

Boston University School of Law

## Scholarly Commons at Boston University School of Law

---

Faculty Scholarship

---

11-2011

### Direct Concern in Regional Policy: The European Court of Justice and the Southern Question

Daniela Caruso

*Boston University School of Law*

Follow this and additional works at: [https://scholarship.law.bu.edu/faculty\\_scholarship](https://scholarship.law.bu.edu/faculty_scholarship)



Part of the [Comparative and Foreign Law Commons](#), and the [International Law Commons](#)

---

#### Recommended Citation

Daniela Caruso, *Direct Concern in Regional Policy: The European Court of Justice and the Southern Question*, in 17 *European Law Journal* 804 (2011).

Available at: <https://doi.org/https://doi.org/10.1111/j.1468-0386.2011.00579.x>

This Article is brought to you for free and open access by Scholarly Commons at Boston University School of Law. It has been accepted for inclusion in Faculty Scholarship by an authorized administrator of Scholarly Commons at Boston University School of Law. For more information, please contact [lawlessa@bu.edu](mailto:lawlessa@bu.edu).





*European Law Journal*, Vol. 17, No. 6, November 2011, pp. 804–827.

© 2011 Blackwell Publishing Ltd., 9600 Garsington Road, Oxford, OX4 2DQ, UK  
and 350 Main Street, Malden, MA 02148, USA

# Direct Concern in Regional Policy: The European Court of Justice and the Southern Question

*Daniela Caruso*

**Abstract:** *For a few years, the European Court of Justice (ECJ) has declared inadmissible, for lack of direct concern, a number of annulment actions initiated by sub-state actors in the context of regional policy. This article compares the ECJ's holdings with the General Court's more generous application of the 'direct concern' standard in some of the same disputes, and argues in favour of the General Court's approach. The cases hereby analysed pertain to the implementation of structural funds in Southern Italy. Relating regional policy to the historical unfolding of the 'Southern Question', this article examines the unexpected opportunity for civic and administrative renewal brought by regional policy to Italy's South in the late 1990s, and links standing for sub-state actors to the long-term realisation of that opportunity. It further argues that a more direct judicial involvement with territorial policies would prompt taxonomic renewal in EU law as a discipline.*

## I Introduction

The issue of standing to challenge European Community (EC) acts received great interest in European law circles in two different circumstances. First, in the 1980s, judicial standing became the catalyst for debates on European democracy. It was through the lens of standing in actions for annulment that the European Parliament fought and eventually won its battle for political recognition.<sup>1</sup> Second, in the past decade, the fundamental theme of effective judicial protection in the legal order of the EU was debated at length in terms of judicial standing. The famous pleas of Spanish farmers and French fishermen, whose right to challenge various EC regulations had been denied in court, brought to everyone's attention the lofty goal of guaranteeing an effective remedy to all those affected by Community action.<sup>2</sup> That debate resulted

<sup>1</sup> Case 294/83, *Parti Ecologiste 'Les Verts' v Parliament* [1986] ECR 1339; Case 302/87, *Parliament v Council (Comitology Decision)* [1988] ECR 5615; Case C-70/88, *Parliament v Council (Chernobyl I)* [1990] ECR I-2041.

<sup>2</sup> Case C-50/00 P, *Unión de Pequeños Agricultores v Council* [2002] ECR I-6677; Case C-263/02 P, *Comm'n v Jégo-Quéré & Cie SA* [2004] ECR I-3425.

in a new formulation of Article 263 of the Treaty on the Functioning of the EU (TFEU).<sup>3</sup>

Today, other salient issues are emerging from the doctrinal intricacies of judicial standing. The Treaty of Lisbon, in the context of a general expansion of the institutional role of sub-state entities, granted judicial access to the Committee of Regions as a whole,<sup>4</sup> but left unanswered the plea of regions for privileged standing.<sup>5</sup> Against this background, this article focuses on a particular string of actions for annulment of Community decisions, initiated by sub-national actors in the context of structural funds.<sup>6</sup> The excruciating technicality of the problems involved should not bury their substantive importance. At stake in these disputes are the architecture of participatory democracy and the legal (as opposed to political) status of cohesion in contemporary Europe.

Essentially, the cases analysed in these pages share the following pattern: regions or local government agencies receive EU structural funds for specific projects; implementation and spending prove problematic; the Commission decides to revoke funding; and the recipients demand that the Commission's decision be annulled, only to find their pleas rejected in court. Several of these cases concern development policies in Southern Italy, also known as Mezzogiorno—an area notoriously characterised by thorny social and political issues.<sup>7</sup>

The message that the Union sends this area at the end of such disputes is, for right or wrong, one of disinterest. The Commission seems eager to engage the periphery of sub-national actors when things go well, so as to bypass the state and to promote supranational integration,<sup>8</sup> but it is equally eager to disengage when things go badly. The General Court occasionally opens the door to judicial dialogue between Brussels and the southern periphery, but the ECJ regularly shuts it down, thereby affirming the Commission's posture.

One aspect of this story has already been identified in the literature under the heading of 'regional blindness.'<sup>9</sup> The difficulty for regions in establishing standing in annulment actions is just one of the many hurdles they encounter in asserting their political

<sup>3</sup> Treaty of Lisbon amending the Treaty on EU and the Treaty establishing the EC, December 13, 2007, 2007 O.J. (C 306) 1 [hereinafter Treaty of Lisbon]; Consolidated Version of the Treaty on the Functioning of the European Union Art 263, Sept. 5, 2008, 2008 O.J. (C 115) 47 (hereinafter TFEU).

<sup>4</sup> TFEU Art 263 and Treaty of Lisbon Protocol (No 2) on the Application of the Principles of Subsidiarity and Proportionality Art 8.

<sup>5</sup> See K. Lenaerts, 'Access of regions with legislative powers to the European Court of Justice', in Committee of the Regions (ed), *Implementation of the Subsidiarity Principle* (Brussels, 2008), at 13. The recent Case C-444/08 P (*Região autónoma dos Açores v Council* [2009] ECR I-200) further highlights the relevance of regional standing in the context of environmental debates.

<sup>6</sup> The issue of standing for non-privileged actors in matters of structural funds regards, of course, not just regions. See, eg Case C-321/95, *Stichting Greenpeace Council (Greenpeace International) and Others v Comm'n*, [1998] ECR I-1651.

<sup>7</sup> The expression 'Southern Question' (Questione Meridionale) refers to the socio-economic problems experienced by the south of Italy since its political unification in 1861. It also refers to the profound economic dualism of the country, which is characterised by a lively and competitive economy in its northern regions. N. Moe, *The View from Vesuvius* (University of California, 2009), at 1.

<sup>8</sup> Evidence of this cooperative attitude is given in Case T-272/02, *Comune di Napoli v Comm'n* [2005] ECR II-1849 (where the Commission expresses hope for a non-judicial solution of the controversy and counts on further meetings).

<sup>9</sup> S. Weatherhill, 'The Challenge of the Regional Dimension in the European Union', in S. Weatherhill and U. Bernitz (eds), *The Role of Regions and Sub-National Actors in Europe* (Oxford: Hart, 2005), at 1.

existence in the EU,<sup>10</sup> and there is no lack of insightful commentary on the need to let local governments participate in European decision making.<sup>11</sup> Particularly relevant is the literature linking *locus standi* with the full and fair participation of sub-state players in a range of new governance processes.<sup>12</sup> There is also important scholarship on the administrative practices generated by structural funds, on the possibility for deliberative democracy in the shared management of grants, and on the opportunities for grass-root participation triggered at every step of project selection and implementation.<sup>13</sup> The bulk of structural-funds action happens indeed far away from Luxembourg, and the scholarly focus has accordingly given little weight to the sparse case law in such matters.<sup>14</sup>

This essay focuses, by contrast, precisely on the fact that the EU courts have recently engaged more directly with cohesion policy,<sup>15</sup> and have done so in a particular socio-political context. This fact is remarkable for several reasons. First, Southern Italy is an area where cohesion policy, due to a series of historical contingencies, came to acquire extraordinary salience in the late 1990s. That experience, in turn, brought new life to European regional policy in the form of an independent report requested by the Commission, which is informing contemporary cohesion strategies.<sup>16</sup> An analysis of that context demonstrates the potential impact of structural funds on the legal and political life of backwards regions—if not directly on their material progress.

At a second and more systemic level, the judicial engagement of EU courts with territorial policy is bound to affect the relative weight of such policies in legal discourse. It is well known that the entire body of EU law centres upon judicial pronouncements, that the role of the ECJ in shaping the substance of legal integration has gone way beyond the limits of the founding fathers' imagination, and that the methods used in Luxembourg have subverted the Napoleonic idea of judicial subservience to legal text.<sup>17</sup> Over the years, the ECJ has become a key player in the elaboration of rules for the Community.<sup>18</sup> What the ECJ does not deal with is not really 'law' in the perception of

<sup>10</sup> Regions 'have no better standing under Art 230 than a private individual.' Weatherhill, *supra* n 9, at 5.

<sup>11</sup> See G. De Búrca, 'Developing Democracy Beyond the State', (2008) 46 *Columbia Journal of Transnational Law* 221, 249 (articulating the theoretical implications of this participation and positing that the 'self-interest of bodies and organisations wishing to maximise their reputation and their authority' is conducive to democracy in decision-making processes based outside the nation-State).

<sup>12</sup> J. Scott and S. Sturm, 'Courts as Catalysts: Re-Thinking the Judicial Role in New Governance', (2007) 13 *Columbia Journal of European Law* 565, 576.

<sup>13</sup> See, eg R. Balme and D. Chabanet, *European Governance and Democracy: Power and Protest in the EU* (Rowman and Littlefield, 2008), esp. at 145–151.

<sup>14</sup> Commentary of the cases discussed in these pages is provided by A. Turk, *Judicial Review in EU Law* (Edward Elgar, 2009), at 59–63 and by C. Alvaro, 'La Política Regional nella Giurisprudenza Comunitaria', (2009) 23 *Rivista Giuridica del Mezzogiorno* 403, 407–412.

<sup>15</sup> The terms 'cohesion policy' and 'regional policy' are used synonymously in these pages as in most of the literature on such subjects.

<sup>16</sup> F. Barca, *An Agenda for a Reformed Cohesion Policy. A Place-Based Approach to Meeting European Union Challenges and Expectations* (April 2009) (hereinafter 'Barca Report'), available at [http://ec.europa.eu/regional\\_policy/policy/future/pdf/report\\_barca\\_v0306.pdf](http://ec.europa.eu/regional_policy/policy/future/pdf/report_barca_v0306.pdf) (last accessed 20 September 2011). One important aspect of the current debate is whether to focus more on regional convergence or on territorial competitiveness and innovation. See Balme and Chabanet, *supra* n 13, at 150.

<sup>17</sup> M. Lasser, *Judicial Transformations. The Rights Revolution in the Courts of Europe* (Oxford University Press, 2010), esp. at 64 (discussing the impact of EU law on the relation between legislative and judicial power in French law).

<sup>18</sup> E. Stein, 'Lawyers, Judges and the Making of a Transnational Constitution', (1981) 75 *The American Journal of International Law* 1.

legal practitioners and scholars. And because the business of the court still revolves around the realisation of the four freedoms and its two corollaries—competition and protection of fundamental rights—textbooks, academic writings and symposia continue to centre upon such issues. For being a policy that employs over one third of the EU budget, cohesion is still strikingly minor in judicial discourse. The recent escalation of encounters between the ECJ and the periphery in matters of structural funds may change this state of affairs. The new cases may bring the implementation of cohesion policy closer to what counts as law proper in the legal community.

A third reason for investigating these cases is that the judicial engagement with cohesion blurs the taxonomic lines separating, within the EU legal order, old from new governance, central from local law-making, and ultimately law from redistribution. Cohesion policies involve focusing on welfare, which is a matter of political choice and, most importantly in EU legal discourse, a traditional prerogative of State sovereignty. Cohesion policy is therefore too often treated as peripheral to supranational matters. The cases analysed in these pages may reverse this entrenched and marginalising characterisation.

## II The Doctrine

The doctrinal question in these cases is whether the sub-state applicant, while not being the formal addressee of the Commission's decision to cancel financial assistance, can still have standing to request that the decision be annulled. To establish standing, the applicant must show *direct* concern. *Individual* concern—the other prong of the standing test—is routinely found to be present because the applicant is either the named beneficiary of the funds or at least the entity in charge of the realisation of the funded project.<sup>19</sup> Direct concern, by contrast, is difficult to establish for two reasons: first, funds are given primarily to the State, and in the legislative framework of structural funds, the State remains the pivotal interlocutor to the Commission;<sup>20</sup> second, even after EU funds have been revoked, it is still theoretically possible for the State to continue to fund the project until completion out of its own pocket, and to neutralise the adverse impact of the Commission's decision on the finances of local entities.

In the past few years, two Advocates General have invoked both reasons to deny the admissibility of a sub-state actor's challenge.<sup>21</sup> The Court of Justice has followed their opinions consistently. The General Court, however, has been less aligned. At times, it has simply ignored the issue of standing, letting the applicant win or—more often—lose on the merits.<sup>22</sup> At other times, the General Court has tackled the issue frontally and

<sup>19</sup> Opinion of Advocate General (Op. Advoc. Gen.) Ruiz-Arabo Colomer, Case C-417/04 P, *Regione Siciliana v Comm'n* [2006] ECR I-03881, at 71.

<sup>20</sup> *ibid.*

<sup>21</sup> *ibid* and Op. Advoc. Gen. Kokott, Joined Cases C-445 & C-455/07 P, *Comm'n v Ente per le Ville Vesuviane* [2009] ECR I-7993.

<sup>22</sup> In Case T-272/02, *Comune di Napoli v Comm'n* [2005] ECR II-1849, the General Court does not even rule on the admissibility of Napoli's application and moves quickly to the merits. (Napoli's application failed on the merits.) This cavalier attitude bothers AG Ruiz-Arabo Colomer, who clearly thinks the issue is important. Op. Advoc. Gen., Case C-417/04 P, at 3. In Case T-176/06, *Sviluppo Italia Basilicata SpA v Comm'n* [2008] ECR II-126, the General Court dismissed as unfounded on the merits the application of Sviluppo Italia Basilicata for annulment of Commission Decision C(2006) 1706 reducing financial assistance from the European Regional Development Fund (ERDF). The General Court did not address at all the question of admissibility, and the ECJ upon review decided to ignore the part of the Commission's

concluded that, in particular circumstances, direct concern can be established.<sup>23</sup> The Commission has not been pleased with such conclusions, even when granted victory on the merits.<sup>24</sup> It has therefore fought for affirming the idea that, when funds are revoked, sub-national actors may bring their complaints to their State's capital if they so please, but must not bother Luxembourg.<sup>25</sup>

The Commission, besides a number of textual arguments, has excellent policy reasons on its side. First, if funds have already been paid out, the practical problem for the Commission is recovering them. From the creditor's standpoint, the state certainly appears to be a better debtor than its constituent localities: it has deeper pockets, and also many ongoing dealings with Brussels, so that the Commission may get its money back simply by withholding sums it owes the state for other reasons. Second, the Commission expects the Member States to remain, as per legislative design, the only guardians against the mischief of sub-state actors, and wants no policing role at the receiving end of its cohesion policy.<sup>26</sup> The management of structural funds is so deeply enmeshed with local politics, and so often plagued by inefficiency and corruption, that direct involvement with the periphery in the course of judicial disputes might be pointless if not altogether counter-productive.

As a result, the Commission treats structural fund grants as if they were special creatures of private law: contracts with a third-party beneficiary, whose rights remain dependent upon the action of the contracting parties and never achieve the status of directly claimable entitlements. Before the ECJ, the Commission has so far prevailed.<sup>27</sup> By contrast, the attitude of the General Court has often been defiant, and is worth exploring insofar as it amplifies the otherwise inaudible voice of the disgruntled applicants. The following section begins with one such episode of defiance, dated 2005, and goes on to explore its recent reiterations.

### III The Cases

On October 18, 2005, the General Court rendered a judgment that would prove irritating in the eyes of the Commission and of many others.<sup>28</sup> Visually, the background of Case T-60/03 can be pictured as a large and idle dam built across the Sicilian River

---

defence based on the appellant's lack of direct concern and therefore of standing. Case C-414/08 P, *Sviluppo Italia Basilicata SpA v Comm'n* [2010] ECR I-2559, at 51–52. See also Case T-65/04, *Nuova Gela Sviluppo v Comm'n* [2007] ECR II-68, at 27–29 (where the Court of First Instance asserts its prerogative to bypass the question of admissibility and to simply reject the application on its merits).

<sup>23</sup> Case T-189/02, *Ente per le Ville Vesuviane v Comm'n* [2007] ECR II-89 (action dismissed on merits but found expressly admissible).

<sup>24</sup> Joined Cases C-445 & 455/07 P, *Ville Vesuviane* [2009] ECR I-7993 (on cross appeal from Case T-189/02, *Ville Vesuviane* [2007] ECR II-89).

<sup>25</sup> *ibid.*

<sup>26</sup> See, eg the text invoked by the General Court to deny standing to a Portuguese sub-state entity in a dispute concerning the revocation of cohesion funds (Case T-324/06 R, *Município de Gondomar v Comm'n* [2008] ECR II-173); Commission Reg 1164/94, Art 5.2, 1994 O.J. (L 130) 1 and Commission Reg 1831/94, Art 7, 1994 O.J. (L 191) 9 (both envisaging direct relations between the Commission and the state only).

<sup>27</sup> Most notably in Case T-189/02, *Ville Vesuviane* [2007] ECR II-89 (reversed on point of admissibility by Joined Cases C-445 & 455/07 P, *Ville Vesuviane* [2009] ECR I-7993) and in Case T-60/03, *Regione Siciliana v Comm'n* [2005] ECR II-4139 (reversed on point of admissibility by Case C-15/06 P, *Regione Siciliana v Comm'n* [2007] ECR I-2591).

<sup>28</sup> Turk, *supra* note 14, at 59–63, noticing the difference between this case and several others decided by the same court on the subject of direct concern.

Gibbesi. Its construction started in the 1980s and is now completed, but the proper infrastructure of channels that would allow for the agricultural fruition of the river's water is still lacking. As a result, the precious water that accumulates from time to time goes wasted, and many fields stay tragically dry.<sup>29</sup> In December 1987, the Region of Sicily had successfully obtained structural funds for the completion of the project. According to the Commission, the dam was meant to be subservient to a new industrial complex to be built in province of Licata. The local land owners hoped that the dam would (also) bring water to their fields, but in the eyes of the Commission, the core function of the dam was to be industrial rather than agricultural.<sup>30</sup> Several years after the funding was awarded, it became clear to the Commission that the Licata complex would not see the light, and funds were accordingly revoked. When the Region appealed, the General Court had no trouble confirming the correctness of the Commission's decision on the merits. But it did so only after finding that Sicily's action for annulment was procedurally admissible.

The decision was, on this point, at odds with the General Court's own ruling concerning similar Sicilian matters.<sup>31</sup> Only 1 year earlier, the same court had told Sicily that it had no direct concern, and therefore no standing to challenge the Commission's decision to cancel structural funds. That case concerned a modern highway connecting Palermo, the region's capital, with Messina—the island's closest city to Italy's main land. Sicily had then pleaded its very direct relationship with the Commission, exhibiting—in the mode of a spurned lover—proof of written correspondence.<sup>32</sup> But the Court had not been moved: the region's concern was not direct enough because the Italian Republic, interlocutor of the Commission by legislative design, could have still decided not to recover the funds from Sicily, and to pay the ensuing EU debt out of its own pocket.

Given this recent precedent, why would the General Court change its posture so abruptly in the Gibbesi affair? The very timing of its decision in T-60/03 also had a defiant flair. The issue of Sicily's *locus standi* after cancellation of financial assistance would be soon discussed by the ECJ in the review of the highway case,<sup>33</sup> so it might have been proper for the General Court to stay put, waiting for guidelines from above.<sup>34</sup> Moreover, Sicily had filed a whole new series of similar cases, all pending, and the General Court's welcoming gesture might be seen as an unconscionable abdication of its gate-keeping role.<sup>35</sup> A sharp rectification was in order.

<sup>29</sup> See, eg 'Comune di Delia—Crisi Idrica—Diga Gibbesi', in Canicatti Notizie, April 28, 2010.

<sup>30</sup> The improvement of irrigation of over 1000 hectares was a 'secondary objective.' Structural Funds: Commission decides to cancel the financing for an investment in the region of Sicily, Italy, available at [http://ec.europa.eu/regional\\_policy/newsroom/document/sicily\\_en.pdf](http://ec.europa.eu/regional_policy/newsroom/document/sicily_en.pdf) (last accessed 20 September 2011).

<sup>31</sup> Most importantly, Case T-341/02, *Regione Siciliana v Comm'n* [2004] ECR II-2877 (appealed in Case C-417/04 P, *Regione Siciliana v Comm'n* [2006] ECR I-3881). See also, less directly on point, Case T-190/00, *Regione Siciliana v Comm'n* [2003] ECR II-5015 (state aid for Sicilian agriculture held void. Region's application for annulment dismissed).

<sup>32</sup> '[T]he applicant points out that, contrary to what the Commission maintains, direct legal relations existed between itself and the Commission with respect to the project at issue.' T-341/02, *Siciliana* [2004] ECR II-2877, at 46. (citing letter of 1997 from the Commission to Sicily).

<sup>33</sup> C-417/04P had been filed on September 29, 2004.

<sup>34</sup> AG Ruiz-Arabo Colomer finds it 'surprising' that the General Court went ahead and decided the case without waiting for the ECJ to decide C-417/04 P, which also has to do with cancellation of assistance from the ERDF. Op. Advoc. Gen., Case C-417/04 P, *Regione Siciliana* [2006] ECR I-3881, at 3.

<sup>35</sup> *ibid*, at 3 n. 6.

Both Sicily (on the merits) and the Commission (on admissibility) promptly appealed Case T-60/03, thereby setting the stage for judicial reversal before the ECJ in due course. The highway case, however, provided a more immediate opportunity to chastise the erring Tribunal. AG Ruiz-Arabo Colomer was to give his opinion in that case,<sup>36</sup> so he seized the chance to reprimand the General Court's inconsistency. The AG made sure to criticise not just the court's explicit grant of standing to certain sub-state entities, but also its alternative technique of jumping to the merits of structural funds disputes without saying anything at all about admissibility.<sup>37</sup> Admissibility is important, his message went, and it is important that standing be explicitly denied when the applicant is a sub-national recipient of structural funds.<sup>38</sup> This opinion was rendered on January 12th, 2006, and the ECJ fully embraced its findings on May 2nd of the same year.

The Court of First Instance was convinced up to a point. Rather than promptly dismissing as flatly inadmissible the many similar cases pending on its docket, it decided to stay all such proceedings a little longer, until after the ECJ's forthcoming pronouncement on the Gibbesi matter.<sup>39</sup> When the Gibbesi controversy finally reached the ECJ, the court ruled against admissibility along the clear argumentative lines already drawn by AG Ruiz-Arabo Colomer.<sup>40</sup> The issue seemed solved, *éclairé* for good.

And yet it was not. Since then, the General Court has had other opportunities to deal with disappointed beneficiaries of EU assistance in Southern Italy, and its attitude has been mixed.<sup>41</sup> In some cases it has, deliberately and confidently, adjudicated merits without first dealing with admissibility hurdles;<sup>42</sup> and in other cases, it has explicitly found that sub-state entities have standing.<sup>43</sup> Being a court of law, it has cast such acts of disobedience in respectful form, carefully distinguishing the facts before it from the ECJ's recent and relevant precedents. In the eyes of the General Court, not all sub-state applicants are equal, and not all must undergo the pattern of rejection suffered by Sicily in both the highway and the Gibbesi situations.

In the case of Ville Vesuviane, for instance (yet another Southern Italian scenario), the recipient of funds had been explicitly designated both responsible party for the execution of the project and beneficiary of the funds. Moreover, Italy had expressly decided not to grant out of its coffers the amount revoked by the Commission so that the sub-state actor would unquestionably bear the brunt of the cancellation. Direct concern—the General Court held—is established in such cases. For this holding, the

<sup>36</sup> Op. Advoc. Gen., Case C-417/04 P, *Regione Siciliana* [2006] ECR I-3881.

<sup>37</sup> *ibid.*, at 3, referring to Case T-272/02, *Napoli* [2005] ECR II-1849.

<sup>38</sup> *ibid.*

<sup>39</sup> On September 25, 2008, the General Court finally decided a number of offset cases (Joined Cases T-392 & 408 & 414 & 435/03, *Regione Siciliana v Comm'n* [2008] ECR II-2489). On the same day, but separately, the General Court issues an ordinance dismissing another plea of the region concerning revocation of ERDF grants for Porto Empedocle (Case T-363/03, *Regione Siciliana v Comm'n* [2008] ECR II-201).

<sup>40</sup> Case C-15/06 P, *Siciliana* [2007] ECR I-2591.

<sup>41</sup> Occasionally, the General Court has flatly aligned itself with the ECJ's denial of standing for sub-state actors. In an order of June 11, 2007, addressed to the Portuguese local entity of Gondomar, the judge refers simply to the precedents concerning Regione Siciliana (C-15/06 P and 417/04 P) and finds the application manifestly inadmissible. Case T-324/06 R, *Gondomar* [2008] ECR II-173. The order was appealed, to no avail, in Case C-501/08 P, *Municipio de Gondomar v Comm'n* [2009] ECR I-152.

<sup>42</sup> See especially Case T-65/04, *Nuova Gela* [2007] ECR II-68, at 27–29.

<sup>43</sup> Case T-189/02, *Ville Vesuviane* [2007] ECR II-89. With order of November 25, 2005 (referred to in *ibid* at 20) the General Court had purposely deferred deciding this case until after the ECJ's holding in 417/04P.



court received another reprimand, again in the judicially proper form of a reversal before the ECJ complete with an opinion by AG Kokott.<sup>44</sup>

Reversal was avoided in another, more recent case, concerning the challenge of a sub-state recipient from the Region of Basilicata.<sup>45</sup> The General Court's choice to address directly the merits of the case, instead of adjudicating the preliminary point of admissibility, was justified by reasons of 'procedural economy.'<sup>46</sup> The applicant lost on the merits and appealed. By the time the victorious Commission raised the issue of inadmissibility before the ECJ, the issue seemed beside the point and could be set conceptually aside.<sup>47</sup> Jumping to the merits without bothering with admissibility concerns is a practice that AG Ruiz-Arabo Colomer had frowned upon, but the General Court was clearly undeterred. As it held in a related dispute,

One must remember that the Community judge, depending on the circumstances of each case, *has the right to determine* whether a correct administration of justice justifies rejecting an application on its merits, without deciding first the issue of inadmissibility raised by the respondent.<sup>48</sup>

The court's stance on standing has no impact on the final outcome of the dispute: the Commission regularly prevails. Because of such holdings, however, the message sent by Luxembourg in point of admissibility is not univocal, and the screening power of 'direct concern' is reduced. As a consequence, Commission decisions to discontinue structural assistance keep being challenged by sub-state recipients.

The story is clearly not over.<sup>49</sup> And the unusual concentration of such cases in the South of Italy hints at a story that is deeper than technical standing issues or national administrative arrangements.<sup>50</sup> To draw meaning out of the many court orders that reject these actions for annulment is, in a way, like drawing blood from stones. Like stones, these documents are hard, indigestible and unyieldingly dry. But these are no ordinary stones—at least not in the perspective of the remarkable scholars who have tried for over a century to make sense of 'the southern question.'<sup>51</sup> These stones are the polished marbles of the Vesuvian Villas, witnesses to the old splendour of Neapolitan

<sup>44</sup> Op. Advoc. Gen. Kokott, Joined Cases C-445 & C-455/07 P, *Ville Vesuviane* [2009] ECR I-7993.

<sup>45</sup> Commission Reg 4254/88, Art 6.2, 1988 O.J. (L 374) 15 provides for agreements directly concluded by the Commission with an 'intermediary.' The intermediary is to be selected by the Member State in agreement with the Commission. The intermediary then selects the individual beneficiaries of the funds. In Case C-414/08P, *Basilicata* [2010] ECR I-2559, the Commission claimed that its decision to reduce financial assistance was addressed to Italy only, that the intermediary was not a beneficiary of the funds, and that the intermediary, lacking direct concern, had no standing to challenge it.

<sup>46</sup> Op. Advoc. Gen. Trstenjak, Case C-414/08 P, *Basilicata* [2010] ECR I-2559, at 31.

<sup>47</sup> *ibid*, at 36; Case C-414/08 P, *Basilicata* [2010] ECR I-2559, at 51.

<sup>48</sup> Case T-65/04, *Nuova Gela* [2007] ECR II-68 (original in Italian. Unofficial translation by author).

<sup>49</sup> The latest instances of this saga come from Puglia and Campania. In Case T-388/07, *Comune di Napoli v Comm'n* (Judgement of 6 May 2010, 2010 O.J. (C161) 39) the City of Naples found no procedural hurdle in the General Court, and the Commission argued (successfully) only on the merits. In Cases T-84/10R & T-223/10R, *Regione Puglia v Comm'n* (Order of 25 June 2010, 2010 O.J. (C234) 38), the Commission did object to the admissibility of a challenge brought by the Region of Puglia, but the General Court decided nonetheless to hear the Region's version of the story. With no more than a nod to the stern ECJ precedents on point (*ibid*, at 26) and having claimed for himself a large sphere of freedom in interim proceedings (*ibid*, at 13), President Jaeger held that there was 'no need to adjudicate the question of admissibility . . . regarding the direct concern of the applicant.' (*ibid*, at 26).

<sup>50</sup> See C. Iaione, 'Local Public Entrepreneurship and Judicial Intervention in a Euro-American and Global Perspective', (2008) 7 *Washington University Global Studies Law Review* 215, 221–224 (explaining the degree of autonomy enjoyed by Italian regions in light of recent reforms).

<sup>51</sup> A famous example of this literature is A. Gramsci, *The Southern Question (1921–1926)*, Pasquale Verdichio Translation (Guernica Editions, 2006).

culture; or the bricks of a dam on the Gibbesi, fully built yet unable to bring water to adjacent lands. They are therefore a lens for reflecting—through the bounded but crucial perspective of EU judicial opinions—on the meaning of cohesion policy for Europe's many peripheries, which are rich in history and potential, and yet resiliently desolate.

#### IV Merits and Context

A closer look at the Gibbesi affair highlights the significance of Sicily's plea, which in turn exemplifies the background of the several annulment actions discussed in these pages. By zooming into this particular story, these pages treat Sicily as a synecdoche for the whole Mezzogiorno, and the Mezzogiorno as one of the many examples of EU areas that lag behind socially and economically.

In 2005, when the case was decided by the General Court, the sad status of the dam was well known to regional deputies and yet practically ignored at the national political level.<sup>52</sup> The dam was, and still is, complete but useless: it has never been subject to final technical vetting, nor has it been equipped with the network of irrigation channels that would lead to a purposeful release of accumulated water. So, the dam does what it is meant to do: it collects water when it rains and when the Gibbesi swells. But when the dam fills up to capacity, technicians are under order to simply release the water into the more capacious banks of the Salso River, where it can flow peacefully and uselessly into the sea.<sup>53</sup> The waste is insulting to the many farmers of the area, who consider agriculture the primary economic engine of the land, and see that engine stalled due to political and administrative inertia. Today, this periodic disposal of precious water is covered in local daily publications, but it fails to concern, other than in times of elections, the political deputies of the region.<sup>54</sup>

The reasons for this case of waste and paralysis are multiple and would certainly lend themselves to investigative journalism. The little that can be glimpsed from the local press reveals already several complications. One question is whether or not it makes sense to build agricultural infrastructures in a place whose economic vocation seemed once tilted towards industrialisation. The dam was originally conceived in 1966 in the context of an agreement entered by the regional agency for mineral resources (Ente Minerario Siciliano (EMS)) with a national agency in charge of energy resources (Ente Nazionale Idrocarburi (ENI)) and a large industrial conglomerate (Montedison).<sup>55</sup> The agreement was typical of the industrial policy of the 1960s, when state intervention for the industrialisation of the nation still seemed the way to go. It was also made at a time when Sicily, thanks to its natural resources of oil and minerals, seemed set to build its own power plants and large-scale factories.

<sup>52</sup> Allegato B, Seduta n. 605 del 18/3/2005, Pag. 18537, Atti di Controllo, Presidenza del Consiglio dei Ministri, available at [http://www.camera.it/\\_dati/leg14/lavori/stenografici/sed605/bi00r.htm](http://www.camera.it/_dati/leg14/lavori/stenografici/sed605/bi00r.htm) (last accessed 20 September 2011) (during the meeting, deputy Cusumano asked the president of the Council of Italian Ministers whether he planned to intervene in the matter).

<sup>53</sup> D. Butera, 'Futuro della Diga Gibbesi, se ne parlerà lunedì in consiglio', *Il Giornale di Gela*, April 15, 2010, available at <http://www.ilgiornaledigela.it/component/content/article/9169.html> (last accessed 20 September 2011).

<sup>54</sup> D. Butera, 'Le risorse idriche della Diga Gibbesi da utilizzare per le campagne di Riesi', *Il Giornale di Gela*, April 22, 2010 (reporting that a municipal council convened to discuss the Gibbesi matter was sadly deserted by regional deputies), available at <http://www.ilgiornaledigela.it/politica/9241-risorse-idriche-della-diga-gibbesi-da-utilizzare-per-le-campagne.html> (last accessed 20 September 2011).

<sup>55</sup> Allegato B, *supra* n 52.

The 1987 funding of the project with both national and European funds still partook of the impression that the dam (already at the ‘third stage’ of construction) would serve industrial goals in the region. The construction of the dam was completed in 1992. However, a report sent in 2000 by the Italian authorities to the Commission revealed that the dam was not yet operational.<sup>56</sup> By the time of this report, many things had changed since the inception of Community funding. The industrial growth of the area, anticipated in the 1960s and sustained through injections of public money through the 1990s, had not materialised.<sup>57</sup> The EMS, plagued by debts, had been privatised in 1999,<sup>58</sup> and the administration of the orphaned dam had been devolved, for lack of better alternatives, to a local agricultural agency.<sup>59</sup>

The reason given by the Commission for revoking funds was the uselessness of the project. In the absence of the industrial complex in Licata, the dam had lost its original purpose, and the spirit of the project had been betrayed. The Commission was entirely deaf to the claim that the dam could still improve the conditions of local farming. This stance was not only due to the fact that structural funds are usually intended for non-agricultural purposes.<sup>60</sup> More generally, the Commission is losing patience with the claimed inefficiency of Sicilian farming. EU funds dispensed under the heading of agricultural policy happen to sustain productions that would be quickly extinct if left to market forces.<sup>61</sup> It is well known, for instance, that many Sicilian oranges are left to rot on trees because picking them would cost more than their sale value, and that land owners prefer to collect their EU subsidies (Euro 800–1200 per hectare) without losing any money to labour.<sup>62</sup> As a consequence, the idea that much agricultural support is wasted on Sicily gains political ground, and the EU grows increasingly averse to sustaining the traditional agriculture of the island, with the exception of a few highly distinct productions.<sup>63</sup> The revocation of funds in the Gibbesi affair seems therefore in line with Brussels’ overall plan for the island—a land where archaeological sites, natural beauty and specialty products, rather than run-of-the-mill agriculture, are the real sources of comparative advantage. Of course,

<sup>56</sup> Case T-60/03, *Regione Siciliana* [2005] ECR II-4139, at 5.

<sup>57</sup> Allegato B, *supra* n 49, reports that the manufacturing plant near Licata, to which the dam was supposed to bring water, no longer exists.

<sup>58</sup> Regional Law 5 of January 20, 1999, *Soppressione e liquidazione degli enti economici regionali AZASI, EMS, ESPI* (Gazz. Uff. Reg. sic., Jan. 23, 1999, n. 4).

<sup>59</sup> Consorzio di Bonifica Gela 5, a subdivision of the regional agency for agriculture. This agency is also about to be suppressed, and the administration of the dam will fall into one of several competing municipalities. See Butera, *Le risorse idriche*, *supra* n 54.

<sup>60</sup> S. Bussoletti and R. Esposti, ‘Regional Convergence, Structural Funds and the Role of Agriculture in the EU’. *A Panel-Data Approach* 1, 2008. A special section of the Common Agricultural Policy, the European Agricultural Fund for Rural Development (EAFRD), is meant to support specifically farming infrastructure. Council Reg 1290/2005, Art 2, 2005 O.J. (L 209) 1, 6; Council Reg 1698/2005, Art 4, 2005 O.J. (L 277) 1, 9.

<sup>61</sup> A recent series of interviews was conducted among Sicilian durum wheat growers, with regard to ‘the real probability of the removal of community aid from 2013 onwards.’ The authors of the study report that ‘more than 50% of the interviewees believed they would not continue to cultivate durum wheat.’ M. Crescimanno, V. De Stefano and A. Galati, ‘Possible Future Scenarios for Sicilian Cereal Cropping in the Light of Current Trends in Agricultural Policy of the European Union’, (2008), available at <http://purl.umn.edu/44804> (last accessed 20 September 2011).

<sup>62</sup> R. Giovannini, ‘E le arance marciscono’, *La Stampa*, January 11, 2010.

<sup>63</sup> Several Sicilian wines are supported by EU legislation that grants protection to their denomination of origin, and also by funds aimed at advertising those wines outside of Europe. Also protected are such specialty products as oranges from Ribera, lemons from Siracusa and pistachios from Bronte.

this view may not do justice to some places' own understanding of their economy or to the aesthetics of their landscape; but it is well known that European integration has often demanded major shifts in the organisation of agricultural production (in some regions definitely more than in others).<sup>64</sup>

The context here outlined corroborates the logic of the Commission's decision, as well as its judicial affirmation. The Sicilian farmers thought that the dam would have helped *them*, but they were mistaken: common agricultural policy (CAP) and structural funds remain conceptually different from one another and make for very different items in the budget of the EU.<sup>65</sup> Good administration requires that they not be confused by disorderly local practices.

By contrast, the ECJ's insistence on inadmissibility is not as clearly justified by the context. The finding of admissibility for the Region of Sicily had enough grounding in precedents and secondary legislation to warrant the General Court's decision *as a matter of law*. The claim in these pages is that admissibility might also have been better *policy*. The final outcome—revocation of funds—would not have changed, but other—perhaps more fruitful—dynamics could have been triggered.

## V Standing and Context

'No direct concern'—the clear response given by the ECJ to Sicily's pleadings—meant a number of unpleasant things. First, Sicily is not in charge of its own awakening. Whether or not it feels the heat of the cancellation will depend on its ability to extract additional money from the national budget, not on its ability to demonstrate a purposeful use of the funds. Second, Sicily's version of the story, which by now finds no listeners in Rome, is of no interest in Luxembourg either. The stale and sterile interaction between the centre and the periphery of Italy, based on mutual mistrust, would not be revisited. Third, the money it receives from Brussels for a specifically Sicilian project really belongs to the national government, who will not fight to keep it. While enjoying a special status as a region with larger administrative autonomy than most, Sicily remains utterly dependent upon central action. All in all, structural funds may not be the kind of exogenous discontinuity that development economists deem essential to the South's revival.<sup>66</sup> There is no break with the past: the money that comes to the island is really only another instalment of national funding, whose waste Sicily will be blamed for without being given its day in a supranational court.

A pivotal element of the denial of standing to sub-state entities, in the reasoning of the ECJ, is the State's more than purely theoretical ability to bail the applicant out of its predicament. This argument presupposes a healthy relationship between the State

<sup>64</sup> The EU has, since its inception, identified areas where the cultural and aesthetic significance of a vital agriculture must be preserved at all costs, even if it defies economic logic and requires huge subsidies.

<sup>65</sup> According to some commentators, the reform of the CAP in 2003–2005 paid lip service to the Lisbon strategy, focused on job creation and at closing the disparity gap between regions, but it remained a self-contained policy at all practical levels. See R. Esposti, 'Reforming the CAP: An Agenda for Regional Growth?' (2008), available at <http://purl.umh.edu/44868> (last accessed 20 September 2011).

New evidence of an intent to coordinate the CAP with cohesion is to be found in more recent Commission documents. See European Commission, Directorate-General for Agriculture and Rural Development, 'Why Do We Need a Common Agricultural Policy?' (December 2009).

<sup>66</sup> cf. F. Barca, 'New Trends and the Policy Shift in the Italian Mezzogiorno', (2001) 130 *Daedalus* 93 (identifying in the 2000–2006 cycle of structural funds the possibility of a 'turnaround' in the economic policies of the South).

and its local government agencies—a relationship of dialogue and mutual trust. It also presupposes healthy finances and room for manoeuvre in the national budget. In the context of Southern Italy, such presumptions are often wrong.<sup>67</sup> In deciding whether to rescue the local entity from yet another incident of lost funding, the State is notoriously conditioned by financial constraints. Moreover, the central government operates in the entrenched assumption that the problems of the South are ‘intractable’ and that its decline is ‘irreversible.’<sup>68</sup> ‘No standing’ is therefore the kind of answer that flattens a hoped-for triangulation: the Commission’s decision to cancel funding is now sheltered from judicial scrutiny so that the State and its backward regions are left to their old and fruitless bilateral communication.

The reasons why local actors demand standing in their own right when structural funds are crunched are, of course, various and not equally meritorious.<sup>69</sup> It may not be the case that the local entity knows any more or any better than the national administration, and the State may be perfectly willing and able to discuss any problems occurred in the implementation of structural projects.<sup>70</sup> In general, a challenge initiated by the region may simply be a cheap signal of engagement sent by local politicians to prospective voters, with no added value *vis-à-vis* an equally plausible action brought by the relevant Member State.

It is possible, however, that sub-state actors aspire to independent standing for reasons that are either very substantive or highly symbolic from the viewpoint of cohesion. At a given point in recent history, the relation between Italy and its Mezzogiorno was characterised by the sense that Brussels’ cohesion policy would be the lift the South had been waiting for. In light of that history, the regions’ plea for standing becomes an important voice in contemporary European discourse and must be listened to. The following sections are meant to place that voice in context, historically and politically.

## VI Europe and the Southern Question

The destructive force of World War II (WWII) had pummelled the South of Italy more viciously than the north, thereby deepening an economic dualism as old as the political

<sup>67</sup> In Cases T-84/10 R & T-223/10 R, *supra* n 49, the region requested that the Commission decision to revoke funds be preliminarily suspended so as to prevent irreparable harm. It argued that it needed the money very badly to continue to perform its basic public functions. The Court reminded the region that money is only money, and that the lack of it is never *per se* cause of the sort of irreparable harm that court injunctions are meant to prevent (*ibid*, at 23). Impeccable at law, the court’s reply was properly indifferent to the region’s real problem. Structural funds should not, in theory, replace the state in its provision of basic services. But the funding cycle of 2000–2006 coincided with a major financial crisis for the state of Italy, and the traditional funding of the south suffered a severe crunch. Many lament the contraction of ordinary expenditures for the south, made possible by the diversion of extraordinary funds.

<sup>68</sup> cf. P. Schneider and J. Schneider, *Reversible Destiny* (University of California Press, 2003) (addressing directly this perspective and challenging the assumption that the Mezzogiorno is forever doomed to be ridden by criminality).

<sup>69</sup> A dispute concerning the contraction of structural funding for Puglia, was articulated in two identical suits brought separately by the region (Cases T-223/10 and T-84/10) *supra* n 49 and by the state (Case T-239/10, 2010 O.J. (C195) 31). Puglia’s independent filing may have been meant to pave the ground for requesting a suspension order, with local actors hoping that a claim of irreparable harm would have sounded more credible if voiced directly by the region.

<sup>70</sup> In Cases T-223/10 R and T-84/10 R *supra* n 49 for instance, the challenged Commission decision reveals deep involvement of the national bureaucracy with the case.

unification of the peninsula in 1861.<sup>71</sup> The lagging conditions of the South worried both national and international policy-makers, who saw the Mezzogiorno as potentially fertile ground for communist propaganda.<sup>72</sup> The history of Southern Italy since the aftermath of WWII is therefore characterised by money injections from a variety of sources—national, European and international—and development strategies of all political colours—from liberalist to statist.

Opinions differ as to whether the South was a net (and inapt) recipient of subsidies,<sup>73</sup> or rather a victim of camouflaged exploitation.<sup>74</sup> The first thesis emphasises the South's inability to spend, the criminal diversion of funds from proper usage, the political vice of sterile demagoguery, and the Southern ethos of unaccountability.<sup>75</sup> The exploitation thesis, by contrast, points at migration patterns depriving the South of its human capital, at the fact that infrastructural investment was small in comparison with the boost received by northern enterprises,<sup>76</sup> and more generally at the anti-Southern bias of liberalisation.<sup>77</sup>

The sociological understanding of the Southern question also ranges between two extremes. One view takes it at face value and accepts in full its premise: the South of Italy is different from the rest of the nation and from the whole of Europe. Because of its history, its geography or both, the South is an area with special features. Its differences from the rest of the continent are not just quantitative (more poverty, more crime); its problems are qualitatively different and therefore refractory to all known strategies of intervention. This approach inspired multiple macroeconomic strategies specifically aimed at reconstructing the South in the aftermath of WWII. Paradoxically, the same essentialist view of the South is at the core of currently powerful northern politics, which consider the Mezzogiorno unredeemable and demand its administrative and fiscal separation from the North of the peninsula.<sup>78</sup>

An alternative way to look at the Southern question is through the lens of cultural studies.<sup>79</sup> From this standpoint, the Southern question is no more than a cultural phenomenon created by the intellectual elite of post-unification Italy. The depiction of the South as populated by unredeemable creatures, brutalised by poverty and

<sup>71</sup> 'World War II [...] destroyed 28% of the south's already lagging industrial capacity (v. 18% in the north)': 'Hope in the Mezzogiorno', *Time*, June 13, 1955.

<sup>72</sup> C. Spagnolo, 'Appunti per una storia regionale dell'integrazione Europea nel Mezzogiorno', in C. Spagnolo and R. De Leo (eds), *Verso una Storia Regionale dell'Integrazione Europea*, (2010) at 7, 19. The Protocol concerning Italy, attached to the 1957 Treaty of Rome, refers to 'dangerous tensions' that might arise from high unemployment in certain regions of Italy, available at [http://eur-lex.europa.eu/it/treaties/dat/11957E/tif/TRAITES\\_1957\\_CEE\\_1\\_XM\\_0922\\_x1616x.pdf](http://eur-lex.europa.eu/it/treaties/dat/11957E/tif/TRAITES_1957_CEE_1_XM_0922_x1616x.pdf) (last accessed 20 September 2011).

Help for the reconstruction of the south came to Italy directly from the Marshall plan (see P. Paolo D'Attorre, 'Italian Reconstruction and "Depressed Areas": The Marshall Plan in the "Mezzogiorno"', (1987), available at [http://www.ces.fas.harvard.edu/publications/docs/pdfs/CES\\_11.pdf](http://www.ces.fas.harvard.edu/publications/docs/pdfs/CES_11.pdf) (last accessed 20 September 2011)) and also from the World Bank ('Hope in the Mezzogiorno', *Time*, June 13, 1955).

<sup>73</sup> Spagnolo, *supra* n 72, at 20 (discussing spending difficulties).

<sup>74</sup> L. Ricolfi, 'Il sacco del nord. Saggio sulla giustizia territoriale', (2009) (providing evidence for the exploitation thesis).

<sup>75</sup> S. Cassese, 'Federalismo e mezzogiorno', (2005) 19 *Rivista Economica del Mezzogiorno* 5 (positing the existence of a particular ethos of southern administration, characterised by an emphasis on job stability and unaccountability).

<sup>76</sup> N. Novacco, 'A proposito di 60 anni di (inadeguata) industrializzazione della Sicilia', (2005) 19 *Rivista Economica del Mezzogiorno* 925.

<sup>77</sup> Ricolfi, *supra* n 74.

<sup>78</sup> 'Centrifugal forces', *The Economist*, May 13th, 2010.

<sup>79</sup> Moe, *supra* n 7.

abjection, is in this perspective a fictional construction that has, by itself, generated the myth of Southern essentialism.<sup>80</sup> But because this framing has determined, for a century and a half, the shape of local and national politics, the branding of the South as special, and especially bad, has become a self-fulfilling prophecy.

The Community's approach to the South of Italy began simply as a projection of national politics, with no attempt to bring any original contribution to its understanding.<sup>81</sup> The Southern question had occupied national politicians, for better or worse, since Italy's unification in 1861, and it was clear to political elites in the 1950s that the liberalisation envisaged by the early Community treaties might outlaw some of the special regimes, such as state aids, that were part of Rome's strategy for the Mezzogiorno. Another piece of that strategy consisted of buying Southern votes by granting public funds without adequate spending plans, and without holding recipients accountable for results.

This sort of indiscriminate funding (aptly named 'a pioggia' or 'a fondo perduto') would not stop with European integration. Italy's entry into the common market came with a number of South-friendly provisions: Article 92.3 of the European Economic Community (EEC) Treaty, which allowed for intra-national transfers to backward regions;<sup>82</sup> the European Social Fund, aimed at boosting employment;<sup>83</sup> the European Investment Bank, presided by Italy in the early years of the Community;<sup>84</sup> and a special Protocol, annexed to the EEC Treaty upon Italian insistence.<sup>85</sup> In a Europe of six, the South of Italy had become the South of the whole Community.<sup>86</sup> The Mezzogiorno has since been the archetypal backward region of the EU and the reason why regional policy—often referred to as an afterthought—is rather written in the very DNA of European integration.

There is no univocal account of the socio-economic impact of European integration upon the Italian South. The inception of the CAP certainly allowed for a shift of resources towards agricultural regions, and agriculture accounted for a larger share of Southern economies.<sup>87</sup> On the other hand, for many years, the Community's

<sup>80</sup> Moe, *supra* n 7, at 297 (noting that 'the issue of representation is central to the Southern Question.')

<sup>81</sup> See J. Palayret, 'I Primi interventi della banca Europea per gli investimenti a favore del Mezzogiorno', Spagnolo and De Leo, *supra* n 72, 27, 40 ('The most serious limit of Community action consisted of its almost complete subordination to interventions decided at the national level. In this way, not only did the Community give up on having its own policy; it was not even able to correct the errors of the Italian government, whose effects the Community ended up amplifying.' Original in Italian. Translation by author). For a comprehensive analysis of the preservation, at Community level, of national administrative equilibria struck after WWII, see P.L. Lindseth, *Power and Legitimacy: Reconciling Europe and the Nation-State* (Oxford University Press, 2010).

<sup>82</sup> Treaty Establishing the European Economic Community Art 92.3, Mar. 25, 1957, 298 U.N.T.S. 11, (hereinafter EEC Treaty).

<sup>83</sup> Art 123–125 EEC.

<sup>84</sup> Protocol on the Statute of the European Investment Bank (EIB) annexed to the EEC Treaty, March 25, 1957. See Spagnolo, *supra* n 72, at 19. The EIB would fund a number of Infrastructural and industrial investments in the Italian south.

<sup>85</sup> Protocol on Italy annexed to the EEC Treaty, March 25, 1957.

<sup>86</sup> Spagnolo, *supra* n 72, at 18–19 (defining the Mezzogiorno as the first laboratory of Community regional policy, and noting some French interest in the policy because of France's overseas territories). Italy is divided 'between a rich "continental" northern part of the country and a poorer southern part whose characteristics are largely similar to many regions of the cohesion countries.' S. Tarditi and G. Zanas, 'Common Agricultural Policy', in R. Hall, A. Smith and L. Tsoukalis (eds), *Competitiveness and Cohesion in EU Policies* (Oxford University Press, 2001) 179, at 195.

<sup>87</sup> Tarditi and Zanas, *supra* n 86, at 194.

agricultural policy was centred on price support rather than infrastructural development, and therefore by design, it brought more help to those rural areas where infrastructures were already in place and productions abundant—namely the centre-north.<sup>88</sup>

In terms of industrialisation, the interventions of the Community in favour of Southern economies also had ambivalent effects. On one hand, the European Investment Bank contributed real money to the projects sponsored by the Cassa del Mezzogiorno (a financial institution set up in 1950 with the task of funding the infrastructural development of the South).<sup>89</sup> On the other hand, the bulk of the Community's industrial policy was geared towards boosting Italy's northern industrial poles,<sup>90</sup> making it impossible for the South to ever catch up.<sup>91</sup> It is a fact that Community-led initiatives, while prompting some change,<sup>92</sup> ultimately failed to close the north–south gap in Italy.

It is against this background that the impact of structural funds upon the Mezzogiorno must be assessed.

## VII The Dawn of Cohesion Policy and the Mezzogiorno

Regulation 17/64, concerning the guidance section of the CAP, provided the archetype of structural funds.<sup>93</sup> Projects for infrastructural renewal (public, private or mixed) would be submitted by the state for Commission approval. The requesting party (often a public entity) did not have to coincide with the beneficiary (often a cooperative of private parties). Co-financing of the state was necessary then as it is today.<sup>94</sup> This model did spur some interesting activity in the Mezzogiorno<sup>95</sup> but remained narrow in scope, marginal in quantity, and far from implementing any coherent policy of cohesion.<sup>96</sup>

<sup>88</sup> Price support transfers income from allegedly richer non-agricultural sectors to allegedly poorer agricultural sectors. It is, in this sense, distributively progressive. At a closer look, however, the transfer is regressive in three ways. First, it is a regressive tax on consumers because lower income households consume a larger share of their budget on food. Second, it transfers income to farmers in proportion to their production capacity, benefiting producers with large production capacity. Third, it helps landowners more than hired workers. See Tarditi and Zanas, *supra* n 86, at 205. Only in 1992 was the CAP reformed to address some of its most flagrantly regressive distribution effects.

<sup>89</sup> F. Pirro, 'L'industrializzazione in Puglia e nel Mezzogiorno: dall'avvio dei poli di sviluppo al progetto CEE per l'area Bari-Taranto (1957–1965)', in Spagnolo and De Leo, *supra* n 72, at 65 (highlighting the Commission's commitment to the industrial development of the Mezzogiorno in the early 1960s.) See also Novacco, *supra* n 76 (positing that the period that goes from the creation of the Cassa del Mezzogiorno (1950) to the mid '70s is characterised by targeted intervention, capable to stop at least the worsening of the north–south gap. Novacco traces the lessening of the Cassa's efficacy to the aftermath of the oil shock, which led to an industrial policy focused on keeping up the global competitiveness of the already advanced northern-Italian industry.)

<sup>90</sup> This pattern was already evident in the allocation of Marshall Plan money. By 1951, the significant loan of 30 million dollars to southern industry paled in comparison with the 121 million dollar loan made to Northern industries. D'Attorre, *supra* n 72, at n 36 and corresponding text.

<sup>91</sup> Novacco, *supra* n 76.

<sup>92</sup> In 1966, the Commission published with pride a report on a centre for industrial development built in Southern Italy, thanks to Community expertise and support. See L. Grazi, 'L'Italia e le origini della politica regionale comunitaria: il polo di sviluppo Bari-Taranto-Brindisi' (1957–1966), (2006) 21 *Annali della Fondazione Ugo La Malfa* 85.

<sup>93</sup> See J. McMahon, *European Trade Policy in Agricultural Products* (Martinus Nijhoff, 1988), at 20.

<sup>94</sup> The requisite of additionality was prescribed by Council Reg 4253/88, Art 9.1, 1988 O.J. (L 374) 1.

<sup>95</sup> R. De Leo, 'Politiche agricole per il mezzogiorno e integrazione europea: Il caso dell'Ente di Sviluppo in Puglia, Lucania e Molise' (1957–1977), *Spagnolo and De Leo, supra* n 72, at 49.

<sup>96</sup> De Leo, *supra* n 95, at 57–58 (explaining that funding through this regulation benefited the center-north more than the south of Italy). See also Palayret, *supra* n 81, at 39.



The idea of expanding this model of intervention beyond agriculture, and to transform it into a coordinated policy in favour of backward regions, was championed by the Commission already in the 1960s.<sup>97</sup> In the EEC Council, the Italian government was then the only proponent of a common fund for regional development.<sup>98</sup> France and Germany, by contrast, objected, respectively, to the expansion of Community policies and to devolving Community resources to this cause.<sup>99</sup> After the accession of the UK and Ireland (both countries with severely backward regions), the Commission's project took momentum, and the first European Regional Development Fund was established in 1975.<sup>100</sup> Subsequent reforms allowed the fund to grow in assets and to be further released from the grip of intergovernmental control.<sup>101</sup>

At each round of enlargement, new depressed regions entered the Community, and the Mezzogiorno became less special in the eyes of the Commission. Following the accession of Greece and in light of the imminent Iberian accession, Jacques Delors put forth the proposition that 'more Community financial assistance should be channelled to the South of Europe.'<sup>102</sup> Delors identified the 'southern flank' of the Community as an area of 'regions that sometimes have no means to pick up on their own,'<sup>103</sup> but his view of what counted as South was remarkably encompassing and allowed also many French and northern Italian regions to benefit from the newly instituted 'Integrated Mediterranean Programs.'<sup>104</sup>

By the time the Single European Act finally gave regional policy full dignity with primary legislation,<sup>105</sup> in principle, the Mezzogiorno stood to benefit from three different types of structural funds.<sup>106</sup> All the eight Southern Italian regions were covered by 'Objective 1' of the first round of structural fund programmes (1989–1993), with the express goal of accelerating the socio-economic cohesion of the South with the rest of Italy.<sup>107</sup> In practice, however, the political enthusiasm for curing Italy's economic

<sup>97</sup> See Commission, Direction Générale des Affaires économiques et financières, Lignes générales d'une politique régionale de la Communauté, Communication de Monsieur Marjolin, Bruxelles, November 11, 1960, II/COM (60) 167.

<sup>98</sup> L. Grazi, 'Origini e sfide della politica regionale comunitaria: dagli studi preliminari all'Atto unico europeo' (1957–1986), (2009) 30 *Memoria e Ricerca* 47, 51.

<sup>99</sup> *ibid.*, at 54.

<sup>100</sup> Council Reg 724/75, 1975 O.J. (L 73) 1 (replaced by Council Reg 1787/84, 1984 O.J. (L 169) 1). The ERDF was at least in part motivated by the need to compensate the UK for its net CAP contributions. See Balme and Chabanet, *supra* n 13, at 146.

<sup>101</sup> See Council Reg 2052/88, 1988 O.J. (L 185) 9 on the tasks of the Structural Funds and their effectiveness and on coordination of their activities between themselves and with the operations of the European Investment Bank and the other existing financial instruments. See also Council Reg 4253/88, 1988 O.J. (L 374) 1, laying down provisions for implementing Council Reg 2052/88 (subsequently amended by Council Reg 2082/93, 1993 O.J. (L 193) 20).

<sup>102</sup> Commission Communication, Integrated Mediterranean Programmes, February 20, 1985, in Bull. EC 2-1985 9, at 14, available at <http://aei.pitt.edu/2831/01/013.pdf> (last accessed 20 September 2011).

<sup>103</sup> Bull. EC 2-1985, *supra* n 102, at 12.

<sup>104</sup> Available at [http://aei.pitt.edu/4624/01/003992\\_1.pdf](http://aei.pitt.edu/4624/01/003992_1.pdf) (last accessed 20 September 2011), Commission May 1989, 7/89 (showing little variation in expenditures between certain southern and northern Italian regions).

<sup>105</sup> Single European Act, February 28, 1986, 1987 O.J. (L 169) 1 (hereinafter SEA). The SEA added arts. 130a–130e to the EEC Treaty under the new Title 'Economic and Social Cohesion.'

<sup>106</sup> The European Agricultural Guidance and Guarantee Fund, Guidance Section; the European Social Fund; and the European Regional Development Fund. EEC Treaty Art 130d.

<sup>107</sup> See A. Rainoldi, Dal 1989 al 2009. Vent'anni di intervento del 'Fondo europeo di sviluppo regionale' nel Mezzogiorno d'Italia: scelte allocative, utilizzo delle risorse e ruolo del fattore-tempo, (2010) 24 *Rivista giuridica del Mezzogiorno* 7, 9–10 (noting the Commission's explicit commitment to accelerate the socio-economic cohesion of the south with the rest of Italy).

dualism was fading. In Rome, the Cassa del Mezzogiorno, once an icon of national commitment to the socio-economic improvement of the South,<sup>108</sup> had come to symbolise inefficiency and demagoguery. In Brussels, it had become known that prior chunks of EU money had fallen onto a pile of unaccounted-for funding.<sup>109</sup> Evidence of irregularities and crimes in connection with the spending of European funds in Southern Italy was being gathered by the Commission.<sup>110</sup> The worst, however, was still to come.

The EU had just been born at Maastricht when very disturbing events plagued the Mezzogiorno. In 1992, two judges were assassinated for having dared to unearth certain criminal activities of the Sicilian Mafia.<sup>111</sup> Their deaths sent a shock through the spine of the whole country and left the South in a state of profound despair. In a Europe enlarged to 12 members and busy dismantling the remnants of the iron curtain, Sicily was as evidently problematic as it had been to the Community's founding fathers in Messina in 1955.

In the same year, buried under a mountain of criticism, the Cassa del Mezzogiorno was shut down. Also in 1992, by legislative fiat, benefits once aimed at the Mezzogiorno were extended to other backward areas of the country, signalling the end of an epoch.<sup>112</sup> In this climate, the experience of the 1989–1993 structural funds proved disastrous. Spending was delayed until after 1992.<sup>113</sup> National co-financing was not available,<sup>114</sup> and the regions seemed incapable of spending within given timelines. In 1993, over 500 million Ecus were transferred from regional to central Italian administrations so as not to lose the allocated funds.<sup>115</sup> Eventually, the Commission and the Italian government negotiated an agreement, allowing the expired structural funds to be used until the end of 1997.<sup>116</sup> Due to this delay, the next cycle of structural funds (1994–1999) received the attention of Italian administrators only in 1998.

It is hard to believe that anybody in that climate could genuinely see structural funds as an opportunity for the political renewal of the Mezzogiorno. A leap of faith of such proportions would indicate that, in terms of strategies for the South, Italy was scraping the bottom of the barrel. Yet the leap occurred, and faith materialised in concrete steps.

## VIII Structural Funds and Structural Change

In 1998, under the guidance of the Italian Minister of Treasury Carlo Azeglio Ciampi, the decision was made to use structural funds as an instrument of economic and

<sup>108</sup> G. Pescatore, *'La Cassa per il Mezzogiorno'. Un'esperienza italiana per lo sviluppo* (2008), esp. at 83 ff.

<sup>109</sup> Casual comments of the following tenor add to the desolation of the picture: 'In the 1980s, a new profession, that of the progettista, was born. The term refers to the "project consultant" who seeks European Commission funds on behalf of a town or governmental agency (presumably one lacking personnel competent to know how to manage public money efficiently, as though that were an esoteric art), and then spends these monies, taking a large commission for himself and his cohorts. [...] Considering the vast investments involved, the tangible results are precious few, apart from expensive vacation homes for the project administrators themselves,' available at <http://www.bestofsicily.com/mafia.htm> (last accessed 20 September 2011).

<sup>110</sup> I. Dawnay, 'EEC Mafia Report Faces Rejection', *Financial Times*, March 10, 1986.

<sup>111</sup> 'Giovanni Falcone and Paolo Borsellino', *Time*, October 24, 2006.

<sup>112</sup> S. Loddo, 'Old and New Intervention Policy: A Survey of Empirical Studies for the Mezzogiorno', (2004) at 13. Available at <http://veprints.unica.it/294/1/04-01.pdf> (last accessed 20 September 2011).

<sup>113</sup> Rainoldi, *supra* n 107, at 10–11.

<sup>114</sup> *ibid.*

<sup>115</sup> *ibid.*

<sup>116</sup> *ibid.*

cultural transformation for the South.<sup>117</sup> Development policies, until then handled by a separate Ministry, were subsumed under the umbrella of the Treasury, which undertook a strongly centralised policy-making function.<sup>118</sup> A leftist coalition was then in power and enjoyed unusually stable political support.<sup>119</sup> The left had always championed the Southern question and could not afford preaching austerity in the Mezzogiorno, but it could—by borrowing the logic of structural funds—tout a message of change: emphasis would now be placed on ex-ante vetting and ex-post evaluation of the projects receiving EU money. The seemingly obvious demand for accountability coming from Brussels would be, if taken seriously, a veritable break with the past for Italy's Southern policy.<sup>120</sup>

The 2000–2006 structural funds cycle acquired unprecedented importance in Italian politics and seemed for a while poised to prompt a shift in the architecture of southern administration. Regions were explicitly asked to take full charge of the new projects and to rise to the new, extraordinary occasion brought to them directly by the European Commission. Regions would develop proposals rich in territorial knowledge, and local actors would fill in the necessary details.<sup>121</sup> The emphasis on local socio-economic specificities would also have the welcome result of disaggregating the South and disassembling the monolith of northern prejudice.<sup>122</sup> The very elaboration of local projects would bring to the fore different realities with both liabilities and assets, which would no longer be flattened onto a single plateau of misery.<sup>123</sup>

A key player was a notable economist, Fabrizio Barca, called by Ciampi to lead the development policies of the Treasury.<sup>124</sup> Barca's own account of this 'Nuova Programmazione Regionale' (NPR) is a story of concrete efforts, aimed at transforming the culture of the southern bureaucracy involved in the design and implementation of structural funds in Italy:

<sup>117</sup> C. Azeglio Ciampi, 'Premessa', in Ministero del Tesoro, del Bilancio e della Programmazione Economica, (1998) *Cento Idee per lo Sviluppo. Schede di Programmazione 2000–2006*, iii, available at <http://www.dps.mef.gov.it/documentazione/docs/all/doc03.pdf> (last accessed 20 September 2011).

<sup>118</sup> G.P. Manzella, 'Intervista a Fabrizio Barca, Dove va la politica regionale europea? Riflessioni tra Bruxelles ed esperienza meridionalista', (2009) 23 *Rivista giuridica del mezzogiorno* 1173, 1174.

<sup>119</sup> Since 1947, no other Italian government had received the full support of the entire range of leftist parties in the Italian Parliament. The Prodi I government (1996–1998) did. In October 1998, Romano Prodi, who would later preside the European Commission (1999–2004), was replaced by Massimo d'Alema as Prime Minister. With D'Alema, the left remained in power until 2001, when Silvio Berlusconi's centre-right party, Forza Italia, conquered a large electoral base.

<sup>120</sup> F. Barca, 'Regional Policy Experience in Southern Italy', in B. Funck and L. Pizzati (eds), *European Integration, Regional Policy, and Growth* (World Bank, 2003), at 129, 133. ('The EU method [ . . . ] gave us [ . . . ] not only credibility but ideas and principles that are becoming part of a shared vision of economic policy.')

<sup>121</sup> The economic theory behind creating incentives to information sharing is known as 'incomplete contract theory.' See É. Brousseau and J.M. Glachant, 'The Economics of Contracts and the Renewal of Economics', in É. Brousseau and J.M. Glachant (eds), *The Economics of Contracts* (Cambridge University Press, 2002), at 3.

<sup>122</sup> Spagnolo, *supra* n 72, at 7–8 (discussing the intellectual developments of the 1980s aimed at disaggregating the concept of 'South' and at highlighting the plurality of experiences of each locality).

<sup>123</sup> Moe, *supra* n 7, at 299, critiquing the 'tendency to turn a spectrum of differences into a (north–south) dichotomy'.

<sup>124</sup> Manzella, 'Intervista a Fabrizio Barca', *supra* n 118. Barca remained in charge of the department for development and cohesion until the beginning of 2006.

Models were used to establish benchmarks for policy, evaluation guidelines were produced, and investment in evaluation capacity was undertaken at national and regional levels. These initiatives . . . improved the knowledge base for decision-making and contributed to a more rigorous and open debate on policy choices.<sup>125</sup>

Benchmarks, guidelines and evaluations were rightly touted as real novelties *vis-à-vis* the entrenched pattern of unaccounted-for subsidies. In December 1998, hope found its fulcrum in a convention held in Catania (a major economic and cultural pole in Sicily).<sup>126</sup> The convention was youthfully branded ‘100 Ideas for the South’ and was preceded by the redaction of a hefty document of proposals commissioned, as a platform for discussion, by the Treasury.<sup>127</sup> Excitement and energy abounded in Catania. The group ended the 3 days of work with a written manifesto, nailing down objectives and raising the stakes of the reform.<sup>128</sup> At several levels of administration, old heads fell, and new, technically competent personnel were hired.<sup>129</sup> The Ministry told regions—as opposed to municipalities—that the reform was really for them to have and to hold. A strong sense of civic and political mission characterised the whole enterprise.<sup>130</sup>

By the end of the cycle (2000–2006), modest progress had been made. Ex-ante planning had prevented funds from being diverted from their original purpose; the benchmarks designed at the start had allowed for measurements, and measurements had quantified Italian successes and failures with a welcome dose of accuracy.<sup>131</sup> Overall, however, the culture of structural-fund bureaucracy had not yet been transformed in the process. Most planning had been hopelessly vague; the allegedly meritocratic selection of worthy projects had soon reverted to the old way of funding (again ‘a pioggia’) for all sorts of initiatives.<sup>132</sup> Implementation had been sloppy.<sup>133</sup> The Commission had found itself mired in verifications and accounting that should have been performed by local actors. Most importantly, the envisaged participatory forum for political exchange in matters of cohesion had simply not emerged.<sup>134</sup> The political shift following the 2001 elections had dislodged some of the structures carefully put into place only 3 years earlier.<sup>135</sup> The financial crisis had cast its shadow on the whole of

<sup>125</sup> F. Barca, ‘European Union Evaluation Between Myth and Reality: Reflections on the Italian Experience’, (2006) 40 *Regional Studies* 273–276.

<sup>126</sup> D. Di Vico, ‘Ciampi: Cento idee per il sud’, *Corriere della Sera*, Nov. 27, 1998.

<sup>127</sup> Cento idee, *supra* n 117.

<sup>128</sup> F. Giannino Bassetti, ‘La Conversazione con Fabrizio Barca’, November 19, 2007 (hereinafter *Conversazione*), available at [http://www.fondazionebassetti.org/it/labires/2008/01/la\\_conversazione\\_con\\_fabrizio\\_1.html](http://www.fondazionebassetti.org/it/labires/2008/01/la_conversazione_con_fabrizio_1.html) (last accessed 20 September 2011).

<sup>129</sup> *ibid*, at 6.

<sup>130</sup> L. Cannari, M. Magnani and G. Pellegrini, ‘What Policies Do We Need for Southern Italy? The Role of National and Regional Policies in the Last Decade 1’, (2009), at 59, available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1605208](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1605208) (last accessed 20 September 2011).

<sup>131</sup> F. Barca, *Audizione al Senato, Rome, December 11, 2008*, in *Il futuro della politica di coesione dopo il 2013*, available at xiii. [http://www.senato.it/documenti/repository/lavori/affarieuropei/dossier/XVII/Dossier%2031\\_AP.pdf](http://www.senato.it/documenti/repository/lavori/affarieuropei/dossier/XVII/Dossier%2031_AP.pdf) (last accessed 20 September 2011).

<sup>132</sup> Cannari *et al.*, *supra* n 130, at 51 lamenting that project selectivity ended up being more relaxed than expected).

<sup>133</sup> Corte dei conti, *L’impatto del Fondo europeo di sviluppo regionale nel Mezzogiorno* (2010), at [http://www.corteconti.it/export/sites/portalecdc/\\_documenti/controllo/sez\\_contr\\_affari\\_com\\_internazionali/2010/delibera\\_n.\\_4\\_2010\\_e\\_relazione.pdf](http://www.corteconti.it/export/sites/portalecdc/_documenti/controllo/sez_contr_affari_com_internazionali/2010/delibera_n._4_2010_e_relazione.pdf) (last accessed 20 September 2011).

<sup>134</sup> Barca, *Audizione al Senato, supra* n 131, at xiv. Barca notices that there is no discussion of cohesion policy at the level of EU Council of Ministers.

<sup>135</sup> *Conversazione, supra* n 128, at 6. In spite of electoral shifts, Dr Barca remained in charge of Italian development policies through 2006.

Europe and affected severely the demand for goods and services in the South of Italy, with disastrous consequences in terms of economic growth. The spirit—if not the form—of additionality, a fundamental feature of structural funds, had been betrayed.<sup>136</sup>

The momentum of the late 1990s is now gone, and the dam on the Gibbesi is a sad monument to many instances of disillusion. The hope was that structural funds would break intra-national gridlock and jumpstart a process of southern renewal. Cohesion was a promise of rescue, but for places like Licata, it is now at best just money, and at worst water into the sea. The South can now boast icons of economic recovery, such as the modernised airports of Bari and Catania, but it remains a land of severely underutilised social and material capital. The Italian political debate reveals deep disagreement on how to handle the economic dualism of the country. Even basic facts (how much was spent for the Mezzogiorno, which proportion of these expenditures was budgeted as ordinary, what counted as special intervention, and how much of it was siphoned to other goals) remain opaque.<sup>137</sup> According to a study published by the Bank of Italy in 2009, the problems of the Mezzogiorno stay in large part unsolved.<sup>138</sup>

There is, however, a legacy worth treasuring, which may bring later fruits if adequately sustained. Even highly critical accounts acknowledge that the causes of failure were mostly exogenous to the design of the regional policy,<sup>139</sup> and all agree that the grid of deadlines imposed by each cycle of structural funds is way too tight for the current state of Italian administration.<sup>140</sup> The long-term effects of the 1998 design may be yet to be seen.

## **IX Southern Renewal and Locus Standi**

The novelty of the NPR and its long-term potential should not be underestimated. The credibility of the actors involved, all endowed with tremendous academic credentials, technical expertise and proven leadership, was *per se* an extraordinary break with the past of regional policy. It challenged not only the Italian way of doling out money for purely electoral goals, without either planning or accountability. It also took EU cohesion policy more seriously than Brussels ever did. No longer would structural funds be reduced, in substance, to side payments offered to Member States to buy their consent to EU enlargement or unrelated policy decisions.<sup>141</sup> The funds would be taken as opportunities for economic growth and, no less importantly, for enhancing the quality of human interaction among all levels of administration. The focus on human capital in the NPR was at the core of the 1998 agenda of the Treasury. It found its intellectual matrix in the Bank of Italy—professional alma mater of Dr Barca and headed for many years by Ciampi himself<sup>142</sup>—whose distinguished affiliates were

<sup>136</sup> Cannari *et al.*, *supra* n 130, at 61.

<sup>137</sup> Attività della Commissione V (Bilancio, Tesoro e Programmazione) della Camera dei Deputati, 24 *Rivista giuridica del mezzogiorno* 341 (2010) (reporting numerous requests for accounting clarifications expressed by members of the Italian Parliament).

<sup>138</sup> Cannari *et al.*, *supra* n 130, at 5.

<sup>139</sup> *ibid.*, at 59.

<sup>140</sup> Rainoldi, *supra* n 107. See also *Conversazione*, *supra* n 128, at 9.

<sup>141</sup> cf. A. Moravcsik, 'Reassessing Legitimacy in the European Union', (2002) 40 *Journal of Common Market Studies* 603, 607 (defining structural funds as side payments).

<sup>142</sup> Carlo Azeglio Ciampi was governor of the Bank of Italy from 1979 to 1993.

studying the correlation between financial vitality and interpersonal trust.<sup>143</sup> The NPR flipped upside down the causal chain of Mezzogiorno strategies:<sup>144</sup> rather than considering social capital only a side effect of prosperity, the NPR would *begin* with fiduciary relations between private actors and public administrations, create channels of mutually beneficial collaboration, instil trust, and only then place economic growth on this foundation.

There are signs that some of this vision has taken roots and may survive:

Good results have been obtained in terms of method, especially in matters of planning, evaluation and monitoring of intervention. The planning system applied to Community funds has contributed to spread a culture of transparency, which has in turn affected the planning for national expenditures in developing areas and should be further transferred to all national policies of public spending.<sup>145</sup>

There is even talk of ‘a new attitude of the regions.’<sup>146</sup> The icons of development that have been made possible with EU intervention—new airports, high-speed trains and school laboratories—surely engendered a sense of pride in those who planned and completed them. However small and insular, the instances of social capital accumulated around each territorial project deserved acknowledgment. And they got it, albeit indirectly. A tribute to the intellectual leadership of the NPR came from Brussels when Danuta Hübner, then commissioner for regional policy, asked Dr Barca to prepare a report on cohesion policy. By then, Barca was no longer head of development policies in Italy and would write the report with the whole of the EU in mind.<sup>147</sup> His particular experience, however, informs the whole document. Crucial to the report is the insistence on gathering place-based expertise. Following the theoretical matrix of incomplete contracts, the report assumes the importance of grass-root input and participation in the design of targeted intervention.<sup>148</sup> Wherever resources are underutilised, empowerment and accountability of the base are essential.

Against this rich background, the question whether to grant regions standing in matters of structural funds takes another meaning altogether.

We are now in the middle of a new cycle of structural funds (2007–2013), probably the last to embrace so generously the regions of Italy’s South.<sup>149</sup> The critique of indiscriminate funding and the plea for accountability come now from the right.<sup>150</sup> This time, the reprimand of administrative agencies’ inefficiency is harsher and further

<sup>143</sup> L. Guiso, P. Sapienza and L. Zingales, ‘The Role of Social Capital in Financial Development’, (2004) 94 *American Economic Review* 526.

<sup>144</sup> Cannari *et al.*, *supra* n 130, at 28.

<sup>145</sup> Aldo Mancurti (head of department for development and cohesion of the Ministry for Economic Development), ‘Audition before the Chamber of Deputies of the Italian Parliament, January 27, 2010’, (2010) 24 *Rivista Giuridica del Mezzogiorno* 341, 345 (original in Italian. Translation by author).

<sup>146</sup> *ibid.*, at 349.

<sup>147</sup> The report emphasises growth over redistribution, in marked opposition to the practice of considering structural funds mere compensation for those left behind by liberalisation. Consequently, the report promotes cohesion for all situations of unrealised socio-economic potential, and dismisses the emphasis—typical of traditional Mezzogiorno politics—on regional backwardness. Barca Report, *supra* n 16, at XIII- XIV.

<sup>148</sup> *ibid.*, at XIII.

<sup>149</sup> On May 5th, 2009 in Palermo, a well-attended political conference was convened under the title ‘South 2007/2013: The Last Occasion,’ available at [http://finanziamentipubblici.it/files/Bollettino%20Ufficiale%2020.04.09\\_15.05.05.pdf](http://finanziamentipubblici.it/files/Bollettino%20Ufficiale%2020.04.09_15.05.05.pdf), at 14 (last accessed 20 September 2011).

<sup>150</sup> ‘Intervista a Cristiana Coppola, Diciamo basta agli aiuti a pioggia, ora cabina di regia’, *Il Sole 24 Ore*, Feb. 19, 2010.

animated by small-government rhetoric.<sup>151</sup> In many places, tea-party propaganda has displaced the idea that structural funds could empower local administrations, change the culture of bureaucracies, engender real public–private partnerships, and trigger renewed trust in sub-state agencies.

In this climate, many would probably agree with the merits of the judicial opinions discussed earlier in these pages. When it comes, however, to deciding whether or not to grant regions their day in court—their right to give their version of the story and to claim good faith in the implementation of the funds—a different result might emerge. If we asked, we might find that a more generous understanding of ‘direct concern’ in annulment actions is the policy of choice across the political spectrum. For those who see structural funds as a reason for rejuvenating the role of sub-state actors and for infusing them with the pride of accountability, the possibility of shedding judicial light on the region’s failures would be probably seen as essential.<sup>152</sup> The revolution envisaged in 1998 saw Italian regions as pivotal elements of the new administrative construction, primary gatherers of individual preferences and necessary participants at every stage—from conception to completion—of each funded project.<sup>153</sup> The finding that the region has no standing runs contrary to that institutional design. Besides, it might be important for all (including northern federalists) to see sub-state actors take the stand and try to explain their own shortcomings. Policy views might converge in favour of standing.

Policy considerations are, of course, subordinate to textual argument. But when the General Court and the ECJ disagree about the mandates of EU law in a given case, policy nestles comfortably in the wedge, and matters. Article 263 TFEU contains sufficient safeguards against the undue proliferation of actions for annulment brought by sub-state actors. Within the limits identified by the General Court, standing might have been affirmed with no major downsides and with some benefits.

## X Standing and Taxonomy

The ECJ’s finding that the state is *the* proper applicant in structural funds-related litigation is supported by legal text and firmly based on grounds of judicial economy. Insisting on a centralised conception of the state also yields the convenient side effect of keeping out of the Court the debate on fiscal and administrative devolution, which currently plagues Italian politics and is notoriously echoed by secessionist movements in other Member States. In general, it is prudent for the Court to avoid questions of national law concerning the attribution of competences to sub-state entities.<sup>154</sup> For all these reasons, the ECJ may continue on its path, denying standing to regions and/or other sub-state actors, and allowing only a small fraction of cohesion disputes into its chambers.

As discussed in these pages, this course of action would be misaligned with the emphasis on organic territoriality that characterises the contemporary understanding

<sup>151</sup> N. Picchio, ‘Mezzogiorno, incentivi e fondi Ue più «mirati»’, *Il Sole 24 Ore*, Feb. 19, 2010.

<sup>152</sup> Scott and Sturm, *supra* n 12. A classic US-based account of how relaxation of standing requirements enhanced accuracy, consistency and legality in the action of administrative agencies, together with a critical assessment of this ‘reformation’, is to be found in R. Stewart, ‘The Reformation of American Administrative Law’, (1975) 88 *Harvard Law Review* 1667, esp. at 1723 ff.

<sup>153</sup> *Conversazione*, *supra* n 128, at 4.

<sup>154</sup> See A. D’Atena, ‘Subsidiarity and Division of Competences Between European Union, Its Member States and Their Regions’, in I. Pernice and R. Miccù (eds), *The European Constitution in the Making* (Nomos, 2003), at 135, 139.

of cohesion policy, as envisaged in the Barca Report and in the very language of the Treaty of Lisbon.<sup>155</sup> But this is not all. This course of action would also perpetuate the optical illusion by which welfare matters remain peripheral to the EU enterprise. Standing requirements, if applied strictly, prevent many dramas of cohesion policy from being played in Luxembourg, and therefore allow other EU matters to dominate, as always, the scene.

There is, in EU literature, an evolutionary account according to which the redistributive portion of the integration project came onto the radar screen of the Union's institutions only as an afterthought. At the dawn of the third millennium, one reads that

[T]he EU has travelled a very long way since the time of the original treaties. . . . [Now] there are also important redistributive instruments at the Union level aiming at the reduction of existing disparities. The link between the internal market and the EMU on the one hand and redistribution on the other has become firmly established.<sup>156</sup>

To be sure, as observed earlier in these pages, the founding fathers of the Community were much more aware of welfare disparities than they receive credit for. They worried a great deal about the fact that the common market would bring prosperity only to some areas and saw it as their joint responsibility to correct such inevitable imbalances. The form of such corrections, however, remained for a long time intergovernmental. As a consequence, cohesion policies remained at the margins of Community *law* for a long time. Indeed, path-breaking reflections on European economic constitutionalism dealt with the realisation of market freedom<sup>157</sup> and focused on the Ricardian view that trade between individuals, unencumbered by protectionist regulation, would bring both peace and prosperity. Socio-economic convergence would result not from deliberate top-down intervention but rather from the realisation of comparative advantage by way of private exchange of goods, factors of production and services. The fact that massive transfers of money and veritable shifts in wealth were occurring, under the heading of CAP, through the definitely not Ricardian tool of public subsidies, somehow did not taint that line of reflection.

To this day, there is, within the Union, a fully fledged apparatus of trade law built upon the realisation of the four freedoms. Within this framework, the ECJ is always comfortably striking balances between economic and/or social conflicting interests, even when this involves making dramatic redistributive choices.<sup>158</sup>

By contrast, the Court is much less confident in its jurisdictional reach when it comes to development policies, which, inside Europe, take the code name of cohesion. The Commission defines cohesion policy as openly redistributive.<sup>159</sup> This does not mean—the Commission explains—that income is redistributed from rich to poor as in

<sup>155</sup> TFEU Title XVIII, Economic, Social and Territorial Cohesion.

<sup>156</sup> M. Dunford, R. Hall, A. Smith and L. Tsoukalis, 'Introduction', in *Hall, Smith and Tsoukalis, supra* n 86, at 4–5.

<sup>157</sup> eg M. Maduro, *We the Court: The European Court of Justice and the European Economic Constitution* (Hart, 1998).

<sup>158</sup> Notably in Case C-438/05, *Transp. Workers' Fed'n v Viking Line ABP (Viking)* [2007] ECR I-10779 and Case C-341/05, *Laval un Partneri v Svenska Byggnadsarbetareförbundet (Laval)* [2007] ECR I-11767.

<sup>159</sup> European Commission, Unity, solidarity, diversity for Europe, its people and its territory, Second report on economic and social cohesion, Part III.1 (2001), available at [http://ec.europa.eu/regional\\_policy/sources/docoffic/official/reports/p31\\_en.htm](http://ec.europa.eu/regional_policy/sources/docoffic/official/reports/p31_en.htm) (last accessed 20 September 2011) ('Redistributive expenditure is the main instrument of cohesion policy.')



nation-states' politics.<sup>160</sup> Rather, cohesion is meant to bring EU resources in areas where endogenous growth needs an exogenous jump-start, with the result of enhancing the welfare of those who live in backwards regions. This targeting of welfare goals, however indirect, is enough to give the court pause. On its face, the adjudication of structural funds might resemble the old case law on agricultural policy: in both lines of cases, the issue is whether Commission funds have reached their intended destination. But structural funds, contrary to CAP instruments,<sup>161</sup> partake of the fuzziness of new governance, which by definition blurs the line between supranational law and inter-governmental politics.<sup>162</sup>

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

*First submission: January 2011*

*Final draft accepted: January 2011*

<sup>160</sup> *ibid*, The Commission explains that 'cohesion policies are aimed at increasing investment to achieve higher growth and are not specifically concerned either with expanding consumption directly or with redistribution of income. This differs fundamentally from national cohesion policies that are in part aimed at transferring income to the poorest areas'.

<sup>161</sup> A. Mairate and R. Hall, 'Structural Policies', in Hall, Smith and Tsoukalis, *supra* n 86, at 318 (noting that structural funds are discretionary while CAP funds are granted automatically when certain conditions apply; moreover, structural funds require shared management).

<sup>162</sup> K. Armstrong and C. Kilpatrick, 'Law, Governance, or New Governance? The Changing Open Method of Coordination', (2007) 13 *Columbia Journal of European Law* 649, 674 (illustrating, with reference to Commission documents, how cohesion policy is related to matters of social inclusion, healthcare and pension reform).

<sup>163</sup> Barca Report, *supra* n 16, at XIII.

<sup>164</sup> L. Hancher and P. Larouche, 'The Coming of Age of EU Regulation of Network Industries and Services of General Economic Interest', in P. Craig and G. de Búrca (eds), *The Evolution of EU Law* (Oxford University Press, 2nd edn, 2010) (positing that EU law is in the process of moving from a static legal paradigm to a new paradigm which 'is more dynamic, integrative and inter-disciplinary. [ . . . ] It leads to "managed competition", where EU law integrates other objectives besides market access').