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The “cage of rules” in Italy. Proposals to “unlock” it*

* A longer version is available in Italian on the website www.lablib.luiss.it

ABSTRACT

In Italy there is currently a serious regulatory problem, notably in the economic field, due to the complexity, quality and effectiveness of rules.

In order to improve regulation and consolidate certainty of law, an important contribution may be offered by the actual and effective application of RIA and *ex-post* regulatory analysis, which determine utility and effectiveness of the rules and verify whether the whole regulatory framework is coherent and up to date as well as by the consultation of interested parties. Simplification and broadcasting of the approval process of regulations of the Government and Parliament are necessary as well.

It is important that all this is undertaken in a joint and coordinated manner, because an individual change will unlikely occur and would be, anyhow, useless.

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1. Introduction

In Italy there is currently a serious regulatory problem, notably in the economic field, due to the complexity, quality and effectiveness of rules.

Abusing of a renown sociological metaphor (BAUMAN), it can be stated that we now stand before "liquid law", which changes quickly and often unclearly, to then undergo further change, turning the expression "certainty of law" in an empty and meaningless one, at a time in which, in a civilized and advanced society such certainty counts at least as much as the much longed-for political certainty and stability.

The Report for 2012 issued by the Observatory on legislation of the Chamber of Deputies has highlighted the substance of the problem very clearly. It is useful to recall the main issues that have been raised in such report, also referring to the recent summary drafted by the Italian Court of Auditors:

1) a structure and formalization of the written texts that renders comprehension very difficult, due to the length and oftentimes excessive number of articles and (or) paragraphs, as well as to the technical and linguistic formulation of laws, and to the abused employment of indications which are merely programmatic and lack prescriptive content;
2) the excessive reference to enactment provisions, which often stand at the edge or outside of the traditional system of sources of the law, and provide, quoting the Court of Auditors "atypical or even indefinite commitments";
3) legislative stratification, made more complicated each day by the volatility of the law and by the presence of similar provisions, which are yet not coordinated among themselves.

The situation is quite paradoxical: it has been defined as a "flight from the law". However, besides this is the "cage of rules", which grows in size and becomes less transparent.

2. The flight from the law

The role of the Parliament has grown marginal (even the ISSIRFA Report for 2012 has insisted on its delegitimization), not only as a consequence of the growing interposition of derived European law (regulations and, notably directives for maximum harmonization). A recent document issued by the Observatory on legislation contains an interesting fact: in the XVI° legislature, the Italian Parliament, on the total of 805 first-level normative acts, the laws are less than half (384), most of which are "necessary" ones (104 conversion laws, 19 delegation laws, etc.). Laws which are typically issued by the Parliament are constantly

diminishing and are now only ¼ of the total. The process of their approval rarely originates from an initiative of the government which, when it is not forced to resort to the Parliament, rarely uses the tool of draft bills.

The Parliament has maintained a significant role only in the conversion process of law decrees issued by the government, which in turn have become, especially with the economic crisis and the consequent emergency legislation, a tool, together with the provisions connected with the financial bill, used to introduce recurrently articulate reforms which have a substantial systemic effect on the medium-long period.

On the other hand, decrees become more and more broad. During parliamentary exam – as the Report for 2012 on legislation has observed – such decrees grow in length of over a third compared to the original version drafted by the government. Often this growth is inconsistent and occurs through so-called maxi-amendments (with reference to the latter, see the proposals contained in the Report issued by the panel of "Saggi", appointed in March by the President of the Italian State). The Constitutional Court, with decision No. 22 issued on February 16, 2012, has also expressed its view on the importance that the consistency of law decrees be retained also in the conversion of such decrees in laws.

Undoubtedly, both decrees and amendments escape all regulation impact analysis (RIA), and, despite the best of intentions that, with reference to the former, arises from the new regulation issued on this matter, it is hard to believe that the situation may improve in practice.

As the OCSE 2012 report on Better Regulation in Italy has underlined, policies for consultation and monitoring must be implemented – which are insufficient, if not in the case of public Authorities – by combining the process of rule drafting with tools that guarantee their actual enactment, also on the regional and local scale.

The role of lobbies is, oftentimes too strong and lacks transparency, when it should only influence contents, framed in a convincing framework of policies, which should be articulated by legitimate and well-identified interests. The time has come to regulate this phenomenon also in Italy, as the report issued by the committee of "Saggi" has suggested.

3. The cage of rules

On the other hand, the overwhelming amount of second-level normative acts – 832 for 69 provisions in the "Monti" government, as reported in a note cited in the Agenda drafted by the "Saggi" committee – extensively lengthen the time that is normally required for a legislative provision to actually change things. Of the 832 second-level normative acts that were conceived by the "Monti" government, 319 must now be enacted by the new "Letta" government.

By studying the Report for 2012 on legislation and the tables therein provided, it is clear that it is normal for enactment provisions to require an actual time of adoption that can also exceed a year. According to a well-known Italian scholar (CASSESE), "between three

fourths and two thirds of laws, after one year has passed from their issuance, still await government enactment provisions".

In short, months go by, oftentimes a year or more, before a "reform" becomes effective.

The enactment then becomes "administrative", concerns enforcement, and more time is needed (as well as a cooperative and efficient administration on the various hierarchical and territorial levels). It is not farfetched to state that it may take a few years to achieve – when this is possible – a reform of medium complexity.

One example may be recalled, concerning the liberalization of professional services, on which different legislative provisions have intervened in the past fifteen years. Just recently, from Law Decree n. 138/2011 onwards, with particular emphasis.

According to the new government, which in its keynote speech to Parliament has made very few references to competition, with reference to autonomous work and free professions "the liberalization measures have already been enacted and adopted". However, the process of liberalizations seems far from being completed, also on the legislative level, with many rules that still need to be issued, despite the recent regulation that has enacted the reform of professional orders (Presidential Decree August 7, 2012, No. 137). Reference can be made especially to the recent Law No. 247 issued towards the end of 2012 concerning the legal profession, which requires for its attainment further regulation that must undergo a complex approval process, and which delegates the government to draft specific rules for companies between lawyers, which would be divergent (even in principles and guiding criteria) from the rules set out in the decree No. 34 issued on February 8, 2013 on companies between professionals. In any case, if and when such process will be complete, it will still be very difficult to identify a coherent strategy of liberalization, with reference to both professional orders and generally speaking, also considering the professions which are not organized, pursuant to the recent Law 4/2013.

4. Proposals

The Agenda issued by the "Saggi" committee to improve regulation and consolidate certainty of law recommends, with reference to first-level normative acts, a strengthening of RIA and *ex-post* impact evaluation, with the involvement of institutions such as ISTAT and the independent Authorities.

With reference to second-level normative acts, the monitoring of Parliament; the consultation of interested parties; on-line broadcasting of the whole approval process and of the reasons of any possible delays; the simplification of the approval process of regulations, so to avoid employment of decrees which are not regulation-level; a rewarding system for public administrations that respect the timing for the approval of second-level provisions.

These suggestions may be shared. However, when possible – as in the case of liberalizations – some time off law drafting in order to enact what has already been done is

also vital. I recall the idea expressed by Fabrizio Barca, which has recently been revived, which involves a halt to market reforms and the refusal to draft new rules in order to enact, instead, the novelties that have already been introduced.

Besides guaranteeing “stability” and therefore “certainty” to the regulatory framework, it is essential to restore an improvement in the quality of rules. This translates into the need, in first place, that specific and transparent policy decisions be made, and that these must then be transposed in normative acts that are written clearly, concisely and accurately.

An important contribution may be offered by the revival of RIA and *ex-post* regulatory impact verification, on which, despite failures and delays, it is necessary to concentrate, with even more conviction. Rules need to be analysed *ex ante*, in order to determine their utility and effectiveness, resorting to a wide consultation and public discussion; they must be subject to a specific, periodic and complex *ex post* exam, by identifying their inefficiencies, also through confrontation with who is called to apply and interpret such rules, and in particular, by ascertaining if the regulatory framework is coherent and up to date.

All the above can only be achieved if the use of law decrees is traced back to real emergencies and to cases of extraordinary need and urgency, as provided for by Article 77 of the Italian Constitution, ensuring a real fast track for governmental proposals (suggestions may be found in the Report by the committee of “Saggi”); by deeply reforming RIA; by asking the Parliament, to which RIA does not apply, to also undertake a deep evaluation-process on laws and amendments and to make the participation of lobbies evident.

It is important to highlight that, if all this is not undertaken in a joint and coordinated manner, an individual change will unlikely occur and would be, anyhow, useless. I realize the difficulties, but what obstacles that are not merely political – and therefore, could, if wanted, be overcome – prevent this?

Attention to the quality of rules may not be detached from an action on their quantity.

The “cage of rules” must be reduced and rules must be significantly cut back without simply transferring their issuance at lower hierarchical levels, with less transparency, less political responsibility and more risks of delays if not of cover-ups and misinterpretation that would follow.

Less rules, but above all, less enactment and second-level provisions. More trust, with reference to detailed provisions, in the self-regulation of companies and citizens.

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