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THE IMPLEMENTATION OF COMMUNITY LAW OBLIGATIONS IN THE ITALIAN LEGAL FRAMEWORK: THE "LEGGE COMUNITARIA" (COMMUNITY STATUTE)

I. COMMUNITY STATUTE AND ITS CONSTITUTIONAL FOUNDATIONS

Twenty years ago the Italian legal order chose a model for its adjustment to the Community regulations, not directly enforceable, required to be adopted annually in order to be timely and consistent. It consisted of a Statute approved by the Parliament — the so-called "legge comunitaria," i.e. Community Statute — aimed to implement Community law in the national system.

It should be noted that the 2007 Annual Report to the Parliament hypothesized another simplification of the domestic adjustment procedure, through the introduction of an instrument similar to the "ordine di esecuzione" (executive order), foreseen for the enforcement of international treaties. This procedure could lighten the role of the Community Statute for those directives which can be directly applied in the domestic system, consequently strengthening the objective of the faithful adaptation to the national system of the self executing Community rules.

However implemented, the introduction of a periodic means of adaptation of the domestic system to those Community laws which are not directly enforceable in the Italian legal order — already begun via the so-called *Legge* La Pergola, no. 86/1989 — has assumed a clear position in favor of a harmonized dialectic between national sovereignty and its limits, as stated by Article 11 of the Italian Constitution, and in favor of the valorization of the domestic sources at the time of the implementation of the Community law.

The constitutional framework from 1989 till today is deeply embedded. In fact, the consistent function of the Community Statute is placed in a context characterized by the circumstance that state Statutes and regional Statutes are subject

— as stated by Article 117[1] of the Italian Constitution — to the commitments of the Community legal order.

The instrument of the Community Statute (the general and fundamental contents of which are ruled by the *legge* no. 11/2005, the so-called *Legge* Buttiglione) after the 2001 reform (that deeply innovated the Fifth Title of the Italian Constitution; see Cartabia-Onida) has a constitutional basis; as underlined by the Constitutional Court decision no. 372/2004, the exclusive legislative authority of the State, charged, according to Article 117[5], to establish the rules of procedure, whereas the Regions and the Province Autonome (Autonomic Provinces) of Trento and Bolzano participate in the implementation and execution of international agreements and European Union Acts. This system refers not only to the making of the "upward phase" of the Community Statute, but also to the implementation of Community obligations. In fact, the function of the Community Statute is the enforcement of the Community obligations, criss-crossing the complex regional system and the local autonomies, through constitutionally defined "rules of procedure."

II. COMMUNITY STATUTE AND GOVERNMENT LEVELS IN THE NEW TITLE V OF THE ITALIAN CONSTITUTION

Therefore, if we look at the renewed system of the allocation of legislative competences, the definition of the "rules of procedure," also in the "downward phase," is an exclusive state commitment. The Italian State is responsible for the infringements towards other member states: for this reason Article 117[2], (letter a) granted to the Parliament competence on the relations between the State and the European Union.

The practice of legislative competences assigned to the Regions will have to take into account the constraints derived from the Community system (Article 117[1] of the Italian Constitution). They are directly called to participate in the Community integration procedure as stated in the new text of the Article 117[3], because the relations of the Italian Regions with the European Union are considered as one of the concurring legislative competences. For these purposes the state Community Statute is charged with establishing the basic principles in the several material fields of non-exclusive regional competence (Article 16 of *legge* no. 11/2005), in order to accomplish more and attempt to be harmonized with the regional rules entrusted to regional reception Statutes modeled on the national Community Statute (Bilancia).

Considering the new constitutional order, the Community Statute plays a very interesting role, not only for the external relations with the other European Union member states, but also on the domestic side, interposing in the dialetics between the different governmental levels of people's sovereignty.

III. THE "STATIC" AND THE "DYNAMIC" PROFILE OF THE COMMUNITY STATUTE

The considerations above could suffice to explain the peculiarities of the Italian Community Statute, considering that the new allocation system of competences among the State and Regions gives many disciplines to the exclusive legislative competence and to the corresponding policy powers of the Regions.

The judgement of the Italian Constitutional Court no. 126/1996 already warned that "the implementation of Community rules by the Member States has to consider the structure of every State (centralized, decentralized, federal). In this way, Italy is enabled and obliged to respect its basic regional system by its constitutional law."

Until now the "static" profile of the Community Statute has been explained, as the articulation of the coordination and rationalization of the complex network of the law-making competences, resulting in harmonization via the Community Statute in the name of the political domestic liability of Parliament and the Government towards Community policies.

On the other hand, the "dynamic" profile is related to the duties of Italy as a member state, compelled to adopt and complete as soon as possible the draft of the Community Statute. This need has required specific modifications to the regulations of the Chamber of Deputies (in 1999) and the Senate (in 2003): Article 126-ter of the Regulation of the Chamber of Deputies and Article 144-bis of the Regulation of the Senate state the inadmissibility of all the amendments and articles related to subjects external to the specific object of the Community Statute, as framed by the actual legislation.

This does not mean that Parliament and Government cannot otherwise rule, id est through reception rules separate from the Community Statute. Nevertheless, the method of the Community Statute, even if it is not a constitutional obligation (as, for instance, the budget Statute according to Article 81 of the Constitution), fulfills not only the reasons aimed at improving the stability and the permanency of the domestic adaptation procedure (Cartabia-Weiler), but also serves to unite the objectives of the Italian regional system, based at once on the autonomy of decentralized orders and on the principles of unity and indivisibility of the Republic. These principles have to be guaranteed also in consideration of the character of Community law (Article 5, Constitution).

IV. FROM *LEGGE* NO. 86/1989 TO *LEGGE* NO.11/2005

The relevant position of the Constitutional Court expressed in the decision no. 170 of 1984 (Chief Justice Antonio La Pergola was the redactor of this decision) directed Italy to walk for good a new path in the relations between the domestic

law and Community law. The decision expressed the requirements for the precedence of Community law in the domestic legal system: if the national law is incompatible with the Community law, it has to be disapplied. The Court stated that "[c]onsidering the direct effects of the CEE regulations, every modification or reception of the Community law in the domestic law, even if exercised through mere reproducing rules, could be inconsistent with the automatic enforcement of the derivative Community rules. Moreover, it could unduly remove the interpretation of the European Court of Justice, that, according to Article 177 of Treaty of the European Community, has to rule the interpretative preliminary rulings, necessary and basic guarantee of the uniform application of the Community law in all its Member States."

On the other hand, *legge* no. 86/1989 stated: "General rules on the participation of Italy in the ruling Community procedure and on the executive procedures of the Community commitments," answered to an unavoidable requirement dealing with the consistency of the domestic legal system with the Community commitments, i.e. the need to fulfill the commitments by the State connected with its European Community membership, related to the not directly applicable rules and to the judicial assessments of the European Court of Justice, defining the incompatibility of the primary and secondary domestic sources with the Treaty rules.

Later the *Legge* La Pergola has been replaced by the *legge* no. 11/2005 (so-called *Legge* Buttiglione). This latter Statute rationalized the development procedure of the Italian upward phase of the arrangement of the European Community and Union law. Article 1 of *legge* no. 11/2005 stresses the need to defend the fulfillment of the commitments deriving from Italy's membership in the EU (downward phase of the European integration), on the basis of subsidiarity, proportionality, efficiency, transparency and democratic participation principles, in relation to:

a) the adoption of every Community and EU provision able to bind the Italian Republic to the adoption of implementation rules;

b) the judicial assessment, through an ECJ judgement, of the incompatibility of the legislative and regulative rules of the national judicial system with the Community order provisions;

c) the enactment of frame-decisions and of decisions adopted in the framework of the cooperation between police and judicial authority in the criminal field.

This legal model answered the essential need for fulfillment of the requirements of European integration in the Italian legal system, through a reception of the not directly binding European legal production, as well-timed as possible.

For this purpose, as a result of the verification of the compatibility with the domestic legal order of the rules produced by the EU institutions, the Prime Minister or the Minister for EU Policies, in concert with the Foreign Affairs Minister and with the other involved Ministers, by December 31 every year, must present to the Parliament a draft Statute named *Provisions for the fulfillment of the obligations*

resulting from the Italian membership in the European Communities, according to Article 8 of the *legge* no. 11/2005. It is supposed to be also indicated by definition as a community statute and the year of publication.

On the one hand, the establishment of *legge* no. 11/2005, defining the general provisions dealing with Italian participation in the EU law-making process and the executive procedures of the Community, within the upward phase, fixes an exclusive and standard procedure, aimed to guarantee the participation of the State and of the several subjects of pluralism (national Parliament, local entities and the social parties, according to Articles 3–7 of *legge* no. 11/2005). On the other hand, within the downward phase, Article 8 lays down the principles for the well-timed execution of the community directives supposed to be enforced by the State, the Regions and the Autonomic Provinces.

Indeed, the regulation of the yearly Community Statute cannot exclude other alternative proceedings: concerning State liability, Article 10^1 of *legge* no. 11/2005 decrees that the Prime Minister or the Minister for EU Policies can put forward to the Cabinet the adoption of urgent statutes in order to fulfill the obligations required of the member states by European rules and judgements, whenever the expiration is before the supposed date of the yearly community statute. Consequently, it seems that the State could use alternative means only in cases of urgency.

Article 10^4 of *legge* no. 11/2005 provides that a delegation to the Government could be inserted in other statutes, even if the devolution deals with the general directive criteria and principles accorded with the Community Statute of that very same year (Cartabia-Violini).

V. COMMUNITY STATUTE AS A "RULE OF PROCEDURE"

From the viewpoint of executive timeliness, the structure and the development of the Community Statute could seem complex and not efficient, considering that it is remanded to other sources of law (Celotto-Pistorio). Nonetheless, its great value is that it has been able to fix the point of the state of the Community law implementation (Modugno), considering that the current Article 117^5 of the Constitution, as reformed by the *legge costituzionale* (constitutional statute) no. 3/2001, expresses an implied provision, as a state rule of procedure, able to criss-cross the several levels of domestic law-making in a legal system that, although regionally structured, preserves its unitary and indivisible character according to Article 5 of the Italian Constitution.

The guideline of the Community Statute, as rule of procedure, is that the state legislator has to choose annually the most suitable instrument for the reception of Community law; therefore, downstream in the area of reception of Community law, it will have to set the enforcement modalities and the corresponding domestic source of law.

Nevertheless, this does not deal with an instrument unable to be controlled by the law-maker, seeing that the legislator, in order to choose the adequate executive source, will have to consider the more and more complex network of competences laid down by the Constitution, not only at the primary level, but now — after the constitutional reform of Title V — also at the secondary — regulatory level, because Article 117^6, providing that the regulatory authority is granted to the State (Article 117^2) but for the delegation to the Regions, underlines that the Regions have regulatory authority in every other field, also in those fields belonging to the concurrent regulatory authority.

As declared in the 2005 Annual Report of the Government to the Parliament, the main points of the Community Statute can be distinguished as follows:

a) the express formulation of the annual Community Statute can contain, *inter alia*, directions able to individualize the rules required to execute the international treaties signed in the framework of the external relations of the EU (Article 9^1, letter e);

b) in the provision stating that the annual Community Statute can contain provisions able to individualize basic principles stating that the Regions and the autonomic provinces exercise their law-making competence in order to execute or guarantee the application of the Community rules in the areas stated by Article 117^3 of the Constitution (Article 9^1, letter f);

c) in the disposition stating that the annual Community Statute can contain rules able to individualize rules that, in the subjects of regional and provincial law-making competence, confer delegation to the Government for the enactment of *decreti legislativi* (legislative decrees by the Government, under delegation by the Parliament) containing criminal sanctions in the case of infringement of the Community rules implemented by Regions and Autonomic Provinces (Article 9^1, letter g);

d) in the disposition providing that the same statute can contain provisions enacted through the explication of the preventive substitutive power, according to Article 117^5;

e) in the disposition stating that the Cabinet can enact urgent legislative measures, arising from particular circumstances related to the enforcement of rules or ECJ decisions. Special devices are also foreseen for enacting measures involving regional and provincial competences (Article 10, *legge* no. 11/2005).

VI. TYPOLOGY OF THE EXECUTIVE MEASURES

Generally speaking, the typology of executive measures can be described according to Article 9 of *legge* no. 11/2005.

First of all, a legislative measure is seldom enacted. It is chosen only in order to modify or void those domestic rules conflicting with Community law; on other

occasions, a legislative delegation by the Government is enacted according to constitutional provisions (Article 76) either through a governmental regulation in the framework of delegification, or — in the subjects of exclusive state competence — through a ministerial or interministerial regulation or general administrative measure by the competent Minister, in concert with other involved Ministers.

If the subject affected by the Community law appertains to a regional legislative competence, the Community Statute will individualize the basic principles in respect of which the Regions and the Autonomic Provinces will have to exercise their own legislative competence in order to execute or guarantee the application of the Community Statutes according to Article 117^3 of the Constitution (concurring legislative competences).

As stated by Article 117^5 of the Constituion, the State will move subsidiarily in the areas of regional and provincial competence in order to redress the possible failure of Regions and Autonomic Provinces to implement the Community law.

In this event, the enacted State rules will be applied as soon as the executive Community law term expires. These State rules will have a soft character, because they will be replaced by the regional and provincial measures as soon as they are enacted. The Statutes are subject to the preventive control of the Permanent Conference for the relations among State, Regions, and Autonomic Provinces of Trento and Bolzano (see Articles 9 and 11^8, *legge* no. 11/2005).

It is certain that Regions and Autonomic Provinces can directly implement a community directive, while in the areas of concurring competence the Community law indicates the basic principles unable to be derogated by the regional or provincial statute adopted late and prevalent to an already enacted conflicting rules by Regions and Autonomic Provinces (Article 16^1, *legge* no. 11/2005).

VII. THE MOST RECENT PRAXIS

The most recent praxis shows that Italy fulfills the goals set out by European directives through the adoption of legislative decrees by the Government, under delegation by the Parliament. Thus, for example, Community Statute 2008 (no. 88/2009), Article 1, contains a very broad provision, as it delegates the Government to enact all the legislative decrees that are necessary to adjust Italian regulations to Community law within the terms established in the relevant directives, attached to the Statute.

Moreover, it is broadly accepted that the Government has the power to modify the legislative decrees it has previously enacted — even without a new delegation by the Parliament — if further adjustment is required by later directives, carrying new regulations. Furthermore, "supplementary and corrective" decrees (as they are named in Italy) can be used to introduce sanctions for violations of (the regulations imposed by) Community law. For instance, this procedure has been followed

to adapt Statute no. 163/2006 (regulating contracts stipulated by "public" contractors) in compliance with directives no. 2004/17/CE and no. 2004/18CE.

In any case, governmental interventions in this field are not strictly limited by the framework outlined — year after year — by Community Statutes. Indeed, the Government sometimes fulfills certain obligations settled by the Community resorting to *decreti legge*, which are emergency measures immediately coming into force (but needing to be confirmed by the Parliament within 60 days). This has been (among others) the case of *Decreto legge* 297/2006, dealing with bank and credit regulations and financial intermediation: see pp. 32; 91 of the Annual report (2006) the Government is bound to deliver to the Parliament, according to Statute 11/2005, Article 15. As another example one may consider *Decreto legge* 73/2007, concerning common provisions for the deregulation of the energy markets: see p. 103 of the Annual report (2007).

Community Statute 2007 (34/2008) aimed at accelerating the pace of the adjustment procedure, as it provided that the Government should enact the "decrees of adaption" to Community law before the deadlines pointed out by the relevant directives have expired. Other provisions of Community Statute 2007 aim at the same goal: thus, the Government has been required to enact within 90 days all legislative decrees needed to comply with directives whose deadlines have already expired. Moreover, the Government has been provided by Community Statute 2007 with the power to enact "sectorial codes" (*codici di settore*) in order to systematize the regulations of specific subjects, while renovating them in accordance with the latest European directives. Finally, the Government has been delegated to implement certain frame decisions enacted by the European Union in the context of judicial cooperation on criminal matters, that is 2003/577/GAI; 2005/212/GAI; 2005/214/GAI.

Statute 34/2008, Article 28, pars. 2–3 provides that the legislative decrees are enacted in compliance with Statute 400/1988, Article 14 — that is, under proposal of the President of the Council of Ministers or the Minister for European Policies and the Minister of Justice, in concert with the Minister of Foreign Affairs, the Minister of the Interior, the Economics Minister, the Finance Minister, as well as with other interested Ministers. Statute 34/2008 also provides that the schemes of the above-mentioned legislative decrees have to be transmitted to the Chamber of Deputies and the Senate of the Republic so that the competent authorities of the Parliament can deliver their advice. If the competent authorities fail to deliver their advice within 40 days, the decrees are enacted automatically.

VIII. THE SYSTEM OF ADJUSTMENT AT THE REGIONAL LEVEL

According to the reform of the Italian Constitution which took place in 2001 (Constitutional Statute 3/2001), Italian *Regioni* (local authorities) have the com-

petence to adjust local regulations in compliance with non-immediately applicable Community law, insofar as it impinges on subjects assigned to their legislative competences by the Constitution. This can be made through local statutes or even through secondary regulations or administrative orders — unless the Constitution provides that a particular subject must be regulated only through statutes enacted by representative bodies (*Parlamento della Repubblica*, *Consigli regionali*).

In several regions, a specific local statute sets out a general procedure for the yearly adjustment of local regulations to Community law, similar to what happens with the State in the above-mentioned Statute 11/2005 (see, for example, *legge regionale* Friuli Venezia Giulia 10/2004; *legge regionale* Emilia Romagna 6/2004). Thus, several regions actually approve, year after year, their "local Community law," following the scheme described above when dealing with the adjustment of the laws of the State. This praxis may give rise to doubts of legitimacy, as Article 117, par. 5 of the Italian Constitution provides that the power to make laws regulating the procedure for the periodical adjustment to Community law is vested in the Parliament of the State. However, scholars believe that the local statutes cited above cannot be considered unconstitutional, insofar as they imitate and reproduce the same procedural steps set out by Statute 11/2005.

IX. THE PARLIAMENT AND GOVERNMENT ROLES IN THE "DOWNWARD PHASE"

The relationship between the role of the Government and that of the Parliament in adjusting the Italian legal system to comply with Community obligations has been debated at length in Italian legal doctrine. As was mentioned earlier, the obligations set forth by European directives are usually fulfilled by acts of the Government, while the Parliament stays in the background, as it delegates the relevant legislative powers to the Government, or even confirms *a posteriori* the emergency measures enacted by the latter. However, the position of the Parliament cannot be considered marginal. Indeed, one should remember that the Parliament is able to exert a strong influence at a previous stage, when Community law is being made, before regulations and directives are formally enacted by the relevant authorities of the Community (Statute 11/2005, Articles 3–5).

Above all, it must be taken into account that Community Statute is chiefly a "procedural" one, as it provides a "regulation … on how further regulations must be produced" (*essa è una fonte sulla produzione di altre fonti*): actually, it is not common for Community Statutes to directly modify current regulations impinging on the subjects affected by Community law. Community Statutes usually arrange just a procedural pattern, while they vest the Government with the power to enact concrete regulations compatible with Community obligations. At the most, Community Statutes predetermine the type of acts that the Government is instructed

to enact: they establish if European obligations are to be fulfilled by the Government through legislative decrees, secondary regulations or even administrative orders (unless the Constitution reserves a specific subject to the legislature).

On the one hand, it is true that the Government is the main organ responsible for implementing Community law into the Italian legal system; yet on the other hand, it would be far from accurate to affirm that the Parliament is condemned to a low-profile role. Indeed, latest Community Statutes show a more and more pronounced trend towards the involvement of parliamentary authorities in the making of regulations the Government is delegated to adopt in order to comply with Community law. Namely, Community Statutes 34/2008 and 88/2009 require in many cases that the relevant parliamentary commissions (the one or ones having competence on that particular subject) express their advice on the schemes of decrees outlined by the Government before they may be enacted and come into force.

Furthermore, the Government has to constantly provide the Parliament with detailed information concerning every regulatory act deliberated by the authorities of the European Union and European Communities. The Government also has the duty to verify, from time to time, the general level of adequacy of the Italian system as regards the legal standards imposed by Community law. The outcomes of these controls must be timely reported to the Parliament; in any case, the Parliament must be adjourned on this matter every four months. This duty of information particularly regards every measure that has to be taken in order to fulfill Community obligations. This information must also be reported to the Permanent Conference for the relationship among State and local authorities and the Conference of the Presidents of the representative bodies of State and local authorities. The above-mentioned Conference can express its advice on any relevant matter.

The initiative concerning the formation of the Community Statute belongs to the Government, and it is exercised every year. Along with the project of Community Statute, the Government drafts a report. Such reports are addressed to the Parliament and contain information concerning the level of implementation of Community obligations in Italian law. The report also deals with any open infringement proceedings against Italy before the Commission or before the Court of Justice. The report illustrates the case-law of the Court of Justice, as regards any cases of non-compliance of Italian regulations with Community law declared by the Court. Finally, if relevant, the report clarifies the reasons why a particular project does not provide for the implementation of certain directives, though the relevant deadlines are about to expire.

The above-mentioned elements must be taken into consideration in order to understand the different roles played by Government and Parliament in the implementation of Community law and in the fulfilment of Community obligations, as the parliamentary form of government postulates that Government and Parliament share every decision and responsibility concerning the foreign and European policies of the State.

X. THE COLLOCATION OF THE COMMUNITY STATUTE IN THE SYSTEM OF THE SOURCE AND THE RECEPTION RULES OF THE COMMUNITY REGULATION

The problem concerning the position of Community Statutes within Italian legal system is still open to question. Indeed, doubts are formulated as regard the position of every regulatory act of the State incorporating Community law.

Such questions must be answered taking into account Article 117, par. 1 of the Constitution: it provides that the power of central and local legislatures will be bound by the obligations set out by Community law. Another relevant provision set out by Italian Constitution is Article 11, which provides that the State admits some limitation of its sovereignty insofar as it is necessary to build an international legal order able to ensure peace and justice among nations. On these grounds, it is a relatively common opinion among scholars that regulations fulfilling Community obligations must be considered as provided by the Constitution with a special strength (the so-called *copertura costituzionale*). In other words, some regulations, such as the ones incorporating Community law, show a special link with the Constitutional provisions concerning the position of the State within Europe and the international community. This implies that they have a particular resistance against innovations brought by later acts and they can be eliminated or modified only through special procedures. This conceptual arrangement has been strengthened by the reform of the second part of Italian Constitution in 2001: it is only since 2001 that the Constitution explicitly affirms that Italian law is bound by Community law, while before that date this was a matter of interpretation.

All things considered, it must be noted that the relationship between Italian law and Community law cannot be described by solely resorting to one simple key of interpretation. The traditional reading of the Italian legal system would be influenced by the concept of hierarchy: the prevalence of Italian regulations fulfilling Community obligations against conflicting norms would be considered as a matter of supremacy. However, the impact of Community law on Italian legal system clashes with this representation. It shows the inadequacy (or at least the limits) of some traditional "tools," such as the concept of hierarchy, when it comes to assessing the relationship among complex systems. Instead, more and more attention is being paid to the implications of categories such as "competence." Its evaluation may foster innovative solutions concerning the role of administrative regulations enacted by the Government to fulfil Community obligations (especially when it comes to assessing their relationship with later Statutes voted by the legislature).