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ITALY

1. Which are the procedures for the incorporation of Security Council resolutions imposing sanctions into the internal legal order of your State? Are they incorporated through legislation, regulations or in any other way? Has the implementation given rise to any constitutional or other legal problems at national level? Is there any relevant case law?

In principle, binding acts of an international organisation are given effect through the *ordine di esecuzione* ("order of execution"; "ordre d'exécution") – usually given by ordinary law – that implemented the constituent treaty; to the extent that they are self-executing, therefore, UNSCRs do not need an *ad hoc* act of implementation. In practice, however, UNSCRs are always implemented through a specific act.

The normal instrument implementing UNSCRs is a legislative act: either a law or a *decreto legge* ("law-decree"; "décret-loi"), a provisional measure with the force of law.

According to Article 77 of the Italian Constitution[1], in cases of necessity and urgency the Government may issue provisional measures with the force of law, which need subsequent confirmation by Parliament: law-decrees need to be converted into a law within 60 days from their enactment; if they are not, they cease to be in force retroactively (unless a law is passed for the purpose to save the effects they produced while they were into force).

Delegated legislation – an other act with the force of law – which constitutes the normal instrument for implementing EC directives (as well as other acts of EU law) is instead never resorted to for the purpose of implementing UNSCRs.

As a general rule, UNSCRs implemented through EU-regulations do not need national provisions of implementation. According to the case-law of the Court of Justice of the European Community (ECJ), in fact, the direct applicability of regulations implies that national provisions of implementation are not only unnecessary, but even prohibited under the Treaty of the European Community (ECT). However, should a regulation exceptionally require an act of implementation to be taken at the national level, member States are under an obligation to adopt the necessary measures. This is typically the case of EC regulations setting out the obligation for member States to provide for "effective, proportionate and dissuasive" sanctions applicable to their infringements. These sanctions complement the general civil law provision according to which any transaction illegally operated shall be null and void[2].

In Italy implementation of EU measures giving effect to UNSCRs – where necessary – required the adoption of an *ad hoc* act[3]. In this respect, however, Law-decree No. 369 of October 12, 2001,

[1] Article 77 of the Italian Const. reads as follows:
(1) "The Government shall not, unless properly delegated by the Chambers, issue decrees having the value of law".
(2) "When, in exceptional circumstances, the Government issues, on its own responsibility, provisional measures having the force of law, it shall on the same day submit them for conversion into law to the Chambers […]-
(3) "Law-decrees shall loose effect as of the date of issue if they are not converted into law within sixty days of their publication. The Chambers, may, however, approve laws to regulate rights and obligations arising out of decrees that have not been converted into law".

[2] See e.g. EC Regulation No. 2580/01 "on specific restrictive measures directed against certain persons and entities with a view to combating terrorism" adopted pursuant to Common Positions 2001/930/CFSP and 2001/931/CFSP, for the purpose of implementing UNSCR 1373 (2001).

[3] An example may be illustrative of this pattern. For the purpose of providing sanctions for infringements of the measures

converted into Law No. 431 of December 14, 2001, introduced two major innovations concerning both the determination and the application of sanctions.

As regards the determination of sanctions, Art. 2 introduced penalties for all breaches of EU regulations aimed at preventing and suppressing the financing of terrorism, also in implementation of UNSCRs, rendering them null and void. The law also makes it possible in future – and here lies its main innovative character – to avoid the need of enacting specific legislative instruments in order to lay down penalties for violation of EU regulations banning exports of goods and services or calling for the freezing of capital and other financial resources, including in implementation of UNSCRs. This provision has been modified by the statute implementing the International Convention for the Suppression of the Financing of Terrorism (Law No. 7/2003) to the effect that not only "acts in violation of provisions concerning a ban on export of goods and services or the freezing of funds or other financial assets" are null and void, but also acts in violation of provisions on "bans of provision of financial services". In all such cases, administrative penalties will henceforth be automatically applicable. Violations are punished through administrative sanctions amounting to at least half of the value of the transaction and up to the double of the same value.

At the institutional level, Art. 1 established the *Financial Security Committee* (CSF) – chaired by the Director General of the Treasury and made up of representatives of the Home Affairs, Foreign Affairs, Justice and defence Ministries, as well as the Bank of Italy, CONSOB (the Stock Exchange Commission), IUC (Italian Exchange Office), Guardia di Finanza (Customs and Excise Police), DIA (Anti-Mafia Directorate) and the Carabinieri. The CSF has the task of monitoring the way in which the prevention system operates and sanctions are imposed on persons violating national legislation, with particular reference to EC Regulations prohibiting the export of goods and services, bans on flights, and the freezing of capital assets. Through the CSF, Italy has thus acquired the instruments for applying the European procedure for imposing penalties in implementation of UNSCR 1373(2001) but also for complying with its international obligations arising under subsequent UNSCRs, including, for instance, Resolution 1455(2003).

Also in the case where a UNSCR states an international obligation to incriminate a certain individual conduct, as does, for instance, Resolution 1373 – the EU or EC measure only restating the obligation to prohibit and punish with a criminal sanction the criminal behaviour in question – implementation of this obligation is required from the member States. Under Italian law, a legislative instrument has to be adopted in order to define the crime to which a criminal sanction applies. See e.g., Law-decree No. 374/2001, converted into Law No. 438/2001 (art. 1) introduced into Italian law the crime of the unlawful financing of association in the pursuit of both international and domestic terrorist activities, by updating Article 270-*bis* ("Conspiracy for the purposes of domestic or international terrorism or for subverting the democratic order") and article 270-*ter* ("providing assistance to associated persons") of the Criminal Code. This Law also extends the provisions of Anti-Mafia legislation to international terrorism as regards restrictions on personal freedom, investigation of economic and financial assets, seizure and confiscation of goods.

To date implementation of UNSCRs imposing sanctions has not given rise to specific constitutional or other legal problems.

2. Does the choice depend on the content of the Security Council resolution?

The choice to implement UNSCRs imposing sanctions through an *ad hoc* act is independent upon their self- (or non self) executing character. The legal nature of the Security Council resolution is

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adopted against the Taliban, Italy enacted Law-Decree No. 353/2001, converted into Law No. 415/2001. This law provided for administrative fines in implementation of EC Regulation No. 467/01 and subsequent amendments thereto, referred to the lists of names to which these provisions and subsequent updates apply, and established penalties in conformity with Articles 247 and 250 of the Criminal Code, concerning respectively "aiding and abetting acts of war" and "trading with the enemy". The same instrument also provided that any acts performed in violation of the provisions banning export of goods and services as well as of the provisions calling for the freezing of capital and other financial resources, as set out in relevant EC Regulations, including in implementation of UNSCR, are null and void. This statute is no longer in force (see *infra*, *sub* question 3(b)).

also irrelevant as to the choice of the national measure – whether a law or a law-decree – that must be taken.

3. When sanctions are imposed for a fixed period of time which is not renewed, are they tacitly repealed within your domestic legal order or is any normative action required?

In principle, national measures provided for as temporary cease to be in force once the period for which they were set up expires (unless their duration is extended or they are renewed by an *ad hoc* act). Most measures introduced for the purpose of implementing UNSCRs (including sanctions provided therein), however, are adopted for an indefinite time. In these cases, their duration may be brought to an end in two different ways.

(a) Where the law (or law-decree) implementing the measure at the national level is silent on this point, an *ad hoc* act with (at least) the same legal force of the act to be repealed is needed for the measure to cease to be applied. In these cases, which are the most frequent ones, instances may occur in which the national measures are not repealed, while the international and/or EU-EC measure they were intended to implement is no longer in force.

(b) Sometimes the national measure provides that its provisions will cease to be in force when the international measure is no more in effect – or is suspended – at the international level. This was the case, for instance, of Law No. 415/2001, providing for administrative sanctions in implementation of EC Regulation No. 467/01 and subsequent amendments thereto. Article 4 of this Law stated that its provisions would cease to be in force when the measures established in the regulation were suspended or terminated. As Regulation No. 467/01 (together with Regulation No. 1354/01) was repealed by Regulation No. 881/02, the law is no more in force.

With the express provision that measures elapse automatically together with the termination of the international and/or EU-EC sanctions they are intended to implement, the problem of the duration of potentially permanent national measures is solved in principle; there remains, however, the interpretative problem of finding out whether a certain measure is internationally in force or at which date it ceased to be so.

4. When a Security Council resolution imposing an export embargo provides for exceptions while not establishing a committee to authorise such exceptions, does the incorporating act appoint a national authority which is competent to authorise export?

To date, no national institution or organ has been endowed with the general power to authorize trade or other action in derogation of embargos established by UNSCRs. Nor has any new body been instituted for this purpose.

EC regulations often provide that derogations or exceptions to the general prohibitions laid down therein be authorized by the “competent authorities of member States” and contain a list of competent authorities attached thereto. See e.g. the List of competent authorities referred to in Articles 3, 4 and 5 of the Annex to EC Regulation No. 2580/01.

In principle, the competent national authority is determined in accordance with the general rules allocating competence among the different branches of the State’s apparatus: e.g. the Ministry for Foreign Affairs, the Ministry for Productive Activities, the Ministry for Infrastructures and Transportation, the Ministry of Economics and Finance – or a particular office thereof – depending of the subject matter of the measures concerned.

5. Are Sanctions Committee decisions specifying Security Council sanctions or setting conditions for their activation incorporated into domestic law?

This question should be answered, in principle, in the negative for the Committees of sanctions are generally not endowed with the power to issue binding decisions. It is at the enforcement level; therefore, that conformity with a Committee's interpretation of measures already implemented is to be ensured.

There is no practice of *ad hoc* acts of implementation with respect to binding decisions of Committees of sanctions. Such decisions are given effect through the measures enacted for implementing the UNSCR under which the Committee was established. However, when decisions of a Committee of sanctions amount to a change in the regime of sanctions, implementing measures need to be, and indeed are, accordingly modified through a specific act. See e.g. UNSCR 1452(2002), which explicitly sets out a regime of exceptions to the restrictive measures adopted against Usama bin Laden, members of the Al-Qaida organization and the Taliban, implemented with a series of EC Regulations, pursuant to Common position 2003/140/CFSP.

6. Have there been cases where the act incorporating sanctions in the domestic legal order was challenged in court for being in violation of human rights? For example, have national courts assumed jurisdiction in cases where sanctions are challenged by individuals affected by sanctions:

a. if implemented through EU-regulations
b. if implemented directly at national level?

This question is answered taking into account various possible scenarios according to Italian Constitutional law, EU law and the system of judicial protection established under the European Convention on Human Rights. The final paragraph highlights the problem of possible gaps in the judicial protection of fundamental rights vis-à-vis EU and national measures adopted in the implementation of UNSCRs.

(i) Constitutional challenges against UNSCRs and EU-EC measures (or the national measures of implementation thereof)

In principle, UNSCRs have the same force as the act which provides to their introduction into the domestic legal order. As the order of execution of the UN Charter was given by an ordinary law and UNSCRs are implemented by way of a law or an act with the force of law, implementing measures also have the force of law.

By virtue of Article 117 of the Italian Constitution[4], however, the Italian legislator is bound to respect all international obligations in force for the Italian State. This means that legislation implementing UNSCRs prevail over conflicting (previous or subsequent) legislation. They cannot, however, run counter the provisions of the Constitution. National measures of implementation could thus be challenged before the Italian Constitutional Court for the purpose of establishing whether they are consistent with the Constitution.

Indeed, albeit in few cases, statutes giving effect to international treaties have been successfully challenged. No such challenge, however, has ever been brought with respect to the law giving effect to the Charter of the United Nations or a law (or a law decree) implementing a resolution of the Security Council.

As to EC regulations, which – as recalled above – are acts endowed with direct applicability, it is a well established principle that they "prevail" over conflicting national legislation and, as a consequence thereof, determine the inapplicability of the latter.

[4] Article 117, paragraph 1, of the Italian Const. reads as follows:
"Legislative power belongs to the State and the regions in accordance with the Constitution and *within the limits set out by European Union law and international obligations*" (emphasis added).

According to the Italian Constitutional Court, they remain subject to the "fundamental principles" of the Italian Constitution and, within these limits, may be subject to the judicial review of the Constitutional Court (possibly by way of a challenge of constitutionality against the law which gave effect to the EC treaty and subsequent amendments thereto). This is a theoretical assertion, however, very unlikely to be ever applied by the Court.

Also acts adopted within the CFSP or the JHA pillars cannot be challenged *per se* before the Constitutional Court[5]. Only national laws (or acts with the force of laws) implementing them could eventually be challenged (possibly – again – by raising the question of their constitutionality together with the constitutionality of the law implementing the Treaty of the European Union (TEU)). There are no instances so far of such challenges.

(ii) Judicial protection under the TEU and the ECT

Under Article 6, paragraph 2, TEU, measures adopted by the EU and the EC have to conform to fundamental rights and freedoms. However, EU acts adopted under the II pillar are excluded from the judicial review of the ECJ, in accordance with Article 46 TEU, while EU acts under the III pillar are subject to the Court's powers of judicial control only to the limited extent provided for in Article 35 TUE[6]. EC regulations only are subject to full judicial review.

Private parties adversely affected by EC regulations, however, can bring a direct challenge before the Court of First Instance only in so far as he/she is "directly and individually concerned" by the regulation in question. This will rarely occur[7].

A regulation could also come before the ECJ through a preliminary reference. There are, in fact, a few instances in which the ECJ has ruled with respect to a regulation implementing sanctions decided by UNSCRs. One of such instances is the case *Bosphorus Hava Yollari Turizmve Ticaret AS* vs. *Minister for Transport, Energy and Communications and others*, on reference for a preliminary ruling by the Supreme Court of Ireland. In its judgment given on July 30, 1996, the Court interpreted Article 8 of EC Regulation No. 990/93 on trade between Serbia and Montenegro and the European Community, implementing UNSCR 820(1993), to the effect that it applied to an aircraft owned by Yugoslav airlines but operated by a Turkish charter company[8].

(iii) Judicial protection before the ECHR

The scarce number of venues for private parties to effectively enforce their rights allegedly impinged upon by national and/or EC-EU measures adopted for the purpose of implementing UNSCRs is only partially remedied by the existence of the system of judicial protection established under the European Convention for the Protection of Human Rights and Fundamental Freedom[9]. Under the European Convention, an individual or group of individuals who claims to be a victim of a violation of its rights under the Convention may lodge an application against the State allegedly

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[5] Under Article 134 of the Italian Const., the Constitutional Court is endowed with the power to decide on "disputes concerning the constitutional legitimacy of laws and acts having the force of law, adopted by the State and the Regions."

[6] See in this respect the decision of the Court of First Instance of the European Communities (Second Section), in the case *SEGI and others* vs. *Council of the European Union* (case T-338/02), Order of June 7, 2004 (available at http://www.europa.eu.int), holding that under Article 35 TEU the Court has no jurisdiction to hear claims for compensation of damages allegedly caused by a common position adopted under Title VI TEU. For more details, see *infra* note 11 and corresponding text.

[7] See, however, in the reply by the European Union for references to a number of appeals against EC Regulations Nos. 881/2002 and 872/2004 lodged by persons and entities designated by a UN Sanctions Committee in accordance with a UNSCR.

[8] European Court of the Justice, *Bosphorus Hava Yollari Turizmve Ticaret AS* vs. *Minister for Transport, Energy and Communications and others* (Case C-84/95), Judgment of July 30, 1996, in *European Court reports 1996*, p. I-3953. See the next paragraph on a parallel proceedings lodged – and still pending – before the European Court of Human Rights.

[9] Or under other – less effective – human rights monitoring mechanisms. See e.g. the Human Rights Committee's Concluding Observations on the United Kingdom and Northern Ireland of December 6, 2002, scrutinizing some national measures taken pursuant to UNSCR 1373(2001) (UN Doc. CCPR/CO73/UK).

responsible before the European Court of Human Rights (ECHR). In the *Matthews* judgment, the ECHR stressed the principle that the Convention does not *per se* exclude the transfer of competence by a contracting State to an international organization as long as "equivalent human rights protection" is maintained. Where the alleged violation arises directly from a measure of EC or EU law, however, the ECHR would lack jurisdiction *ratione personae*.

As far as common positions adopted under Titles V and/or VI TEU are concerned, the case brought before the ECHR by two Basque organizations (*SEGI and others* and *Gestoras Pro-Amnistia and others* vs. *Germany and others (15 Member States of the European Union)*[10] is illustrative of this point.

SEGI and Gestora Pro Amnistia (two organizations close to ETA) filed an application after they were included in the list to be the subject of strengthened police and judicial cooperation on the basis of Common Position 2001/930/CFSP "on combating terrorism" and Common Position 2001/931/CFSP "on the application of specific measures to combat terrorism", both adopted on December 27, 2001 for the purpose of implementing UNSCR 1373 (2001). They alleged a violation of their rights under Articles 6, 10, 11 and 13 of the European Convention and Article 1 of Protocol 1. On May 23, 2002, the ECHR declared their applications inadmissible as they lacked capacity as "victim" within the meaning of Article 14 of the Convention. According to the ECHR, the common positions adopted in the context of CFSP are not, as such, directly applicable in the Member States and their implementation requires adoption of specific provisions in national law in the appropriate legal form in each member State.

An other action was subsequently lodged before the Court of First Instance of the European Communities by the same organizations against the Council of the EU. The applicants claimed compensation for damages suffered as a result of their inclusion in the list of terrorist organizations in the Annex to Common Positions 2002/340/CFSP and 2002/462/CFSP, which updated Common Position 2001/931. The Court rejected the application[11], holding *inter alia* that under Article 35 TEU the Court has no jurisdiction to hear claims for compensation of damages allegedly caused by a common position adopted under Title VI TEU. This, notwithstanding the express recognition by the Court that "with all probability, [the applicants] dispose of no effective means of judicial redress either before the judicial organs of the EU or the national jurisdictions against their unlawful inclusion in the list of persons or entities implicated in terrorist activities" (paragraph 38 of the order).

In view of the foregoing, it is difficult not to conclude that the legal protection of individuals is insufficient with regard to the potential consequences of common positions or actions adopted under Title V and/or Title VI TEU.

As to regulations, if one were to apply the reasoning of the Court in the *Matthews* case, one would have to conclude that a State cannot be held accountable for human rights violations arising out of acts not "freely entered into" by the State concerned only to the extent that the existence of a system of "equivalent protection" can be established. As shown above, the right of private parties to judicial review with respect to EC regulations is not guaranteed under the ECT.

In a case still pending before the ECHR – *Bosphorus Hava Yollari Turizmve Ticaret AS* vs. *Ireland* – the applicant, an airline charter company, contends that the impounding of an aircraft leased by it is a disproportionate interference with its peaceful enjoyment of its possession. The impounding was brought about by Ireland in furtherance of its obligations under EC Regulation No. 990/93 (adopted in implementation of UNSCR 820(1993)). The ECHR has yet to rule on the question as to whether "the impugned acts can be considered to fall within the jurisdiction of the Irish State within

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[10] European Court of Human Rights (Third Section), *SEGI and others* and *Gestoras Pro-Amnistia and others* vs. *Germany and others (15 Member States of the European Union)* (Joint Applications 6422/02 and 9916/02), Decision on admissibility of May 23, 2002 (available at http://www.echr.coe.int).

[11] Court of First Instance of the European Communities (Second Section), *SEGI and others* vs. *Council of the European Union* (case T-338/02), Order of June 7, 2004 (*supra*, note 6).

the meaning of Article 1 of the Convention, when that State claims that it was obliged to act in furtherance of a directly effective and obligatory EC Regulation". On September 13, 2001 the ECHR held that it did not have sufficient information and that the issue was too closely linked with the merit of the case to be decided at the stage of admissibility[12]. On January 30, 2004 the Chamber relinquished jurisdiction in favour of the Grand Chamber. As the ECHR held Grand Chamber hearing on September 29, 2004, a judgment is expected to be delivered at any time soon.

(iv) Filling the gaps in the judicial protection of fundamental rights.

As the previous analysis has shown, there may be instances in which no effective protection is available to individuals whose rights are impinged upon by measures adopted pursuant to UNSCRs. The most sensitive issues arise in regard to the implementation of – and judicial protection against – measures impinging upon individual rights in the criminal field. Other rights that are likely to be especially affected are the right to property and the freedom to pursue a commercial activity[13]. In these fields at least there is an apparent need to fill the gaps in the judicial protection of fundamental rights both at the national and the EU level.

7. Are there decisions of nationals courts or state practice concerning the relationship between sanctions directed towards individuals and the human rights of these individuals?

To date there is no relevant case law on the point in question.

[12] European Court of Human Rights (Forth Section), *Bosphorus Hava Yollari Turizmve Ticaret AS* vs. *Ireland* (Application 45036/98), Decision on admissibility of September 13, 2001 (available at http://www.echr.coe.int).

[13] See the Thematic Comment on "The Balance Between Freedom and Security in the Response by the European Union and its Member States to the Terrorist Threats" issued in 2003 by the Network of Independent Experts in Fundamental Rights – a group set up by the European Commission at the request of the European Parliament in 2002, in order to assist it in the development of a EU policy relating to human rights. The Report (available at: http://www.europa.eu.int) stresses a number of sensitive areas in which violation of human rights may arise (in the field of fundamental principles of criminal law, personal data protection etc.) and puts forward possible venues to reconcile the measures of the EU and/or the member States with human rights.