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## THE ITALIAN “NETWORK CONTRACT”: A NEW TOOL FOR THE GROWTH OF ENTERPRISES WITHIN THE FRAMEWORK OF THE “SMALL BUSINESS ACT”?

### BRIEF COMMENTS ON THE ITALIAN LAW 9 APRIL 2009, N. 33, ART. 3, CO. 4-TER

*Chiara Ferrari\**

As a forerunner in Europe, Italy adopted in April 2009 a law on the “network contract,” under the auspices of the Small Business Act (SBA), aimed at enhancing collaboration among enterprises to increase their potential for innovation, research, and development. The Italian network contract, as a new tool for enterprises’ growth, may drive the attention of other Member States and European institutions towards contractual models of inter-firm coordination and towards the possible creation of more comprehensive solutions at the E.U. level.

The Article, after an overview of the most recent European policies in favor of small and medium enterprises, provides a brief description of the essential elements of the network contract and a critical analysis of some crucial issues posed by this new contractual form of collaboration.

#### I. INTRODUCTION: THE EUROPEAN FRAMEWORK FOR SMEs

Small and medium enterprises (“SMEs”) are the engine of the European economy<sup>1</sup> and have been the target of several policies implemented by E.U. institutions since 2000.<sup>2</sup>

In June 2008, the Commission adopted the SBA, which is specifically aimed at creating a level playing field for SMEs throughout the European Union and at enhancing “SME-friendly”

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<sup>1</sup> SMEs represent 99% of the E.U. non-financial business economy and contributed up to 84% to the employment growth between 2002 and 2007. EIM Business and Policy Research, *First Section of the Annual Report on EU Small and Medium-Sized Enterprises*, at 5 (Jan. 12, 2009), available at [http://ec.europa.eu/enterprise/policies/sme/files/craft/sme\\_perf\\_review/doc\\_08/spr08\\_annual\\_reporten.pdf](http://ec.europa.eu/enterprise/policies/sme/files/craft/sme_perf_review/doc_08/spr08_annual_reporten.pdf).

<sup>2</sup> See *Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions: “Think Small First,” A “Small Business Act” for Europe*, at 2, COM (2008) 394 final (June, 25 2008) [hereinafter SBA]; Parliament and Council Decision 1639/2006/EC, Establishing a Competitiveness and Innovation Framework Programme (2007 to 2013), 2006 O.J. (L310) 15; *Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions: A Single Market for the 21st Century Europe*, COM (2007) 724 final; *Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions: Small and Medium-Sized Enterprises—Key for Delivering More Growth and Jobs: A Mid-Term Review of Modern SME Policy*, COM (2007) 592 final; *Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions: Implementing the Community Lisbon Programme—Modern SME Policy for Growth and Employment*, COM (2005) 551 final; European Charter for Small Enterprises, adopted by the General Affairs Council on June 13, 2000 and endorsed by the European Council in Santa Maria de Feira of June 19–20, 2000, available at [http://ec.europa.eu/enterprise/policies/sme/files/charter/docs/charter\\_en.pdf](http://ec.europa.eu/enterprise/policies/sme/files/charter/docs/charter_en.pdf).

policies. The objective is to facilitate SMEs' growth and innovation. The SBA is founded on ten key principles that should guide national and Community policy-makers in taking SMEs' interests into account at the very early stage of policy-making (the so called "Think Small First" principle).<sup>3</sup>

A year after the adoption of the SBA,<sup>4</sup> both the Commission and Member States<sup>5</sup> took substantial actions to improve framework conditions for SMEs, with a particular focus on the most urgent issues posed by the financial and economic crisis—namely, the access to finance and the removal of unnecessary administrative burdens. One of the crucial areas which the Commission and Member States are still called to work on is boosting innovation and research and development (R&D). In this context, the development of a cluster strategy,<sup>6</sup> also with a view to encourage transnational cooperation, is explicitly mentioned by the Commission among the practical measures to implement the SBA.<sup>7</sup>

Collaboration represents an increasing tendency among European SMEs<sup>8</sup> and is considered an effective solution enabling the achievement of development strategies (either to improve production processes or to increase competitiveness based on innovation and quality). However, the recent SBA lacks clear guidelines for designing models of inter-firm collaboration.

In addition to the actions taken in the fields of industrial and enterprise policy, the European Union has also adopted regulations establishing a harmonized legal framework for setting up businesses. European institutions, though, seem to have focused more on provisions concerning organizational devices to conduct business activities—some of which are not necessarily aimed at enhancing inter-firm collaboration—than on contractual forms of coordination. Except for the Regulation on the European Economic Interest Grouping (the EEIG),<sup>9</sup> which can be viewed as a sort of hybrid model between contracts and organizations, the other European interventions

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<sup>3</sup> SBA, *supra* note 2. The ten key principles are the following: create a "friendly environment" for entrepreneur and family businesses; support honest entrepreneurs who faced bankruptcy, providing them a "second chance"; design rules according to the "Think Small First" principle; adapt public administration to the needs of SMEs, removing administrative barriers; adapt public policy tools to the needs of SMEs, in particular in terms of awarding public procurement contracts and allocating State aid; facilitate SMEs' access to different types of finance; ensure that SMEs benefit from the opportunities offered by the Single Market; promote SMEs' potentials for innovation, research, and development; foster the turning of environmental challenges into opportunities for SMEs; support SMEs in opening towards external markets.

<sup>4</sup> *Commission Working Document, Report on the Implementation of the SBA*, COM (2009) 680, available at [http://ec.europa.eu/enterprise/policies/sme/small-business-act/implementation/files/sba\\_imp\\_en.pdf](http://ec.europa.eu/enterprise/policies/sme/small-business-act/implementation/files/sba_imp_en.pdf).

<sup>5</sup> In Italy the SBA has been adopted by a Prime Minister's Directive of 27 November 2009, available at [http://www.governoitaliano.it/GovernoInforma/Dossier/direttiva\\_pmi/Direttiva\\_Governo\\_SBAct\\_27nov09.pdf](http://www.governoitaliano.it/GovernoInforma/Dossier/direttiva_pmi/Direttiva_Governo_SBAct_27nov09.pdf).

<sup>6</sup> The link between innovation, competitiveness, and inter-firm cooperation had already been recognized in previous policy interventions, emphasizing also the relevance of a cross-border dimension. See Parliament and Council Decision 1639/2006/EC, *supra* note 2, Recital 35, arts. 10.2.b, 12, 13; *Communication from the Commission, Implementing the Community Lisbon Programme*, *supra* note 2.

<sup>7</sup> See European Parliament Resolution of 10 March 2009 on the Small Business Act, P6\_TA(2009)0100, ¶¶ 34–35, available at <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+TA+P6-TA-2009-0100+0+DOC+PDF+V0//EN>.

<sup>8</sup> See EUROSTAT, EUROPEAN BUSINESS—FACTS AND FIGURES 27 (2007), available at [http://epp.eurostat.ec.europa.eu/cache/ITY\\_OFFPUB/KS-BW-07-001/EN/KS-BW-07-001-EN.PDF](http://epp.eurostat.ec.europa.eu/cache/ITY_OFFPUB/KS-BW-07-001/EN/KS-BW-07-001-EN.PDF).

<sup>9</sup> Council Regulation 2137/85, On the European Economic Interest Grouping (EEIG), 1985 O.J. (L 199) 1 (EEC), available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31985R2137:en:HTML>.

concentrate on corporate vehicles such as the European Company,<sup>10</sup> the European Cooperative Company,<sup>11</sup> and recently the European Private Company.<sup>12</sup> Yet, SMEs often prefer growing strategies that do not imply the creation of a separate entity or the loss of their own independence (through a merger). The reasons could be manifold. Among the more important ones, setting up a new organization could be not only more costly but it could also result in greater rigidity, limiting the ability of the enterprise to react to new circumstances and changes in market demands.

The absence of common forms for contractual coordination and of common principles of European contract law to be applied to these particular schemes could affect the smooth functioning of the internal markets and hamper SMEs’ growth, especially in their internationalization strategies.<sup>13</sup>

As a forerunner in this framework, in April 2009 Italy adopted Law 9 April 2009, n. 33<sup>14</sup> on the “network contract” (the “Network Contract Law”) that, following the direction recently sketched by the European Union, promotes the development of inter-firm cooperation strategies to foster enterprises’ innovation and growth. This law represents a novelty in Europe and may offer new challenges and hints for future discussion at European and national levels on further implementations of the “Think Small First” principle.

## II. THE ITALIAN LAW 9 APRIL 2009, N. 33, ART. 3, CO. 4-TER: THE ESSENTIAL ELEMENTS OF THE NETWORK CONTRACT

SMEs are the backbone of the Italian economy. Their needs have been generally taken into account both in policy design and in legislative and administrative initiatives, often encouraging collaborative mechanisms to overcome the excessive fragmentation of the economic system. Indeed, the positive experience of Italian clusters<sup>15</sup> shows that flexible collaborative systems may be successful in overcoming dimensional limitations and difficult economic conditions.

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<sup>10</sup> Council Regulation 2157/2001, On the Statute for a European Company (SE), 2001 O.J. (L 294) 1 (EC), available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2001:294:0001:0021:EN:PDF>.

<sup>11</sup> Council Regulation 1435/2003, On the Statute for a European Cooperative Society (SCE), 2003 O.J. (L 207) 1 (EC), available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2003:207:0001:0024:EN:PDF>.

<sup>12</sup> A European Private Company Statute, specifically designed for small and medium enterprises, has been proposed within the framework of the Small Business Act, but it has not been yet adopted. See *Commission Proposal for a Council Regulation on the Statute for a European Private Company*, COM (2008) 396 final (June 25, 2008), available at [http://ec.europa.eu/internal\\_market/company/docs/epc/proposal\\_en.pdf](http://ec.europa.eu/internal_market/company/docs/epc/proposal_en.pdf).

<sup>13</sup> Legal scholars have pointed out that neither Rome I on the Law Applicable to Contractual Obligations nor the Draft Common Frame of Reference provides clear rules for contractual devices of inter-firm coordination or for multi-party contracts. European Parliament and Council Regulation 593/2008, On the Law Applicable to Contractual Obligations (Rome I), 2008 O.J. (L 177) 6 (EC); PRINCIPLES, DEFINITIONS AND MODEL RULES OF EUROPEAN PRIVATE LAW: DRAFT COMMON FRAME OF REFERENCE (DCFR) (Christian von Bar et al. eds., 2009). See Fabrizio Cafaggi, *Contractual Networks and the Small Business Act* (EUI Working Paper LAW No. 2008/15, 2008), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1156839](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1156839).

<sup>14</sup> Law 9 April 2009, n. 33, art. 3, co. 4-ter–4-quinquies, Gazz. Uff. 11 Apr. 2009, n. 85 (Law Converting Law Decree 10 February 2009, n. 5, Gazz. Uff. 11 Feb. 2009, n. 34), available at <http://www.camera.it/parlam/leggi/090331.htm> (last modified by Law 23 July 2009, n. 99, Gazz. Uff. 31 July 2009, n. 136, art. 1, available at <http://www.parlamento.it/parlam/leggi/090991.htm>).

<sup>15</sup> The Italian industrial clusters are group of enterprises (generally SMEs) concentrated in a specific geographical area and characterized by strong relationships of strategic collaboration and networking. Nowadays,

In April 2009 the Italian legislature introduced the network contract as a flexible model for inter-firm coordination aimed at fostering competitiveness and innovation.<sup>16</sup> The Network Contract Law is not specifically targeted to SMEs. It is intended to offer a general tool of collaboration to be used by enterprises of any dimension. However, the Law is particularly suited for SMEs.<sup>17</sup> Network contracts can help SMEs overcome limitations due to their dimension without causing them to lose their legal independence, while also enabling them to collaborate with firms of different dimensions.

The network contract allows two or more enterprises, on a purely contractual basis, to jointly perform one or more economic activities in order to increase their potentials for innovation and competitiveness.

The regulation provides only a framework scheme identifying the essential content of the contract and leaving to the freedom of the parties the definition of specific clauses according to their needs and to the circumstances in which they operate. The essential elements of the network contract include the following items.<sup>18</sup>

#### *Form*

The contract must be in writing and it must be filed with the Register of Enterprises where the participants have their headquarters.

#### *Structure*

The contract should be at least bilateral, but there is no limitation on an increased number of participants. It therefore also encompasses multi-party agreements.

#### *Common Purpose*

Through the network contract, enterprises pursue the common goal of improving their potential for innovation and competitiveness. These strategic goals should be expressly indicated in the contract together with the economic activities to be jointly performed.

#### *Network Program*

Through the network contract, the firms perform a “network program,” as defined in the contract, which specifies rights and duties of each participant and ways and means to achieve the common goal. The participants to the network contract commit themselves to jointly perform one or more economic activities within their business scope. The Law requires some sort of functional link between the economic activities performed via the network contract and the business scope of each firm. Nevertheless, it seems not confined to the “ancillary” role typical of the EEIG.<sup>19</sup>

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within a global scenario, it is crucial to develop inter-firm collaborative mechanisms able to go beyond the local dimension typical of the cluster model, evolving towards longer production chains and networks of enterprises.

<sup>16</sup> Law 9 April 2009, *supra* note 14. For a preliminary broader analysis of the network contract, see IL CONTRATTO DI RETE (Fabrizio Cafaggi ed., 2009); LE RETI DI IMPRESE E I CONTRATTI DI RETE (Paola Iamiceli ed., 2009).

<sup>17</sup> In May 2010, the first network contract was been signed in Bologna (Italy) by eleven SMEs of the automotive industry. See Emilio Bonicelli, *Pmi meccaniche in rete Bologna fa da apripista*, SOLE 24 ORE, May 7, 2010, available at [http://www.ilsole24ore.com/art/SoleOnLine4/Editrice/ISole24Ore/2010/05/07/Economia%20e%20Lavoro/23\\_C.shtml?uuid=5a5409ec-599e-11df-acb8-823383602e85&DocRulesView=Libero&fromSearch](http://www.ilsole24ore.com/art/SoleOnLine4/Editrice/ISole24Ore/2010/05/07/Economia%20e%20Lavoro/23_C.shtml?uuid=5a5409ec-599e-11df-acb8-823383602e85&DocRulesView=Libero&fromSearch).

<sup>18</sup> Law 9 April 2009, *supra* note 14, art. 3, co. 4-ter.

<sup>19</sup> Council Regulation 2137/85, *supra* note 9.

*Governance*

The internal governance of the network contract hinges on a common body entrusted with the performance of the network contract—the achievement of the common goal—and with powers to act on behalf of the participants when entering into contractual relationships with third parties and/or government bodies.<sup>20</sup> The contract should specify the powers of the management body and the governing rules concerning internal representatives of participants. The firms are also free to establish entry and exit rules and the contract duration.

*Liability and Financial Aspects*

The firms should create a common fund aimed at pursuing their common goal and make contributions to it, according to what is defined in the contract.

Under some circumstances,<sup>21</sup> such a fund constitutes a separate asset of the network: the personal creditors of the participants cannot have recourse to it and the participants cannot ask to divide and distribute it among themselves for the entire time of the contract. In this case the participants therefore have limited liability towards creditors and other third parties for the obligations undertaken within the network contract’s scope and in the network’s name. This is another major difference from the EEIG, where all the members have unlimited joint and several liability (despite the principal liability of the grouping for its debts).

Alternatively, if the firms are public stock corporations, they may also create set-apart funds in their own assets.

Finally, enterprises which use the network contract for the strategic goal of improving their potentials for innovation and competitiveness are given access to specific financial aid measures, simplified procedures for access to finance, and simplified administrative procedures.<sup>22</sup>

### III. SOME CRITICAL ISSUES OF THE NEW NETWORK CONTRACT

The Network Contract Law provides a very poor and incomplete regulation of the network contract. This gives large freedom to the parties to “customize” the contract and emphasizes its intrinsic flexibility. Nevertheless, it poses inevitable interpretative problems.

One crucial interpretative question concerns the scope of the network contract and precisely whether it encompasses both “pure” contractual models of coordination and more structured “organizational” devices. The essential elements of the network contract, as defined by the Law, seem to allow both these possibilities. In particular, the creation of a common body to perform the contract and the availability of a limited liability regime might lean towards a type of network

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<sup>20</sup> The law allows the management body of the network contract to enter into agreements with government bodies in relation to procedures facilitating the access to finance, promoting and defending Italian products, or encouraging internationalization and innovation strategies. Law 9 April 2009, *supra* note 14, art.3, co. 4-ter, lett. e.

<sup>21</sup> The limited liability is only granted if the network contract, as concretely set up by the enterprises, gives rise to a common organization which is independent from that of each participant and is in charge of performing the network program and of negotiating with third parties. The law makes the limited liability contingent upon the application of two provisions of the Italian Civil Code concerning the contract of consortium (Articles 2614 and 2615) to the network contract, as far as compatible with its concrete structure. *Id.* art.3, co. 4-ter, lett. c.

<sup>22</sup> *Id.*, art.3, co. 4-ter.2 & co. 4-quinquies.

endowed with a certain degree of independence from its participants, even if not giving rise to a fully separate legal entity. The contractual or “organizational” elements may therefore prevail over one another, from time to time, depending on the needs and goals of the participants.

A second issue regards the aim of the contract that is the “joint performance of one or more economic activities.” A literal interpretation would exclude from the definition of network contract situations of mere coordination, therefore limiting the scope of application of the Law. In practice, networks of enterprises are used to realize either “lighter” forms of coordination, where the contract coordinates economic activities performed by each enterprise autonomously,<sup>23</sup> or more intense forms of coordination, where the participants perform through the network contract a specific phase or project within the value chain<sup>24</sup> or even jointly perform an economic activity.<sup>25</sup> All these different settings may equally contribute to the achievement of technological innovations and developing strategies. “Lighter” forms of coordination, moreover, may be particularly suitable in preliminary stages of cooperation among SMEs. A broad interpretation of the network contract would offer a flexible contractual form of coordination able to encompass several contractual devices currently provided by Italian law,<sup>26</sup> such as the consortium<sup>27</sup> and the “associazione temporanea di imprese,”<sup>28</sup> and at E.U. level, such as the EEIG.

Overall, the Network Contract Law, lacking default rules, places a significant burden on the freedom of contract of the parties who should define several aspects of their relationship (such as the contract’s termination, management of potential conflicts of interests among the firms, and financial rules). This may create uncertainty, raise transaction costs, and affect the credibility and solidity of the network contract especially when it deals with third parties. A critical issue in this perspective is the absence of rules concerning the common fund (i.e., minimum fund requirement, minimum amount of contributions, management rules, transparency requirements) which may result in a lack of safeguards for the creditors of the network.<sup>29</sup>

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<sup>23</sup> For example, the firms through the network contract only share the costs and regulate the use of a technological innovation that each enterprise will use for its own business activities.

<sup>24</sup> For example, the firms through the network contract collaborate to perform R&D activities that could be beneficial to their own business or collaborate to patent and commercialize an innovation.

<sup>25</sup> For example, some farmers, in order to produce high quality agricultural products and to increase their competitiveness, decide to collaborate via a network contract to implement exclusively organic agricultural practices, according to specific rules to be defined in the “network program,” and to market their products with a common trademark created ad hoc as a quality certification mark.

<sup>26</sup> Italian legal scholars have suggested interpreting the network contract as a contract cross-cutting all the different types of collaborative devices already available in Italian law. *See, e.g.*, IL CONTRATTO DI RETE, *supra* note 16; Carmelita Camardi, *Dalle reti di imprese al contratto di rete nella recente prospettiva legislativa*, 10 *CONTRATTI* 928 (2009). Even so, a more comprehensive intervention to coordinate the network contract with the other tools would have seemed and seems necessary.

<sup>27</sup> *See* Codice civile [Italian Civil Code] arts. 2602–2615. The consortium is a multi-party contract giving rise to a common organization which regulates or coordinates and performs one or more phases of the economic activity of the member firms.

<sup>28</sup> The “associazioni temporanee di impresa” (temporary enterprise ventures) are contractual devices for inter-firm collaboration very similar to contractual joint ventures and mainly used in public construction projects. *See* Legislative Decree 12 April 2006, n. 163, art. 37, *available at* <http://www.camera.it/parlam/leggi/deleghe/testi/06163dl.htm>.

<sup>29</sup> *See also* Paola Iamiceli, *Il contratto di rete tra percorsi di crescita e prospettive di finanziamento*, 10 *CONTRATTI* 942 (2009).

Conclusively, the Network Contract Law may be welcomed positively as far as it gives official recognition to the phenomenon of the networks of enterprises, well developed in Italy (and in Europe) for a long time. Yet, it seems it has somehow constrained a much more complex and multiform phenomenon to a limited and still troublesome description. Networks of enterprises indeed deserve a more systematic and comprehensive approach.

#### **IV. CONCLUSION: POSSIBLE IMPROVEMENTS AT THE EUROPEAN LEVEL**

The Network Contract Law deserves attention from other Member States and the European Union, as it could offer the opportunity to enhance networking among policymakers and to promote exchanges of experiences and practices, as was one of the goals of the SBA. In particular, it could further a discussion at E.U. level about defining a common legal framework on contractual devices for cross-border inter-firm collaboration, with a view to overcoming the still perceptible barriers of Member States' different contract law regimes and private international law rules.