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**"THE IMPACT
OF THE ENLARGED EUROPEAN UNION
ON NEW MEMBER STATES AND PROSPECTS
FOR FURTHER ENLARGEMENT"**

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REPORT

"IMPLEMENTATION OF EU ACTS INTO DOMESTIC LEGAL ORDER: LEGAL AND PRACTICAL OBSTACLES AND WAYS TO OVERCOME THEM IN THE LIGHT OF THE ITALIAN EXPERIENCE

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1. For candidate Member States, complying with the so-called Community "acquis" requires a tremendous effort indeed.

At the pre-negotiation stage, the candidate State is expected to convince the Commission that it possess the capacity of putting its domestic legal order in line with the whole body of Community and European Union Treaty rules, acts and case law which has been building up during a period of time of almost 50 years. This is a pre-condition which needs being met before the real negations may start.

Even worse, by the date agreed upon for the effective accession and save for some temporary derogations which may be granted in respect of some specific rules or acts, the new Member State is required to apply the whole of the acquis as if it were an old Member State. Such a result could never be achieved unless the candidate Member State anticipates the real accession and starts gradually adapting its domestic legal order to EU law early enough. The so-called pre-accession strategy which the EU inaugurated with the two last enlargements, is indeed aimed at assisting candidate Member States in this difficult task, by providing financial means and specialised expertise.

However, the need for Member States to make sure that the domestic legal order is consistent with EU law does not end at all with accession. New binding acts are still issued by the institutions every year at an amazing rate. Almost all of such acts, particularly EC directives and EU framework decisions , require Member States to implement them within a given time limit. The Court of Justice produces a massive case law. Many rulings have a dramatic impact on existing domestic rules, which, as a consequence, need altering or even removing altogether. Infringement actions initiated by the Commission under Article 226 EC may also force Member States to quickly act, so to avoid that the case is brought before the Court of Justice and may eventually lead, if the infringement persists, to the imposition of a fine under Article 228, paragraph 2, EC. In other words, the imperative of keeping the domestic legal order in line with EU law is a never ending story.

In that, new Member States are in no better position than old Member States. Although new Member States may enjoy, soon after accession, of a more lenient attitude from the Commission, the "honey moon" will soon be over and if new Member States fail complying with EU law, they may find themselves, as any old Member State, in the difficult position of being confronted with an infringement action.

It is therefore useful for candidate Member States to draw from the experience of an old Member State like Italy.

As you know, Italy was among the first six founding States of the then European Coal and Steel Community in 1951 and of the then European Economic Community in 1957. However Italy has always found it difficult to meet the obligations deriving from EU law regularly and on time. For many years, Italy came first for the number of infringement actions which had been started against her per year. Although, up until now, Italy has never been sentenced by the Court of justice to pay a fine under Article 228, paragraph 2, EC, the case law shows an impressive bulk of judgments declaring that Italy had infringed EU obligations.

At the moment, the situation is not as bad as it used to be. New procedures have been introduced in the Italian legal order which succeeded in speeding up the process of implementing EC and EU acts and in making it more reliable and efficient. The Italian example may therefore show the way that also newer Member States may find attractive.

2. Before concentrating on the problems that Italy encountered and on the solutions which were found therefore, it is interesting to remind that neither the Commission nor the Court of justice ever accepted as a defense for not having fulfilled one or other EC obligation the internal difficulties that a Member State might have experienced in doing so.

The ruling in case 79/72, Commission vs. Republic of Italy, E.C.R. [1973] 667, is a good example of such an attitude. The Court declared that Italy had infringed its duty to implement a directive within the assigned time-limit despite the fact that a political crisis had occurred in Italy during that time, the Government had resigned, the Parliament had been dissolved before the normal term, new general elections had been held and for a long time there had been no new Government.

In other rulings, the Court made it clear that, in similar cases, it would be open to a Member State to apply to the Council so that an extension of the time for implementation may be granted. Alternatively, a Member State may contact the Commission and ask for its assistance in order to find a solution to a specific and unpredictable difficulty in complying with EU law. On the contrary, a Member State may not unilaterally derogate to the time limits for implementing directives.

It is also to be considered that, when faced to an infringement action, a Member State is regarded as a whole, like under International Law. A Member State may be held responsible for any breach of EC law, whether the illegal action was taken by the National Parliament or the Judiciary, despite the fact that such organs are fully independent under the National Constitution and the National Government has no means of forcing them to act differently.
By analogy, while EC law respects the division of powers between Central or Federal Government and Regional or local authorities as laid down by the Constitution of each Member State and does not oppose to the fact that the task of implementing EC law is given to latter, a Member State is still responsible for a breach of EU law although this was provoked by the misbehaviour of a Region or some other local authority.

The idea that the distribution of tasks and powers between the various level of governance which may be found in each Member State is irrelevant for EU law is clearly reflected in the ruling of the Court of Justice in case C-388/01, Commission vs. Republic of Italy, E.C.R. [2003] I-721. Here the Commission complained against the fact that old-aged visitors were granted a rebate for admission to the Museums in Venice only if they were Italians and not if they were nationals of other Member States. This went plainly against the principle of non-discrimination under Article 12 and 50 EC. Italy invoked that local Museums and the admission thereto were under the exclusive jurisdiction of Regions. The Court dismissed the argument, quoting its previous case law according to which a Member State is the sole responsible vis-à-vis the European Community for the compliance with Community rules.

3. Two are the main reasons why Italy has had so many problems in implementing EC and EU acts and, generally speaking, in complying with EU law. The first has to do with the fact that, almost inevitably, the correct implementation of EC acts would have required the passing of a new Act of Parliament, in order to repel a pre-existing piece of legislation or to modify it. However the passing of a new Act is a very time consuming experience and the Government had no means to speed it up nor to go round it.

The second reason is connected with the Regional structure of the Italian State. Many EC acts regulate matters which fall within the legislative jurisdiction of the Regions. Would the implementation of such acts be a job for the Regions or for the State? Should the State be left completely free in deciding whether to vote in favour of such acts, or should the Regions have a say about it?

4. In the fifties, most of the Italian legal order was made of Acts of Parliament. Even areas for which the Constitution would have allowed general rules to be laid down by the Government, Acts of Parliament were in force. In fact, at the time, it was thought that it was better to restrict the scope of the Government's normative power. Now, an Act of Parliament can only be abrogated or modified by another Act of Parliament. Governmental Acts do not normally have such a capacity. Therefore, when the need arose to implement EC law into the Italian legal order, most often the Parliament had to be involved.

However, the number and frequency of EC acts to be implemented each year rapidly grew to such an extent that the normal parliamentary procedure was soon regarded as inadequate and too time consuming.

At first, it was thought that a solution could come from Article 76 of the Constitution. This provides that an Act of Parliament may delegate to the Government the issuing of legislative decrees, having the same force as a real Act of Parliament. However such a power may only be granted for specific matters and for a limited time. Moreover, the Government must comply with the directives that the Parliament shall lay down.
Indeed in the seventies, through several Acts based on Article 76 of the Constitution, the Parliament delegated to the Government the task of implementing through legislative decrees hundreds of EC directives and regulations, especially in the field of the Common Agricultural Policy. Such a trend was heavily criticised. The range of matters for which legislative powers were delegated to the Government was much too vast, as they covered most of the fields falling in the EC jurisdiction. Consequently the Parliament was at pain when laying down the directives to be followed by the Government, so that this enjoyed too great freedom in shaping its legislative decrees. More importantly, the requirement that the delegation of power should be limited in time, obliged the Parliament to pass now and again new Acts under Article 76 of the Constitution. This process took a considerable time and was often completed after that the time limit for the implementation of the EC directives had already elapsed. Italy was therefore unable to reduce the number of infringement actions started by the Commission and was under considerable pressure to find a an alternative solution.

During the eighties, Italy experimented a different way. When the time limit for the implementation of a directive was about to elapse or had already elapsed and there was no realistic possibility of having an Act passed by the Parliament quickly enough, the Ministry having jurisdiction over the matter governed by the un-implemented directive, would circulate instructions to all its agencies to the effect that they should observe the directive and not the conflicting domestic rules. Italy argued that, as the recent case law of the Court of justice had held that directives, if sufficiently precise and unconditional, were capable of producing direct effects and ought to be applied to the individuals, even if they had not been implemented yet, any further implementation unnecessary.

Having been sued by the Commission before the Court of justice, Italy was found to have failed its duty to implement properly the directive. In its ruling in case 145/82, Commission vs. Republic of Italy, E.C.R. [1983] 711, the Court made clear that there are no directives

which do not require implementing. As to the instructions that the Italian Government had circulated to its agencies, the Court did not considered them as an appropriate means of implementation as such instructions could be changed at any time and were not officially published.

In order to respond to such criticisms, completely new procedures had to be put in place. This was down through Act no. 86 of 9 March, 1989, known as the Lapergola Act, after the name of the then Minister for European Affairs, who had drafted this text. Act no. 26 was amended on several occasions and finally was replaced by Act no. 11 of 4 February, 2005.

The greatest innovation was the idea of a yearly European Community Act. Every year the Government should propose to the Parliament and this should pass an Act aimed at putting the Italian legal order in line with all the EC obligations which Italy is expected to meet within the year of reference.

The advantage of such, new method, is that it gives regularity to the process of adapting Italian legislation to EU law. The Government is requested to keep constantly under review the state of the domestic legislation vis-à-vis EC law and to list all the necessary steps to be taken in a single, standardised document which should be presented to the Parliament in the Spring of each year and could be approved in a short time.

Another important innovation introduced by the Lapergola Act has to do with the ways in which the implementation of EU law may take place.

As we have seen, in the past an Act of Parliament could either directly lay down provisions aimed at implementing a specific EU act or delegate legislative powers for this purpose to the Government pursuant to Article 76 of the Constitution. Now a third way is added. The European Community Act may also provide that, in order to implement specific directives, the Government shall pass administrative acts of general scope, which, in force of the authorisation provided for in the Act, shall prevail on the pre-existing legislation and possess the capacity of replacing or modifying it. Here the advantage is that, save for the authorisation granted by the European Community Act, a legislative act is no more required. The field covered by the directive is therefore somehow downgraded. In the past , only legislative acts could regulate it; after the European Community administrative acts will govern it. Therefore, if a new directive concerning the same field is adopted in the future, its implementation will not require any more any involvement of the Parliament, nor the passing of a legislative act.

Of course this effect of downgrading, cannot be applied in all cases. There areas for which the Constitution itself requires that they should be governed only by Acts of Parliament (taxes, limitations to the personal freedom of individuals, criminal offences, etc,). For such fields the implementation may still only follow the traditional ways: either an Act of Parliament or Legislative Decree issued by the Government upon delegation from the Parliament under Article 76 of the Constitution.

6. The second source of difficulty is linked to the role of the Regions in implementing the EU acts which regulate matters falling into the Regional jurisdiction.

At the beginning, it was thought that the whole of the relationship between Italy and the European Community was a matter for the State and that the Regions had no part in it. This was particularly true for the implementation of the EU acts. Had the Regions be granted the power of taking action in this respect, the State could have been held responsible for a failure of one or more Regions without having the means to remedy to it. It was not before such

means were introduced that both the legislation and the case law of the Constitutional Court changed attitude on this point.

The regulation of how the Regions may act and what the State could do in case of persistent lack of action has changed several times. The matter comes now under the new Fifth Title of the Constitution.

According to Article 117, paragraph 5, in the fields falling within their jurisdiction (whether exclusive or shared with the State), the Regions shall implement the legislative EC acts. The State is only entitled to lay down the basic principles which the Regions are obliged to observe when implementing such acts. This will be done by an Act of Parliament (normally the European Community Act). Under Article 120 of the Constitution, the State is also entitled, in case of lack of action by one or more Regions, to act en lieu of the Regional organs. In such cases, the State act will cease producing effects as soon as the failing Region does pass the required legislation.