Complexity of EU law in the domestic implementing process

Keywords
European Union legislation – Implementation in the Member States

Abstract
This article highlights how the complexity of EU secondary law (other than self-executing acts) can be a real difficulty at the stage of its transposition at national level. Two practical examples, involving the intervention of the Commission, are taken to illustrate the problem. It is assumed, on the one hand, that the general principles of law (legal certainty, legitimate expectations and transparency) require to the European Union legislator to ensure the intelligibility and quality of the drafting, and on the other hand that these features are the essence not only for citizens and for business, but also to enable the national authorities to adopt implementing domestic measures in an effective and timely manner. In that perspective, the article provides for some tentative methodological suggestions, while addressing, in the light of the ECJ case-law, the methods of interpreting EU law, the role of recitals, the Commission’s adoptions of soft law instruments to guide national implementing measures, as well as the proactive attitude from Member States within and outside the Council. In the latter respect, a suggestion of practical nature is made, i.e. to establish a close connection at national level between the personnel taking part in the drafting of an EU legal act (upstream phase) and the personnel engaged in the process of implementing that act (downstream phase). Linking the two phases so as to rely on the same national staff for advising on both appears to be a quite simple scheme to ensure better understanding of the EU legal texts and to sound a warning wherever there is a risk of an infringement due to inadequate implementation.

A. Introduction
All public officials in the European Union (EU) Member States, first of all the legislator, must as a rule ‘comprehend’, that is to say interpret, secondary legislation of the EU (other than self-executing acts) before implementing it. Within the internal dynamics of norm-creation, that experience may be rather challenging due to the complexity of the EU legal act. The obvious body to turn to for assistance is the

* Roberto Baratta, Professor of EU and International Law, University of Macerata, and Luiss-Guido Carli, Rome Italy.
European Commission. First, for a utilitarian reason: should the Member State adopt an interpretation different from the one which the Commission favours, it runs the risk of infringement proceedings. Second, absent the authority of the European Court of Justice (ECJ), the Commission is considered as the institution enjoying a power of interpretation. Third, if there are diverging views among national officials – who may indeed be exposed to conflicting sub-national actors and interest groups, for instance – an EU official body to consult with, is needed. Be it a calculated instrumental approach due to the Commission’s function as the guardian of the treaties or one related to a real trust in its independence and overarching role to promote the general interest of the Union (Article 17 TEU), public officials in the Member States do in fact rely on the Commission. It is after all a daily interpretative factory of EU law.

This article will highlight how the complexity of EU law can be a real difficulty at the stage of its transposition at national level. Two practical examples, involving the intervention of the Commission, will hopefully help to illustrate the problem (section B). Some tentative methodological suggestions will be made in the final part of the article (section C).

B. Two practical examples
The fundamental issue at stake is the correct comprehension of EU law. Although in theory a piece of EU legislation should be relatively coherent and easy to assess, in practice that is not necessarily the case. Indeed a legislative text is often the result of compromises between competing interests and objectives being pursued by the EU institutions, the national Governments and others taking part in the process. Unsurprisingly, as the practice in the law-making process proves, legitimate concerns for the quality of legislation may be outweighed by the need to find a compromise acceptable to all the parties. In such situations national authorities, sometimes already under strain due to ongoing infringement proceedings, face interpretative issues of the relevant acquis.

1. Bus passengers’ rights
The first example concerns Regulation (EU) No 181/2011 on the rights of passengers in bus and coach transport (“the Regulation”). Italian authorities raised some interpretative matters with the Commission when the domestic legislator was about to finalize a measure to comply with the Regulation and, most importantly, to close an infringement proceedings at pre-litigation stage.

As to a question regarding Article 12 (on a Member State’s obligation to designate terminals where assistance for disabled persons and persons with reduced mobility has
to be provided), the Commission’s reply points to the need for a systematic reading of the Regulation, taking into account Articles 2 and 13. Briefly, according to the Commission's view, the rights of persons with a disability and reduced mobility pursuant to Article 12 do not apply to regular services where the scheduled distance of the service is less than 250 km. Consequently, the obligation for the Member States to designate bus terminals in accordance with Article 12 applies only to regular services with a scheduled distance of more than 250 km. By doing so the Commission rejects the argument endorsed by some of the Italian authorities, according to which the doctrine of effet utile and a teleological approach required that Member States ensured the rights of the persons concerned even for services of less than 250 km. That approach would secure – it was argued – the most effective protection of the persons with disability and reduced mobility.

In its reply, the Commission does touch upon the objective of the Regulation, as pointed out in its Recital (2) – to grant a minimum level of protection for passengers – and clarifies that Member States are without doubt allowed to adopt measures which provide passengers with a higher level of protection. Thus, it is possible for Member States to appoint bus terminals in order to provide assistance for persons with disabilities and reduced mobility also for shorter distance services. However, according to the Commission’s interpretation, that is not, strictly speaking, an obligation under the Regulation.

Arguably, as it often occurs also in harmonization activity, Member States may go beyond the minimal level required by EU law. In such a case, EU law grants a latitude to Member States, setting only the lowest limit above which a margin is left for optional action. In this field the application of the legal framework becomes voluntary and thus optional. Over-implementation is obviously possible in principle, but it is a policy choice of both national Government and Parliament possibly justified by a cost-benefit analysis and, sometimes, even desired by stakeholders. Yet legal advisers in the Member States should be crystal clear in that respect.

Finally, the Commission addresses the question whether it is possible to designate bus terminals which, because of their architectural barriers and the lack of specific equipment, are only accessible to persons with certain types of disabilities, but not to others. It replies first of all, that the minimum level of assistance is defined by a systematic interpretation of the relevant provisions of the Regulation and the Annex to it; secondly, that the Regulation provides for some limits when providing assistance to disabled persons (referring to Article 10(1)(b)); thirdly, that recital (11) calls upon the Member States to endeavour to improve existing infrastructure where this is necessary to enable carriers to ensure access for disabled persons and persons with reduced mobility as well as to provide appropriate assistance. Finally, in the Commission's view, information about bus terminals where people with certain disabilities can be assisted and which can provide certain forms of assistance listed in part (a) of Annex I to the Regulation, is of key importance. Thus, the Commission encourages the Italian
It seems worth noting in particular that the Commission rightly refers to recitals as interpretative tools. In that respect, the preamble of a legal act is a useful means for interpreting it, as is briefly discussed below.

2. Freedom of movement
My second example gets us back again on recitals but focuses mainly both on the use of the preamble as a normative means in secondary law acts and on its impact on the interpretative outcomes. As is known, secondary law practice shows that sometimes recitals perform a supplementary normative role. However, that point is quite problematic, given the limits upheld by the ECJ in its case-law (see again infra).

One of the most telling illustrations concerns the vexed question whether national bodies may expel EU citizens who have recourse to the social assistance system of the host Member State. As is well-known there are many controversial aspects here and several among them have been referred for preliminary rulings to the ECJ. My purpose is to address only a point of legislative technique regarding two of the binding provisions of Directive 2004/38 ("the Directive").

In short, joint application of Article 8(4) and Article 14(3) implies on the one hand that, having recourse to social assistance benefits does not entail per se that national authorities can adopt an expulsion measure (negative obligation); and on the other hand, that they must take into account the situation of the person concerned (positive obligation). Therefore, the normative text entails both a negative and a positive obligation. The first is relatively plain, whereas the second appears to be quite vague. However, the latter becomes clearer if one reads it in the light of recital (16) which ultimately requires national bodies to apply a proportionality test in all decisions concerning expulsion of the relevant persons. More precisely, that recital clarifies that only when the beneficiary has become an unreasonable burden for the local social system, can national authorities actually proceed to his expulsion, after having considered the personal situation, which implies that:

4 ‘An expulsion measure shall not be the automatic consequence of a Union citizen's or his or her family member's recourse to the social assistance system of the host Member State’ (Article 14(3) of the Directive).
5 As regards Union citizens who apply for a right of residence on the territory of another Member State for a period longer than three months, and have inter alia comprehensive sickness insurance cover in the host Member State and assure the relevant national authority that they have sufficient resources not to become a burden on the social assistance system of the host Member State during their period of residence, Article 8(4) of the Directive sets out that ‘Member States may not lay down a fixed amount which they regard as “sufficient resources”, but they must take into account the personal situation of the person concerned’ (emphasis added).
‘The host Member State should examine whether it is a case of temporary difficulties and take into account the duration of residence, the personal circumstances and the amount of aid granted’.

In other words, a four-step approach is suggested, almost imposed by a recital.

In such a situation, when advising on implementation of the Directive within the domestic legal order so as to avoid the risk of infringement proceedings, one is tempted to suggest that the implementing measure had better contain a copy-out of that recital as well. For it actually has a supplementary normative nature, as the Commission itself seems to confirm since it builds on that recital⁶. When applying the provision, as well as the related recital, much is left to the administrative authorities and ultimately to the national judiciary. The Directive only provides an outline scheme. To comply with that normative framework, including the attendant recital, detailed steps of the procedure have to be practically fulfilled on a case-by-case basis. As it can easily be seen, the recital in this case supplements the operative part of the Directive.

C. Tackling the complexity of EU secondary law

The highlighted complexity of secondary legislation matters. The intelligibility and quality of the drafting are of the essence (for citizens and for business) not only in order to comply with the principles of legal certainty and legitimate expectations⁷, but also to enable the national authorities to adopt implementing domestic measures in an effective and timely manner. Secondary law has to be acceptably clear in its terms and reasonably consistent with the **acquis** – this holds true in particular when secondary law codifies the interpretation of primary law as ruled by the ECJ – in order to serve its objectives. Besides, the clearer a law instrument is, the better the principle of transparency is reaffirmed.

---

⁶ The genuine supplementing operative nature of the recital seems emphasized in the Commission’s Communication on guidance for better transposition and application of Directive 2004/38/EC (COM/2009/0313). Tellingly, in that Communication the Commission points out that:

‘Recital 16 of Directive 2004/38 provides three sets of criteria for this purpose:

(1) **duration**
• For how long is the benefit being granted?
• Outlook: is it likely that the EU citizen will get out of the safety net soon?
• How long has the residence lasted in the host Member State?

(2) **personal situation**
• What is the level of connection of the EU citizen and his/her family members with the society of the host Member State?
• Are there any considerations pertaining to age, state of health, family and economic situation that need to be taken into account?

(3) **amount**
• Total amount of aid granted?
• Does the EU citizen have a history of relying heavily on social assistance?
• Does the EU citizen have a history of contributing to the financing of social assistance in the host Member State?’.

⁷ EU legislation must enable those concerned to acquaint themselves with the precise extent of the obligations it imposes upon them (see Cases C-161/06 **Skoma-Lux** [2007] ECR I-10841, paras 36 and 38, and C-361/06, **Feinchemie Schwebda GmbH**, [2008] ECR I-3865, para. 50).
As is known, at least since the Amsterdam Treaty, a number of disparate sources of rules and guidelines apply to the drafting process. However, in the course of the cumbersome ordinary and special legislative procedures these rules and guidelines may be overlooked and sacrificed to compromise between the institutions, and within the Council itself. As lawyers know, within the Committee of Permanent Representatives of the Member States (Coreper), and within the Council, according to a settled practice decision-making tends to be consensual, even where the voting rule is qualified majority. To reach a consensus or unanimity within the Council is a source of complexity in itself and it has an impact on the quality of legislation. In fact, the need to approve a measure without explicit dissent or with the consent of the twenty-eight governments may give rise to strained compromise wording, leading quite often to ambiguous texts. Likewise, the same holds true when it comes to reaching an agreement between the Parliament and the Council. From the viewpoint of the rotating Council Presidencies, progress is often measured in quantitative terms rather than focusing on the technical quality of the legal acts adopted.

Moreover, if a normative text fails to fulfil the principle according to which *leges ab omnibus intelligi debent*, it is destined, in due course, to become a source of virtually endless references for preliminary rulings. That amounts to being a tangible phenomenon of deferring to the judiciary the role of complementary legislator, revealing in fact a failure to legislate properly. One may wonder whether the EU judiciary is supposed to act as an arbiter of the legislative inconsistencies – is the ECJ...
really entitled to surreptitiously assume the role of the EU legislature? Be that as it may, until the authoritative decision by the ECJ, would that uncertainty not give rise to a risk of fragmented application of the same act throughout the Union?

1. The inherent difficulty of interpreting EU law

Firstly, one could be inclined to have recourse to the classic methods of interpreting EU law. But that is not an easy task either. Unlike domestic legal orders which sometimes tend to prefer literal approaches, EU legislation is to be interpreted purposively, while taking into account its peculiar common nature; it cannot be just based on textualism, though this method enjoys a natural appeal for its simplicity and for serving to insulate the interpreter, as far as possible, from charges of political activism. It suffices to recall two leading statements by the ECJ in the CILFIT case:

‘Community law uses terminology which is peculiar to it. Furthermore, it must be emphasized that legal concepts do not necessarily have the same meaning in Community law and in the law of the various Member States’.

Strict textualism can therefore be misleading and raises a problem at the implementation stage, particularly if national interpreters are unfamiliar with the particularities of EU law. In any case, faced with a problem of understanding an EU act, national public officials are expected to apply the ECJ’s approach to interpretation. They must look to the words and then to the purpose or intent when the wording is uncertain, as well as to the overall evolution of the EU law. In CILFIT the ECJ ruled that:

‘every provision of Community law must be placed in its context and interpreted in the light of the provisions of Community law as a whole, regard being had to the objectives thereof and to its state of evolution at the date on which the provision in question is to be applied’.

15 It is a matter of course, however, that the interpretation of law cannot entail its subjective application nor its exploitation to justify a desired end. Only in this perspective, Voltaire’s view, according to which to interpret the law is to corrupt it, can be retained. Interpretation may be to a certain extent creative, albeit not arbitrary, activity under EU legal system.


17 To quote the words of the European Court in the Da Costa case “When it gives an interpretation of the Treaty in a specific action pending before a national court, the Court limits itself to deducing the meaning of the Community rules from the wording and spirit of the Treaty ….” (Joined Cases 28 to 30/62, Da Costa [1962] ECR 31, 37).

18 Case C-336/03, [2005] ECR I-1947, para. 21. For another example of purposive interpretation, Case C-173/07 Emirates Airlines [2008] ECR I-5237, para. 35: ‘to regard a ‘flight’ within the meaning of Article 3(1)(a) of Regulation No 261/2004 as an outward and return journey would in fact have the effect of reducing the protection to be given to passengers under the regulation, which would be contrary to its objective of ensuring a high level of protection for passengers’.

19 Case 283/81, CILFIT, para. 20. Likewise Case C-292/00, Davidoff [2003] ECR 1-389, para. 25: ‘The Court observes that Article 5(2) of the Directive must not be interpreted solely on the basis of its wording, but also in the light of the overall scheme and objectives of the system of which it is a part’; and Case C-63/00 Schilling [2002] ECR I-4483, para. 29. The philosophical idea that individual norms are to be envisaged as fragments drawn from a larger order (N. MacCormick, Questioning Sovereignty: Law, State,
In the example of the Regulation on the rights of passengers in bus and coach transport, the Commission correctly stressed the need for a systematic interpretation of the text. Structuralism – *i.e.* finding the meaning of a particular provision only by reading it in the light of the legal text as a whole and its context – and teleological interpretation are often the key concepts as regards the interpretative methods to be used in the EU legal order. To say the least, national judges and, more generally, public officials should be well aware of these criteria.

2. The Commission could adopt more soft law instruments to guide national implementing measures

Secondly, if it is not easy to solve the matter through the means of common and relatively simple interpretative methods, the Commission might have more recourse to instruments of soft law, such as recommendations, communications, practical guidelines or explanatory papers. Naturally, they would not bind Member States. But they would help them to implement a certain piece of legislation properly, when they are sometimes already fearsome of the risk of infringement proceedings. Most of all, it would favour uniform application throughout the Union – a corollary goal which should not be underestimated, particularly when the EU act concerns internal market law. Many problems potentially affecting the correct application of EU legislation could then actually be resolved without the need to resort to infringement proceedings. That would be in line with the principle of loyal cooperation to assist Member States ‘in carrying out tasks which flow from the Treaties’ (Article 4(3) TEU).

3. The limited role of recitals

Thirdly, in order to address the problem *ex ante* – *i.e.* in the law-making process – it is appropriate to make use of the preamble. But the EU legislator is expected to draft it accurately. Going back to the second example (in section B.2), recital (16) of Directive 2004/38 is probably the utmost the legislator can do. As noted above, the very obligation set out in the operative part of the Directive to take into account the specific situation of the person concerned, has been supplemented twice: once by means of a recital that substantiates the application of a proportionality test; and then the relevant

---

20 As regards the regular use by EU courts of judicial review ‘as the medium through which to construe Community policy in a teleological manner so as to best attain its objectives’, see P. Craig, ‘Institutions, Power and Institutional Balance’, *The Evolution of EU Law*, cit. ([supra](#) note 8), 41, 73.

21 As a matter of principle, however, if no other interpretative method leads to a different conclusion from the one suggested by the textual analysis, the ECJ is ‘not entitled to assume the role of the Community legislature and interpret a provision in a manner contrary to its express wording. It is for the Commission to submit proposals for appropriate legislative amendments to that end’, regardless of the objective reasons put forward by the Commission and intervening Governments advocating an interpretation which was not consistent with the text (Cases C-310/98 and C-406/98, *Met-Trans and Saggol* [2000] ECR I-1797, para. 32). See in that regard the Opinions of Advocate General Léger in Case C-350/03, [2005] ECR I-92, paras. 84-94 and Advocate General Colomer in Case C-396/07 *Juuri* [2008] ECR I-8883, paras. 44-48, who suggested that it is necessary to take both words and goals seriously.
details were subsequently clarified by the four-step approach suggested by a soft-law instrument.

As lawyers know, recitals are interpretative tools in the EU legal order (as in legal orders in general for that matter) that the ECJ refers to in a restrictive manner. In principle the ECJ does not give effect to recitals that are drafted in normative terms. Recitals can help to explain the purpose and intent behind a normative instrument. They can also be taken into account to resolve ambiguities in the legislative provisions to which they relate, but they do not have any autonomous legal effect:

‘the preamble to a Community act has no binding legal force and cannot be relied on as a ground for derogating from the actual provisions of the act in question’.

Therefore, a recital cannot displace the operative provisions of a legal instrument. The rationale of the case-law appears to be based on the principles of legal certainty and legitimate expectations.

In a case concerning the interpretation of a consolidated legislative act, the ECJ, after having analyzed the content and purpose of the new text, stressed that a recital in the preamble to that text did not correspond to any of the provisions which it contained. Following the opinion of the Advocate General, the ECJ stressed that it was a mistake which was made when consolidating the earlier legislation, and held that a

---

22 One interesting precedent is about the meaning of Directive 2000/78/EC, that includes a number of ‘normative’ recitals with no corresponding substantive provisions in the operative part of the Directive itself. In that respect, the ECJ apparently sticks to the recital wording, but ultimately it does not pay much tribute to the preamble (Case C-267/06 Tadao Maruko [2008] ECR I-1757, paras. 49 to 60).
23 Case C-244/95, Moskof, [1997] ECR I-6441, paras. 44-45. Recitals can help to establish the purpose of a provision (Case C-173/99 BECTU [2001] ECR I-4881, paras 37-39) or its scope (Case C-435/06, C [2007] ECR I-10141, paras. 51-52) But they cannot take precedence over those substantive provisions. ‘Whilst a recital in the preamble to a regulation may cast light on the interpretation to be given to a legal rule, it cannot in itself constitute such a rule.’ (Case 215/88 Casa Fleischhandels [1989] ECR 2789, para. 31). Moreover, ‘the preamble to a Community act has no binding legal force and cannot be relied on as a ground for derogating from the actual provisions of the act in question or for interpreting those provisions in a manner clearly contrary to their wording…’ (Case C-162/97 Nilsson [1998] ECR I-7477, paragraph 54. See also Case C-412/93 Edouard Leclerc-Siplec [1995] ECR I-179, para. 47; Case C-308/97 Manfredi [1998] ECR I-7685, para. 30; Case C-136/04 Deutsches Milch-Kontor [2005] ECR I-10095, para. 32; Case C- 110/05 Commission v Italy [2009] ECR I-519, Advocate General Léger Opinion, para. 64-65 (‘It is clear from settled case-law that ‘the preamble to a Community act has no binding legal force and cannot be relied on as a ground for derogating from the actual provisions of the act in question or for interpreting those provisions in a manner clearly contrary to their wording’. In this case, neither of the recitals referred to by the Italian Republic is repeated in the actual body of the directives. And, as I have already emphasised in point 70 of my Opinion in the Meta Fackler case, although the preamble to a directive in principle may give the Court information as to the legislature’s intention and the meaning to be given to the measure’s provisions, the fact remains that, where a concept set out in a recital is not given concrete expression in the actual body of the directive, it is the terms of the latter that must predominate’).
‘recital cannot be relied upon to interpret Article 6(1) of Regulation No 822/87, as amended by Regulation No 1325/90, in a manner clearly contrary to its wording’\textsuperscript{25}.

It noteworthy that the Interinstitutional Agreement of 16 December 2003 on Better Law Making,\textsuperscript{26} underlined the need to improve the quality of legislation and reiterated the EU institutions’ commitment to the full application of the Interinstitutional Agreement of 22 December 1998 on common guidelines for the quality of drafting of Community legislation\textsuperscript{27}, stating \textit{inter alia} that

‘The purpose of the recitals is to set out concise reasons for the chief provisions of the enacting terms, without reproducing or paraphrasing them. They shall not contain normative provisions or political exhortations’\textsuperscript{28}.

4. A proactive attitude from Member States

Fourthly, in order to tackle the problem of the complexity of EU legal texts – a difficult task as among others the recent ECJ ruling on the Directive on Data Retention proves\textsuperscript{29} – several suggestions could be made. One is the stricter application of the 1998 Interinstitutional Agreement which already provides that EU acts are to be drafted ‘clearly, simply and precisely’\textsuperscript{30} and that ‘provisions of acts shall be concise and their content should be as homogeneous as possible. Overly long articles and sentences, unnecessarily convoluted wording and excessive use of abbreviations should be avoided’\textsuperscript{31}. It would also be worth exploring the possibility of improving the current interinstitutional legal framework on better law making, or of encouraging the Commission to pay more attention as to the clarity of provisions in the legislative process; the Council could be more sensitive to such an issue in its current practice\textsuperscript{32} even in terms of enhancing the involvement of lawyers in the Working Groups\textsuperscript{33}.


\textsuperscript{27} OJ C 73, 17.3.1999, p.1.

\textsuperscript{28} Cit. 2, point 10 (emphasis added).

\textsuperscript{29} Although specific provisions of that Directive did not permit the retention of the content of the communication or of information consulted using an electronic communications network, on the basis of a systematic interpretative approach, including reference to recitals, the ECJ held that ‘it is not inconceivable that the retention of the data in question might have an effect on the use, by subscribers or registered users, of the means of communication covered by that directive and, consequently, on their exercise of the freedom of expression guaranteed by Article 11 of the Charter’ (Joined Cases C-293/12 and C-594/12 Digital Rights Ireland Ltd [2014] ECR I-0000, Judgment of 8 April 2014 nyr, para. 28).

\textsuperscript{30} Interinstitutional Agreement of 22 December 1998, cit. point 1.

\textsuperscript{31} Ibidem, point 4.

\textsuperscript{32} Search for a compromise, namely among Member States, should not be done at any cost and the rotating Presidencies should pay close attention to the matter, with the help of the institutions’ legal services, as well as of the Member States’ lawyers. In other words, it does not seem unreasonable to argue that Article 11 of the Council Rules of procedure could be applied more strictly, possibly with the Commission’s help. This is not to say that the search for a consensual solution within the Council is
But the purpose of this section of the article is not to dwell on institutional steps but to focus is on national experiences instead. The following suggestion is of a practical nature.

At the transposition stage, a Member State might involve national staff who actively took part in the EU law-making process. For that staff – it can be reasonably assumed – has developed in the course of the negotiations a solid expertise both on the legal implications of the EU legal text and, above all, on its impact on domestic law. That staff should in principle advise on the minimum required to effectively implement a Directive for instance, so as to avoid over-implementation and to advise when implementation goes beyond the minimum necessary to comply with it and the legislator starts approaching a *domaine libre*. As a matter of principle, national public officials should not only be able to manage the interpretative issues flowing from the legal text being implemented, but also to pinpoint which part of the domestic legal order should be revised. Risks of infringements would in principle be reduced accordingly.

To put it more generally, it would appear to be a pragmatic solution to establish a close connection at national level between the personnel taking part in the drafting of an EU legal act (in the Italian jargon ‘fase ascendente’ or upstream phase) and the personnel engaged in the process of implementing that act (‘fase discendente’ or downstream phase). Linking the two phases so as to rely on the same national staff for advising on both appears to be a quite simple scheme to ensure better understanding of the EU legal texts and, where appropriate, to sound a warning wherever there is a risk of an infringement due to inadequate implementation. In addition, such a close link between negotiation and transposition would permit national authorities to draft transposition measures at an earlier stage – even immediately after the law-making process in Brussels is over.

A recent Italian reform is appreciated step in the right direction. In 2012, Italy approved Bill No 234 repealing previous statutes, and setting out comprehensive provisions on the participation of national authorities in the normative and political activity of the Union.

---


34 That has been my personal experience when I was the legal advisor of the Italian Permanent Representation. In fact in 2007 I made that suggestion to the former Chief of Legislative Unit of EU Department for EU Affairs.

EU’s institutions, as well as in the related implementing stage at national level. Article 20 has set up for the first time the ‘Evaluation Unit of the EU legal acts’ to ensure ‘a more effective Italian participation in the law-making process of the EU and’ – what is important to stress here – ‘its careful implementation in the internal legal order’. It may be pointed out that the Evaluation Unit is composed of public officials from the relevant departments who have the tasks of monitoring EU activities, contributing to the information to be given to the Italian Parliament and, significantly, assisting the members of the Committee of senior officials of the public administrations responsible for determining the Italian position in the making of EU law (Article 19). It is to be noted that pursuant to Bill No 234/2012, the national staff that follows negotiation in Brussels is involved in the drafting of a Report to be addressed to the Italian Parliament as to the content of the Commission’s legislative proposals. That report contains inter alia an impact assessment on the national legal order, as well as an initial transposition table (Article 6(4) and 6(5)), which is to be progressively updated.

Although in a quite indirect way and perhaps in a slightly bureaucratic manner, this legal framework appears to demonstrate that the suggestion to have one single Unit in charge for both ‘upstream’ and ‘downstream’ phases has been endorsed by Bill No 234/2012. It goes without saying that it is not per se a panacea, since its workability will depend on the national legislator and, most of all, on the timely adoption of the national legislative instruments to implement at domestic level EU secondary acts – i.e. ‘legge europea’ (‘European Law’) and ‘legge delegata europea’ (‘Delegated European Law’). In principle, however, it is worth noting that these two internal law instruments are theoretically designed to achieve transposition in an effective manner. The former sets out provisions for directly modifying, supplementing and repealing domestic legislation to comply with EU binding instruments, including the ECJ rulings on infringements and...

---

36 According to its long title, Bill No 234/2012 provides for the full flegded involvement of the parliamentary authorities which has been designed in full coherence, on the one hand, with the Italian Constitution, and on the other hand with EU principles of conferral, subsidiarity, proportionality, sincere cooperation, efficiency, transparency and participatory democracy. One of the most innovative parts of Bill 24 December 2012 No 234 is indeed Part II which provides a thorough involvement of the Italian Parliament in the legislative process of the EU. The new Bill establishes obligations to consult with and inform the Parliament (Article 4), including the international agreements concluded among Member States in financial, economic and monetary areas (Article 5). The objective is to effectively involve the Italian Parliament in the decision making process of secondary law before the Government adopts a position within the EU institutions (Article 6). In the same vein, the Italian Chambers may adopt formal instructions addressed to the Government, as well as parliamentary scrutiny reservations (Article 10). In short, any political or legislative activity of the EU, namely in the economic governance area, is currently subject to serious scrutiny control by the Italian Parliament. Implicitly the new Bill is also meant to inject into the EU system more democratic legitimacy through the Italian national system, much on the lines set out by the Bundesverfassungsgericht (BvR 987/10, 2 BvR 1099/10 e 2 BvR 1485/10) concerning the compliance of the German laws authorizing financial aid to Greece with Articles 38, 110, 115 and 14 of the Grundgesetz; see also ruling 28 January 2012 (on application 2 BvR 8/11). However, this will be realised only if the Italian Parliament has the strength to effectively scrutinize the Government. The Bill is indeed a step in that direction by providing all the necessary legislative tools.

37 As noted by C. Favilli, cit., 725, if it is taken seriously, the ‘revolutionary’ obligation to submit a Report to the Italian Parliament will have a positive effect on the so-called ‘fase discendente’, since it commits the competent administrations to deal with the EU law-making process in a systematic manner, and not only after it is over.
international agreements concluded by the Union (Article 30(3)); the latter is deemed to
confer a delegated power to the Government with a view to the transposition of
directives and of decisions taken by the Union under the Common Foreign and Security
Policy (CFSP) only (Article 30(2)) – that is to say EU legal instruments which require
more systematic and coordinated transposition measures. In that respect, the
Government is committed to adopt the delegated acts at the latest two months before the
deadline set out in the directives or the decisions (Article 31(1)). It is also worth noting
that the Government has been given the power to modify, where necessary, the
delegated act within 24 months after its adoption (Article 30(5)), even as regards the
transposition of EU delegated acts aimed at supplementing or amending non-essential
elements of the relevant directive (Article 31(6)).

As a result, Bill No 234/2012 decouples the former ‘Community Law’ (or ‘Legge
comunitaria’) which was conceived as one omnibus tool. Overall, the domestic
legislative process concerning transposition becomes much more flexible. Instead of
having a single instrument, Italian authorities have several means at their disposal. That
holds true particularly if one also considers the possibilities: (a) for the Italian
Parliament to approve where necessary ad hoc delegated powers to the Government
(Article 34); (b) for the Government to transpose directives by means of regulatory and
administrative provisions (Article 35), and when it comes to implementing EU acts
adopted by the Commission or the Council (Article 36); and finally, (c) for the
Parliament to approve urgent transposition instruments, specifically to bring to an end
infringement procedures (Article 37).

D. Conclusion
In conclusion, there is no single, magic bullet to deal with complexity of EU secondary
law. Several suggestions could be adopted both at EU and national level to help remedy
the problem. National experiences may indeed be a valuable source of inspiration. To
paraphrase a famous statement38, do not ask what the EU institutions could do to guide
national authorities when implementing a complex legal act, but each Member State
should ask itself what it can do to achieve an effective result at home. In other words,
Member States could be instrumental in mitigating the complexity of secondary law.

38 In his inaugural speech in 1961, President John F. Kennedy urged American citizens to “ask not what
your country can do for you - ask what you can do for your country”.