidents of the Supreme Judicial Courts (Network of the Presidents) and the Association of the Councils of State and Supreme Administrative Jurisdictions of the European Union (ACA-Europe) (Benvenuti 2013). This gives me the opportunity to switch to the second argument, connected to the former, which relates to the ever-growing importance of horizontal and vertical interaction through networking as an alternative avenue of dialogue for the elaboration of shared views of what EU law is. Here, I first theoretically and conceptually frame the issue of judicial networks and then illustrate how



they contribute to the development of a coherent, although fragmented, European judicial field within the broader European legal field (Vauchez 2013a, 9).<sup>VI</sup>

Overall, the common sense understanding among last instance courts of the obligation to submit a preliminary reference to the ECJ reveals their self-perception as active European courts. At the same time, its elaboration is itself an example of how judicial networks, enacting informal cooperation (both horizontal and vertical), help to build a stronger judicial culture that might improve the cooperative dynamics ensured by the preliminary mechanism. In that sense, judicial networks – the prelude for a European judicial community in the making? – are the necessary infrastructure for a functioning multilevel legal order, standing for re-composition attempts of an inevitably fragmented transnational community. The choice of the topic is exemplary in that it touches upon a key-mechanism governing the relations between the European and the national legal systems, where the Court of Justice and national courts seem to have adopted different approaches.

In the concluding section of this article, I observe that acknowledging the role of national courts in the development of European law and enhancing a European judicial community – which implies a paradigm shift in the understanding of the relation between the European and national legal orders (to be framed in a federalist sense<sup>VII</sup>) – involves not only the strengthening of avenues for dialogue that are alternative to the preliminary reference procedure, but also the improvement of a set of tools relating to judicial training, knowledge management, and judicial organization in general. This opens new and interesting lines of research to be empirically investigated.

## **2. Preliminary reference between judicial protection of individuals and safeguard of the legal order: the understanding of the CILFIT criteria by supreme national courts**

As is well known, the preliminary reference *ex* article 267 TFEU is a mechanism inspired by provisions regulating judicial review by Constitutional courts, namely the German *Bundesverfassungsgericht* (Article 100 *Grundgesetz*) and the Italian *Corte costituzionale* (Article 134 *Costituzione*). In Italy, the “ricorso incidentale” allows a national judge to halt proceedings and submit a constitutional issue to the constitutional court, which then



decides upon the constitutionality and the correct constitutional interpretation of a given legislative provision. The aim of such a procedure is to safeguard the constitutional conformity of national legislation and the internal constitutional coherence of a system based on a rigid constitution.

Jan Komárek observed that a prevailing understanding – supported by the European Commission and followed by the Court of Justice – sees the preliminary reference as a “mechanism for the judicial protection of individuals” rather than as a “tool for achieving coherence of EU law” (Komárek 2007, 469). Furthermore, such an understanding regards the need for unity and coherence as a need for absolute *uniformity in any legal domain* – an aim that is not only fictitious, but which is also not always achieved by the case law of the Court of Justice itself, serving rather the political goal of supremacy.<sup>viii</sup> This approach – although odd from a legal perspective (think about the contradiction between the protection of individuals and the lack of typical procedural guarantees of the judicial process in the preliminary reference procedure) – is explained by reference to a specific historical period in which the Court of Justice was struggling to shape the EC legal order as an autonomous sphere with a nature distinct from the international legal order. A further explanation is that the Court of Justice builds its own legitimacy and authority “on its direct relationship to all EU citizens” (Komárek 2007, 484). From an opposite perspective, Komárek contends that preliminary ruling “must be seen as a deviation from normal organization of the judicial process”. Its *raison d’être* lies indeed in providing guidance in the most relevant legal issues for the sake of systemic coherence. This explains its unique procedural characteristics, as Advocate General Jacobs rightly pointed out (Komárek 2007, 476 and 479).

Far from being an exception, the preliminary reference is nonetheless considered the avenue *par excellence* through which Member States’ courts engage in a dialogue with the Court of Justice, thus acting as European courts inflecting legal reasoning in terms of “individual rights” (Kelemen 2011, 45ff; Lasser 2010, 159f). Consequently, the number of preliminary references by national courts is often referred to as one important indicator of their degree of Europeanization. Critical observations have been raised in this regard. Without considering that a preliminary reference does not always imply a true dialogue (Claes and de Visser 2012, 113), being in some cases an indicator of top-down Europeanization, at least theoretically the very lack of preliminary references may indicate



that courts *know* European law and do not need the ECJ's "assistance". Should we otherwise consider as non-sufficiently European the French *Cour de Cassation*, which submitted only 95 references between 1961 and 2011, having at the same time got involved in an intense transnational interaction and having developed working methods aimed at making decision-making aware of what is going on at the European level as well as in other Member States? (Canivet 2009, 147f) Should we consider as non-sufficiently European the German *Bundesverwaltungsgericht*, whose president stated that «courts of all the member states [...] have the challenging mission to defend [the European legal framework], which supports the present state of cooperation and integration. [...] Every national judge is – thus – a European judge as well. He – or she – is the judge entrusted with the care for the main pillar of the European Union»? (Hien 2008)

The equation between a high number of references and a high degree of Europeanization has therefore the same dignity as the opposite equation between a low number of references and a high degree of Europeanization. The problem, as usual, is conceptual confusion stemming from ambiguous terminology. The difference lies indeed in the kind of Europeanization we expect: passive vs. active Europeanization. In the latter case, national courts are willing to partake in the development of EU law. This involves a double paradigm shift. From a legal perspective, the EU legal order is not a separate legal order whose development is reserved to European institutions only (in our case, the Court of Justice); on the contrary national courts, and supreme courts in particular, partake in such a development, leaving to the Court of Justice merely the most controversial issues. From a socio-legal perspective, national and European judges are not worlds apart, but they are somehow interlinked. Over the next pages, I suggest that national supreme courts hold an active approach as shown by their understanding of the preliminary reference procedure.

These two opposite ways of understanding the preliminary reference procedure indeed affect the interpretation of the obligation of last instance courts to refer a question according to article 267(3) TFUE. According to this article, courts and tribunals of a Member State against whose decisions there is no judicial remedy under national law – which is most of the time with regard to supreme courts – “shall bring the matter before the Court”. The ECJ has provided guidance on the matter. In *Massam Dzodzi v. Belgian State*, which however originated from a lower tribunal, it generally held that it is up to the



national court to determine the relevance of this question.<sup>IX</sup> The Court of Justice has also provided more precise guidance with regard to the obligation of last instance courts to refer to it, formulating the so-called CILFIT criteria. Such criteria are logically conceived as an exception to the obligation (Lenaerts 2006, 221), but are nonetheless considered to be quite strict.<sup>X</sup>

Following this famous jurisprudence, recalled in the *Information note* provided by the Court,<sup>XI</sup> according to article 267(3) TFEU national courts are not obliged to refer a case if the Court already gave an interpretation on an identical matter in a similar case, or even when the questions at issue are not strictly identical (*acte éclairé*); or if the correct application of Community law is obvious and raises no doubts (*acte clair*).<sup>XII</sup> In the latter case, it may be unclear whether the correct application is obvious or not. According to the Court, national jurisdictions «must be convinced that the matter is equally obvious» to the jurisdictions of other Member States and to the Court of Justice. In addition, their interpretation must be based on a comparison of the different linguistic versions of the uncertain provision and keep in mind differences in terminology.<sup>XIII</sup> A further interpretive criterion is that every Community provision must be interpreted in the light of the Community as a whole, including its objectives and «state of evolution».<sup>XIV</sup>

Most scholars consider such criteria to be too restrictive, believing that few national judges are able to abide to them (Chalmers, Davies and Monti 2010, 176 f). Seemingly, the ECJ's restrictive approach aimed at avoiding abuses by national supreme courts in circumventing the application of EU law – at that time notably the French *Conseil d'Etat*, from which the doctrine of *acte clair* is drawn (Groussot 2008, 6). Even though one can assert that the CILFIT jurisprudence can, paradoxically, be read in the opposite way – as encouraging «national courts to decide seemingly non-controversial or technical matters of EU law themselves» (Chalmers, Davies and Monti 2010, 177)<sup>XV</sup> –, nonetheless the later Köbler jurisprudence confirmed the duty of national courts to refer a case for preliminary ruling when the doctrines of *acte clair* or *acte éclairé* do not apply, holding that failing to comply with that duty results in a breach of EU law by a Court<sup>XVI</sup>. Interestingly enough, Austrian courts worriedly reacted to this further jurisprudence.

When it comes to judicial practice, as a general trend national supreme courts (not to talk about constitutional courts, which are not the object of this article) only coyly refer decisions to the Court of Justice. Comparing across countries is problematic due to the





major differences in the judicial organization of the Member States and would require a specific focus. However, one can observe that in the period between 1961 and 2011, in at least eleven Member States of the once 27 (i.e. excluding the newly acceded Croatia), referrals by supreme courts have been below 30% of total national references.<sup>xvii</sup> Sure enough, strong differences exist from one Member States to the other, in line with general trends that include lower courts (Mayoral 2012, 84). Even if one can argue that such a ratio is understandable, the number of references by supreme courts in the considered period (around 2300) remains very low compared to the total cases dealt with by Member States' courts. Indeed, that means that in 50 years, supreme courts from Member States submitted, on average, 46 references per year. If one adopts a strict approach to the obligation to submit a preliminary reference, the number of references should have been much higher, also considering those factors that make higher courts more willing to cooperate with the CJEU (Mayoral 2012, 87). The self-restraint of last instance courts in referring questions to the Court of Justice is however not surprising. From a theoretical point of view, high courts are more concerned than lower courts with the stability of the legal order and the bearing on it of European law (Alter 2003, 14). They are generally less prone to be guided by European jurisprudence, at least in those cases where their authority and the finality of their decisions are more clearly defied. As Komárek also put it, the main objective of supreme courts «is to solve the disputes brought to them by the parties rather than create a new legal order in sincere cooperation with the Court of Justice» (Komárek 2007, 476).

We can therefore find a clear contradiction between the ECJ's reading of the obligation to refer, further tightened by the Köbler jurisprudence, and what national supreme courts actually do. As shown by the mentioned reaction of the Austrian judges to Köbler – who stated that «in the future the Austrian Administrative Court will think very carefully before withdrawing a reference as it did in the circumstances that gave rise to the Köbler Action» – such a contradiction can have harsh consequences. It is therefore understandable that against the restrictive approach resulting from the Court of Justice's jurisprudence, judges from national supreme jurisdictions call for more flexibility. This position plainly emerges from reports of conferences and official stances of the two mentioned European associations of supreme courts, which I am going to present next.

Problems regarding the application of EU law have been under the careful consideration of ACA-Europe since the last decade. In particular, the 19<sup>th</sup> colloquium of



the Association aimed at contributing «to an improved method of working with the national judicial bodies and an improved interaction of the national judiciaries with the Court of Justice». <sup>xviii</sup> Related topics were dealt with on the occasion of the 18<sup>th</sup> colloquium held in 2002, <sup>xix</sup> the 21<sup>st</sup> colloquium held in 2008, <sup>xx</sup> and two further seminars held in 2008 and 2011. <sup>xxi</sup> At these events, a series of problems concerning the application of EU law have been highlighted, mainly through *questionnaires* submitted to the members of the Association, and final reports setting standards or just main common lines were eventually produced. <sup>xxii</sup> More specifically, the issue of the duty of last instance courts to refer a case to the Court of Justice has been discussed during the 18<sup>th</sup> colloquium of ACA-Europe held in Helsinki in 2002, and it has subsequently been the object of broad considerations by a working group on that matter joined by the Network of the Presidents (van Djiek 2008).

The conclusions of the Working Group on the preliminary reference procedure set up at the meeting held in Warsaw in May 2007 <sup>xxiii</sup> stressed the need to interpret the CILFIT criteria «in a rational and reasonable way» and «with common sense» (van Djiek 2008, 11). According to the report of the Working Group, «Interpretation with common sense entails that the lesser the problem the more the national court can convince itself that it is capable, at first sight, to solve itself the question on the basis of its own knowledge and understanding of EU law, as the Court should not be bothered by minor problems or by problems the national court itself can solve in a satisfactory and acceptable way». The Working Group therefore added a criterion of “worthiness” that was not contemplated in the European jurisprudence, but which is along the line drawn by some critics of the CILFIT criteria, starting with the Ole Due Report in 2000. <sup>xxiv</sup> This view has been reiterated in other circumstances by supreme administrative judges. Suffice here to recall what the vice-president of the French *Conseil d’Etat* and current President of ACA-Europe, Jean-Marc Sauvé, said: «quant à l’obligation de renvoi pesant sur les juridictions statuant en dernier ressort, elle n’a rien de mécanique, compte tenu des critères posés par la Cour dans son fameux arrêt *Cilfit* du 6 octobre 1982, *que j’interprète comme un appel au bon sens des juges des Etats membres*» (Sauvé 2009, 5). This is justified primarily by the need not to overburden the procedure, limiting a more rigid understanding of the criteria only to questions of major relevance in the perspective of the unity, coherence and development of EU law. In particular, it is interesting to quote the cutting statement that «the original requirement to compare the text of all language versions is no longer realistic or feasible» (if it has ever



been), and the recommendation that the «the Court [...] seizes a suiting opportunity to clarify its position on CILFIT in a judgment».<sup>xxv</sup> It should be noted that this sort of “good practice” reflects the actual practice of some supreme administrative courts in particular. In its 2008 annual report, the Court of Justice of the European Union for example lamented the low referring rates by the German, French, Italian and Spanish ones (Sarmiento 2009, 37).

The approach to the CILFIT jurisprudence, as it emerges from the discussion within and among judicial networks, has the nature of a bottom-up advocacy that contends the strict approach adopted by the Court of Justice and counters an excessive centralization of European courts. This is also in line with a more general approach on the role of national supreme courts, which emerged for example during the 19<sup>th</sup> Colloquium of ACA-Europe held in June 2004, one year after the Köbler ruling.<sup>xxvi</sup> It is the expression of the self-assertion of supreme national judges, «who see themselves as responsible for the administration of all law in their territories», against an undeserved and sneaky seizure by the European courts, “infantilizing” them (Chalmers, Davies and Monti 2010, 178). This fits with what Eyal Benvenisti and George W. Downs observe: «A national court that engages in serious application of international law sends a strong signal to international courts that the national court regards itself as an active participant in the transnational law-making process and will not accept just any decision rendered by an international tribunal» (Benvenisti and George W. Downs 2010, 166).<sup>xxvii</sup> To be fair, it should be added that we should not necessarily see an institutional conflict between the ECJ and national courts here. The conflict is rather conceptual, involving two different understandings of the respective roles of European and national courts in the development of the European legal order – one resulting from the “official” case law of the ECJ, the other from the actual behaviour of national supreme courts and judges.<sup>xxviii</sup> In this regard, a member of the NPSCEU stressed that European judges themselves agree in their discussions with national judges that a broader understanding should be given to the CILFIT rules.<sup>xxix</sup>

In any case, such a perspective points to a real Europeanization of national legal systems and to the assumption of responsibility by national courts to act as «co-actors in the development of European law-making» (Hirsch Ballin and Senden 2005),<sup>xxx</sup> as it has also been reiterated by the first President of the Italian *Corte di cassazione*, Vincenzo Carbone, during a Symposium organized in 2009 by the ECJ (Carbone 2009 4; Ravarani



2009 4). At the same time, this flexible approach – where a margin of discretion is left to national courts – does not annul, on the whole, the criteria set by the ECJ, whose former judge Christian Timmermans participated in the working group in the quality of observer. On the contrary, it stresses the need for an extended advertising of preliminary references made by other courts as well as of ECJ case law in order to more easily find out about those issues touched upon by ECJ case law.

To sum up, the formulation of a shared understanding by national supreme courts with regard to the CILFIT criteria not only shows the taking of an official stance on the issue as an indicator of the will to actively partake in the development of EU law. It also expounds that trans-judicial interaction in the European area in the form of “networking” and through other methods (Canivet 2010, 24) is a *sine qua non* for courts to act as «co-actors in the development of European law-making». Interaction takes different shapes and resorts to different tools: from transnational associations to more informal contacts, and from case-law dialogue to the exchange of legal materials, also through common databases, they all contribute to the building of a “European judicial field” within the broader European legal field. In the next section, I dwell on judicial networks (associations) as the most apparent form of interaction, highly relevant in the case we have just examined. I first clarify the notion of “judicial networks” and then highlight the theoretical importance of the horizontal and vertical dialogues it enacts as an alternative to the preliminary ruling procedure.

### 3. The EU’s regulatory philosophy on disaster risks

When it comes to judicial networks, some preliminary clarifications are necessary. The spread of networks is indeed a substantive phenomenon happening in the EU. Since the creation of the European Judicial Network on 28 April 1997, the language of networks strikingly entered the European legal terminology. Since then, a number of entities have been created under this denomination within the fields covered by the former Third Pillar. In December 2001, the Laeken European Council called for «a European network to encourage the training of magistrates to be set up swiftly [in order to] develop trust between those involved in judicial cooperation». In September 2005, the Hague Programme mentioned those «networks of judicial organizations and institutions, such as



the network of the Councils for the Judiciary, the European Network of Supreme Courts and the European Judicial Training Network, [that] should be supported by the Union». In May 2010 the Stockholm Programme, in a section on “Developing Networks”, stressed the need for increased judicial cooperation, promotion and circulation of best practices and training of the operators involved.<sup>xxxI</sup>

The rise of networks responds to a logic of horizontal cooperation that Armin von Bogdandy has conceptualized under the notion of *Verbund*, i.e. the European multilevel system that has developed since the second half of the 1990s and notably since the adoption of the Amsterdam Treaty (van Bogdandy 2000, 27). One major qualitative change occurred at that time, namely the extension “of the Union’s grasp on the horizontal networking among the Member States’ administrative and judicial systems”. This essentially means the strengthening of mechanisms of cooperation among State authorities that were already foreseen, although at an embryonic level, in article K.1 of the Maastricht Treaty, which had explicitly enumerated a number of fields in the area of Justice and Home Affairs where Member States should cooperate as a matter of common interest.<sup>xxxII</sup>

The use of the term “network” by EU institutions is however often imprecise and actually encompasses different phenomena and institutions.<sup>xxxIII</sup> Scholars have unravelled the heterogeneity of this vague concept (Magrassi 2011; Claes and de Visser 2012; de Visser 2012; Dallara 2012; Dallara and Amato 2012). A first understanding refers to *institutional* networks whose main function is to *support* national jurisdictions to «enhance judicial cooperation in the relevant field, in order to improve the functioning of the European judicial system and to increase mutual trust» (Claes and de Visser 2012, 100 and 108). This concept of network as a form of judicial cooperation is also mentioned under the label “beyond networking towards coordination” (Magrassi 2011, 169). In this sense, institutional networks “oil” the gearwheels connecting different judicial systems within the EU in cross-border matters through «international legal assistance».<sup>xxxIV</sup> Therefore, they imply direct contacts between national judicial systems and operate as intermediates between them, by way either of contact points without a unitary strategy and more or less bureaucratized (EJN and EJNIccm) or as examples of greater coordination, although labelled as “light coordination”, including a unitary strategic approach (EUROJUST) (Dallara and Amato 2012, 10, 15 and 18).

Here, I focus more on the so-called networks of judicial institutions and professionals



established bottom-up by judges themselves, usually under national law. The two networks mentioned in the previous section, the Network of the Presidents and ACA-Europe, both belong to this category.<sup>xxxv</sup> Networks of judicial institutions and professionals are different from institutional networks established top-down through legislative acts of the European institutions that put into effect the policy of horizontal cooperation elaborated in the Stockholm program. Although they respond to the same horizontal logic and may have similar effects, these two forms of dialogue between judges should not be mixed up (as many EU policy documents do) with the different concept of judicial cooperation (Caponi 2011, 1). At the same time, institutionalized forms of judicial cooperation, understood as mutual assistance, should not overshadow other types of *de facto* judicial interaction happening outside the “institutional” framework of the EU and mostly based on voluntarism in which each individual actor is driven by his own motivations and interests. Indeed, the EU Commission itself strategically provides support – mainly financial support in a social-constructivist perspective (Risse 2009, 144)<sup>xxxvi</sup> – to such initiatives. The rationale for the establishment of judicial interaction lies in the existing gap within the *Verbund* between a legal environment tending towards increased harmonization and the lack of interconnection and uniformity between national and supranational structures (the only institutional links consist in the above-mentioned instruments of judicial cooperation and the preliminary reference).<sup>xxxvii</sup> Therefore, networks both integrate the vertical dialogue between European and national courts *ex* article 267 TFEU and improve the horizontal dialogue among national judges themselves, through which standards are set up and the interpretation of legal rules discussed. They are therefore indicative of a change in the understanding of legal integration from a top-down imposition of rules to «a process of negotiation between legal and political actors at the national and supranational level» (Alter 2003, 12). According to this view, national courts are not passive recipients but have a role to play (Accetto 2011, 20). National courts and judges participate in the elaboration of European legal knowledge and a common legal culture, and networks are (among) the *fora* where this happens.

As to their impact, although not always clearly discernible, it is possible to trace an “ascending” dimension where networks function as channels of dialogue with European institutions and the CJEU in particular, contributing to the (re-)elaboration of legal policies, and a “descending” dimension where networks act as Europeanization devices of national



judiciaries.<sup>xxxviii</sup> In the first case, courts are involved in European governance and enact a strategy of self-assertion that can be fruitful only if a «united, coordinated judicial front exists» (Benvenisti and Downs 2010, 166). With regard to the case discussed in the previous paragraph, judicial networks thus engaged in a dialogue with the ECJ, expressing their common approach as a form of «collective empowerment» (Benvenisti and Downs 2010, 170). Former judge Christian Timmermans mentioned precisely this example as a case in which discussion about the relationship between domestic and Union law was possible (Timmermans 2012, 17ff). In the other, descending dimension, networks are *filters* between the EU legal system and its national judicial application; with regard to the case discussed above they almost legitimized a common sense approach to the CILFIT criteria against, for example, the worries expounded by Austrian judges.

From a socio-legal perspective, judicial networking therefore supplements the lack of institutional links by developing a transnational judicial community whose consistency then needs to be empirically assessed. At least in principle, a European judicial community allows the definition of more stable legal concepts in an unstable and uneven socio-legal environment (Paunio 2010, 8). Unlike national legal orders, the EU legal order is indeed shaped by a high number of considerably different legal actors, while in a national environment actors consist of a more limited group of specialists. Furthermore, for the same European principles and rules, portions of territory implementing such principles are presided over by different laws using different languages. As the Vice-President of the French *Conseil d'Etat* stated when advocating forms of cooperation among European judges, the aim is «to improve our proceedings and concepts in the light of other proceedings and concepts already familiar to other systems» (Burgues et al. 2010, 233). Finally, networks make up for the possible lack of the courts' self-restraint or “respect” towards other courts and legal systems<sup>xxxix</sup>, while the creation of a «transnational united front» for the purpose of coherence also aims at avoiding race to the bottom and forum shopping.

From the perspective of the legal system, networks indeed allow the resolution of aporias between partly overlapping systems (Ferrarese 2010, 56; Martinico 2011), acting as *de facto* “filters” decreasing the «overall systemic complexity» (Bobek 2013, 205) of the multilevel legal system by operating selective choices on the understanding of concepts, techniques, rules, and principles. Here, the activity of networks is directed at “creating” a



common substratum of establishing legal meanings for the use of national judiciaries, but also tools and expertise in general. Judicial networks thus amount to interpretive communities (Johnstone 2004, 189ff ) establishing given understandings of legal and behavioral norms defining the judicial role. Such understandings have a persuasive role and work as a form of (very) soft law that has clearly no force of law but still some legal relevance.

The Network of the Presidents and ACA-Europe well portray this trend towards the building of a European judicial community (but also its weaknesses that should not be underestimated and which ought to form the object of another paper). In this article, I have sketched their role in shaping a common understanding of the obligation to refer for a preliminary ruling. The choice of the topic is exemplary in that it shows a different approach between the Court of Justice and national courts and touches upon a key mechanism governing the relations between the European and the national legal systems.

#### 4. Concluding remarks: an agenda for future research

In this article, I have drawn attention to the role of national supreme courts in the development of the EU legal order: a topic that has become mainstream in the last years, but which has been put on the agenda already more than 15 years ago (Weiler 1991, Slaughter, Weiler, and Stone Sweet 1998). In particular, I have looked at national courts' self-perception as active European courts through the prism of the extra-judicial elaboration of a common understanding of the obligation to refer a decision for a preliminary ruling (article 267 TFEU and related ECJ case law). At the same time, the *locus* in which this extra-judicial elaboration happens (transnational networks of judges) is the other side of the coin of national judges' self-assertion regarding the obligation to refer a decision for a preliminary ruling. A "loose" or common sense approach to such an obligation – in any area of law – involves indeed the need to strengthen alternative and informal avenues of dialogue: to put it differently, the need for communicative infrastructures between European and national judges *and among national judges themselves*.

The building of such communicative infrastructures, suggesting a European judicial community in the making, lies at the core of the functioning relationship between legal orders in a multilevel system (Komárek 2007, 476).<sup>XI</sup> The acknowledgement of the role of





national courts involves indeed a change in the way one looks at the relation between the European and national legal orders. The ECJ's approach in the CILFIT decision is logically based on the idea of separate legal orders and on the pre-eminence of the European over the national legal orders. Against this, another way to handle the issue is to consider the two legal orders as interdependent and the European and national courts as "working partners" (Stone Sweet 2004, 20). Jan Komárek rightly observed that the «the attempt to attach fundamental status to every provision of EU law is contradicting the premise that EU law has become part of national law. If it has, then EU law can no longer be treated as "supranational" law having some special force in each instance, rather must the weight of its rules reflect their actual nature». <sup>XLI</sup>

This implies moving away from the traditional account of the relation between national and European courts, abandoning thereby the paradigm of the separation between the European and national legal orders where the Court of Justice (and EU bodies in general) is the only institution responsible for interpreting European law. I borrow once again Jan Komárek's sharp words: «We must look at the EU judicial system as a whole – not as a mere conglomerate of the central courts in Luxembourg and the national courts in Member States, each having a different *quality* – the former being "supranational" courts having tasks similar to all international courts, and the latter "wearing Community law hat" only when EU law enters their court-rooms [...] finding solutions based on EU law is not only work for the Luxembourg oracle, but also for them» (Komárek 2007, 483 and 479). The case analysed in paragraph two shows that national supreme courts regard European law as their own law and are willing to assume responsibility with regard to its everyday development. According to Silvio Gambino, the activism of national courts in the re-elaboration of jurisprudence is a symptom of the shift in the «horizon de sens avec lequel a jusqu'ici été analysé le processus d'intégration communautaire». It shows the transition from the classic paradigm («l'unité dans la diversité») to a postmodern one («la diversité dans l'unité»), in which «le "nouveau visage de l'intégration" doit avoir une qualité différente : conditionné politiquement par les 'valeurs' nationales» (Gambino 2011).

Within this framework, the preliminary reference procedure is not to be seen as sufficient to achieve legal coherence. Statistics on the preliminary reference, on the contrary, indicate that the self-sufficiency of the mechanism is *de facto* already difficult to maintain. Other methods of judicial interaction are also essential. Here, I have stressed the



importance of just one tool: judicial networks, i.e. voluntary associations established by national courts and judges themselves outside the institutional framework of the EU, but nonetheless somehow supported by the latter.<sup>XLII</sup> The spread of networks of judicial institutions and professionals all along the last decade is indicative of a qualitative change in European legal integration, connected not only to the deepening of the European project and to its geographical enlargement, but more profoundly to the rise of a horizontal approach to legal integration.

The analysed case shows that associations of national supreme courts have elaborated a common position that explains and legitimizes a judicial practice countering a rigid understanding of the ECJ's case law. With reference to the obligation to refer a question for preliminary ruling, we have witnessed how interaction has helped cementing a European judicial community around the issue at stake. Far from being closed entities, networks may indeed give rise to a broader community of jurists due to intense collaborations. As van Haersolte metaphorically put it, each network does not operate in a void but moves like a wheel within a wheel (van Haersolte 2010, 138).

Sure enough, this article focuses on just one example, but the same phenomenon can be observed with regard to other areas of substantive law, namely those that are more directly affected by Europeanization: competition law, environmental law, asylum/migration law, taxation law, etc. Preliminary research seems to indicate that these forms of networking cannot be scornfully labelled “judicial tourism”. On the contrary, in some cases they may even have a broader impact than professional training, also considering the scope of their activities, ranging from the organization of colloquia devoted to a specific subject to the realization of case-law databases such as Dec.Nat and JuriFast, and from the publication of bulletins on legal development of EU interest to the organization of judicial exchanges among courts.<sup>XLIII</sup> In this regard, Mayoral, Jaremba and Nowak (2014, 1131) also pointed out “the relevance of EU transnational/cross-border networks and personal contacts and discussion with foreign colleagues that seems to facilitate judges’ learning process”. A first line of future research should therefore cover the mapping of judicial networking phenomena happening in the European space as part of an expanding, although fragmented, “European legal field” (Vauchez 2008, 2013a) and analyse their impact. Empirical research is still lacking on this topic, namely with regard to the actual impact on both the development of European law (ascending dimension) (Muller



and Richards 2010, 18) and national judicial cultures (descending dimension).<sup>XLIV</sup> The expansion of judicial networks is just a trend, and factors of weakness of the phenomenon must not be underestimated, nor should their unintended consequences and side effects be ignored.<sup>XLV</sup>

Alongside this line of research, other directions should be followed. Judicial interaction happens at various levels; transnational associations are just one of them. Other tools, methods, and avenues allowing and/or indicating the formation of a European judicial community exist. An example are *informal* networks and socialization. This is the case of the activities promoted by the Center for Judicial Cooperation, recently established at the European University Institute on the initiative of Prof. R. Cafaggi, or the meetings promoted by the Hague Institute for the Internationalization of Law (HIIL) in 2006 and 2009 on the changing role of supreme courts.<sup>XLVI</sup> Other topics to be investigated more in-depth include the development of judicial techniques and the use of case law as tools of hidden dialogue (Martinico), frameworks of European judicial training (Benvenuti), and the introduction of knowledge management tools in national courts (Canivet 2009 30). In sum, there is still a broad and stimulating field of research to be inquired into in order to assess the actual functioning of national courts as European courts and to understand their role in the development of the European legal order.

Mitigation policies, in fact, foster the European integration through the harmonisation of legislation in areas of shared competence. The whole SES legislation on air traffic management is a clear example of the efforts to make air safety a cross-border issue that cannot be governed on a mere national basis any longer, but which needs a supranational approach within the EU – actually, based on the recognition of functional airspace blocks – in order to meet the near future challenges of increased traffic (both for movement of persons and goods) in the EU air transport sector. In this sector, safety and efficiency needs have actually boosted the integration process and competences are partially, but relentlessly lifted to the supranational level. This case also shows the actual functioning of the pre-emption mechanism which, according to art. 2(2) TFEU, governs the exercise of shared competences (Craig 2012: 379).



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<sup>I</sup> *Van Gend en Loos v Nederlandse Administratie der Belastingen*, [Case 26/62](#), 1963 and *Flaminio Costa v ENEL*, Case 6/64, 1964.

<sup>II</sup> *Arrêt Nicolo*, 20 October 1989.

<sup>III</sup> In an interview, a lower Austrian judge clearly explained that in her eyes in the case of conflict between a European rule and an Austrian constitutional rule, with particular regard to fundamental rights, the precedence would be certainly given to the Austrian constitutional rule: in no way the European legal order has supremacy over the national one. She however added that interpretation techniques would allow her to overcome the problem by keeping the conflict hidden, for example by justifying the relevance of the Austrian rule through the reference by the Treaties to the constitutional traditions of the Member States. *De facto*, it is very rare that a conflict may not be resolved in this way.

<sup>IV</sup> This is a significant shift from a traditional international law logic to a domestic law logic, where single bodies or institutions of the State are subject to law.

<sup>V</sup> I use here the acronym ECJ (European Court of Justice), which indicates the highest judicial body of the European Union and is part of the Court of Justice of the European Union (CJEU), which includes also the General Court, formerly Court of first instance. In the article, I refer to the CJEU only where strictly necessary.

<sup>VI</sup> Following Antoine Vauchez, the notion of the European legal field indicates «a constellation of oft-distant-yet-interdependent legal actors and institutions competing for authoritative manipulation and interpretation of European law».

<sup>VII</sup> I refer here to a non-state notion of federalism (Van Bogdandy 2000, 28).

<sup>VIII</sup> Authors highlighted the shortcomings of an approach to legal coherence as predetermined uniformity (Muller and Richards 2010, 5).

<sup>IX</sup> Paragraph 34.

<sup>X</sup> On CILFIT, see the essays in Poiares Maduro, Miguel, and Loïc Azoulai. 2010. *The Past and Future of EU Law*. Oxford: Hart Publishing.

<sup>XI</sup> Information note on references by national courts for preliminary rulings, ECJ, 11 June 2005, point 1. This Information note has been replaced by a new one issued on 5 December 2009 (2009/C 297/01) (point 12).

<sup>XII</sup> Case 283/81, CILFIT v Ministry of Health [1982] ECR 341, par. 13, 14, and 16.

<sup>XIII</sup> Par. 18 and 19.

<sup>XIV</sup> Par. 20.

<sup>XV</sup> According to Edward (2010, 177), the Court precisely adopted a middle-way approach, excluding the «hard line approach» of the Advocate General but also the flexible one suggested by the Commission in favor of the recognition of national courts' discretion.

<sup>XVI</sup> Case C-244/01, Köbler v Austria [2003] ECR I-239. Rigidity of the courts' duty to the «right» interpretation of European law was also stressed in Case C-129/00, Commission v Italy [2003] ECR I-14637, where the Court held that although the provision concerned was not in breach of EC principles, it had nevertheless been applied by national courts in a way *de facto* contrasting European law. It is however to mention that ECJ adopted a more flexible stance as regards the CILFIT criteria in Case C-495/03, Intermodal [2005] ECR I-8551 (Groussot 2008, 7).

<sup>XVII</sup> Court of Justice of the European Union, 'Annual Report', 2012 119-121.

<sup>XVIII</sup> «The quality of European legislation and its implementation and application in the national legal order», The Hague, 15-16 June 2004.

<sup>XIX</sup> «Preliminary reference to the Court of Justice of the European Communities», Helsinki, 20-21 May 2002.

<sup>XX</sup> «Consequences of incompatibility with EC law for final administrative decisions and final judgments of administrative courts in the Member States», Warsaw, 15-16 June 2008

<sup>XXI</sup> «Convergence of the supreme administrative courts of the European Union in the application of Community law», Santander, 8-10 September 2008; «European Case Law Identifier (ECLI) and meta-data: harmonization of case law identification in the European Union», Warsaw, 30 September 2011. On 22-23 March 2004 a meeting has also been organized in collaboration with ERA and TAIEX gathering the courts from the then 13 Candidates Countries for EU membership in order to familiarize them with Community law and, more specifically, with the system of referring questions to the ECJ for preliminary rulings. More than 60 judges from the supreme administrative courts of the future Member States attended this meeting.

<sup>XXII</sup> Among the issues considered, it is worth mentioning the problems of interpretations due to the fragmentary nature of EU legislation or to the variety of EU official languages; doubts arising as to the



hierarchical relations within the European legal order; judicial cooperation and the approaches to the preliminary reference procedure; and State liability for breach of EU law and its consequence on the relations between the European and the national courts systems (Senden 2004; Hirsch Ballin and Senden 2005; Puissechot and Timmermans 2004).

XXIII The conclusions reached by the working group were further taken in consideration by the Symposium “Reflections on the preliminary ruling procedure” organized by the ECJ on 30-31 March 2009, attended by the Presidents of the Constitutional Courts, the Supreme Judicial Courts and the Councils of State. However, the substance of the conclusions was already present in previous stances of the network during its activities (see for example the meeting organized on 22-23 March 2004, *supra* fn 20).

XXIV A standard of worthiness was also called for by Advocate General Jacobs, but then refused by the ECJ, in Case C-338/95, Wiener [1997] ECR I-6496 (Groussot 2008, 6ff; Lenaerts 2006, 219).

XXV This view has been reiterated on occasion of the Symposium of the Presidents of the Member States’ Constitutional and Supreme Courts “Reflections on the Preliminary Ruling Procedure”, Court of Justice of the European Communities, Luxembourg, 30-31 March 2009.

XXVI In its introduction to the Final Report of the colloquium, the General Rapporteur stated: «The most important quality requirement for European legislation is therefore not that it be complete, but that it be capable – where necessary – of coordinating and harmonizing a multiplicity of national systems that will continue to exist in all their diversity» (Hirsch Ballin, ‘Preface’, in Senden 2004, 3 and 6). The view is reaffirmed in the Report: «a differentiated interpretation and thus transposition of one and the same rule must in his view be accepted to a certain extent, as being a physiological characteristic of even a system such as the European one, in which the national courts must try to bring the different national rules back to a uniform interpretation of the European legal rule from which they ensue.»

XXVII It is almost worthless saying that the ECJ can be well considered as an international court here, and this does not withdraw the peculiarities of the Court and of European law compared to international law.

XXVIII It would be also interesting to unveil how national judges come to the decision to refer a decision for preliminary ruling: among the criteria is not just relevance, but also the level of agreement between judges in the referring court. I give only two examples: In the Austrian Obergerichtshof, preliminary reference can be a way out when the members of a chamber do not come to a decision due to disagreements in the interpretation of European law; interview with the Former president of the Austrian Obergerichtshof, 24<sup>th</sup> April 2014. Something similar happens in the Hungarian Kúria, where disagreement among judges is one of the criteria for referring a decision for preliminary ruling; interview with a member of the Kúria, 18<sup>th</sup> April 2014.

XXIX Interview with the Former president of the Austrian Obergerichtshof, 24<sup>th</sup> April 2014.

XXX This view oversteps the ambit of courts of last resort and applies to lower courts whose judgments can be appealed, and who are traditionally more willing to refer (van Djiek 2008 5).

XXXI «The European Council considers that contacts between senior officials of the Member States in areas covered by Justice and Home Affairs are valuable and should be promoted by the Union in so far as possible» 2010/C 115/01, § 3.2.2. The Stockholm Programme also mentions, among the networks of professionals, the European Network of Councils for the Judiciary and the Network of the Presidents of the Supreme Judicial Courts of the European Union.

XXXII Forms of administrative or judicial cooperation already existed, but as an exception rather than as part of a comprehensive integration strategy. See for example Council Directive 77/799/EEC on mutual assistance by the competent authorities of the Member States in the field of direct taxation, *ibidem*. Concerning the criminal field, these networks are the result of a double dynamic. On the one hand, they are the last step of a process started with the intergovernmental network named TREVI, created by the European Council in 1975 to tackle cross-border criminal issues. On the other hand, they found a decisive push at the beginning of the 1990s as a presumed logical derivation from the completion of the single market and the underlying freedom of movement. Thus, the deepening of cooperation in criminal matters with the creation of the 3<sup>rd</sup> pillar in 1993 (Justice and Home Affairs, then Police and Judicial cooperation 1997) brought about the establishment of instruments of enhanced cooperation in the criminal field, with the normative definition of legal policy principles as to the definition of a set of relevant crimes (drug trafficking, international fraud, etc.). On this matter, see more extensively Dallara and Amato 2012, 5.

XXXIII The term network itself has become a «fashionable catch word» in many scientific disciplines (Börzel 1997 1). Critics of the sheer concept of network governance note that the vagueness of the concept in EU documents goes hand in hand with the «governmental rhetoric», and that it shows the need for its



interpretation in terms of hegemony, power relations and hierarchy. This does not mean, however, negating the usefulness of the concept - quite the contrary (Davies, 2011, 10 and 13).

XXXIV The concept of “mutual assistance” was first introduced in European legal terminology by Council Regulation 515/97 EC (Dallara and Amato 2012).

XXXV Examples of networks of judicial professionals, where membership is individual or reserved to private judicial associations, are the European Association of Judges, the Association of European Administrative Judges, the Association of European Competition Law Judges, European Commercial Judges Forum, European Union Forum of Judges for the Environment, etc. Examples of networks of judicial institutions are the Conference of European Constitutional Courts, Network of the Presidents of the Supreme Courts of the EU, Association of the Councils of State and Supreme Administrative Jurisdictions of the European Union, European Judicial Training Network, European Networks of Councils for the Judiciary. This latter category is still heterogeneous, including both networks composed of courts or their representatives and networks composed of judicial institutions that carry out only administrative functions, even though conditioning the exercise of the judicial function.

XXXVI It is worth recalling that the same social constructivist approach is taken by the European Commission that in 2011 set the objective of enabling 700.000 legal practitioners in Europe (which is approximately half of the total) to take part in European judicial training by 2020 (van Harten 2012, 14).

XXXVII The lack of uniformity explains the establishment of requirements of structural compatibility and standards of democracy and the rule of law set by the Treaties (van Bogdandy, 2000, 30)

XXXVIII The self-restraint approach also aimed at influencing the attitude of lower courts. Thus, in England the Court of Appeal and the House of Lords drafted narrow guidelines on referral by lower courts (Alter 2003, 19). This idea of the judicial network as a “filter” whose impact extends through a spillover effect to national judiciaries is stressed by members of the networks themselves. According to the president of the EU Forum of Judges for the Environment, activities should not be limited to the Forum; indeed, what is discussed should be “spread” at the national level among those judges who do not participate in the Forum. For example, in Belgium this is done through initial and advanced training, or by resorting to e-mail groups for judges dealing with environmental law, but it is acknowledged that there can be huge differences from one country to another and it is quite difficult to objectively assess such an impact. Interview of the author with Luc Lavrysen, Judge at the Belgian *Cour d'arbitrage*, 21<sup>st</sup> May 2013 (audio document). The call for raising awareness of colleagues not participating in the network was made during the annual conference of the Association of European Administrative Judges held in Utrecht on 24 May 2013.

XXXIX Christian Timmermans holds that the relations between the ECJ and domestic courts has been marked by such respectful behaviour, and that in spite of some frictions «no real conflict has occurred» (Timmermans 2012, 21). One can however question the tenability of this opinion, noting – as some authors did – the «aggressiveness of the CJEU towards domestic courts» (Martinico, 2011, 457).

XI. With regard to Constitutional courts, see Martinico 2008.

XI.I It is interesting to note that in *Köbler* (par. 32), the Court makes a reference to a principle of international law as an argument to characterize in absolute terms State liability for breach of EU law. One could on the contrary argue that such an absolute character does not fit a fully integrated system. Indeed, the principle of State liability is actually connected to the acknowledgement that “national loyalties” can be questioned and that the degree of unreliability is still high.

XI.II However, the formation and effectiveness of the European judicial field must be empirically investigated, also in order to highlight weaknesses that certainly exist. For example, networks are financially dependent on the Commission (ranging from 70% up to 90%) and participate in initiatives that are funded and organized with the support of the Commission. However, the relationship is not one of dependence; networks are autonomous and reflect the strong identity of judges as a professional group.

XI.III The author conducted interviews during which it emerged that the Administrative court of Ljubljana was able, after accession, to get acquainted with the complex European legal system thanks to its involvement in the Association of European Administrative Judges and its pragmatic approach based on specialized working groups, where a limited number of judges discuss selected cases. Interview of the author with Jasna Šegan, President of the Administrative Court of Ljubljana, 3<sup>rd</sup> June 2013 (audio document). Other examples indicate the relevance of networking in fact-intensive and intricate legal cases, such as environmental and competition cases. With regard to the latter, it emerged for example that the case-law of the Italian *Corte di Cassazione* regarding the use of the National Competition Authority decision as evidence (decision 3640/2009) has been directly influenced by the discussions the drafting judge had with colleagues of the Association of European



Competition Law Judges; interview of the author with Marina Tavassi, Judge at the Tribunal of Milano, 22<sup>nd</sup> November 2013 (audio document).

<sup>XLIV</sup> Whether network are only relevant as a form of dialogue with the ECJ and other European institutions or also as a filter that impacts national judiciaries (i.e. national judges who are not members and do not participate in their activities) is an open issue that needs to be empirically investigated. Theoretically, two options are possible. The first one is that networks are not so relevant with regard to changes in national judicial cultures, lacking a working link between the members of the networks and the national judiciaries. On the other hand, networks can be considered as crucial devices allowing – together with professionalized training activities – the Europeanization of national judiciaries. The answer to which of the two options is true may not be a general one, due to differences across both countries and networks.

<sup>XLV</sup> Questions about the impact in terms of convergence and substantive choices on the content of law have been raised by Muller and Richards 2010, 17.

<sup>XLVI</sup> The Center is carrying out a wide array of initiatives bringing together judges and academics. Among them, the project "European Judicial Cooperation in the fundamental rights practice of national courts. The unexplored potential of judicial methodology", is supported by the European Commission DG Justice, aims at "promot[ing] and develop[ing] the dialogue existing between the European judges by exploring concrete dimensions of judicial cooperation in the area of selected EU fundamental rights, namely principle of non-discrimination, freedom of expression and fair trial".

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**Riddle Me This, Riddle Me That:  
Anti-social Behaviour, Vagueness and Judicial  
Discretion in the United Kingdom**

by

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## Abstract

Earlier this year, the UK Parliament passed an Act aimed at redesigning the legislative landscape in the field of anti-social behaviour.

It is no secret that, when anti-social behaviour legislation first came into force, a lot of doubts were raised as to the dangerously arbitrary nature of these measures given that, while imposing heavy limitations on freedom of movement and other fundamental rights and freedoms, the conditions for granting them were unclear, as were the requirements to which respondents had to attune to.

In that context, judges played a crucial role in attempting to define the scope of anti-social behaviour measures.

During the Bill's passage, parliamentary debates emphasised the issues of vagueness and broadness but, nevertheless, the enacted legislation still poses serious questions concerning the scope, efficacy, and legitimacy of measures dealing with anti-social behaviour.

This paper proposes to analyse the difficult balance between protecting communities and social groups, on the one hand, and maintaining safeguards for individual rights, on the other, that the measures in question attempt to achieve; and discusses whether the new legislation is capable of doing so without sacrificing one to the other.

To that effect, it analyses a few pivotal judgments where the difficulty of maintaining this balance has become apparent.

## Key-words

Anti-social behaviour, injunction to prevent nuisance and annoyance, criminal behaviour order, civil preventive measures



## 1. Anti-social Behaviour in Britain: A brief history

Upon its introduction, the anti-social behaviour order (ASBO) immediately stood out for its peculiar features, even though it belonged to a long-standing tradition which scholars usually refer to as “anti-social behaviour and disorder law”.

In order to understand the social significance of such anti-social behaviour in British legal history, it is necessary to look back to the 14<sup>th</sup> century, when judges would impose sanctions on entire communities for a crime that was referred to as “breach of the peace”. Basically, these sanctions dealt with widespread social unrest, susceptible of challenging the King’s authority, and the disparate conducts they were aimed at included prostitution, drunkenness, brawling, defamation, foul language and so on. Lords entrusted their local sheriffs with the power to try all conducts perceived as illicit in order to uphold public order.

While the very concept of public order was originally designed to reconcile small communities with authority, it evolved in such a way that by the 16<sup>th</sup> century breach of the peace was a punishable offence, targeting single nomadic individuals who lingered in rural communities - the professed “vagrants” - in order to expel them. It is no coincidence that for around this time a great number of so-called “poor laws” are documented for the first time, even though it is believed they had been around for a few centuries, providing for a peculiar kind of “forced repatriation” of vagrants to the communities they had originated from.

At the same time, behaviour perceived as “anti-social” was progressively ascribed to the field of morals: on the one hand, it was dealt with by ecclesiastical courts prosecuting single offences by establishing the accused’s moral indignity and consequent estrangement from the communities they were part of; on the other hand, various organisations sought to prevent such conduct by promoting morality within British society, a task made particularly arduous by the increasing urbanisation and industrialisation of Britain.

During the Victorian Era, public policy was regulated via byelaws, i.e. local regulation, which is interesting given that in the relevant contemporary legislation local authorities are designated as the preferred applicants for obtaining IPNAs<sup>1</sup>. In order to maintain public tranquillity, borough policemen were endowed with the task of avoiding mass insurrection,



especially where labourers' quarters were concerned. The crucial point of the arrangement in question was to reprimand conduct susceptible of ripping social cohesion apart because of its "anti-social" or "aggravating" nature, the same logic at the heart of the breach of the peace mechanism.

## 2. The Evolution of Anti-social Behaviour Legislation

In the British legal system, the category of ancillary orders is comprised of three sub-categories: reparative orders, merely preventive orders, and punitive and preventive orders. Punitive and preventive orders are non-retroactive, their scope is precise, and they are subject to the criminal standard of proof<sup>II</sup>. Merely preventive orders are not subject to such heavy safeguards.

Anti-social behaviour orders were conceived of as merely preventive orders, but they undoubtedly have the potential to include punitive aspects, especially since the Police Reform Act 2002 introduced a distinction between so-called "stand-alone ASBOs"<sup>III</sup>, which fell into the category of civil preventive measures and were obtained in civil proceedings, and criminal anti-social behaviour orders – so-called "CrASBOs"<sup>IV</sup> –, which could be granted following a criminal conviction in addition to the imposed sentence or a conditional discharge.

In 2012, the conservative government led by David Cameron announced plans to thoroughly reform ASBO legislation<sup>V</sup>. The Anti-social Behaviour, Crime and Policing Act 2014 came into force earlier this year and replaced stand-alone ASBOs with injunctions to prevent nuisance and annoyance (IPNAs) and CrASBOs with criminal behaviour orders (CBOs), but some of the key issues that had come up over the years still remain.

### 2.1. The introduction of Anti-social Behaviour Orders: A question of community

The main ideas behind ASBOs started acquiring political standing only near the end of the 20<sup>th</sup> century – in the 1980s, to be precise. The fundamental inspiration for ASBOs is the so-called "broken windows theory"<sup>VI</sup>, according to which certain conducts, including minor illicit acts, actively contribute to the dissolution of social unity and the degradation of quality of life and living conditions within communities because they are widespread and constantly reiterated.





The Crime and Disorder Act 1998 formally introduced anti-social behaviour orders. Section 1(1) defines the kind of conduct that justifies applying for an ASBO as a manner that has caused or was likely to cause harassment, alarm or distress to one or more persons not of the same household as himself.

The apparent lack of clarity and finiteness in this definition posed an immediate challenge to the judiciary. Based on that definition alone, the natural conclusion would have been to dismiss the provision in question as being too broad, given that the conduct the provision seeks to punish was unspecific with regard to both the manner and means by which it was supposed to be fulfilled.

The only finite aspect of the provision was that it required an assessment of causality with regard to the alternative outcomes of anti-social behaviour, described as “harassment, alarm or distress”.

“Harassment” refers to a wide range of behaviour, spanning from random provocations to constant vexation, but its consistency can be appreciated from an objective, matter-of-fact standpoint. However, the other two elements hinge on the appraisal of a subjective condition, which consists either of a state of profound apprehension, in so far as “alarm” is concerned, or of pure, unadulterated anguish, where “distress” comes into play, almost as if hinting to a sort of “psychological climax”.

During the Bill’s passage<sup>VII</sup>, Lord Goodhart, in an attempt to mitigate the vagueness of the provision’s wording, noted that a further requirement ought to be introduced; this would have resulted in a “reasonableness test” with regard to victims of anti-social behaviour, basically making sure that they were of sound judgement and not easily impressionable. The Solicitor General rebuked his remarks by stating that introducing such a requirement would be redundant, given that insignificant or negligible conducts were already left out of the relevant legislation by employing existing parameters<sup>VIII</sup>.

Nevertheless, the lack of a clear distinction between relevant and irrelevant conducts allowed for ample judicial interpretation, to the extent that, in some cases, it veered dangerously on the arbitrary, as ASBOs were sometimes granted for inappropriate reasons or unsupported by sufficient evidence.

In truth, scholars did not seem too concerned with issues relating to causality, perhaps because ASBOs were designed to oppose behaviour affecting entire communities rather



than a single individual, at least to some degree, and yet they did concern themselves with the particularly elusive expression “likely to cause” that appeared in section 1(1).

The prevailing opinion, which had its strongest supporters in those who promoted the introduction of ASBOs into the UK’s legal system<sup>IX</sup>, was that adding probability as a requirement for granting an ASBO justified the inclusion of so-called “professional witnesses”, i.e. local authorities, police officers and so on, among those who could legitimately apply for it.

Consequently, victims of anti-social behaviour would not be forced to give evidence in order to lodge a complaint. Had it been otherwise, they would have felt discouraged; respondents would in turn be able to provide specific evidence as to the reasonableness of their conduct with regard to the circumstances in which it occurred.

As for the requirement that complaints be not from members of the same household as the respondent’s, it was probably introduced so that the specific judicial remedies against domestic violence listed in Part IV of the Family Law Act 1996 would not be restricted in scope as a result of the new, less explicit ASBO legislation. Moreover, leaving intra-family disputes out of anti-social behaviour legislation served the purpose of underlining the scathing “ripple effects” anti-social conduct has on a community’s general wellbeing, or lack thereof, thus making its punishment a question of public policy.

Determining the legal nature of anti-social behaviour orders is of crucial importance since the newly introduced measures are of the same nature and, unsurprisingly, the issue was at the forefront of political debate upon their introduction. The legal provision itself is of little use, given its aptitude to encompass any kind of contrary attitude, even unintentional, that is likely to cause an emotional reaction in a third party. Evaluating whether or not the allegedly anti-social conduct is unreasonable given the circumstances is a task reserved for judicial interpretation, which makes the ruling even more arbitrary, however much endowed with common sense judges may be.

In a 1995 Labour policy paper, “A Quiet Life: Tough Action on Criminal Neighbours”, there is mention of a “Community Safety Order”, the aim of which would have been to punish prolonged violations of public peace and tranquillity in residential areas, not by considering each single violation separately, but rather the persistence of anti-social behaviour over a certain period of time.



Therefore, single offences, against which judicial remedies capable of preventing the offender from reiterating them would not normally be granted, would be susceptible of judicial consideration as a whole, thus assuring that communities would be protected from the constant threat of anti-social behaviour.

This is relevant inasmuch as it reveals that the original intention behind the 1998 Act was not that of punishing single actions that might have caused offence to someone, but rather the idea of protecting communities from consistent anti-social conduct. It follows that while single acts may be labelled as “anti-social”, they must be severe enough to justify granting a preventive measure originally imagined as a remedy against persistent delinquency. This seems to be confirmed by the provision in section 1(1), which states that an ASBO can be granted only if such an order is necessary to protect the relevant persons from further anti-social acts by the respondent. The requirement was meant to steer judicial discretion, but it was also the clearest indication of the preventive nature of the ASBO, which could be granted on the sole basis of a prognosis concerning the threat that a person might pose to a community at some point in the future, irrespective of actual considerations about the seriousness of previously committed offences. It should also be noted that while the provision stated that an ASBO had to be granted to prevent “further anti-social acts”, it did not specify whether these “further acts” were assumed to be of the same nature as previous offences or if the issue was irrelevant, in which case the type of punishment would not necessarily have to mirror the nature of previously committed offences.

Such uncertainty made it quite difficult to distinguish between ASBOs that contained mere preventive measures and those including a *de facto* punitive measure, especially since the most recurring type of obligation involved hefty limitations on the freedom of movement.

The distinction is hardly trivial, given that the two alternatives would require different standards of proof and that the criminal standard didn’t mix well with the swift judicial procedure culminating in an ASBO, which was supposed to provide immediate protection against anti-social behaviour based on a relatively low standard of proof.

The shifting nature of the ASBO made it difficult to understand its place within the justice system and courts were of little help in placing it<sup>X</sup>.



ASBOs could also be granted as standalone preventive measures or as supplementary measures within other judicial proceedings. However, where criminal acts and proceedings were concerned, it is important to remember that the content of anti-social behaviour orders might well have been completely unrelated to the offence being prosecuted. This is a key issue given that, under the 1998 Act, the minimum duration of an ASBO was two years from the moment it took effect, and that the breach of such an order was punishable with up to five years in jail, irrespective of the legal nature of the conduct that had resulted in the ASBO.

## 2.2. Criminalizing ASBOs: The Police Reform Act 2002

The Police Reform Act 2002 formally introduced the so-called CrASBO<sup>XI</sup>, which could be granted if upon conviction the prosecution had proof, beyond reasonable doubt, that the offender had engaged in anti-social behaviour and that it was necessary to protect others from further anti-social acts by him. Therefore, the order could be granted as a supplementary punishment or, hypothetically, also as an alternative measure to detention, but it was not specified whether the relevant behaviour was supposed to be somehow connected to the one that had received a criminal conviction. In either case, the ASBO procedure and the criminal trial were conducted separately.

For this reason, it was believed by many that the offender ought to be allowed to challenge the facts that had been brought as evidence for obtaining an ASBO without necessarily defying the merits of the principal criminal charge. As a result, an inquiry ought to be held before a judge in order to resolve issues not directly related to the principal charge, much like the so-called “Newton hearing”<sup>XII</sup>.

CrASBOs took effect upon conviction, thus acting as a *de facto* ancillary order even though it was granted via a separate procedure. It follows that, while the criminal conviction came first, both logically and temporally, it ought to have no bearing on the outcome of the CrASBO procedure.

## 3. ASBOs and judicial interpretation

Judicial practice has shown that there is little doubt as to the preventive nature of anti-social behaviour orders, an observation that is in turn tied to the workability of the civil



standard of proof.

In the crucial McCann ruling (2002), the Appellate Committee of the House of Lords was tasked with determining the legal nature of stand-alone ASBOs given that, despite the allegedly civil nature of the measure in question, the ruling often resulted in a heavy limitation on individual liberty and that the law provided for the breach of an ASBO to be punished with a prison sentence. The Law Lords resolved the matter by stating that the legislator's aim had been to structure ASBOs in accordance with the statutory injunction model, i.e. basically prohibiting someone from doing something, the violation of which begot a criminal sentence, and that ASBOs had an undoubtedly preventive purpose that made the use of the civil standard of proof appropriate, while they were not directly set up to constitute a surrogate prison sentence, nor to contribute to an increase in the duration of the main punishment.

This is significant considering that the civil standard implied admitting hearsay evidence to ASBO rulings, free of the restrictions that apply to criminal proceedings, such as cross-examination. From a broader perspective, hearsay is perhaps the most recurring evidence when it comes to proving anti-social behaviour, given the peculiar “communal” danger the conduct in question poses, projecting itself beyond offences committed against single individuals and assuming a pronounced social significance.

However, the Law Lords recognised that, given the heavy limitations on personal freedom ASBOs brought about<sup>XIII</sup>, the standard for evaluating previously committed offences which constituted the basis for an application ought to be the same as for criminal proceedings, whereby judges would have to discretionally consider whether granting the measure was opportune. On one hand, it thus follows that a double standard was put forth, by which judges could consider evidence that would normally be excluded according to the criminal standard when deciding whether the requested measure was necessary; on the other hand, introducing a new version of the criminal standard via judicial interpretation defeated the very purpose of anti-social behaviour orders, i.e. providing immediate and effective protection by allowing for a lower threshold than the criminal one<sup>XIV</sup>. It is possible that the Law Lords thereby meant to soften the “tailor-made” aspect of anti-social behaviour orders, which prompted heavy limitations on personal freedom based on *ad hoc* rules tailored to meet the specifics of a case and not necessarily derived from a primary source of law, therefore running the risk of retroactive measures.



Nevertheless, the merely preventive nature of ASBOs cannot be affirmed with absolute certainty because of the serious consequences their breach gave rise to, not to mention the fact that ASBO rulings were publicised, as were respondents' personal information and photographs, a practice that was chastised by the Council of Europe, especially with regard to minors<sup>xv</sup>.

Moreover, there was no legislative provision requiring the orders to be drafted so as to ensure that the relevant obligations were outlined in a clear and precise manner. It is no surprise then that most ASBO critics pointed out the vague and excessively broad terms by which judges granted orders, which made it impossible for respondents to conform and for authorities to keep track of them<sup>xvi</sup>; and the fact that ASBOs had a minimum duration of two years made the chances of breaching them quite substantial.

Breach of an ASBO resulted in a prison sentence of up to five years and, while the conduct that the order was based upon could be relevant when assessing the violation in question, this was not necessarily so when it came to establishing the length of the punishment to be carried out upon determining this breach, since the judge who granted the order was mainly concerned with determining whether the person against which the application had been made had the potential to create further damage and, if so, which was the most appropriate remedy to contain it, irrespective of the kind of anti-social behaviour that had originally taken place.

Furthermore, in the relevant legislation a criminal sentence was described as the *ipso facto* effect once a breach had been committed, without any regard to the nature of the violation, which made the issue of vagueness an especially significant one, not to mention that the conduct in breach of an ASBO may not have been criminal in itself, nor even anti-social by the standards set in the 1998 Act, for that matter.

By contrast, if the conduct in breach of an ASBO constitutes a criminal offence in its own right, irrespective of the ASBO violation, an entirely different sort of problem arises, i.e. double jeopardy.

Judicial practice shows that there has been much concern over this particular aspect. In Boness (2005) the Court of Appeal recognised that, while the conduct in breach of an ASBO could amount to a criminal offence regardless of the violation in question, the main function of anti-social behaviour orders was to prevent respondents from having further opportunities to commit anti-social acts. Therefore, if a breach had occurred and the



underlying conduct amounted to a criminal offense, it was necessary to determine whether the same could be characterised as anti-social in accordance with the requirements set out in the 1998 Act, otherwise the punishment for breach of an ASBO would result in an underhand addendum to the main criminal conviction. In Morrison (2005), the violation of a disqualification from driving order was considered and an analysis into ASBO statistics showed that this kind of measure was often employed to boost the maximum statutory penalty for the principal offence, in contrast with their declaredly preventive aim. As to the specifics of the case, the Court ruled that even though the offender had driven after having been prohibited from doing so, he had not acted in an anti-social manner. Finally, in Wadmore and Foreman (2006), a list of requirements meant to preserve the preventive nature of ASBOs was clearly outlined: the measure ought to be necessary to protect communities from further anti-social acts by the respondent; the obligations placed upon the respondent ought to be clear, precise and practicable; and they ought to be controllable by the relevant authorities and proportional to the actual conduct described as anti-social. Moreover, it was said that “the purpose of an ASBO is not to punish an offender. This principle follows from the requirement that the order must be necessary to protect persons from further anti-social acts by him. The use of an ASBO to punish an offender is thus unlawful” (Hooper L.J. in “Boness”, paragraphs 28-29).

As a matter of fact, while standalone anti-social behaviour orders could not be considered in the same manner as aggravating circumstances in light of the fact that the former were granted as a result of a self-supporting civil procedure that bore no tether to a criminal trial, the fact that the breach of an ASBO resulted in a prison sentence, despite being ascribed to the general category of civil preventive measures, made it hard to place ASBOs into a given branch of the UK’s legal system.

Interestingly, the Sentencing Guidance Council established a few guidelines for ASBO rulings<sup>XVII</sup>: if a conduct in breach of an ASBO consisted of a criminal offence that was punishable with a lower maximum penalty than the breach itself, the former had to be decided separately, even though nothing prevented the court in the latter procedure from taking this fact into account in order to determine the extent of the punishment.

Even the attempt to keep the two proceedings separate is notable, since it is difficult to imagine that an ASBO granted in strict relation to offences that were the object of a criminal trial did not amount to a form of supplementary punishment, however woven in,



especially since the preventive aim of the measures in question was hardly to be found once the defendant had been convicted. The same could be said if ASBOs had been granted as a sort of alternative punishment to detention, given that their nature was supposed to be merely preventive.

Whatever the case, anti-social behaviour orders had the potential to absorb every other preventive measure because of their inherent vagueness<sup>XVIII</sup>.

#### **4. Changing course... slowly: the Anti-social Behaviour, Crime and Policing Act 2014**

Under the Anti-social Behaviour, Crime and Policing Act 2014, anti-social behaviour is dealt with through a variety of measures.

The first newly introduced measure is the injunction to prevent nuisance and annoyance (IPNA), which is granted if the following requirements are met<sup>XIX</sup>: the court must be satisfied on the balance of probabilities that the respondent has engaged or intends to engage in anti-social behaviour; and it must also recognise that it is just and convenient to grant the injunction in order to prevent the respondent from committing further anti-social acts.

Obviously, the first critical issue is defining what amounts to anti-social behaviour. Even though a definition had been provided in section 1(2) of the Bill as brought from the Commons<sup>XX</sup>, it deviated so much from both the established legislative framework and judicial practice that it was fervently and resiliently challenged by the Lords on the grounds that, while the mechanics of the new injunctive procedure were clearly laid out, the threshold test, which represented the necessary foundation upon which everything else was built, had not been thoroughly appraised.

The Bill described anti-social behaviour as a conduct capable of causing nuisance or annoyance to any person and required that the court be satisfied on the balance of probabilities that such behaviour had taken place or that there had been a threat to engage in it.

In the report stage, Lord Dear tabled an amendment concerning the threshold test<sup>XXI</sup>, expressing concerns about the lack of certainty, precision, and clarity affecting the “nuisance and annoyance” test, as well as pointing out that existing ASBO legislation





defined anti-social behaviour by employing the less ambiguous “harassment, distress or alarm” threshold, and that it had done so without having been challenged for being too restrictive in scope<sup>xxii</sup>. He also brought up the US Supreme Court’s *Winters v New York* judgement of 1948 as one of the most notable examples that clearly outlined the jurisprudential principle according to which the law should be clear, precise and unambiguous.

Clearly, the “nuisance and annoyance” threshold had been lifted from the context of existing housing legislation, where it was considered appropriate to have a lower test given that it involved neighbours living in close proximity, which made evidence especially hard to obtain, and which was aimed mainly at facilitating the landlord’s management functions. The provision this test was based on was designed to have a very limited scope and did not include open public spaces, as Lord Dear duly pointed out<sup>xxiii</sup>, or else any expression of free speech would be hindered. As an example of the serious effects the lower threshold could have on fundamental rights, especially free speech, Lord Dear referred to the difficulty both practitioners and courts were faced with in defining the scope of the word “insulting” in the Public Order Act<sup>xxiv</sup>.

Another interesting point was made by Baroness Mallalieu, who observed that most anti-social behaviour was already regulated by existing criminal law offences under criminal damage, public order and harassment laws<sup>xxv</sup>. She also noted that the Bill did not provide for defence of necessity or lack of intent, which in turn entailed that there were no compensation provisions for wrongful injunctions or any other safeguards normally attached to a civil injunction, despite the fact that the respondent was not going to be present at the initial hearing.

In the debate the “just and convenient” condition for granting an injunction was also brought into play, since it added nothing to reduce the deficiencies in the substantive provision and was found too vague when compared to both the existing necessity test and the criminal test of proof beyond reasonable doubt; also, it could not be dealt with by guidance notes as the Government had originally intended, since it would be of doubtful constitutional propriety that courts should receive instructions from the former<sup>xxvi</sup>. However, it was also pointed out that the term “convenient” had been long employed in judicial practice and that it incorporated reasonableness, proportionality and appropriateness at the same time<sup>xxvii</sup>.



Lord Faulks, who had tabled an amendment introducing a reasonableness requirement into the Bill in light of the Joint Committee on Human Rights' views, observed that applications could only be made by agencies that would be required to employ proportionality and reasonableness, which in his opinion provided an appropriate filter<sup>xxviii</sup>. He also noted that anti-social behaviour could have ruinous effects on a person's life without amounting to the quasi-criminal conduct described by the existing threshold and, as a consequence, hearsay evidence was vital in order to make sure victims would not be terrified of being identified as the source of a complaint. Agencies would be tasked with a *de minimis* assessment before proceeding any further, and judges would need to be satisfied of the complaint's substantiality as well as the reliability of the anonymous source. Moreover, while IPNAs could be obtained on the balance of probabilities, the criminal standard of proof beyond reasonable doubt would still have to be satisfied in order to establish a breach. Finally, he observed that, with regard to housing, the introduction of a higher hurdle for non-social housing-related offences would result in a two-tier test based on whether victims were private tenants or in social housing which, in his view, was not coherent<sup>xxix</sup>.

However, Baroness Smith of Basildon observed that a one-off event causing nuisance and annoyance to any person could, on the balance of probabilities, equally result in an injunction, thus moving away from the punishment of persistent behaviour<sup>xxx</sup>.

Lord Dear's amendment<sup>xxxi</sup> was agreed to and, despite the Government's initial resistance, became final during parliamentary ping-pong<sup>xxxii</sup>. The amended provision defines anti-social behaviour as a conduct that has caused, or is likely to cause, harassment, alarm or distress to any person<sup>xxxiii</sup>, thus basically reverting to the same substantive provision that came into force when ASBOs were first introduced. As for housing-related anti-social conduct, it is described as capable of causing nuisance or annoyance to a person in relation to the latter's occupation of residential premises<sup>xxxiv</sup> or capable of causing housing-related nuisance or annoyance to any person<sup>xxxv</sup>.

Perhaps the most interesting aspect of the 2014 Act is that it brought about a clear-cut terminological distinction between stand-alone orders (IPNAs) and those related to criminal conviction by introducing a new measure, the criminal behaviour order (CBO), which may be granted exclusively upon application by the prosecution if the court is satisfied, beyond reasonable doubt, that the offender has engaged in behaviour that caused



or was likely to cause harassment, alarm or distress to any person and that the order will prevent the offender from engaging in such behaviour<sup>xxxvi</sup>. While the new provisions concerning criminal behaviour orders are similar to those concerning CrASBOs, the fact that they no longer bear the same acronym as their non-criminally-related counterparts is significant, as it should allow for more case-appropriate obligations to be placed upon respondents, in the case of IPNAs, and offenders, in the case of CBOs. In other words, obligations placed upon respondents should be less constraining than those placed upon offenders given that, logically speaking, the types of conduct carried out by the latter ought to be much more serious so as to prompt a criminally-related order.

Irrespective of this terminological improvement, however, the key issues that were previously discussed still remain.

For one, the Act does not require that obligations stemming from an IPNA or CBO be proportional to the goal that is pursued, nor to the conduct which resulted in such a measure in the first place, leaving this decision completely up to judicial discretion. Nevertheless, the number and scope of the obligations laid upon the respondent or offender must not be so broad as to compromise fundamental rights, such as, for example, the right to respect for private and family life that is found in article 8 of the ECHR<sup>xxxvii</sup>, but there is no legal requirement making sure judges grant measures that are in accordance with the 1998 Human Rights Act<sup>xxxviii</sup> and other laws and charters protecting individual rights and freedoms.

Moreover, the requirement which comes with the expression “just and convenient” is even more elusive than its predecessor, since, while previous anti-social behaviour legislation required that the order be necessary to prevent further anti-social acts in a means-to-end perspective, however tenuous, the present legislation does not provide any indication as to what the evaluation in question is supposed to be based on. Judicial practice has shown that ASBOs were often issued against individuals who had not caused harm *per se*, but who had put themselves in a position which might have led them to cause harm to others: a prime example of this is Lamb (2006), where a graffiti painter was prohibited from accessing the entire Tyneside metro system on account of the fact that he had repeatedly sprayed graffiti on trains serving that system. In cases such as this one, the respondent is clearly not treated as a responsible agent, by imposing obligations that could be defined as “overbearing”, to say the least, like an overprotective parent constantly



second-guessing their child's understanding of the ways of the world. The more extensive the obligations, the more likely a breach will occur.

If an anti-social behaviour order was breached and the conduct in violation was not unlawful in itself, as it did not cause or was unlikely to cause harassment, alarm or distress, the respondent was convicted of a criminal offence for defiance of a court order. In case of breach the criminal standard was of little help, given that the only pending issue at that point would have been whether the respondent had a reasonable excuse not to comply with the injunction since, by that point, any other outstanding question would already have been resolved according to the civil standard of proof. Therefore, courts could impose a *de facto* personal punitive statute on the respondent, irrespective of the rule of law, since Parliament's law-making powers were in fact given away when it came to anti-social behaviour.

That being said, the new law does not provide for a criminal conviction in the event of a breach of an IPNA, but it can still result in imprisonment for contempt. This is probably the biggest step that has been taken so far towards shifting civil preventive measures away from their quasi-criminal implications, but it must not be forgotten that a lot of these measures still carry the "ASBO blueprint".

As for CBOs, despite the fact that the courts' sentencing powers are quite extensive and might therefore make this particular kind of measure obsolete, the question of proportionality is yet to be resolved given that, in the event of a breach, the offender is convicted of a criminal offence which is liable of imprisonment, a fine, or both<sup>xxxix</sup>, irrespective of the nature of the conduct in violation of the order. Moreover, the law in question introduces a new element with regard to criminally-related orders, given that it provides for the possibility of imposing positive requirements rather than prohibitions<sup>xl</sup>. For this reason alone, the nature of the conduct violating the order should be taken into account, given that the type of obligation placed upon an offender is not entirely insignificant.

Finally, the minimum and maximum periods for which IPNAs and CBOs must or may be in effect are also an issue, given that the relevant provisions state that the maximum duration of the measures in question must be specified by the courts<sup>xli</sup>.

All things considered, it does not seem like the new legislation has managed to tackle the big issues related to preventive measures and their "hybrid" nature. It certainly has



moved forward with regard to the aspect of breach of an injunction or order, but the pivotal point concerning the ostensible irrelevance of the conduct which justifies the application when it comes to establishing the obligations to be included in the measure still stands, as well as the ample discretion afforded to the courts. Regulating the breach of an injunction or order in a more reasonable way is commendable, but it is of little use when the foundation upon which both measures are built is riddled with uncertainty. It is therefore still up to the courts to decide which conducts are relevant when it comes to ruling on preventive measures and, given that judicial practice has shown the potentially unlimited breadth of obligations placed upon recipients of such measures, it is highly unlikely that the newly enacted legislation will offer more effective tools to tackle anti-social behaviour.

Ironically, while the Government's intention was to guarantee effectiveness by providing more flexible tools rather than specific solutions to deal with specific problems<sup>XLII</sup>, the very lack of specificity is likely to prevent the newly introduced measures from being effective, given that it affords the judiciary excessive discretion. As long as the relevant legislation remains incapable of providing workable standards for establishing the anti-social nature of certain conducts, courts will undoubtedly struggle to determine the appropriate punishment for each new case that is brought before them, much like a riddle waiting to be solved with no decisive clue to lead the way.

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<sup>I</sup> Section 1(a) of the Anti Social Behaviour, Crime and Policing Act 2014.

<sup>II</sup> Privatory orders, i.e. those consisting of the deprivation of one or more assets from the offender, are a prime example of this category.

<sup>III</sup> Section 1 of the Crime and Disorder Act 1998.

<sup>IV</sup> Section 1C of the Crime and Disorder Act 1998, introduced by the Police Reform Act 2002.

<sup>V</sup> See Home Office White Paper "Putting victims first: More effective responses to anti-social behaviour", 22 May 2012.

<sup>VI</sup> As the name itself suggests, if a single broken glass in a building's structure is not repaired, sooner or later the whole building will be without windows. While the theory is not the only one that contributed to the conceptualization of anti-social behaviour within New Labour, it is certainly the one that had the strongest impact. For more on the subject, see Wilson and Kelling, 1982.

<sup>VII</sup> A Bill's passage through Parliament is comprised of the following stages, irrespective of the House where it starts: first reading, which is usually a formality culminating in an order for the Bill to be published for the first time; second reading, which constitutes the first opportunity to debate the main ideas behind the Bill and its chief purpose; committee stage, where each clause and any amendments to the Bill may be discussed; report stage, where further amendments may be suggested and considered; third reading, in which the now final version of the Bill, at least where the House where it started is concerned, may be debated further and is voted on. Once third reading has been completed, the Bill goes to the other House for its first reading and the other aforementioned stages follow suit. Once the Bill has passed through its third reading in both



Houses, it is returned to the House where it started so that the other House's amendments may be considered. At this point, the Bill may go back and forth between each House until the final draft is agreed on: this is referred to as parliamentary ping-pong. If both Houses are in accord, the Bill can receive Royal Assent, thus becoming an Act of Parliament; if not, the Bill falls. However, in some cases the Commons may invoke the Parliament Acts to pass the Bill in the following parliamentary session without the Lords' consent.

<sup>VIII</sup> HL Deb vol. 587, col. 584-586.

<sup>IX</sup> The ASBO was a byproduct of the crucial importance that New Labour and, notably, its leader Tony Blair placed on the concept of law and order. This is apparent in a few of Blair's speeches, such as the one on crime reduction (30 March 2004) and the one on anti-social behaviour (28 October 2004).

<sup>X</sup> See paragraph 3 for more details.

<sup>XI</sup> Section 1, subsection (c) of the Police Reform Act 2002.

<sup>XII</sup> A Newton hearing generally occurs when there are substantial factual issues relating to a case that have to be resolved between the prosecution and the defence and the conflicting evidence is examined by a judge sitting alone, based on testimony and submissions.

<sup>XIII</sup> Judicial practice has shown that most ASBOs have been granted in order to exclude respondents from their day-to-day social context.

<sup>XIV</sup> In the Community Safety Order Consultation Paper it is suggested that, if a person is unable to provide evidence that would satisfy the criminal standard and therefore allow them to seek protection via a criminal trial, they ought to be able to apply for an ASBO, which is considered a necessary and appropriate alternative measure.

<sup>XV</sup> The respondent needs to be at least ten years old to be eligible for an ASBO.

<sup>XVI</sup> There are two emblematic cases of this: the first dealt with a woman with suicidal tendencies who was instructed to keep away from rivers, lakes and bridges overlooking railway lines; the second dealt with a young man who had committed various crimes, including theft, and who was then forbidden to access public parking lots except for work-related reasons, to go to places of education unless he was a student there, and to carry around anything he might potentially employ to cover his face.

<sup>XVII</sup> SGC, "Breach of an Anti-social Behaviour Order", 2008, p. 4.

<sup>XVIII</sup> Just to give a few examples, they could potentially absorb banning orders, disqualification from driving orders, disqualification from working with children orders, risk of sexual harm orders, sexual offender prevention orders, exclusion from licensed premises orders, travel restriction orders, violent offender orders and so on. This is clearly an exaggeration, since the more specific orders are supposedly more effective, but it serves as an adequate example when it comes to the issue of ASBO vagueness.

<sup>XIX</sup> Section 1, subsections (2) and (3) of the Anti-social Behaviour, Crime and Policing Act 2014.

<sup>XX</sup> HL Bill 052 2013-14.

<sup>XXI</sup> At this point the Bill (HL Bill 66 2013-14, as amended in committee stage) still bore the "nuisance and annoyance" threshold. The amendment in question sought to replace it with the existing test and was put forward by Lord Dear (backed by Baroness Mallalieu and Lord Mackay of Clashfern). It read as follows: "Page 1, line 8, leave out from "in" to end of line 9 and insert "anti-social behaviour.(.) Anti-social behaviour is—(a) conduct that has caused, or likely to cause, harassment, alarm or distress to any person, or (b) in the case of an application for an injunction under this section by a housing provider, conduct capable of causing nuisance or annoyance to any person.".

<sup>XXII</sup> HL Deb 8 January 2014, col 1513.

<sup>XXIII</sup> Nevertheless, the inclusion of a separate provision for housing providers in his amendment was criticized because it did not consider the provisions already in force in the Housing Act 1996, which allows for "relevant landlords" to apply for injunctions against tenants who have acted so as to cause housing-related nuisance or annoyance or threatened to do so. Therefore, there was no reason to give preferential treatment to housing providers that did not fall under the definition of "relevant landlords" (HL Deb 8 January 2014, col 1535).



XXIV HL Deb 8 January 2014, col 1542. Anti-social behaviour legislation and public order legislation enjoy a fascinating relationship. To observe a clear example of this see *Dehal v Crown Prosecution Service* [2005] EWHC 2154, (2005) 169 JP 581.

XXV HL Deb 8 January 2014, col 1517.

XXVI HL Deb 8 January 2014, cols 1519-1521; 1533.

XXVII HL Deb 8 January 2014, col 1529.

XXVIII Based on the Human Rights Act 1998, a judge would have to decide whether an order is proportionate and necessary.

XXIX HL Deb 8 January 2014, cols 1522-1524.

XXX HL Deb 8 January 2014, col 1537.

XXXI See footnote xxi.

XXXII See footnote vii.

XXXIII Section 2 (1) (a) of the Anti-social Behaviour, Crime and Policing Act 2014.

XXXIV Section 2 (1) (b) of the Anti-social Behaviour, Crime and Policing Act 2014.

XXXV Section 2 (1) (c) of the Anti-social Behaviour, Crime and Policing Act 2014.

XXXVI Section 22, subsections (1) and (7) of the Anti-social Behaviour, Crime and Policing Act 2014.

XXXVII Article 8 ECHR (“Right to respect for private and family life”) states as follows: “1. Everyone has the right to respect for his private and family life, his home and his correspondence. 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic wellbeing of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.”

XXXVIII The Human Rights Act 1998 sets out fundamental rights and freedoms that individuals in the United Kingdom benefit from. For the most part, it codifies the protections in the European Convention on Human Rights into UK law. Interestingly enough, Section 19 states as follows: “(1) A Minister of the Crown in charge of a Bill in either House of Parliament must, before Second Reading of the Bill—(a) make a statement to the effect that in his view the provisions of the Bill are compatible with the Convention rights (“a statement of compatibility”); or (b) make a statement to the effect that although he is unable to make a statement of compatibility the government nevertheless wishes the House to proceed with the Bill. (2) The statement must be in writing and be published in such manner as the Minister making it considers appropriate”. In the case of the Anti-social Behaviour, Crime and Policing Act 2014, Lord Taylor of Holbeach declared that, in his view, the provisions of the Bill were compatible with Convention rights (HL Bill 52 2013-14). Home Secretary Theresa May had done the same in the Commons (HC Bill 7 2013-14). Given the controversial nature of the Bill’s contents, it is clear that what should have been a compelling political safeguard has quickly become a mere formality.

XXXIX Section 30(2) of the Anti-social Behaviour, Crime and Policing Act 2014.

XL Section 22 (5) (b) of the Anti-social Behaviour, Crime and Policing Act 2014.

XLI According to sections 1(6) and 25(5), respectively, if the respondent or offender is a minor, the maximum period is 12 months with regard to IPNAs and 3 years with regard to CBOs.

XLII This is expressed very clearly in a ministerial statement laid in the House of Commons on 7 February 2011 by James Brokenshire MP, who was Under-secretary of State for Crime Prevention at the time.



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**Macroeconomic Imbalances in the Euro Area and  
Policy Intervention:  
the Role of Trade with Emerging Economies**

by

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## Abstract

The aim of this paper is to evidence the benefits of a coordinated and symmetrical policy approach in the reduction of macroeconomic imbalances among Eurozone countries by analysing the exploitation of the trade potential with emerging economies as an instrument to reduce such imbalances. To this end we estimate potential trade flows with the group of BRICs and calculate the effect on both trade and current account balances. The results indicate that for the main economies, such as France, Italy and Spain, a coordinated and symmetrical policy intervention in order to increase competitiveness and exploit the trade potential with BRICs will cause substantial improvements in their trade balances. In addition, by means of panel estimates we find a direct effect of net trade increases on public debt reductions in Italy and France. Hence, we conclude that coordinated and symmetrical measures to improve the competitiveness of deficit countries can be a substitute for austerity policies to reduce the debt to GDP ratio in Southern Europe.

## Key-words

Panel data, trade potential, debt, Euro Area, imbalances, policy coordination

JEL codes: C33, E61, F15, H63, O52



## 1. Introduction

Since late 1990s, macroeconomic imbalances in the Eurozone constantly increased and became a critical factor in causing the current debt crisis. Throughout these years, Southern European countries experienced large losses in competitiveness and persistent accumulation of current account deficits against Northern Europe. In addition to this, during the global crisis, the financing of the stimulus measures caused huge budget deficits, leading public debt to unsustainable levels, especially in Greece in 2009 after the truth about the real conditions of public finances were found out by the newly elected government of Papandreou. The prevailing view among the main European authorities and governments was that the crisis was not one of the Eurozone system itself, but of individual countries' (peripheral deficit countries) behaviour within it, and imposed the adjustment to be entirely centred on the highly indebted countries. Fiscal austerity measures, therefore, have been introduced and diffused everywhere in the Eurozone, from Greece's unique fiscal problems to countries such as Spain and Ireland - which have banking and not fiscal crises - and to Italy because of the credibility crisis of the government in charge and the delay in structural reforms.

This view leaves the burden of economic policy, including the necessary reforms aimed at increasing competitiveness in deficit countries, to the sole initiative of the member states. At the same time, no symmetrical adjustment is required for countries in surplus like Germany or The Netherlands. But if most governments cut spending without a compensation from surplus countries the deflationary effect on GDP is magnified and slowdowns in one country reduce the demand for export in others with a negative effect on growth for the whole area, pushed down by the recession in all peripheral countries. This is what happened in the last two years, with Southern European countries experiencing GDP losses until the end of 2013 while other Eurozone countries were barely starting to recover. Economic data for the first part of 2014 do not show signs of improvements and even the core countries like Germany, France and The Netherlands do not show signs of stable recovery.

In our view, the development of trade and current account imbalances and the explosion of public debts after the crisis are strongly related. How such imbalances had



been generated is under discussion among academics and policy makers. Initially, they were seen as the result of the proper functioning of the monetary union and re-equilibrating mechanisms were expected to work in order to avoid the excessive divergence of current account positions (Blanchard and Giavazzi 2002).

Since the global financial crisis, it is clear that the re-equilibrating mechanisms did not work, stimulating a body of literature on the causes of such imbalances. A macroeconomic explanation, which looks at the peculiar functioning of the EMU, was proposed by Krugman (2012), Allsopp and Vines (2010). According to them, the creation of a common money reduced risk premia in the peripheral European countries (Spain, Portugal, Italy), leading to an expansion of expenditure for both consumption and investment, without adequate monetary and fiscal restraints. The higher expenditure and output led to inflation and deterioration of competitiveness (unit labor costs) in the periphery, together with the accumulation of current account deficits. Given the fact that the Euro area as a whole had on average a balanced current account, surplus and deficit euro member countries were mirror images of each other. This explanation stresses the role of financial integration in reinforcing imbalances instead of preventing them (Crocchi-Angelini and Farina 2012). In this process, excessive lending from Northern to Southern countries in search for higher yields has increased imbalances as peripheral countries were not able to sterilize the huge capital inflows (Schnabl and Freitag, 2012).

A complementary explanation that has a microeconomic content (Guerrieri and Esposito 2012, 2013) suggests the role of the international reorganization of the German production system. In particular, outsourcing to Eastern Europe, together with wage restraints and labour market reforms (Hansen 2010, Marin 2010), succeeded in enhancing the competitiveness of the German firms and economy, and contributed to increase its trade surplus with the peripheral European countries, unable to achieve similar gains in comparative advantages. In connection with this result, Guerrieri and Esposito (2013) and Chen et al. (2013) find that competitive differences resulted also in a different degree of competition from emerging economies, with Southern Europe and above all Italy, suffering more from the competition of Chinese products in the intra and extra European Markets. Other authors stressed the role of competitive differences (Dullien and Fritsche 2009, Giavazzi and Spaventa 2011, Brancaccio 2012, Onharan and Stockhammer 2013, Collingon 2012), in particular evidencing the loss of competitiveness in peripheral



countries. Most contributions point to the German competitiveness reforms, especially in terms of wage restraints, as the main cause for ULC divergences.

All in all, the evidence suggests that imbalances are the result of the behaviour of all countries in the Euro area so that a solution is more likely to come from a coordinated approach.

For many years, little attention was paid to imbalances – not only by national authorities, but also by the new European economic governance, which only insufficiently addressed policies capable of favouring economic adjustments. Policy coordination of some kind is needed (Holinski et al. 2012) in many areas of economic and industrial policy. In other words, convergence and adjustment do not happen automatically in the EMU but need to be policy-driven. Gains in competitiveness and convergence must be the result of a cooperative game, which should change the natural divergences among countries arising when economic policy is asymmetric and of a “beggar-thy-neighbour” character (Guerrieri and Esposito 2012).

One of the areas where a coordinated approach is needed to increase competitiveness and reduce imbalances is external trade. The trade channel for many economies has seen its importance as engine of growth strongly deteriorating because of the competition of products coming from emerging countries (Esposito and Guerrieri 2012, Chen et al. 2013), both domestically (import displacement) and internationally (market share losses). Although emerging markets are a source of export earnings as their production processes rely strongly on equipment goods imported from advanced economies, for most of the European countries the balance is negative due to the massive import of low tech/low quality consumption products. This pattern could be reversed in the medium-long run as the demand for high quality consumption goods will raise in fast growing economies, and in the next years is assumed to become predominant in the import composition of emerging countries. The full exploitation of the export potential into such markets will then prove to be particularly beneficial to restore growth, but in countries having a strong export orientation and consequently a high share of manufacturing, an increase in high value added exports could also have a direct effect on the debt reduction by increasing tax revenues more than proportionally. If this link is present, then measures aiming at increasing competitiveness can be a substitute for austerity in order to reduce the debt to GDP ratio. Again, this requires that policy efforts should be taken more intensively at the



European level by not only allowing different policy mixes for different countries, but also by keeping in mind that symmetric rules should be applied to the countries in surplus, as otherwise macroeconomic indicators will never converge. In countries with trade surpluses, symmetric policies imply that the composition of growth should be rebalanced from exporting to domestic demand.

The aim of this paper is to evidence the benefits of a coordinated and symmetrical policy approach in fostering competitiveness through the increase of the surplus vis-à-vis emerging economies. More specifically, we estimate the potential trade flows of European countries against the group of BRICs and simulate trade balances of Eurozone countries when this potential is reached. With this result, the possible outcome is discussed when coordinated and uncoordinated policies are implemented. Furthermore, the direct impact of changes in trade balance on the debt to GDP ratio is estimated to test whether a direct connection exists between the two main sources of imbalances within the Eurozone. Such a link may not be present everywhere, though a coordinated but country specific policy would be better suited and should be applied at least jointly with (lower) austerity measures in fostering growth and financial stability.

The structure of the paper is as follows: In section 2 the evolution of imbalances within the Eurozone and a summary of trade relations with emerging economies is presented. In section 3 an estimation of potential trade flows of European countries with the four main emerging economies (BRICs) is undertaken through an analysis of the implications of the results. Section 4 is dedicated to the estimation of the relation between trade balance and public debt and section 5 offers several conclusions.

## **2. Public debt and trade with emerging markets: some descriptive evidence**

Loss of competitiveness is often believed to be the main factor behind high deficits. To reduce imbalances then requires improving competitiveness. Yet, competitiveness is a dubious concept, as national performances always reflect the aggregation of individual firms and entrepreneurial skills, which interact with institutional efficiency. Measuring these factors can be difficult as they are multi-dimensional, where cause and effect are often intermingled;<sup>1</sup> trade imbalances are considered to be the mirror image of competitive



differences among the Eurozone states since the other current transactions are only loosely related to competitiveness.

Some countries, like Portugal, Greece and Estonia, were exhibiting huge trade deficits already in 1999, but other southern countries, for several reasons, have seen the contribution of trade to their GDP decline constantly since the end of the 1990s. This is the case of Italy that, similar to Germany, has a strong manufacturing sector and an export-led growth model since the 1950s. At the same time, after the collapse of the construction bubble, the Spanish economy cannot sustain its growth model - based on massive imports - anymore, and needs to increase exports to counterbalance the effect of the collapse of capital inflows from abroad. The deterioration of the trade balance took place for the whole Eurozone and struck not only the countries mentioned before, but also countries not experiencing a debt crisis, such as France, Belgium and Finland, while an increasing surplus accumulated in Germany and The Netherlands.

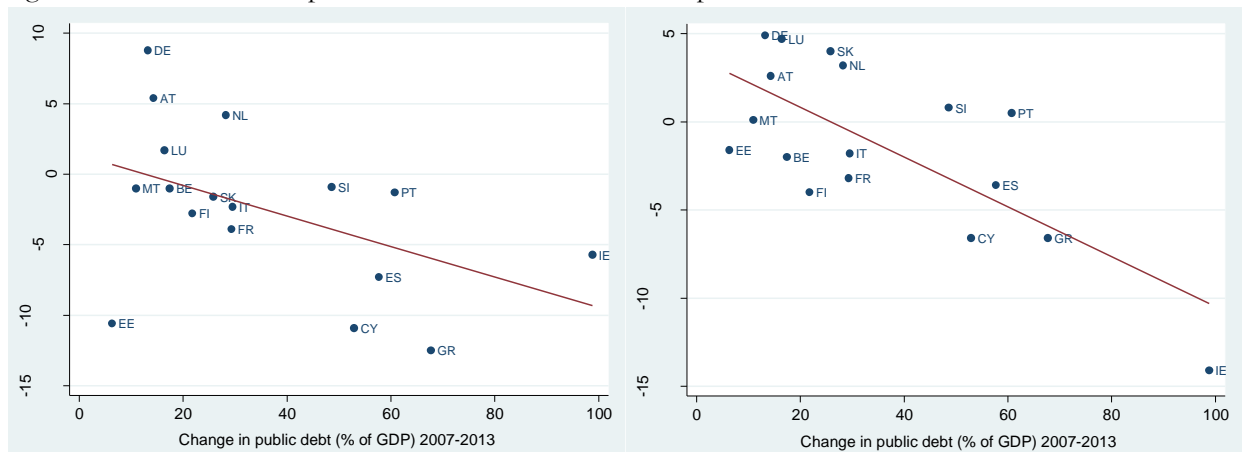
How does the external performance relates to the debt dynamics? Between 1999 and 2007 most of Euro Area countries had gone through a period of consolidation, the main exceptions being Greece and Portugal. After the global financial crisis public debt increased everywhere, due on the one hand to the stimulus measures allowed by the European authorities to counterbalance the effects of the crisis and, on the other hand, to the recessionary effect induced by the early withdrawal of such policies and by the austerity measures implemented to bring down the debt level.

In figure 1 we show that pre-crisis changes in trade and current account balances are negatively associated with the post crisis debt increases and this relation is stronger for trade balances as they better reflect the evolution of competitive differences. This is true in particular for Greece, Spain and Ireland, but all countries are fairly close to the correlation line. This evidence suggests a causality chain between competitiveness and public debt: competitive losses increased the external imbalances of Euro Area by reducing the trade performance of peripheral countries and increasing the need for external financing; the structural weaknesses of these countries implied higher debt increases between 2008 and 2011 as result of the global financial crisis; austerity measures brought peripheral countries into recession, further increasing the level of public debt between 2011 and 2013. In this scenario, contractionary policies aimed at stabilising the level of debt cannot be the only



instrument, as they alone do not generate the expected competitive gain and put additional pressures on the weakest countries. Economic policies aiming at rebalancing competitive differences between countries of the Eurozone, instead, will make public finances more resilient to negative shocks. While a rationalisation of government expenditure is surely important, structural reforms in disadvantaged countries in order to improve their external competitiveness must come alongside cuts in inefficient expenditure. This can be done successfully only with additional support from European community, by loosening the requirements of the Maastricht Treaty so as to counterbalance the natural “beggar thy neighbour” competition between member states.

Figure 1 Relation between pre-crisis external imbalances and post crisis debt increases



Source: own elaboration on AMECO

In order to improve the external performance, industrial policy must stimulate the penetration of emerging markets where demand is growing much faster than in advanced economies. It must be noted, in any case, that the reduction of trade balances in the Euro Area is not only the result of a slower export growth but also of a faster increase of imports, especially from emerging markets. The latter, with China above all, have gained comparative advantages in the production of consumption goods - mainly in the segment of low price/low quality varieties (Schott 2008) - and increased their market share in advanced economies at a fast pace. Conversely, the performance of European countries in those markets so far has been modest, and the evolution of shares depicts a clear distinction between vicious (Portugal, Italy, Ireland, Greece, and Spain; France, Finland, and Belgium) and virtuous (Germany, The Netherlands, and Austria).



If we look at Brazil, Russia, India, and China (BRICs), representing the four strongest emerging economies, all the European countries have been experiencing a negative and deteriorating trade balance between 1999 and 2007 (table 1). Subsequently, deficits shrank almost everywhere, especially in the years 2001-2013, but this is due mainly to the overall import contraction. The higher cumulative losses were experienced by Greece, Belgium, The Netherlands and Finland, while France, Italy and Spain lost approximately 1.5% of GDP each. As it can be seen in table 2, the loss mainly came about because of a much faster growth of imports compared to exports. The share of imports from the BRICs in European markets almost tripled in Italy (from 5.3% to 14.2%) and Germany (5.6% to 13.3%), slightly smaller increases have been recorded for Portugal (from 2.6% to 6.3%), France and Spain (from 4.9% to around 12% for both). Finally, Greece accounts for the stronger increase (from 4.2% to 20%) together with Ireland, although the latter's initial share was below 2%.

The relative poor performance of Euro Area countries in the BRICs markets can be also seen from the dynamics of export market share. In 1999 only Germany, France, Italy, Belgium and Finland had a share above 1% and over time most of the countries experienced strong losses, up to a percentage point in France and Italy and slightly below for Belgium and Finland. On the contrary, Austria, Germany and The Netherlands have been able to keep their share stable.

The evidence in figure 1 and table 1 suggests that successful countries like Germany performed better not only because of the increasing surplus from the EU, but also because they did better in emerging markets, where their export kept pace with the BRICs' growth. In Italy, and to a lower extent in France and Spain, losses against this area account for the bulk of the reduction in total trade balance. For Greece and Portugal, absolute losses are not indifferent, although most of their huge deficit comes from advanced countries. All in all, this means that a policy aimed at improving the balance with emerging markets can do much in terms of the reduction of overall trade imbalances. But what are the margins for further improvements? An answer to this question can be given by assessing whether trade between the Euro area and the BRICs has already reached its full potential or not. In order to answer that, the next section deals with the estimation of potential bilateral trade flows between Euro area countries and the BRICs. If exports are below their potential or imports are above, there will be room to rebalance trade relations in favour of the Eurozone.





Nevertheless, the effect on imbalances will depend on the policies implemented both by single states and European authorities.

Table 1 Trade balance (in % of GDP) and market share with BRICs

	Trade Balance				Export Market share				Import Market share			
	1999	2007	2011	2013	1999	2007	2011	2013	1999	2007	2011	2013
Austria	-0.2	-0.7	-1.1	-0.3	0.4	0.4	0.4	0.4	2.3	6.3	8.3	6.6
Belgium	-0.6	-3.1	-2.4	-2.2	1.8	1.0	1.0	1.2	4.2	7.8	9.4	8.8
Cyprus	-2.5	-3.5	-2.0	-2.1	0.0	0.0	0.0	0.0	6.8	9.1	6.3	6.6
Estonia	-5.6	-6.8	-1.8	0.4	0.0	0.0	0.1	0.1	15.0	18.2	19.5	17.4
Finland	-0.1	-2.1	-2.8	-4.3	1.1	0.7	0.5	0.4	10.3	23.0	23.7	26.1
France	-0.5	-1.3	-1.8	-1.9	2.5	1.9	1.6	1.4	4.9	10.3	12.7	11.8
Germany	-0.4	-1.0	-0.3	0.3	6.3	6.3	6.1	5.9	5.7	12.5	14.3	13.3
Greece	-0.7	-2.7	-3.2	-6.0	0.1	0.0	0.0	0.0	4.2	11.9	17.1	20.0
Ireland	-0.3	-1.8	-0.4	-1.0	0.2	0.2	0.2	0.1	2.0	8.5	6.8	7.7
Italy	-0.4	-1.1	-1.8	-1.9	2.4	1.8	1.6	1.3	5.3	10.2	14.0	14.2
Luxembourg	0.0	0.6	0.0	0.0	0.0	0.0	0.0	0.0	1.0	1.0	2.0	2.3
Netherlands	-1.3	-5.2	-6.5	-9.6	0.9	0.8	0.7	0.9	4.7	13.9	15.8	16.2
Portugal	-0.7	-1.6	-1.6	-1.4	0.1	0.1	0.1	0.1	2.6	5.8	6.9	6.3
Slovak Republic	-6.0	-14.5	-17.2	-12.2	0.0	0.2	0.3	0.2	13.6	14.8	17.9	17.9
Slovenia	-0.7	-1.2	-1.5	-2.5	0.1	0.1	0.1	0.1	3.5	7.2	8.9	8.7
Spain	-0.8	-2.5	-2.2	-2.6	0.7	0.7	0.6	0.5	4.9	11.1	12.9	12.5

Source: own elaboration on UN-COMTRADE data (accessed through WITS)

### 3. Estimation of Eurozone trade potential with BRICs

The different level of success of European countries in penetrating emerging markets sees basically Germany on the winning side while the other main European economies (France and Italy) as well as the rest of southern Europe belong to the losers. This is because the leading economy of the Euro area dedicated higher efforts to investing in Asia and other emerging areas, benefitting from its advantage as the main supplier of equipment goods required for their production processes. Thus, Germany is an example of the exploitation of potential trade in fast growing markets. As for the remaining European countries, given their size and economic development, they are still underperforming, so that policies aimed at fostering the exploitation of such potential can be effective in reducing trade imbalances. As to the import potential, no clear assessment seems possible a priori. The BRICs' market shares are particularly high, but together with the strong price competition of Chinese product we can include only the dependence on energy and



commodities from Russia, and to a lower extent from Brazil, as reasons to assume that we import more than we should.

The next sub-section describes the econometric strategy and methodology to calculate potential trade flows; the results are then discussed in sub-section 3.2.

### 3.1. Methodology

Typically, the estimation of trade potential is based on gravity models, which are the best predictors of bilateral trade flows. The gravity equation - first introduced by Tinbergen (1962) and theoretically founded by Anderson (1976) - relates trade flows to the economic mass of the two countries and to measures of geographical distance. Export potential is calculated by, firstly, estimating the gravity equation for a sample of countries among which trade relations are already developed and, secondly, by applying an out-of-sample forecast to the partner countries whose potential trade needs calculation. The main condition for this procedure to work properly is that the two groups of countries should not differ too much in their level of development. For this reason a benchmark group of 34 OECD countries is used while calculating the potential trade flows between 1999 and 2010 with the group of BRIC countries only, excluding other, less advanced markets.

A common problem occurring when dealing with gravity models is the presence of zero trade flows, caused mainly by the existence of barriers to trade. Factors affecting trade volumes, in particular the fixed costs of exporting, may also affect the decision of a firm to export (Shepotylo, 2009), thereby introducing a selection bias. In order to control for this bias, a two stage procedure is required, whereas in the first stage the probability to observe a non-zero trade flow is estimated for each country. Estimated probabilities are then introduced into the gravity equation as additional regressors to correct the inherent selection bias. The selection equation includes all variables considered in the gravity equation with the addition of other variables affecting the probability to export, but not trade volumes. It spells out as follows:

$$\begin{aligned}
 Pr_{i,j,t}^k = & \delta_0 + \delta_1 \log(GDP_{i,t}) + \delta_2 \log(GDP_{j,t}) + \delta_3 \log(POP_{i,t}) + \delta_4 \log(POP_{j,t}) + \\
 & \delta_4 \log(ER_{i,j,t}) + \delta_5 \log(TAR_{i,j,t}) + \delta_6 \log(Dist_{i,j}) + \delta_7 CT + \delta_8 CL + \delta_9 LL_i + \delta_{10} LL_j + \delta_{11} RQ_{i,t} + \\
 & \delta_{12} RQ_{j,t} + \delta_{13} RL_{i,t} + \delta_{14} RL_{j,t} + \delta_{15} GE_{i,t} + \delta_{16} GE_{j,t} + \delta_{17} \log(IntDist)_i + \delta_{18} \log(IntDist)_j + \\
 & \sum \gamma_t + \varepsilon_{i,j,t}
 \end{aligned}
 \tag{1}$$

where  $Pr^k$  represents the probability of having a non-zero trade flow ( $k$ =import,



export), expressed as a function of the demographical (*POP*) and economic size (*GDP*) of the trading countries, the bilateral exchange rate (*ER*), and the average import tariff (*TAR*). In addition, geographical variables such as bilateral distance (*Dist*) are included, as well as dummies accounting for contiguity (*CT*) and for the presence of a common language (*CL*). As to the variables specific to the selection equation, the internal distances of the trading countries (*IntDist*) are considered, a dummy indicating whether a country is landlocked (*LL*), and a series of indicators accounting for the quality of governance. More specifically, for both trading countries, indexes of regulatory quality (*RQ*) are included, along with rule of law (*RL*) and government effectiveness (*GE*). These geographical as well as governance indicators are introduced to account for country- and pair-specific fixed costs of exporting/importing.

Having estimated equation (1) for both import and export, we calculate the predicted probabilities of positive flows and introduce them into the gravity equations (2) and (3) as a polynomial term of degree 3 (the  $\theta$  terms). As shown by Helpmann et al. (2008), the cubic form is a flexible representation that should closely match the shape of the unknown distribution of the probability to trade:

$$\begin{aligned} \log(\text{Exp}_{i,j,t}) = & \alpha + \beta_1 \log(\text{GDP}_{i,t}) + \beta_2 \log \text{GDP}_{j,t} + \beta_3 \log(\text{POP}_{i,t}) + \beta_4 \log(\text{POP}_{j,t}) + \\ & \beta_4 \log(\text{ER}_{i,j,t}) + \beta_5 \log \text{TAR}_{i,j,t} + \beta_6 \log(\text{Dist}) + \beta_7 \text{CT} + \beta_8 \text{CL} + \sum \gamma_t + \beta_{10} \vartheta_{i,j,t} + \beta_{11} \vartheta_{i,j,t}^2 + \\ & \beta_{12} \vartheta_{i,j,t}^3 + \varepsilon_{i,j,t} \end{aligned} \quad (2)$$

$$\begin{aligned} \log(\text{Exp}_{i,j,t}) = & \alpha + \beta_1 \log(\text{GDP}_{i,t}) + \beta_2 \log \text{GDP}_{j,t} + \beta_3 \log(\text{POP}_{i,t}) + \beta_4 \log(\text{POP}_{j,t}) + \\ & \beta_4 \log(\text{ER}_{i,j,t}) + \beta_5 \log \text{TAR}_{i,j,t} + \beta_6 \log(\text{Dist}) + \beta_7 \text{CT} + \beta_8 \text{CL} + \sum \gamma_t + \beta_{10} \vartheta_{i,j,t} + \beta_{11} \vartheta_{i,j,t}^2 + \\ & \beta_{12} \vartheta_{i,j,t}^3 + \varepsilon_{i,j,t} \end{aligned} \quad (3)$$

The coefficients of both equations are obtained by using the Hausmann-Taylor (Egger 2004, Péridy 2005, 2009) estimator, which has several advantages compared to the standard random and fixed effects (RE and FE) estimators. First, unlike the FE, it allows for the introduction of time invariant coefficients; second, it has the further advantage to control for potential endogeneity of the regressors by relying on an IV type approach and using within-group deviations as instruments. Trade, GDP and exchange rates data are from the CEPII-Chelem database, data for population are collected from the World Development



Indicators and tariffs data are generated from the World Integrated Trade Solution (WITS); geographical data are obtained from the CEPII-Geodist database (Mayer and Zignago, 2005), while governance indicators are from Kaufmann, Kraay and Mastruzzi (2010) as updated by the authors for the World Bank.

### 3.2. Discussion of the results<sup>II</sup>

In general, trade relations between the BRICs and the Euro area indicate a higher penetration of imports from emerging economies than expected by the model, while the export potential appears to be underexploited in all countries with the exception of Russia. This is shown in table 2, where the ratios of potential to actual trade flows for the Euro Area are presented. Imports from China are particularly high, with ratios ranging from 0.09 for Slovakia to 0.48 for Portugal. The main economies of the area all show ratios between 0.21 and 0.27, which means that in these countries China's manufacturing export is four to five times higher than expected by our estimates. Nevertheless, together with Brazil, the export potential into China is relatively high, especially for Spain (4.11), Greece (5.56), Portugal (5.58) and Slovenia (4.57). Similarly, Italy would experience a substantial increase in exports (2.34). On the other hand, Germany is already at full potential in China while Slovakia is even above. This evidence suggests that the exploitation of the Chinese market can be more beneficial to countries experiencing higher difficulties in terms of public debt sustainability and current account imbalances. As for Ireland, another country in financial distress, the gain from export comes more from the other three countries, especially Brazil and India. For the former, the main economies of the Eurozone exhibit a potential increase of around 80% while higher increases might be obtained by smaller countries like The Netherlands, Greece and Slovakia. Turning to India, both import and export gains are modest – except for Ireland, Portugal and Slovakia – while trade with Russia is above its potential practically everywhere.

Table 3 shows the potential change in terms of GDP ratios due to the full exploitation of trade relations with the BRICs. With both import and export at their predicted value, all Euro area countries will experience improvements in their trade balances. Estonia, Belgium/Luxembourg and the Netherlands gain between 5 and 7 points of their GDP and important gains can also be obtained by Italy (2.38), Ireland (2.96%), Finland (2.9%), and Spain (2.27%). The German potential increase is below 2% while an



even lower gain, approximately 1.4% of GDP, befalls Greece and Portugal.

Most of the increase in trade balances is the result of the reduction of imports, since on average all BRICs have been exporting more than their potential suggests. The contribution of exports is higher for Ireland and Belgium but never exceeds 2% of GDP, while it is even negative for Germany, although this is entirely due to the strong reduction German exports would experience in Russia. The gain for Italian exports is 0.75, slightly below that of Spain (0.86%) and Portugal (0.80%), while France's increase is around half a percentage point; there is practically zero benefit for Greece.

Looking at the results with respect to current account imbalances in the Euro area we can conclude that, although the area as a whole becomes a net exporter into the BRICs markets, with a positive balance above 2%, the full exploitation of potential trade is not beneficial and will actually increase the gap between Northern and Southern Europe. Only Italy would turn its trade balance into positive figures, while for Ireland a further improvement of its already high trade surplus would compensate for the huge deficit in services. For both countries, such an improvement could have reduced the pressures imposed by the European authorities on their public finances. Given these results, some gains in terms of the reduction of current account imbalances in the euro area can be obtained only if the reduction of imports from emerging economies and the contemporaneous boost in exports are pursued more intensively by Italy and Spain, Ireland, and to some extent also France. For Greece and Portugal, instead, this strategy returns practically no gain. In these countries it will take time for the GDP to recover from the last crises, given the structural reforms implemented in the last years and required for the next ones.

These conclusions suggest that a policy intervention to stimulate the penetration of emerging markets should not be left to the sole initiative of the individual governments. As it can be extrapolated from figure 2, if all countries reach their potential trade balance, imbalances in the Euro area will actually increase. In addition to this, in the most likely outcome, surplus countries are expected to do better as they do not need to deal with the stabilisation of public finances, with the result of further widening the gap between them and deficit countries. This is actually what happened in the recent years, with Germany reacting to the slowdown in the Euro Area by increasing its surplus in emerging extra EU markets. This situation does not differ much from what we have experienced in the first



years of the Euro area. The introduction of the common currency has exacerbated the differences in competitiveness of the member states, mainly favouring the German economy, not least because of the strong restructuring process undertaken during the last decade, which together with wage restraints kept its unit labour costs practically unchanged over the last years (Hansen 2010, Marin 2010a/b).

Table 2 Ratio of potential to actual trade of Eurozone countries by partner

	Brazil		China		India		Russia	
	Export	Import	Export	Import	Export	Import	Export	Import
Austria	1.91	0.73	1.66	0.20	1.35	0.73	0.30	0.92
Belgium-Lux	1.80	0.84	2.38	0.31	1.00	0.33	0.51	0.23
Germany	1.76	1.20	1.02	0.25	1.03	1.00	0.33	0.60
Spain	1.84	1.96	4.11	0.27	1.31	0.64	0.68	0.23
Estonia	2.40	0.77	1.84	0.20	1.69	1.42	0.16	0.18
Finland	2.40	0.44	2.03	0.35	1.38	1.15	0.44	0.44
France	1.98	1.28	1.90	0.21	1.13	0.57	0.43	0.21
Greece	9.87	0.83	5.56	0.35	1.62	0.90	0.30	0.14
Ireland	4.05	3.97	1.94	0.27	3.79	0.81	1.37	0.75
Italy	1.83	0.86	2.34	0.21	1.13	0.56	0.36	0.28
Netherlands	2.81	1.03	2.04	0.18	1.30	0.56	0.41	0.28
Portugal	2.64	1.29	5.58	0.48	2.78	0.57	1.17	0.32
Slovakia	2.29	1.42	0.87	0.09	2.76	0.61	0.09	0.20
Slovenia	3.43	1.43	4.57	0.18	1.54	0.35	0.11	0.31

Source: own elaboration.

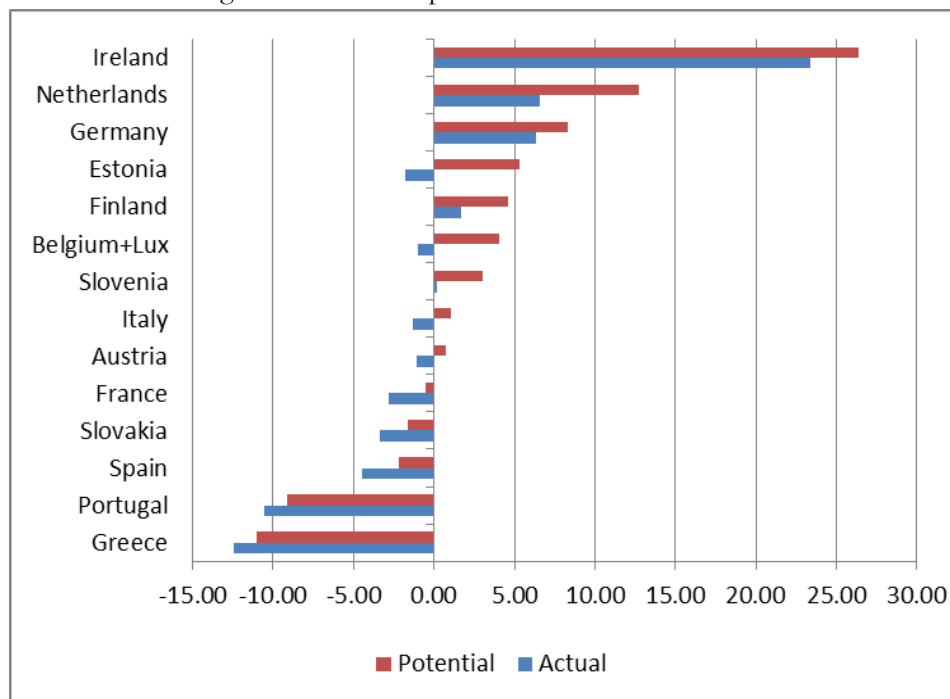


Table 3 Changes in trade flows (in % of GDP) due to the full exploitation of trade potential with the BRICs

	Export			Import			Balance		
	2000	2005	2010	2000	2005	2010	2000	2005	2010
Estonia	-1.02	-0.67	-2.29	-14.21	-10.50	-9.38	13.19	9.83	7.09
Netherlands	1.16	0.89	1.35	-2.11	-3.40	-4.77	3.28	4.28	6.12
Belgium-Lux	1.79	1.68	1.95	-2.02	-2.97	-3.07	3.81	4.64	5.02
Ireland	1.25	1.51	1.89	-1.35	-2.08	-1.06	2.61	3.59	2.96
Finland	-0.15	-1.04	0.77	-1.10	-2.29	-2.13	0.95	1.25	2.90
Slovenia	-0.35	-0.42	-0.06	-0.93	-1.18	-2.90	0.58	0.75	2.85
Italy	0.60	0.59	0.75	-0.67	-0.84	-1.63	1.27	1.43	2.38
Spain	0.54	0.64	0.86	-0.69	-1.12	-1.41	1.24	1.76	2.27
France	0.40	0.39	0.54	-0.72	-1.06	-1.72	1.11	1.46	2.26
Germany	1.03	0.42	-0.28	-0.71	-1.25	-2.24	1.73	1.67	1.96
Austria	0.85	0.51	0.43	-0.65	-0.90	-1.41	1.50	1.41	1.84
Slovakia	0.50	0.12	-2.34	-1.08	-2.02	-4.08	1.58	2.14	1.73
Greece	0.02	0.10	0.22	-0.82	-1.15	-1.22	0.84	1.25	1.44
Portugal	0.52	0.59	0.80	-0.34	-0.35	-0.59	0.86	0.93	1.38

Source: own elaboration

Figure 2 Actual and potential trade balance in 2010



Source: AMECO and own elaboration based on CEPII-Chelem data



In the case of European institutions giving specific support to measures aimed at increasing the competitiveness of deficit countries whilst, at the same time, requiring a slowdown in surplus countries, imbalances will actually reduce and put out of the danger zone countries France and, to a lower extent, Spain and Ireland and give additional boost to the Italian trade balance. Imbalances would still be a serious problem for Portugal and Greece, countries accounting jointly for less than 5% of the Eurozone GDP and for which the export channel has never been a driver of GDP growth.

In conclusion, if imbalances and competitive differences are not corrected with the support of a centralised and symmetric intervention, the “beggar thy neighbour” character of competition between member states as has been the case so far will not put Europe out of the crisis, thereby posing a risk to the overall stability of the single currency area. Hence, the instruments of European industrial policy should be reinforced in terms of resources, and more power of intervention must be given to the European institutions in this field.

#### 4. Public debt and trade balance

Having estimated potential gains from trade with emerging economies, we now assess whether increases in net exports have a direct effect on the level of public debt. An increase in trade balance can affect the debt to GDP ratio in two ways: first, by fostering growth, since tax revenues are closely linked to the level of income while government expenditure is relatively independent of economic activity. This means that in case of recessions, as in the current period, public finances deteriorate because tax revenues decline with GDP while expenditure remains relatively stable. Nevertheless, there can be a different reaction of tax revenues to the sources of GDP growth, depending on the structures of both value added taxation, meaning that improvements in the trade balance can increase revenues more (or less) than expected by its direct contribution to overall growth. This introduces a direct effect of trade balance on the level of public debt. If improvements in trade balances reduce the burden of public debt then, in terms of economic policy, the stimulation of domestic production and exports will be a better strategy than austerity in order to reduce macroeconomic imbalances in the Eurozone.





In this section, this assumption is tested by estimating the following equation, augmenting the standard domestic determinants of the debt level with two variables related to the external performance of a country:

$$\frac{Debt_{i,t}}{GDP_{i,t}} = \mu + \beta \frac{GovExp_{i,t}}{GDP_{i,t}} + \gamma RINT_{i,t} + \delta \frac{TrabeBal_{i,t}}{GDP_{i,t}} + \phi REER_{i,t} + \varepsilon_{i,t} \quad (4)$$

where the debt to GDP ratio of country  $i$  ( $i=AT, \dots, SK$ ) is a linear function of the share of government expenditure, the real long-term interest rate, the trade balance to GDP ratio and the real effective exchange rate. Equation (4) is estimated for the panel of 17 Eurozone members over the period 1999–2011. All variables are obtained from the EC-AMECO database. Previous evidence from panel estimates on the effect of net exports on public debt is from Kotsiois and Kalimeris (2012) but their results are not univocal. On aggregate, they find a negative but insignificant effect in the long run and a positive and significant impact in the short run. As it will be shown below, the long run effect can be explained by countries' heterogeneity in the relation of trade balance and debt level.

As regards the estimation technique, the Common Correlated Coefficients Mean Group estimator (henceforth, CCEMG) introduced by Pesaran (2006) is used, able to estimate long run relationships when regressors are non-stationary (Kapetanios et al. 2011) and when cross-sectional dependence is present, without the need to further test unit roots and cointegration. In addition, a typical feature of the Mean Group type estimators is to control for the endogeneity of the regressors (Pesaran and Smith 1995) as in the case of both real interest rate and government expenditure. For the latter, the endogeneity problem comes from the debt service payments. Finally, the use of the CCEMG estimator allows for calculating country specific coefficients, which are particularly important in order to understand which countries are experiencing the direct positive effect of trade balance to their debt burden.

In table 4 we report the country specific coefficients for the 17 Euro area members. Several countries show no significant coefficients: Germany, Greece, Netherlands, Portugal and Slovakia. On the other hand, all variables are significant for France, Cyprus and Estonia. An increase in the trade balance thus reduces the debt to GDP ratio more intensively in Italy (3.22) and France (2.46), but also in Malta and Estonia. The effect is



reverted only in Cyprus, although the small size of the country makes that comparison less meaningful.

Table 4 Country specific coefficients for internal and external determinants of public debt

	Government	Real 10y	Trade balance	REER
Austria	-0.125 [0.178]	0.260 [0.372]	-0.318 [0.478]	-0.767** [0.367]
Belgium	-0.314 [0.675]	1.870 [1.898]	-2.440 [2.172]	-0.012 [0.091]
Cyprus	-1.238*** [0.261]	1.729*** [0.122]	1.068*** [0.074]	1.354*** [0.122]
Estonia	0.210*** [0.009]	0.056*** [0.009]	-0.095*** [0.006]	-0.038*** [0.003]
Finland	2.264** [1.072]	2.643** [1.243]	0.124 [1.907]	-1.101 [0.915]
France	4.220*** [0.618]	-1.897*** [0.420]	-2.467*** [0.839]	-0.876*** [0.280]
Germany	1.053 [2.620]	2.146 [4.766]	-1.511 [3.191]	-0.217 [0.856]
Greece	1.937 [5.376]	-0.812 [1.517]	1.161 [3.382]	-0.907 [0.725]
Ireland	0.838*** [0.293]	-2.818*** [0.963]	0.237 [0.489]	0.388 [0.700]
Italy	1.524* [0.854]	0.336 [2.186]	-3.222** [1.313]	-0.931** [0.413]
Luxembourg	0.254 [0.417]	1.784** [0.714]	0.331 [0.569]	0.371 [0.558]
Malta	1.016 [0.760]	-1.998*** [0.436]	-1.231*** [0.334]	-0.168 [0.629]
Netherlands	-3.871 [4.115]	1.566 [2.265]	-6.239 [6.034]	0.225 [0.786]
Portugal	0.171 [1.725]	-1.406 [4.761]	-0.081 [1.758]	-0.687 [1.547]
Slovenia	4.904 [5.863]	1.642* [0.925]	-3.676 [4.258]	-3.548 [5.546]
Slovakia	-0.300 [1.572]	-1.362 [4.881]	-1.803 [5.221]	2.462 [5.418]
Spain	1.734*** [0.401]	0.714 [0.914]	-0.270 [0.680]	0.166 [0.446]

Standard errors in brackets. \*significant at 10% level, \*\*significant at 5% level, \*\*\*significant at 1% level.



According to these estimates, only Italy and France would experience a direct beneficial effect of improvements in the trade balance on their debt burden. Considering the results of the previous section, if Italy reaches its potential trade balance with the BRICs, its public debt will experience a reduction of 7.7 percentage points, thereby absorbing more than one third of the increase experienced since the onset of the global financial crisis. A similar effect could be observed in France, although here debt reduction is lower (5.6%). It can thus be concluded that a policy approach focused on the reduction of trade imbalances by improving competitiveness and the penetration of emerging markets is beneficial also for reducing the burden of public debt in two of the main Euro-countries. Given the evident recessionary effect of austerity policies, their substitution with competitiveness enhancing measures appears to be advantageous for higher growth and lower imbalances.

## 5. Conclusions

The solution to the current debt crisis in the Euro area must pass through a correction of macroeconomic imbalances. In this paper, we have argued that such a correction is possible only if policy measures aimed at increasing the competitiveness of deficit countries are taken with a consistent effort, and with much more vigour than has been done so far. The proper policy intervention should have two features in order to succeed in rebalancing the economy: first, it should be coordinated, which means that European authorities should support national governments in implementing the necessary reforms to improve competitiveness and not only demand tougher austerity measures; second, the policy actions and rules should be symmetrical, i.e. a rebalance toward domestic demand should be pursued by countries with a trade surplus.

The aim of this paper was to provide evidence in favour of the benefits of coordinated and symmetrical policy interventions by using trade relations between the Eurozone and the group of BRICs. More specifically, the role of trade with emerging economies as an instrument to reduce macroeconomic imbalances in the Eurozone was analysed by answering two questions: can the full exploitation of the trade potential with the BRICs reduce trade and current account imbalances among member states? And is there a direct effect of trade balance improvements on the burden of debt?



In order to answer the first question we calculated the potential bilateral trade flows between Euro area countries and the BRICs by estimating a gravity equation for a panel of 34 OECD countries. Although, according to our results, all countries would potentially improve their trade balance, the effect on imbalances depends on whether that policy intervention is left to the individual states only or whether there is a coordinated intervention with a certain degree of symmetry. In the former case, our findings shows that the initiative of single governments alone will most likely increase trade imbalances as Northern countries, above all Germany, have a clear advantage in exploiting their trade potential, as shown also by the most recent data. On the other hand, if only some countries, specifically Italy, France, Ireland and Spain, increase their degree of penetration of emerging economies, the pressure on trade balances will be reduced. But this result can be obtained only if coordinated and symmetrical policy actions are taken to favour these deficit countries.

The answer to the second question reinforces the above conclusions, as according to our estimates there is a negative effect of trade balance on public debt – but this effect is significant only for a small group of countries. The most salient case is Italy, which could reduce its debt to GDP ratio by 7.7 percentage points in case of the full exploitation of its trade potential with the BRICs. This reduction would absorb more than one third of the increase accumulated since the global financial crisis; to a smaller extent, France would benefit in terms of debt reduction, too. Given the size of these two countries, the beneficial consequences for the entire Euro area public debt become clear.

Policy makers at the European level should thus work in the direction of having more power in order to enact targeted interventions to rebalance the competitive structure of the Euro area. Additional resources for investment from the EU budget to Southern countries are fundamental to rebalance trade flows. Developments in this direction would reduce the public debt exposure for the second and third biggest countries of the area, with clear benefits of the whole Euro area in terms of the resilience to external and internal shocks. However, the question remains as to how to obtain such policy changes. Given the reluctance of surplus countries, chiefly Germany, to provide additional resources to finance investment in peripheral Europe, steps in this direction must be taken gradually. A feasible policy could be to amend the corrective arm of the Macroeconomic Imbalances Procedure (EC 2011) by imposing contributions to the EU budget proportional to the surplus/deficit



(i.e., contributions increase with the surplus to GDP ratio) and use that money to stimulate investment in deficit countries. Furthermore, if investment incentives are available also to foreign investors in deficit countries, surplus ones will be less reluctant to accept such a policy. Additionally, a by-product of this measure is to strengthen European productive linkages.



## Appendix: estimates of the gravity equation

Table A.1 Estimation results for the selection equation (1)

	K=export	K=import
Log(GDP <sub>i,t</sub> )	0.813*** [0.042]	0.629*** [0.038]
Log(GDP <sub>j,t</sub> )	0.585*** [0.036]	0.831*** [0.044]
Log(TAR <sub>i,j,t</sub> )	-0.297* [0.174]	-0.188 [0.189]
Log(ER <sub>i,j,t</sub> )	-0.034*** [0.009]	0.032*** [0.009]
Log(Dist <sub>i,j</sub> )	-0.704*** [0.053]	-0.686*** [0.055]
CT <sub>i,j</sub>	7.076 [1541.651]	7.264 [1744.345]
CL <sub>i,j</sub>	0.807*** [0.224]	1.178*** [0.281]
DistInt <sub>i</sub>	-0.001*** [0.000]	0 [0.000]
LL <sub>i</sub>	0.248** [0.099]	0.169 [0.103]
DistInt <sub>j</sub>	0 [0.000]	-0.001*** [0.000]
LL <sub>j</sub>	0.194* [0.100]	0.156 [0.104]
RQ <sub>i,t</sub>	-0.035 [0.074]	0.067 [0.079]
RQ <sub>j,t</sub>	0.328*** [0.075]	0.148** [0.075]
GE <sub>i,t</sub>	0.372*** [0.099]	0.115 [0.104]
GE <sub>j,t</sub>	0.011 [0.100]	0.287** [0.101]
RL <sub>i,t</sub>	0.089 [0.094]	-0.016 [0.100]
RL <sub>j,t</sub>	-0.121 [0.096]	-0.04 [0.097]
N	74044	74044
Rho	0.562	0.592
Test rho=0	2150.6	2429.3
Log likelihood	-5141	-5090



Standard errors in brackets. \*significant at 10% level, \*\*significant at 5% level, \*\*\*significant at 1% level.

Table A.2 Estimation results of the gravity equations (2) and (3)

	Export		Import	
	1	2	1	2
Log(GDP <sub>i,t</sub> )	1.026*** [0.122]	1.494*** [0.126]	1.018*** [0.104]	1.636*** [0.109]
Log(GDP <sub>j,t</sub> )	1.120*** [0.061]	1.629*** [0.076]	1.016*** [0.087]	2.506*** [0.130]
Log(POP <sub>i,t</sub> )		-2.740*** [0.228]		-1.709*** [0.220]
Log(POP <sub>j,t</sub> )		-0.653*** [0.073]		-1.453*** [0.109]
Log(ER <sub>ij,t</sub> )	-0.316*** [0.021]	-0.363*** [0.022]	-0.099*** [0.021]	-0.102*** [0.022]
TAR <sub>ij,t</sub>	-0.828*** [0.146]	-0.997*** [0.147]	-0.774*** [0.138]	-0.921*** [0.136]
Log(DIST <sub>ij</sub> )	-0.553*** [0.137]	-0.888*** [0.121]	-0.901*** [0.119]	-1.657*** [0.207]
CT <sub>ij</sub>	-0.101 [0.661]	2.162*** [0.646]	-1.176* [0.713]	3.046*** [0.901]
CL <sub>ij</sub>	0.072 [0.336]	0.153 [0.288]	-0.143 [0.283]	0.086 [0.502]
θ <sub>ij,t</sub>	0.316** [0.122]	-0.046 [0.124]	0.709*** [0.130]	-0.081 [0.138]
θ <sup>2</sup> <sub>ij,t</sub>	-0.019 [0.012]	-0.011 [0.011]	-0.040*** [0.011]	-0.023** [0.011]
θ <sup>3</sup> <sub>ij,t</sub>	0.001 [0.000]	0.000 [0.000]	0.001** [0.000]	0.001 [0.000]
N	9373	9373	9373	9373

Standard errors in brackets. \*significant at 10% level, \*\*significant at 5% level, \*\*\*significant at 1% level.



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<sup>I</sup> See Collignon and Esposito (2014) for a discussion of the different approaches to the measurement of countries' competitiveness.

<sup>II</sup> Estimation results are shown in table A1 and A2 in the appendix.

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# On the Brink of a Federal State? The Decentralisation Model of the Peruvian Constitution

by

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## Abstract

In 2001, constitutional amendments significantly changed the Peruvian Constitution's chapter on decentralisation. A distribution of competencies was introduced and various organic laws were enacted in this domain. More than a decade later, the decentralisation process is still work in progress. In this article, I will analyse the relevant case law of the Constitutional Court and the most important constitutional and organic provisions in the field of decentralisation to highlight the most crucial problem areas of the decentralisation process. I will examine the question of whether Peru is a unitary or a federal state by means of comparative standards of federalism and through references to other decentralised systems.

## Key-words

Federalism, comparative constitutional law, decentralisation, South America, Peru



## 1. Introduction

Since obtaining independence, South American states have found themselves in a constant process of decentralisation and (re)centralisation<sup>I</sup>; Venezuela, Brazil & Argentina are federal states, others such as Ecuador & Chile are decentralised but still unitary states (Penfold 2009: 123; Justiniano Talavera 2004: 75 ff; Schilling-Vacaflor 2009: 24). Historically, Peru has had a predominately centralised system with occasional short periods of decentralisation (Ugarte del Pino 1978; Gutierrez Paucar 1990: 20 ff).

During the last decade, after President Fujimori left power, problems which mainly arose out of inequalities<sup>II</sup> between the rural parts of the country and the metropolitan region of Lima (Guerrero Figueroa 2003: 13 ff) led to a reconsideration of former (hypercentralistic) politics (Dammert Ego Aguirre 2003: 68 ff). As a consequence, Peru once again became a decentralised state as Regional councils were elected and competencies transferred to the regional and local level (Goedeking 2001: 198; Degregori 2003: 220).

The paper focuses on the constitutional and legal position of the regions, to answer the question of whether Peru is still a (purely) unitary state or if it can already be seen as a regionalised, or even a federal state. I will first give an overview of the relevant constitutional provisions in the context of decentralisation. Second, I will analyse the relevant law on decentralisation and the case law of the Constitutional Court with regard to comparative standards of federalism.

## 2. Decentralisation and Constitution

The classification of the Peruvian state as a unitary, regional or federal state in constitutional terms depends on the analysis of both constitutional provisions and certain organic laws on decentralisation. The criteria guiding this analysis draws from comparative studies on federal systems (Watts 2008; Kincaid 2005). Comparative standards of federalism include the distribution of competencies which vests the constituent states with legislative and constitution-making powers, a second chamber or other intergovernmental institutions, and financial resources (Watts 2008: 18 f.; Kincaid 2005: 416 ff; Gamper 2010:



83 ff). The distinction between unitary, regionalised and federal states, however, is gradually coming to depend on the quantity of the criteria met and the quality of their implementation. The more criteria are met, the more likely it is that a state will be classified as a federal state and vice versa.

The Peruvian decentralisation process is primarily laid down in Art. 188<sup>III</sup>, but Art. 43 also mentions decentralisation as a characteristic of government.<sup>IV</sup> More specific provisions can be found in several organic laws that deal with the decentralisation process: the organic law on decentralisation<sup>V</sup>, the organic law on the regions<sup>VI</sup> and the organic law on the municipalities<sup>VII</sup>.

Art. 188 entrenches some general principles from which doctrine derives guidelines for the decentralised system (see below). Art. 189 addresses the division of the territory of the Peruvian republic. Art. 190 lays down norms regarding the process of the formation of new regions and Arts. 191 to 193 contain relevant provisions concerning the regions, whereas Arts. 194 to 197 entrench similar provisions that refer to the municipalities. Art. 198 deals with the status of the capital city of Lima while Art. 199 determines mechanisms of supervision over the regions and municipalities.

## 2.1. Principles of Decentralisation

The principles guiding the decentralisation process stem from the Constitution, but are spelt out in the organic law on decentralisation.

First and foremost, Art. 43 states that the Peruvian state shall be one and indivisible, a unitary and decentralised state. Therefore, Art. 43 fosters not only decentralisation but also the unitary state, which invites the question of which principle should prevail. The wording of Art. 43 is clear on the fact that Peru should stay a unitary state; the decentralisation process has to stop where Peru would no longer be classified as a unitary state.

The Peruvian process of decentralisation has to be seen as continuous on-going and open-ended (Art. 188, Art. 4 para. a) organic law on decentralisation; Chiclayo Tello 2007: 75). Nonetheless, this principle could be changed by a constitutional amendment.<sup>VIII</sup>

According to the present Constitution, it is prohibited to step back from the decentralisation process and reverse it (Art. 188, Art.4 para. c) organic law on decentralisation). The principle of continuity has to be seen as a result of prior, unsuccessful attempts to achieve an effective decentralisation process. Moreover, according



to the Constitution, the decentralisation process has a dynamic design (Art. 188 , Art. 4 para. b) organic law on decentralisation), which means that it should be divided into different phases in order to guarantee an adequate allocation of competencies and formation of regions (Chiclayo Tello 2007: 78; Elguera Valega 2006: 41).

Dynamism and gradualness are two closely linked principles; some authors argue that the process of decentralisation has to be determined by a chronological step-by-step plan (Chiclayo Tello 2007: 81; Elguera Valega 2006: 42). This plan is legally stipulated in the II transitory provision of the organic law on decentralisation and is often criticised (Azpur 2005: 5 f) due to the fact that one phase of the plan does not have to be completed in order to continue with the next step. This approach helps accelerate the decentralisation process, but also causes problems, because it is incoherent<sup>IX</sup>.

Decentralisation is also regarded as a holistic process (Art. 188, Art. 4 para. e) organic law on decentralisation). Accordingly, the state as a whole has to take part in this process; this involves all levels of government and bodies and institutions of the state.

Finally, democracy is constitutionally entrenched as a guiding principle for the decentralisation process (Art. 4 para. d) organic law on decentralisation):<sup>X</sup> The people, particularly those who live in the rural regions far from Lima, should have more (direct) access to participation procedures (Comité Operativo Grupo Propuesta Ciudadana 2006: 70 f.).<sup>XI</sup> This should help ensure a more efficient and transparent decentralisation process (Chiclayo Tello 2007: 89 f.).

Apart from these explicit principles laid down in the Constitution, norms on transparency and good governance were enacted.<sup>XII</sup> Implicitly, subsidiarity is another relevant principle since several provisions in organic and ordinary laws and moreover the Constitutional Court refer to the principle — although not the Constitution itself.<sup>XIII</sup>

## 2.2. Territorial Organisation – Regionalisation without Regions

Art. 189 contains provisions on the territorial division of the state. Accordingly, the territory is divided into regions, departments, provinces and districts. The respective departments are placed under the jurisdiction of the regional government, provinces and districts under that of the local government. Whereas provinces, districts and departments already exist, regions have as yet not been established despite their constitutional entrenchment.<sup>XIV</sup> Therefore, the regional governments' sphere of influence is their



respective departments. The situation of having regional governments for departments is inconsistent, which is due to the planning of the decentralisation process. According to the Constitution, the decentralisation process had to be initiated by the election of regional governments in the respective departments. The formation of regions was planned only afterwards, via referendum; to date no region has been constituted and it does not seem likely at the moment that new efforts will be made to realise new, larger regions.<sup>XV</sup>

### 2.3. Lima – Municipality or Region?

Art. 198 relates to the status of the capital. The capital is not part of any of the regions, but has a special status which is entrenched in the Constitution. The territorial realm of the *Municipalidad Metropolitana de Lima* is understood as coinciding with that of the province of Lima, and the Metropolitan Municipality of Lima is empowered to perform tasks of regional and local character. According to Art. 33 organic law on decentralisation all the provisions regarding the regions are applicable to the Metropolitan Municipality of Lima as well. Therefore, Lima holds the same competencies as the regions and the following thoughts apply equally.

### 2.4. Organisational Structure of the Regions

Art. 191 determines the organisational structure of the regions: a regional council (*consejo regional*) shall have mainly “normative”<sup>XVI</sup> functions, whereas the regional president (*presidente regional*), relying on the administrative authorities of the region (in particular the so-called *gerencias regionales*), has executive functions. He is advised by the regional coordination council (*consejo de coordinación regional*) that consists of the mayors of the provincial municipalities and representatives of civil society.<sup>XVII</sup> Elections for the regional council and the presidency are to be held every four years.<sup>XVIII</sup>

### 2.5. Distribution of Competencies

Art. 192 explicitly enumerates the competencies of the regions. From a regional perspective, the mere fact that the distribution of competencies is laid down in the Constitution is advantageous, since constitutional provisions are less subject to changes than organic laws or ordinary acts of parliament. From an overall perspective, however, both Art. 192 and the organic laws on decentralisation are less *region-friendly*.



The competencies of the regions are laid down in ten paragraphs which include competencies such as the enactment of norms concerning the organisational structure and budget of the region (Art. 192 para. 1), the joint elaboration of a regulatory plan with municipalities and civil society concerning regional development (Art. 192 para. 2), the administration of the regions' properties and their earnings (Art. 192 para. 3), the regulation and concession of permissions, licences, privileges and rights concerning services of regional responsibilities (Art. 192 para. 4), the promotion of the socio-economic development of the region and the execution of the corresponding regulatory plans (Art. 192 para. 5) and the promotion of competition, investment and financing for the implementation of infrastructural projects of regional impact and scope (Art. 192 para. 8). Moreover, regions are competent to pass "norms" that are required for regional administration (Art. 192 para. 6) and they may table legislative initiatives in Congress, insofar as they concern matters of regional competencies. Art. 192 para. 10 concludes with a provision that allows regions to exercise any other function in accordance with laws.

One of the most important paragraphs concerning the distribution of competencies in the regional context is Art. 192 para. 7, and this is due to its content: it is almost the only paragraph that enumerates spheres of competence, such as agriculture or commerce, and is therefore of significant practical relevance, whereas the other paragraphs listed above state more abstract and "technical" competencies such as the passing of bills or the elaboration of plans. The article states that it is a regional competence to foster and regularise activities and/or services in different subject matters (agriculture, fishery, industry, agroindustry, commerce, tourism, energy, mining, transportation and traffic, communication, education, health and environment) in accordance with laws.

Art. 192 para. 7 is noteworthy not only because of its broad content but also because, together with numeral 10, it is the only subject matter that contains the clause "in accordance with laws". The wording "in accordance with laws" refers to organic or ordinary laws of the central level. Regional norms cannot fall under the term "laws" used in Art. 192 para. 7, para. 10, as they are named "ordinances" and neither the Constitution nor the organic laws that develop the relevant provisions on decentralisation ever use the term "regional law" or "law" in lieu of "regional ordinance". The clause "in accordance with laws" weakens the position of the regions considerably, as it prevents them from enacting laws unless a national law empowers them to do so.





Moreover, the distribution of competencies suffers from severe systemic weaknesses:

Firstly, the lack of distinction between legislative and executive competencies is highly problematic, and the Constitution does not provide such a distinction, so one could assume that either only executive competencies are distributed or that a competence matter always encompasses legislative and executive functions.

For the Constitutional Court, one of the core aspects of the Peruvian decentralised system is the political autonomy of the regions that entails normative (legislative)<sup>XIX</sup> authority; however, the assumption that a competence matter always encompasses legislative and executive functions – as is the case in Spain, where the exclusive powers of the autonomous communities entail legislative and administrative functions (Argullo and Bernadí 2006: 248) – cannot be (and actually is not) the case in Peru, since the distribution of competencies laid down in the Constitution explicitly states that the competence matters listed in Art. 192 para. 7 can only be exercised “according to laws”. This means that the Constitution partly delegates the regulation of the competence matters to the central legislator (Congress). A glance at the respective laws shows that they clearly state which functions are regional functions and which functions are the responsibility of the central level, but do not distinguish between legislative and executive functions, either. Hence, both levels are competent with regard to different functions, which are listed in the organic law on the region yet do not entail “legislation” or “execution”, but rather are described as “planning”, “promoting” or “fostering”. As a consequence, since the organic laws developing the distribution of competencies mention different types of competencies, the role of the regions (legislative and/or executive) in each type of competence has to be examined through an analysis of its functions.

Secondly, the Constitution neither distinguishes between exclusive and shared respectively concurrent competencies nor explains how to interpret the non-exclusive competencies. This is especially relevant for the competence matters laid down in Art. 192 para. 7 as they can only be exercised “in accordance with laws” and therefore cannot be exclusive competencies. The distinction between exclusive and shared competencies is laid down in the respective organic laws, based on Art. 192; those competencies mentioned in the Constitution itself are classified “constitutional competencies” (Art. 9 organic law on the regions) and part of them (excluding those with the clause “according to laws”) is – although in different wording – listed again as “exclusive competencies” of the regions



(Art. 10 para. 1 organic law on the regions, Art. 35 organic law on decentralisation). According to Art. 10 para. 2 organic law on decentralisation the exclusive competencies of the regions cannot be restricted by either the (central) legislative power or the (central) executive power.

Those paragraphs which include the clause “in accordance with laws” – that is, Art. 192 para. 7 and 10 – are listed as “shared competencies” (“*competencias compartidas*”, Art. 10 para. 2 organic law on the regions, Art. 36 organic law on decentralisation). Still, there remain doubts on how to interpret the so-called *competencias compartidas*, especially if they have to be seen as either concurrent or shared competencies. Where shared competencies are competence matters where different levels are empowered to exercise different roles, the character of concurrent competencies is different; both levels possess the power to realise a certain competence matter (Watts 2008: 87 ff).

The organic law on the regions enumerates the relevant specific functions of the regions for each of the competencies laid down in Art. 192 para. 7 t, but often remains cryptic by using terms like “planning” without providing an explanation of what “planning” should entail. Frequently it is not clear to what these terms refer, but at least it is apparent that through the allocation of different functions to the different levels of government the latter are empowered to assume different roles in a certain subject matter. Thus, the *competencias compartidas* do not constitute concurrent, but shared competencies.

There remains the question of if, and to what extent regions are empowered to exercise legislative functions in regard to shared competencies. The respective provisions in the organic law on the regions are not clear on that, listing e.g. in the field of education different specific functions – none of them is referring to regional laws or legislation, but rather using terms like “develop”, “to phrase policies”, “stimulate” (Art. 47 organic law on the regions). In the absence of a clear legal provision on how to understand shared competencies, especially with regard to possible legislative and/or executive functions, other concepts for determining those functions have to be applied. As the Constitution and the organic law on the regions both are silent on the question of (competence) interpretation, the case law of the Constitutional Court is of high importance. In the past, the Court developed the competence test and applied the loyalty principle (introduced by the Constitutional Court, but also widely spread in full-fledged federal systems<sup>xx</sup>) and the so-called principle of competence.



Finally, Art. 192 is – as already mentioned – further developed by two organic laws:<sup>XXI</sup> the organic law on decentralisation and the organic law on the regions. Art. 106 states that only certain matters, like matters regarding the organisation of the state, are subject to organic laws. Whereas the Constitution can only be amended in the rather complicated procedure laid down in Art. 206<sup>XXII</sup>, organic laws are subject to the same procedural rules that apply to ordinary laws<sup>XXIII</sup>. From a regional point of view, this has positive and negative aspects; both sets of rules (constitutional provisions and organic law provisions) are passed by the central level. From the regional perspective if norms are region-friendly, it is preferable that they are laid down in the Constitution; if they are not, it is probably more advantageous if they are laid down in organic laws, as changes are easier to realise and therefore more probable. However there is the risk of a worsening of the situation of the regions as well.

## 2.6. Residuary Clause

While the Peruvian Constitution does not explicitly regulate for residual competencies, the Constitutional Court makes deductions based on Art. 4 organic law on the executive branch, which provides that all competencies, functions and attributions which are not attributed to the regional or local level are to be considered as belonging to the competence sphere of the executive branch. The Constitutional Court takes from this provision that the competencies of the subnational governments are exhaustively listed (*case no. 0020-2005-PI/TC*, recital 49). Moreover the Court holds that the residuary clause could be used as an indicator in order to find out whether a state is a federation (*case no. 0020-2005-PI/TC*, recital 46). Therefore, according to the Court, Peru does not rank among federal states, as the residuary clause is not favourable to the regions. This seems highly problematic for several reasons.

Firstly, the allocation of residuary powers at constituent state level is only true for the majority of federations (and also for the established South American federations, namely Argentina, Mexico and Brasil [Blanco Valdés 2012: 206 ff]), but does not constitute an indispensable characteristic of a federal system (Watts 2008: 89). Without doubt states such as India and Canada are federal systems – although the residual authority is retained by the federal government (Watts 2008: 89).



Secondly, a residuary clause in favour of the central level would have to be stated in the Constitution or in an organic law concerning decentralisation. As will be shown, the Constitutional Court assumes that regions are vested with legislative authority. Therefore, a residuary clause that should not only entail executive but also legislative functions cannot be laid down in the organic law on the executive branch as the organic law on the executive itself states that it applies only to the executive branch (and therefore not to the legislative branch). However, a residuary clause would have to be valid for the executive and the legislative branch.

Thirdly (and closely linked to the aforementioned problem), the wording should be changed, e.g. into “*corresponde al gobierno nacional*” or “*corresponde al Estado*” instead of “*corresponde al Poder Ejecutivo*”, since – if we follow the case law of the Constitutional Court as well as doctrine – not only executive but also legislative competencies are transferred to the local and regional level.

## 2.7. Legislative Authority and Constitution-Making Powers

It is highly questionable whether regions are vested with legislative authority or whether their “*ordenanzas*” can only be qualified as secondary legislation. According to Art. 192 preamble, all competencies always have to be exercised in harmony with national plans and policies. This phrase restricts the regions’ margins of action.

Additionally, regional “norms” are named “ordinances” instead of “regional laws”, etc. This gives the impression that regional norms are not laws but rather administrative regulations.<sup>XXIV</sup> Nonetheless, the conclusion cannot be drawn that the use of the term “ordinance” automatically excludes the possibility of the existence of a (regional) law, similar to the so-called “*décrets*” and “*ordonnances*” issued by the parliaments of the Communities and the Regions of Belgium which – despite their names – are considered laws (De Becker 2011: 255; Gamper 2004: 208 f.).

Art. 192 and the relevant organic laws use the cryptic term “*norma*” or “*norma*” and “*ordenanza regional*” when dealing with regional norms that are issued by the regional councils. In addition, ordinary laws do not seem to mention the term “law” or “legislative functions” in regard to the regions. Likewise, the Constitutional Court seems to avoid terms like “legislative” or “regional laws” in this context, but has used it in a number of cases on decentralisation. In a case from 2004<sup>XXV</sup>, the Peruvian Constitutional Court used



the term “legislative” in order to clarify that the distribution of competencies implied a restriction of the legislative power at the central level.<sup>XXVI</sup> In perhaps the most famous case on decentralisation issues, the so-called *boja de coca* decision<sup>XXVII</sup> of 2005, the Court quoted Fernando Badia<sup>XXVIII</sup>, according to whom autonomy always implies legislative competencies, an argument that was affirmed by the Court. At the same time, it stressed the importance of the principle of loyalty; regions were not allowed to legislate<sup>XXIX</sup> if it was against national interests.

Probably the strongest argument in favour of legislative authority of the Peruvian regions is Art. 200 para. 4; which lists different norms as having the status of an Act of Parliament, among them “regional norms of general character”.<sup>XXX</sup>

Hence, the Peruvian Constitutional Court deduces regional legislative functions from constitutional provisions (Art. 200 para. 4 and Art. 191) and the concept of autonomy. Nonetheless, the Constitutional Court does not say so openly.

It is already problematic that the constitutional and legal provisions are not clear on the question of whether regional legislative authority shall be conferred or not; however, the case law of the Constitutional Court warrants further critical examination. Since it can only be assumed that the Court approves the concept of regional legislative authority (and not the opposite), it is unclear why the Court does not openly say so. On account of such vague legal provisions, a clearer case law of the Court would be of great importance and could have a positive impact on the entire process of decentralisation as it could balance the vague legal provisions and serve as a stabilising factor.

The deduction of legislative authority from the concept of autonomy is not unheard of in the continent; the Bolivian Constitution, for example, clarifies in Art. 272 that autonomy implies (amongst other functions) the possibility to exercise legislative functions. Art. 272 of the Bolivian Constitution could therefore serve as a prototype for a possible future Peruvian constitutional provision.

Given that the regions possess legislative authority, the next question – whether the regions have constitution-making powers – arises. According to Art. 192 para. 1, regions are empowered to regulate their own organisation. For this purpose, each region has a statute, the so-called ROF (*reglamento de organización y funciones*<sup>XXXI</sup>), enacted by regional ordinance, but without any particular formal requirement which could justify the assumption that the ROF would be equivalent to a regional constitution. Here, the Bolivian



Constitution could once again serve as a prototype: Art. 275 declares the statute of each subnational level (*Estatuto* or *Carta Orgánica*) to be passed by a 2/3-majority vote and to constitute the “institutional basic norm of the territorial entity”. In the case of Peru, neither the Constitution nor other laws allow the conclusion that regions are vested with constitution-making power. Still, some regional ordinances possess a partly constitutional character that refers to constituent statehood, which is indicated by regional symbols or hymns, for example.<sup>xxxii</sup> To date, nobody has claimed that those ordinances could be unconstitutional and the Constitutional Court therefore has not had the possibility to scrutinise these ordinances.<sup>xxxiii</sup>

## 2.8. Interpretation of Competencies

In the context of the distribution of competencies, problems arise from missing rules (and an absence of clear rulings) on methods of interpretation of competencies<sup>xxxiv</sup> and other rules to solve misunderstandings created by the distribution of competencies - an example is the loyalty principle which the Constitutional Court developed in its case law<sup>xxxv</sup>.

The competent umpire to decide on the interpretation of the Constitution is the Peruvian Constitutional Court. The prototype of a Constitutional Court was set up in Peru in 1979. Since 1993 there has been a proper Constitutional Court; however this Court – instituted by Art. 201 still faces some institutional problems (e.g. in regard to the proportionality test Rubio Correa 2011: 127).

Similar to other Latin American countries, constitutional review is constructed as a so-called “hybrid system” (Frosini and Pegoraro 2008: 50), which means that norms can be declared unconstitutional and repealed *erga omnes* by the Constitutional Court on the one hand, but can also be declared inapplicable by a judge of an ordinary court (*inter partes* effect) in a concrete case on the other hand. According to Art. 202 para. 3, the Constitutional Court is competent to decide (amongst others) on conflicts of competence and, under Art. 200 para. 4, to decide on the constitutionality of regional ordinances.

In the context of decentralisation, two concepts developed by the Constitutional Court are of importance: the first is referred to as the “*bloque de constitucionalidad*” (block of constitutionality).<sup>xxxvi</sup> In the event that the constitutionality of a norm is doubtful, the Constitutional Court not only examines the relevant constitutional provisions but also



organic and ordinary laws in order to determine whether the norm is unconstitutional. However, the block of constitutionality is not a static concept; depending on the respective case, the norms that form it may vary. Furthermore, it is not only important with regard to the topic of decentralisation but also in considering other cases. For instance, if it is doubtful whether a regional ordinance or an ordinary national law based on a shared competence laid down in Art. 192 para. 7 is in line with the Constitution, the organic law on the regions and the organic law on decentralisation have to be taken into account for its interpretation. But, as the Constitutional Court holds, in some cases it might be necessary to consider other provisions as well. Therefore, in order to know if a regional ordinance is in line with the constitutionally laid-down allocation of competencies, a considerable number of legal provisions have to be taken into account.<sup>xxxvii</sup>

The second is the concept of the “*test de competencia*” (competence test)<sup>xxxviii</sup>, which was indeed introduced for issues arising mainly out of the decentralisation process. This test consists of several principles that help determine whether or not a norm exceeds the competence on which it is based, as outlined below.

## 2.9. A More Detailed Look at the Competence Test

To determine which body is vested with the power to exercise a certain competence, the Constitutional Court applies its “*test de competencia*” (competence test) which entails, amongst others, a principle known as the “competence principle”<sup>xxxix</sup>. This principle states that regional ordinances are not inferior to ordinary laws of the central government. If a conflict between a national and a regional norm arises and it is questionable whether the regional norm should regulate a certain matter, this conflict shall be solved by examining whether the region is competent to issue that norm.<sup>xl</sup>

The competence test consists of several principles, such as the principle of unity (consisting of the sub-principles of cooperation and solidarity, of enumeration and residuality, and the principle of control) and is of importance especially when shared competencies come into play. After testing the principle of unity, the principle of competence (consisting of the principle of competence in the narrow sense and the concept of the “block of constitutionality”) has to be applied. Other principles such as the principle of efficiency<sup>xli</sup> of implicit powers and the principle of progressive transfer of



competencies also come into play. The Constitutional Court deduces (and further develops) these principles from constitutional provisions, especially Art. 188.

In a next step, the Constitutional Court applies the competence test as explained above. It is often confusing, since the competence test and its principles are applied by the Court only *in abstracto*. The deliberative steps taken by the Court are not elaborated upon; the Court mentions the steps of the competence test but does not match them with the concrete facts. Hence, although these principles play a certain role in the consideration of the Constitutional Court, their relevance and the exact extent to which they are taken into consideration are left open. This raises another problem in that it is not clear how to proceed in the event that the application of two principles leads to different results; which principle has more weight, and which principle should prevail?

Although the competence test and its principles must be understood as guiding criteria to determine whether the competence is in line with constitutional requirements or not, it cannot be seen as proper method of interpretation (generally Gamper 2012: 110 ff). As it is unlikely that the legislator will reduce uncertainties by stating clear legal provisions, it can be assumed that the conclusion Rubio Correa (2011: 107) draws with regard to the proportionality test is also true for the competence test; as long as the Peruvian Constitution (and its system of constitutional control) is still not consolidated, the Constitutional Court should help create clarity and legal certainty through the improvement of the application of this test by a stable case law.

### **Excursus no. 1: Distribution of Competencies in the Mining Sector – an Example**

The complexity of the distribution of competencies can be illustrated through an examination of the situation of the mining sector. The most important cases brought before the Constitutional Court in recent years concern the regional ordinances which prohibit mining – not directly, but in roundabout ways. In the case of a regional ordinance prohibiting a mining project<sup>XLII</sup>, the Constitutional Court had to determine whether mining was an exclusive or concurrent competence of the regions. For this purpose, it used the *test de competencia* and the *bloque de constitucionalidad*.<sup>XLIII</sup>

Mining is one of the subject matters mentioned in Art. 192 para. 7, but the Article only provides that mining falls within the competence of the regions according to the law. From the formulation “*according to the law* [respectively laws]”, it can be deduced that Art. 192





para. 7<sup>XLIV</sup> has to be understood as a shared competence, partly executed by the regions and partly by the central government. As laid down above, the law in this case refers to the organic laws that implement the Constitution, but, depending on the case, it could also imply ordinary acts of parliament.

Concrete functions in the field of mining are enumerated in the organic law on the regions as so-called ‘specific functions of the regions’, and contain a clause which states that regions must always take into account national plans when exercising their functions. The latter clause is nothing but a manifestation of the loyalty principle, binding in this case the regional government to respect the national plans. Art. 59 of the organic law on the regions contains the respective provisions on mining; according to its para. c, regions are empowered to foster and monitor activities of “small mining” and artisanal mining (*pequeña minería* and *minería artesanal*), and furthermore support activities of exploration and the exploitation of mining resources of the region according to law.

As a consequence, by reviewing all laws that somehow regulate the competence matter of mining, it is possible to establish which functions the region is empowered to exercise in this competence. Moreover, Art. 59 para. f. organic law on the regions empowers regions to grant mining licenses for “small mining” and artisanal mining in the region. To illustrate the interpretation of these laws the ‘Conga’ and ‘Cusco’ cases are cited below.

In the ‘Conga’ case the mining project was not a project of small mining or artisanal mining which would have fallen under the competence of the regional government in accordance with Art. 59 para. 7. Although the central level was in favour of the project, in order to protect its population, the region tried to prohibit the project indirectly by declaring it “infeasible” because of environmental problems.

The regional ordinance in question in the ‘Cusco’ case prohibited the issuing of mining licenses in the whole region of Cusco. As large scale mining (*gran minería*) is not listed as a competence of the regions, it is to be construed as a competence of the central level. Therefore, the regional ordinance which declared the project infeasible in the Conga case was unconstitutional. In the Cusco case, the Court, similarly to the Conga case, argued that since “large scale mining” was a national competence, the region was not competent to declare that no mining licenses could be issued, since it indirectly interfered with a national competence.



The examples show the weak position of the regions, as not only mining, but all the subject matters listed in Art. 192 para. 7 suffer from similar difficulties.

As a consequence, regions are limited in exercising their functions; as more national plans are elaborated, and the more detailed they become, the less leeway regions possess. Moreover, national plans do not have to be organic laws, but can also be “ordinary laws“, decrees, ordinances or resolutions.

### Excursus no. 2: Regional Identity

Interestingly, regional ordinances on “cultural issues”, e.g. concerning regional hymns and symbols, typical food, etc., are becoming increasingly common. For example, Art. 6 para. a) of the organisational statute of the region of Apurímac states that one fundamental aim of the region is the construction of a united community with its own cultural identity (“*Son objetivos fundamentales del Gobierno Regional, los siguientes: a) Construir una comunidad integrada, unida y con identidad cultural, [...]*”).

Whereas regional ordinances dealing with economically relevant subject matters are often brought before the Constitutional Court, ordinances regarding cultural issues without any economic background have not been challenged. However, it may well be the case that some of these regional norms might not always be in line with the Constitution, as the following example of a regional ordinance issued by the region of Cusco illustrates.

Based on the shared competence of “education” as laid down in Art. 192 para. 7 and the respective laws further developing it<sup>XLV</sup>, the region of Cusco introduced, in Art. 4 of the regional ordinance 025-2007-CR/GRC.Cusco that “in the future” any authority and public official of the region would have to have basic skills in Quechua. At least with regard to the relevant constitutional norms, it seems questionable whether the competence on which the region bases Art. 4 of the ordinance covers the requirement of additional skills for public employees in the region of Cusco, since Art. 2 para. 2 prohibits discrimination *inter alia* based on language and Art. 2 para. 19 2<sup>nd</sup> sentence guarantees every national the right to interact with authorities in his or her language via an interpreter. The competence of education and its functions (deriving mainly from Art. 9 and 10 law on the regions) empowers regions to introduce norms on bilingual and intercultural education so as to foster the use of original languages in the region, but does probably not provide a



basis for the requirement of a basic knowledge of Quechua for public officials in the region, as the regional ordinance itself declares.

The Constitution is silent on the question of regional identity. Questions concerning cultural issues are partly covered by provisions on education and are partly a local competence according to Art. 195 numeral 8. It remains to be seen how the strengthening of regional identities will influence the aim of building larger regions – and whether there will be any reaction of the central government in regard to the growing amount of regional ordinances concerning cultural issues.

## 2.10. The Role of the Subsidiarity Principle

Although the principle of subsidiarity is of considerable importance the principle itself is ambiguous – it is explicitly prescribed in laws concerning decentralisation in Peru (Art. 4 para. f. and Art. 14 organic law on decentralisation), various regional norms refer to it and – moreover, some regional organisation statutes (ROF) contain a clause on subsidiarity.<sup>XLVI</sup> The role of this principle, which often “takes on particular salience in periods of institutional transformation” (Follesdal 1998: 191), is not clear at all, though. Therefore, some important issues of this principle in the present context require examination.

One problem is whether the subsidiarity principle can justify legislation of regional governments in matters laid down as shared competencies or if it can only be understood as guidelines for the legislator while elaborating the distribution of competencies. In the preamble of its ordinance regarding the ‘Conga’ case above, the region of Cajamarca pointed out that as a result of the application of the subsidiarity principle, the level of government that is the most suited<sup>XLVII</sup> to perform a competence should be the one empowered to actually exercise the competence. In this case the region invoked the subsidiarity principle to pass an ordinance based on a function of a shared competence (specifically: large scale mining) that was assigned to the central level.

As discussed above, according to the Constitution (and the respective provisions) and case law, the competencies known as “*competencias compartidas*” have to be understood as shared competencies (where each body is exercising different roles) and not as concurrent competencies. Functions assigned to the different levels of government through the organic laws and acts of parliament are different ones and do not allow both levels to perform the same action in the same subject matter. Therefore, in the case of shared



competencies the subsidiarity principle can only be understood as guiding the legislator while elaborating the distribution of competencies. and hence the subsidiarity principle cannot justify legislation of regional governments e.g. in the field of mining known as large scale mining<sup>XLVIII</sup>, as the functions are already clearly laid down in the relevant provisions.<sup>XLIX</sup>

As many (and probably the most important) subject matters are equally laid down in Art. 192 subpara 7 the conclusions of the above mentioned case also apply to those competence areas. This leads to the question of the extent to which the subsidiarity principle is relevant, if at all. An examination of case law leads to the conclusion that it is indeed the establishment of the distribution of competencies that is a field of application of the subsidiarity principle.

In the ‘Mufarech’ case<sup>L</sup>, the Constitutional Court linked the subsidiarity principle to the principle of proportionality.<sup>LI</sup> According to the Court, the role of the principle of proportionality is to limit the application of the subsidiarity principle – or, in other words, to determine whether the allocation of a competence to the lower level of government really constitutes a benefit for the population. Three criteria of the proportionality principle have to be met; first, the allocation of the competence has to be in line with the aims of the Constitution; second, the allocation envisaged has to be the most efficient and “mildest” solution; and third, the allocation must not be against the interest of any other level of government or restrict the capacity to act of any other level of government. To invoke the proportionality principle might help determine the most effective allocation of competencies.

The Court seems to use the term in a way which would suggest that the application of the principle of subsidiarity always requires the allocation of a power at the lowest level of government. Subsidiarity, however, does not necessarily imply this. Rather, it implies that if the lower level is capable of exercising a certain competence more efficiently than the other levels of government, the lower level should be competent. The principle of subsidiarity always has to be applied when competencies are allocated. Once competencies and functions are distributed it does not make sense to invoke the subsidiarity principle.

The subsidiarity principle thus does not play a big role in the Peruvian decentralisation process. Nonetheless, the consideration of the principle in the process of allocating competencies and functions can only be recommended, as this could improve the



efficiency of the decentralisation process. Nonetheless the application of the subsidiarity principle is no panacea; as the experiences of other federal states and the EU have shown, the translation of the subsidiarity principle into a justiciable rule of law is not easy at all (for Germany Taylor 2009).

### 3. The Second Chamber or Other Mechanisms to Participate in the Decision-Making Process at the Central Level

A bicameral system where regions are represented in the second chamber allows subnational entities to influence decisions made by the central level (Russell 2001). However, this depends on factors such as the selection (or election) of the members (or powers) in relation to the first chamber (Watts 2008: 147 ff). In the era of president Fujimori, the former bicameral system in Peru was changed into a unicameral system (Salcedo Cuadros 2009: 271 ff; Estrada Choque 2008: 675 ff). Several bills on the reestablishment of a second chamber have been introduced in Congress since then – so far without any success.<sup>LII</sup> Still, there remain some possibilities for regions to directly participate at the central level; in several subject matters, regions are authorised to propose bills directly in Congress.<sup>LIII</sup>

### 4. Fiscal Powers

In the field of fiscal competencies, regions hold only little power. Art. 192 does not list tax powers as regional competencies, or even as a shared competence (“according to laws”). Art. 192 numeral 3, in connection with Art. 193 numeral 3, is the only reference to regional taxes: the former empowers regions to administrate their properties and earnings, and the latter lists taxes created through (national) laws in favour of the regions, as regional income. This means that, without a national law, regions are not allowed to “create” taxes, but that the national legislator could empower them to do so via (ordinary or organic) law. Therefore, as long as there is no such law the regions depend on transfers by the central government and certain quotas on royalties<sup>LIV</sup>.

Furthermore, Art. 74<sup>LIV</sup> must be taken into consideration as it authorises regions and municipalities to create, alter and cancel charges and fees in their respective jurisdiction and



within the limits provided by law. This wording<sup>LVII</sup> raises the question whether regions and municipalities are allowed to decide on their contributions and fees as long as there is no (central) law, as long as their norms do not exceed a (central) law or if a (central) law is prerequisite for regional and local norms (Ruiz de Castillo Ponce de León). The wording of Art. 74 would seem to support the view that regions and municipalities can determine their contributions and fees without a national law empowering them to do so, but respecting national laws that could eventually set certain limits which could be extensive. However, this view is not shared by doctrine and the Constitutional Court; accordingly, they share the opinion that regions cannot directly determine the amount of fees and contributions (*case no. 0012-2003-AI/TC*).<sup>LVII</sup>

## 5. Coordination and Cooperation

The importance of coordination in the horizontal as well as the vertical sense has been steadily increasing, not least due to case law of the Constitutional Court. The Court has held that not only the regions but also the central level of government have to consider the principles of cooperation and solidarity when exercising their respective competencies (*case no. 00011-2008-PI/TC*). The most important institution for cooperation is the National Council on Coordination. This council unites representatives of the central, regional and local level and is expected to represent regional and local interests at the central level, however the regions in particular criticise its limited sphere of influence, since it can only give recommendations and not enact binding decisions. Therefore, regions and local governments have created their own institutions and are now represented in associations that operate jointly at the central level. The association of regions in particular seems to work successfully via informal meetings with representatives of the central level, by coordinating e.g. proposals for bills in Congress and by joint statements on day events.<sup>LVIII</sup> Although the very existence of the National Council on Coordination as a (formal) institution of cooperation — is a positive it would be advantageous if it had more weight. It could further the decentralisation process and better serve as a platform of communication for the different levels.<sup>LIX</sup> When compared to federal states the status quo in Peru is not surprising; very often actions of cooperation and coordination are exercised by informal means (Watts 2008, 118).



## 6. South American Federalism?

Federal systems can be found all over the world and in states with very different socio-political circumstances, histories and needs (Blanco Valdés 2012: 11 ff). This raises the question of whether we require different parameters from the (North-) American and European standard to determine if states on the South American continent are federal or not. The literature does not support this assumption (Armenta López 2010: 83 ff; Fernández Segado 2003: 4; Blanco Valdés 2012). For example, Watts (2008) considered Latin American states like Argentina, Brazil, Mexico and Venezuela in his comparative research, while Kincaid and Tarr (eds. 2005) included chapters on Brazil and Mexico and Saxena (2011) included states like Brazil, Canada, India, Malaysia, Spain and Sri Lanka in her “Varieties of Federal Governance”. Blanco Valdés (2012: 15) distinguishes between the classic federations (United States, Switzerland, Australia and Canada), the Ibero-American federations which are to be classified as federal systems (Argentina, Mexico and Brazil) and, lastly, what he calls the “practical totality” of European federal states (Russia, Germany, Austria, Belgium and Spain), and conducts a comparative analysis of their (federal) structure.

For Watts (2008:18) “federations have exhibited many variations in the application of the federal idea”, and whilst there are “certain structural features and political processes common to most federations” it is certain that “[t]here is no single ‘ideal’ or ‘pure’ form of federation” (ibid). Nonetheless, Latin American states do have their common grounds; e.g. in Argentina, Brazil and Mexico the idea of federalism has a rather long tradition<sup>LX</sup> and their Constitutions were (at least in regard to the federal idea) strongly influenced by the U.S. Constitution. Therefore, even if it is doubtless that Ibero-American countries do have their peculiarities, this is not reflected in a specific theory of federal states.<sup>LXI</sup>

## 7. A Federal Design for the Peruvian Constitution – Still a Long Way to Go?

First, the fact that the distribution of competencies is laid down in the Constitution has to be seen as positive from a regional point of view. In addition, the regions are not only



referred to in *abstracto*, but each region is explicitly mentioned in the Constitution; the abolition of a single region would need a constitutional amendment, which grants a certain stability.

Second, the primary problems of the norms on decentralisation of the Peruvian Constitution, and more specifically of the distribution of competencies, arise from the missing distinction between legislative and executive competencies and the use of highly ambiguous language; terms like “competence”, “function”, etc., are used in different contexts and it is difficult to arrive at a clear definition. The most recent demonstration of this ambiguity is a bill proposed in August 2013<sup>LXII</sup>, which was lodged by a member of Congress in order to empower the Presidency of the Ministers Council to determine the scope of transferred competencies (shared competencies). Irrespective of the question of whether the Presidency of the Ministers Council was indeed competent, it shows that Peruvian politicians have become aware of the deficiencies of the decentralisation process.

Third, to prevent conflicts like those presented in the cases concerning mining, it could be beneficial to entrench a constitutional distinction between legislative and executive competencies. It could, for instance, be helpful to provide that in matters of shared competence, the central government is competent to legislate and the regional governments are competent to execute those laws or to enact their own laws (ordinances) in the framework of central laws. Since the functions laid down in the organic laws on the regions are not explicit on the question of whether they allocate executive or legislative competencies of the respective government, such clarification would help prevent competence conflicts.

Fourth, the question whether regional ordinances are laws or just bylaws remains unanswered. The wording of the Constitution and the organic laws that develop the relevant constitutional provision are not clear on that question. On the one hand, doctrine and the constitutional court seem to assume that regional ordinances are laws or at least are treated like laws. On the other hand, part of doctrine (Apac 2005) draws the conclusion that ordinances are just secondary legislation. Supporters of the latter opinion particularly argue that any regional norm has to be in line with national laws and plans. It would be highly advisable to clarify this via a constitutional amendment or an organic law.

Fifth, the methods used by the Constitutional Court are often opaque. The best example in this context is probably the test of competence, as it remains unclear how it





shall be applied *in concreto*.

Finally, as mentioned above, the Constitutional Court is still a comparatively recent addition to the institutional landscape of Peru. Rules of constitutional interpretation are not laid down in the Constitution and have, as yet, not been developed by the Constitutional Court in a predictable manner. Written rules of constitutional interpretation could therefore help balance some of the problems the Peruvian Constitutional Court is still facing (generally Gamper 2012: 310 f.) and could further democratic legitimacy, and increase the predictability of and standardise the interpretation of legal norms (Gamper 2012: 89). At the very least, they could pave the path to a consistent<sup>LXIII</sup> – albeit possibly still centralistic – case law on the subject of decentralisation.<sup>LXIV</sup>

Still, the question remains; is Peru a federal state? If we follow the criteria of federal states, the answer can only be in the negative. Despite recent (positive) developments showing that Peruvian politicians are aware of the variety of problems (distribution of competencies, the absence of a second chamber/mechanism to participate in the decision-making process on national level, fiscal policy, etc.), the reality of the situation suggests that Peru is to be qualified as a decentralised, respectively regionalised, but still unitary state.

Compared to the South American trend, this is no surprise. Whereas the established federal systems on the continent, including Argentina, Brazil and Mexico, are not expected to undergo significant changes towards unitary systems, decentralisation is an important issue for most of the unitary states. Bolivia's 2009 Constitution and the new Ecuadorian Constitution both install a decentralisation scheme that, at least in the Bolivian case, should not be underestimated. For example, Bolivia's subnational entities are even (at least partly) vested with legislative authority (Art. 272 Bolivian Constitution), and are empowered to pass their own statutes with increased formal requirements (2/3<sup>rd</sup> majority). Similarly, Chile and Colombia have experienced at least small steps towards decentralisation; in Chile, a law on regional governance and administration was implemented in 1993 (*Ley orgánica constitucional sobre gobierno y administración regional*<sup>LXV</sup>; Arenas 2009: 34) and in Colombia, the 1991 Constitution introduced a concept of autonomy for certain territorial divisions (Art. 1 Colombian Constitution; Ordonez Santo 2012).

To conclude, it can be asserted that decentralisation is a general trend on the continent, primarily in the context of democratisation and the distribution of economic resources (González 2008: 212, 213). Very often, these processes are not only influenced by



developments in neighbouring states but also by European developments and the case law of European Constitutional Courts on the topic of federalism and regionalism. For example, the Peruvian constitutional court referred to Spanish and Italian literature on decentralisation (e.g. in *case no. 0002-2005-AI*, *00031-2005-AI*, *00010-2008-AI* and *00011-2008-AI*) and to the Spanish, Italian and German situation concerning federalism and regionalism in general (e.g. in *case no. 0002-2005-AI* and *0020-2005*, *0021-2005-AI*) numerous times. Hence, trends of Spanish and Italian regionalism in particular might also influence the Peruvian decentralisation process. A federal design for the Peruvian Constitution thus remains unfinished business – at present.

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<sup>I</sup> Lately, most Latin-American constitutions have intensified their decentralisation processes (Uprimny 2011: 1595 f.).

<sup>II</sup> One of the as yet unrealised aims of the decentralisation process is therefore to reduce such inequalities (Art. 4 para. c organic law on decentralisation) and to provide the population with better public services (Palacios and Roca 2000).

<sup>III</sup> All references to Articles are to the Peruvian Constitution unless otherwise indicated.

<sup>IV</sup> Cf. Gamper 2010: 103 ff.; Watts 2008: 95 ff.

<sup>V</sup> Law No. 27783, *Ley de Bases de la Descentralización*, as amended.

<sup>VI</sup> Law No. 27867, *Ley Orgánica de Gobiernos Regionales*, as amended.

<sup>VII</sup> Law No. 27972, *Ley Orgánica de Municipalidades*, as amended.

<sup>VIII</sup> The Peruvian Constitutional Court has qualified certain principles as “*nucleo duro*” of the Constitution, which cannot be changed (a concept similar to the German eternity clause). These principles are determined by the jurisprudence of the Constitutional Court; however, decentralisation has not yet been mentioned as such an “eternal” principle. Interestingly, e.g. the Spanish Constitution also aims to reconcile two opposing principles, similar to the Peruvian ones: the unity of the Spanish nation on the one hand and the guarantee of autonomy of nationalities and regions on the other hand (Art. 2 Spanish Constitution; Argullol and Bernadí 2006: 250). Other constitutions deal with similar (seemingly opposing) principles, e.g. Art. 1 of the Bolivian Constitution guarantees autonomy, but also clearly states that Bolivia is a unitary state, comparable to Art. 1 of the French Constitution. Similarly, the Romanian Constitution lays down that Romania is a unitary state (Art. 1 para. 1 Romanian Constitution) that is administratively organised in counties, towns and municipalities (Art. 3 para. 3 Romanian Constitution).

<sup>IX</sup> E.g. the second step of the plan (2<sup>nd</sup> transitory provision of the organic law on decentralisation) requires the elaboration of a plan for regionalisation and certain actions to support the construction of regions. As the creation of bigger regions failed (politically), instead of attempting a second time, it was decided to proceed with the third step, which consisted in the transfer of certain so-called sectorial competencies.

<sup>X</sup> Another aim is to stabilise and strengthen democracy by fostering involvement of the population (Dargent 2010: 79). This is also true in regard to federalism and democracy in Latin America in general (Blanco Valdés 2012: 74.)

<sup>XI</sup> Other Latin American countries presently also seek to involve their population to a greater extent, cf. Kaufmann (2008: 9 ff.).

<sup>XII</sup> Law no. 27806, *Ley de transparencia y acceso a la información pública*; cf. *Chiclayo Tello* 2007: 93.

<sup>XIII</sup> See below.

<sup>XIV</sup> See Art. 190 PConst and Art. 28 and 29 organic law on decentralisation. A 2005 referendum on the question whether new regions should be established was not successful. In 2006, three regional governments decided to establish a “pilot region”, as the national government had encouraged such ambitions. However, since the national government did not initiate the required law, the three regions submitted a bill in Congress themselves (law no. 29768, *Ley de Mancomunidad Regional*). As yet, no “new” region has been established, although legislation was passed that made it attractive for departments to amalgamate into bigger regions.



XV It is remarkable that “existing” regions seek to gain and strengthen identity through regional symbols, festivals, public holidays, etc. See below.

XVI Regarding the term “normative”, see below. Since the Peruvian Constitution and organic laws use this term instead of the more precise term “legislative”, it shall be used here as well.

XVII Art. 191 PConst is developed mainly through the organic law on the regions.

XVIII Art. 11 organic law on the regions.

XIX See below.

XX For Austria cf. Gamper 2010: 95.

XXI This seems to be similar to the case of Belgium: According to Art. 39 of the Belgian Constitution, it is up to special majority laws to develop the competencies of the regions (Dumont et al 2006: 41).

XXII Constitutional amendments are passed by a majority of 2/3 in Congress in two consecutive annual sessions or by means of an absolute majority in Congress followed by a referendum (Art. 206 PConst and Art. 81 para. a parliamentary rules of procedure).

XXIII Art. 81 para. b parliamentary rules of procedure.

XXIV It has to be noted that in other recently regionalised or federalised systems, terms like the one mentioned above are also rather avoided, for Italy, e.g., cf. Gamper (2004: 266).

XXV *Case no. 00047-2004-AI/TC*, recital 119.

XXVI “[...] in regard to the national government it has to be remarked that it is not completely free to regulate any subject matter, but rather has to follow the distribution of competencies as it is laid down in the Constitution and the laws. Therefore, the distribution of competence is a material and competential limit to the exercise of the legislative function [of the national government]”, *case no. 00047-2004-AI/TC*, recital 119.

XXVII This case dealt with three regional ordinances, all of which declared the coca leaf to be a part of the cultural heritage of the nation and legalised its cultivation, which violated national norms.

XXVIII *Case no. 0020-2005-AI/TC, 0021-2005-AI/TC*, recital 40.

XXIX In the Courts’ words: “*dictar normas*”.

XXX Art. 200 para. 4 PConst states: “The action of unconstitutionality that proceeds against norms that have the status of laws: laws, legislative decrees, decrees of urgency, treaties, standing rules of Congress, regional norms of general character and municipal ordinances that contradict the Constitution formally or materially.”

XXXI Statute on organisation and functions.

XXXII See e.g. ordinance no 03-2012-GRP/CRP, which stipulates provisions on the regional emblem and flag of the Puno region.

XXXIII See e.g. Art. 8 ROF *Ayacucho*, ordinance no. 004-07-GRA/CR, which underlines *inter alia* the importance of cultural identity in the improvement of the situation of the regional population.

XXXIV Generally (and not surprisingly [cf. generally Gamper 2012: 89]) the PConst does not explicitly mention rules on constitutional interpretation. The *Código Procesal Constitucional* statutes in Art. V that constitutionally guaranteed rights have to be interpreted in accordance with the Universal Declaration of Human Rights, other human rights treaties and decisions on human rights applying to treaties of which Peru is a part, decided by international tribunals. For interpretative methods, cf. Díaz Revorio 2004: 233 ff.

XXXV See e.g. *case no. 00024-2007-PI/TC*; nonetheless the Court does not always apply the loyalty principle in the same way (e.g. *case no. 0020-2005-PI/TC*, recital 42–45 and *case no. 00011-2008-PI/TC*, recital 27).

XXXVI The “block of constitutionality” is not an exclusively Peruvian concept. In Spain, “[t]he statutes and the laws pertaining to delimitation of powers lack constitutional status, but they are a necessary complement to the Constitution. For this reason, they along with the Constitution, are considered to form part of the so-called ‘block of constitutionality’ – the complex set of regulations that the Constitutional Court must consider in order to determine the validity or invalidity of state and/or Autonomous Community regulations.” (Argullol and Bernadí 2006: 244).

XXXVII *Case no. 0001-2012-PI/TC*, recital 19 ff.

XXXVIII See e.g. *case no. 0013-2003-CC/TC*.

XXXIX The opposing principle is the so-called “hierarchy principle”. According to the Court, the application of this principle means that regional ordinances are inferior to ordinary laws of congress. The Court stated several times that in the context of decentralisation the competence principle (and not the hierarchy principle) had to be applied (*case no. 00005-2012-PI/TC*, A/. recital 10).

XI. The opposing principle would be the principle of hierarchy. According to this principle, a national law always prevails over a regional ordinance.



<sup>XL1</sup> It seems strange that the principle of subsidiarity, although mentioned as a principle guiding the distribution of competencies and to some extent linked to the efficiency principle, is not at all included in the competence test.

<sup>XLII</sup> Cf. *case no. 0001-2012-PI/TC*, the so-called Conga Case, named after the mining project (regional ordinance declaring a special area an “environmentally protected area” and therefore rendering a previously approved project illegal), *case no. 00009-2010-PI/TC*, the so-called Cusco Case, named after the region of Cusco, which issued the ordinance in question (regional ordinance declaring the whole region as an area free of large scale mining) and *case no. 008-2010-PI/TC* (municipal ordinance prohibiting the issuing of licenses for mining). The last case (*no. 00005-2012-PI/TC*) is peculiar, because the regional ordinance in question was not equivalent to a prohibition of mining, but rather tied companies to national laws aimed at protecting the environment which stipulated that private investments were in the regions’ interest and necessary for them, establishing certain obligations for these activities in the region. The Constitutional Court again applied both the *competence test* and the *bloque de constitucionalidad*, but could not find any violation to the Constitution. The Constitutional Court admits that the reference to “obligations” without any specification could imply that the region elaborated on norms which were not in conformity with the distribution of competence. However, it did not find the regional ordinance in its actual version unconstitutional (*case no. 00005-2012-PI/TC*, § 2 A/).

<sup>XLIII</sup> *Case no. 0001-2012-PI/TC*, § 5, *case no. 00009-2010-PI/TC*, recital 10.

<sup>XLIV</sup> Of course, all competence matters listed in Art. 192 PConst which include the clause “*according to the laws*” are shared competencies.

<sup>XLV</sup> The region is referring to Art. 2 para. 19 PConst which recognises the personal right of ethnic and cultural identity and Art. 48 which states that Spanish and – in regions with a predominantly indigenous population – the indigenous languages are the official languages.

<sup>XLVI</sup> So the ROF of Apurímac (Art. 9 para. j), Ancash (Art. 8) or the ROF of Cusco (Art. 10 para. 10).

<sup>XLVII</sup> This means the level which can exercise the competence in the most efficient way.

<sup>XLVIII</sup> However, in the field of what is referred to as “*minería artesanal*” (traditional mining), regions are competent to legislate.

<sup>XLIX</sup> It is always the individual that acts as the point of reference when applying the subsidiarity principle (Höffe 1994: 30 f.; Isensee 2002: 135). In the Mufarech ruling the Court confirms that it shares this (common) point of view (see *case no. 0002-2005-AI/TC*, recital 52: “That means a materia can only be assigned to the government that is closer to society if an analysis of the competence in discussion shows that the population benefits from such a distribution”). Nonetheless, the region could have taken action against (national) laws distributing the functions in the field of mining, claiming that these laws violated certain provisions of organic laws (Art. 14 law on decentralisation, Art. 4 f. organic law on the regions) and therefore the Constitution by non-consideration of the subsidiarity principle.

<sup>L</sup> See *case no. 0002-2005-AI/TC*, recital 52: “[...]subsidiarity is only constitutionally valid if it is linked to the principle of proportionality and necessity, which mean that the action of the state must not exceed what is necessary to achieve the aims of the Constitution. That means a materia can only be assigned to the government that is closer to society if an analysis of the competence in discussion shows that the population benefits in a threefold way of such a distribution – the proposed distribution needs to be in line with the aims of the Constitution and with the basic principles of decentralisation – the solution in discussion has to be the most effective and adequate possible, which means that the most ‘benign’ means have to be chosen – the determination of content must not affect the functioning of any of the governments”.

<sup>L1</sup> According to Isensee (2002: 172 ff.) the principle of proportionality complements the subsidiarity principle. The Protocol on the application of the principles of subsidiarity and proportionality to the Lisbon Treaty of the EU (Official Journal, C 83/201, 30<sup>th</sup> March 2010) also shows the close relation between these concepts. On the development of the jurisprudence on the subsidiarity principle and its application in Peru cf. Rubio Correa (2011).

<sup>LII</sup> The latest bill dates from August 2011 (Bill no. 0007/2011-CR) and is currently being examined by different commissions of Congress. Yet, the proposed second chamber is not conceived as a second chamber in a federal sense but rather as a *chambre de réflexion*, where regions would not be represented. So even if the proposal is realised, Peruvian regions will not count on representation, but the situation could be compared to that of Spain, where the senate is not construed as a “real house of territorial representation” (Argullol and Bernadí 2006: 252).

<sup>LIII</sup> From 2011 to date, regions have proposed 24 bills, see <http://www2.congreso.gob.pe/Sicr/TraDocEstProc/CLProLey2011.nsf> (last accessed May 16, 2014).



<sup>LIV</sup> Depending on the resources regions have at their disposal, the financial resources gained out of royalties are significant. However, problems are caused by price fluctuations on raw materials on the global market. Moreover, regions with few resources are deprived of this source of income.

<sup>LV</sup> “Regions and municipalities are empowered to create, change and abolish contributions and fees, or exempt from them, in their respective area and within the limits of the law [respectively laws]”.

<sup>LVI</sup> The problem lies with the question of whether „conforme ley“ (according to law [respectively laws]) is equivalent to „con los límites que señala la ley“ (“within the limits of the law [respectively laws]”).

<sup>LVII</sup> Fees and contributions are charged for the delivery of a certain service, e.g. waste collection. Taxes, on the contrary, are paid without receiving a direct service.

<sup>LVIII</sup> Cf. the homepage of the association [www.angr.org.pe](http://www.angr.org.pe) (last accessed May 16, 2014).

<sup>LIX</sup> Currently, a process of restructuring of the National Council on Coordination is taking place. In March 2013, a Commission with the objective of creating a proposal on a new decree on the National Council on Coordination was created. In April 2014, the President of the Council of Ministers announced the restructuring of the National Council on Coordination, cf. Secretaría de Descentralización/Presidencia del Consejo de Ministros 2014: 120 ff.

<sup>LX</sup> Argentina and Brazil were initially unitary states but changed into federal systems more than a century ago (Hernandez 2006: 8 f.; Souza 2005: 79), Mexico became a federal state after gaining independence with a short interruption in the 19<sup>th</sup> century (Gutiérrez González 2005: 210).

<sup>LXI</sup> Moreover, recent decentralisation processes take the Spanish and Italian developments as model, not least for practical linguistic reasons (Carrión M. 2002: 120 f.). The reception of ideas from foreign countries also often depends on how active (constitutional) courts act, for Colombia cf. Cepeda-Espinosa 2004: 557 ff.

<sup>LXII</sup> *Proyecto de Ley N 2538/2013-CR, Proyecto de Ley que incorpora la cuarta disposición complementaria a la ley de bases de la descentralización.*

<sup>LXIII</sup> Due to the vagueness of the distribution of competencies on the one hand and the rule that the national level is (exclusively) competent to elaborate general policies of the state on the other hand, the Constitutional Court seldom decides in favour of the regions.

<sup>LXIV</sup> However, Peru is not the only state facing the problem of an imbalanced case law. For Brazil cf. Arretche 2012: 142.

<sup>LXV</sup> Law no. 19175, re-proclaimed 8.8.2005.

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