RIVISTA DI
DIRITTI COMPARATI

Identity and conditionality in the European Union*

Antonia Baraggia

TABLE OF CONTENTS: 1. Introduction; – 2. The notion of European Identity; – 3. European identity – a problem of definition; – 4. Components of European identity; – 5. European identity – the institutional perspective; – 6. European identity – mobilization from below; – 7. Conclusions.

1. Introduction

This contribution addresses the relationship between identity and conditionality in light of the implications of the Regulation n. 2020/2092[1] and the Court of Justice of the European Union's decisions C-156/21 and C-157/21.

Identity and conditionality are not new concepts in the vocabulary of European integration. However, identifying their contents and boundaries brings us in an area of ambiguity and uncertainty, which ultimately relates to the tensions between Member States and the European Union also in light of the "unfinished" constitutional nature of the European Union and the lack of a supremacy clause like it happens in classical federal arrangements.

The link between identity and conditionality was clearly signaled by the CJEU in the decisions on the rule of law conditionality cases of 16 February 2022. Indeed, the Court linked the legitimacy of a "horizontal regime of conditionality" to the need to protect the EU fundamental value of the rule of law, which is a core feature of the EU identity as a common legal order. I argue that the statements of the ECJ on European identity help to see the ongoing tensions between the EU and the Members States on the rule of law in a new constitutional fashion and will have a significant impact on the future development of the EU. This is even truer if we look at the concrete application of the rule of law conditionality regulation that has been finally activated vis-à-vis Hungary.

We have witnessed to a transformation of the use of conditionality, from a technical tool deployed to assure the good management of EU funds, to a

* Contributo per gli atti dell'VIII convegno annuale di Diritti Comparati su "Costituzione e identità nella prospettiva europea/Constitution and Identity in the European Perspective", Università di Roma 3, 10 novembre 2022.

[1] Regulation (EU, Euratom) 2020/2092 of the European Parliament and of the Council of 16 December 2020 on a general regime of conditionality for the protection of the Union budget.

constitutional instrument to protect the EU identity and its core values: in other words, I argue, it has become an instrument of "militant democracy"[2].

In 2018, J.W. Müller, reflecting on the affirmation of new forms of authoritarianism, argued that «in tightly integrated organizations such as the European Union something like supranational democracy protection remains a highly problematic endeavor»[3]. However, he proposed the establishment of a Commission (the Copenhagen Commission), tasked with the power to investigate violations of the EU fundamental values and to propose to the EU Commission the cut of EU funds or the imposition of fines in case of breaches of the EU values.

This is a mechanism which resembles the one provided by Regulation 2020/2092 – the suspension of EU funds - with the significant difference that it has not been established an ad hoc Commission.

Such evolution has been necessary in light of the ineffectiveness of other existing tool of militant democracy (the procedure of art. 7 above all) and of the growing use by Member States of the identity argument[4] as «trump card against outside interference»[5].

Especially in the rule of law crisis, conditionality and identity became strictly intertwined: indeed, the paper aims to assess the relation between identity and conditionality in light of Regulation 2020/2092 and of the CJEU's decisions on the legitimacy of the rule of law conditionality regime.

2. Conditionality in the EU: its progressive affirmation as a constitutional tool

I will start my analysis of the use of conditionality by arguing that, in a diachronic perspective, conditionality has become a constitutional tool within the EU and even a «defining element of the European integration … process»[6].

Indeed, conditionality has been used by the EU in several areas of intervention, with regard to third countries, to candidate countries and then even with regard to the EU member states.

Initially, conditionality has been deployed as an external relations tool: in particular, mechanisms of political conditionality have been used since the 1990s in

[2] J. W. Müller, *Militant Democracy*, in M. Rosenfeld and A. Saj´o (eds.), *The Oxford Handbook of Comparative Law,* Oxford, 2012, p. 1253.

[3] J. W. Müller, Jan-Werner, *Militant democracy and constitutional identity*, in *Comparative Constitutional Theory,* Cheltenham-Northampton, 2018, p. 430.

[4] G. Martinico, O. Pollicino, *Use and Abuse of a Promising Concept: What Has Happened to National Constitutional Identity?*, in *Yearbook of European Law*, 39, 2020, pp. 228–249,

[5] Ibidem, p. 433.

[6] F. Heinemann, *Going for the Wallet? Rule-of-Law Conditionality in the Next EU Multiannual Financial Framework*, in Intereconomics, 53, 2018, p. 297.

trade agreements and development policies. Following the use of conditionality with third countries, the European Union, then, put in place a robust conditionality structure for its enlargement policy. Both membership itself and financial and technical assistance throughout the accession process have become conditional on candidate countries making continuous progress under the Copenhagen criteria, including the political criteria that require respect for democracy, the rule of law, and human rights[7]. Pre-accession conditionality has been a central theme in the literature on EU enlargement[8], highlighting the possible controversial consequences of conditionality, that not only fail to achieve the intended response but also create new dilemmas[9]. Still in the external relations' field, also the European Neighbourhood Policy (ENP) contains conditionality elements[10].

Besides these classical applications of conditionality, in the last decade, there has been a crucial shift in how conditionality is used by EU institutions as the EU has increasingly relied on conditionality tools internally, that is, vis-à-vis its own Member States. It has done so in several areas.

The first kind of conditionality in the internal dimension of the EU, which apply to all Member states without distinction, is the so-called spending conditionality: it links the disbursement of most EU funding programmes to fulfilling a broad set of rules and standards. The first mechanisms of spending conditionality were introduced as early as the 1990s, especially for the Common Agricultural Policy, where the EU linked funding to the fulfilment of certain environmental objectives. Another classical application of "spending" conditionality, is related to the EU Cohesion Funds, under which the States beneficiaries of the funds were required to submit an economic convergence program and they had to avoid having excessive public debt. This kind of conditionality was introduced in 1994 only for countries beneficiaries of the Cohesion Fund, i.e. Greece, Spain, Ireland and Portugal. Such conditionality, with the successive stages of enlargement, has been applied to all new Member States.

Since then, spending conditionality mechanisms have grown greatly both in terms of their scope of application, as they apply to more funding programmes, and of substantive content, as more and more conditionalities have been attached to funding disbursement. After the already significant steps taken under the previous

---

[7] C. Pinelli, *Conditionality and Enlargement in Light of the EU Constitutional Developments*, in *European Law Journal*, 10, 2004; A. Albi, *EU Enlargement and the Constitutions of Central and Eastern Europe*, Cambridge, 2005; D. Kochenov, *EU Enlargement and the Failure of Conditionality*, the Hague, 2008.

[8] F. Schimmelfennig, U. Sedelmeier, *The Europeanization of Eastern Europe: the external incentives model revisited,* in *Journal of European Public Policy*, 27(6), 2020.

[9] G. Sasse, *The politics of EU conditionality: the norm of minority protection during and beyond EU accession,* in *Journal of European Public Policy,* 15 (6), 2008; D. Kosař, J. Baroš, P. Dufek*, The Twin Challenges to Separation of Powers in Central Europe: Technocratic Governance and Populism,* in *EuConst,* 15 2019.

[10] P. Leino, P. Petrov P., *Between "Common Values" and Competing Universals – The Promotion of the EU's Common Values through the European Neighbourhood Policy*, in *European Law Journal,* 15(5), 2009.

"Common Provisions" Regulation (CPR)[11] for the 2014-2020 MFF, which introduced several *ex-ante* conditions that Member States needed to fulfil to access to EU funding, the new CPR,[12] approved in June 2021, goes even a step further. It transforms the *ex-ante* conditionality regime into an "*enabling conditions*" system, with 4 horizontal and 16 thematic conditions to be monitored throughout the entire budgetary period, and the possibility to suspend funding at any stage of the process. It also reinforces conditions related to respect for fundamental rights in the use of EU funds.[13]

Another interesting application of conditionality internally to the EU is the one deployed during the economic crisis[14]. The eurozone crisis measures and the austerity policies that have been implemented were based on regimes of strict conditionality, negotiated by the EU, the IMF and the Member State in memoranda of understanding signed by EU Member States experiencing economic and financial troubles in order to receive financial assistance[15].

The eurozone conditionality, for the specific circumstances in which it was developed and for the institutional actors involved (not only the EU, but also the IMF and the European Stability Mechanism – ESM), departs from other forms of EU conditionality. However, despite the differences, we can consider it within the broader *genus* of the exercise of power through the use of financial resources. Moreover, we cannot forget that the austerity conditionality has prompted a significant amendment of the TFEU: in order to legitimize forms of macroeconomic conditionality, article 136(3) TFEU, amended in 2011, states that EU financial assistance should be made subject to "strict conditionality".

The most recent evolution of the tool of conditionality is the already mentioned Regulation "on a general regime of conditionality for the protection of the Union budget" approved in December 2020. This signalled a new evolution of conditionality in the EU, since the conditionality mechanism is conceived as a "horizontal tool" capable to be applied to all the EU funds, even to the new instruments, like the NextGenEU.

---

[11] See Regulation (EU) No 1303/2013 of the European Parliament and of the Council of 17 December 2013.

[12] See Regulation (Eu) 2021/1060 of the European Parliament and of the Council of 24 June 2021 laying down common provisions on the European Regional Development Fund, the European Social Fund Plus, the Cohesion Fund, the Just Transition Fund and the European Maritime, Fisheries and Aquaculture Fund and financial rules for those and for the Asylum, Migration and Integration Fund, the Internal Security Fund and the Instrument for Financial Support for Border Management and Visa Policy.

[13] See Annex III, Article 15 (1) of the CPR Regulation.

[14] K. Tuori K., K. Tuori, *The Eurozone Crisis – A Constitutional Analysis*, Cambridge, 2013.

[15] A. M. Guerra Martins, *Constitutional Judge, Social Rights and Public Debt Crisis – the Portuguese Constitutional Case Law,* in *Maastricht Journal of European and Comparative Law,* 22(5), 2015.

The Regulation, while featuring a horizontal mechanism of conditionality, introduces the "sufficiently direct link"[16] criterion – which ensure that the conditionality mechanism is strictly anchored to the implementation of the Union budget and does not transcend the competences of the EU. Another limitation of the mechanism deals with its scope of application: indeed, the Regulation applies only to breaches of the rule of law identified in Article 4(2) of the Regulation and not to any generalized deficiency as regards the rule of law, as envisaged in the original proposal of the Commission[17].

This is a crucial aspect of the Regulation, which sets out – for the first time – several principles and rules that contribute to operationalizing the rule of law value of Article 2 TEU and so make it justiciable within the competence of the EU.

As we can see, conditionality in the EU is a multifaced tools, deployed in different areas with different objectives. However, one of the key and common goals is often strengthening the EU enforcement capacity, especially in areas where the EU lacks coercive powers, lacks tools of enforcement or the already existing ones have proven to be ineffective, as for example in the case of the rule of law crisis.

In particular, the use of conditionality in the rule of law crisis envisages a new, different kind of conditionality, strictly linked to the constitutional dimension of the EU.

In the case of the rule of law, indeed, the aim is to protect the core and founding values of the EU, which define the EU identity, against the challenges posed by Member States to those same values[18].

3. Identity and conditionality in the rule of law crisis

As it is well known, on 16 February 2022, the Court of Justice of the European Union (ECJ) ruled in plenary composition on the actions for annulment brought by Hungary and Poland (C-156/21 and C-157/21 1) against Regulation no. 2020/2092 2. This Regulation introduces a general conditionality mechanism which provides a way

[16] Art. 4(1) of Regulation no. 2020/2092 states that «Appropriate measures shall be taken where it is established (…) that breaches of the principles of the rule of law in a Member State affect or seriously risk affecting the sound financial management of the Union budget or the protection of the financial interests of the Union in a *sufficiently direct way*».

[17] Proposal for a Regulation of the European Parliament and of the Council on the Protection of the Union's Budget in Case of Generalised Deficiencies as Regards the Rule of Law in the Member States, COM (2018) 324 final (May 2, 2018). The vague concept of generalized deficiency risked undermining legal certainty and even promoted a degree of arbitrariness. See Łacny, "Suspension of EU Funds Paid to Member States Breaching the Rule of Law: Is the Commission's Proposal Legal?", in A. Von Bogdandy et al., *Defending Checks and Balances in EU Member States,* 2021, p. 269.

[18] G. Halmai, *The Possibility and Desirability of Rule of Law Conditionality*, in *Hague Journal of the Rule of Law,* 11, 2019, 171.

to suspend European funding to a Member State if infringements of the principle of the rule of law are found which affect or seriously risk affecting, in a sufficiently direct way, the sound financial management of the Union budget or the protection of its financial interests.

The decisions represent landmark cases not only with regard to the specific issue of the rule of law conditionality, but more in general with regard to the constitutional dimensions of the EU.

Indeed, I argue that the ECJ marked, after an incremental process, a new constitutional phase for relations between the EU and Member States, on the one hand, through the reference to the identity of the European Union as a common legal order and, on the other hand, through the recognition of the normative nature of the values of Article 2, «which are given concrete expression in principles containing legally binding obligations for the Member States»[19].

In continuity with previous jurisprudence aimed at giving substance to the EU values[20], one of the most important consequences of the judgments is the elaboration of the normative nature of the values of the rule of law, which can be operationalized in principles and rules set out by the Regulation.

In other words, with the decision in question, the ECJ not only seeks to give flesh to the rule of law value, but also to go further as the Court confirms the nature of Article 2 TEU as a judicially enforceable provision. Recognizing the enforceable nature of Article 2 TEU values brings the Court to define the nature, structural features and the ultimate reason for which the EU stands, in particular playing the delicate chord of the concept of identity. According to the Court, the values enshrined in Article 2 TEU are «an integral part of the very identity of the European Union as a common legal order. Thus, the European Union must be able to defend those values, within the limits of its powers as laid down by the Treaties»[21].

Even though Article 4(2) TEU shows the European Union «respects the national identities of the Member States, inherent in their fundamental structures, political and constitutional, such that those States enjoy a certain degree of discretion in implementing the principles of the rule of law, it in no way follows that that obligation as to the result to be achieved may vary from one Member State to another»[22].

These considerations about the European identity, even though were stimulated by the Hungarian and Polish claims about the violation of national identities, where not strictly necessary for the resolution of the case, which could have been decided on the typical federal grounds of the division of competencies. I think that the ECJ

[19] *Hungary v Parliament and Council* (C-156/21) ECLI:EU:C:2021:974 at 232.

[20] A. Von Bogdandy, P. Bogdanowicz, I. Canor, G. Rugge, M. Schmidt, M. Taborowski, *A potential Constitutional Moment for the European Rule of Law: The Importance of Red Lines*, in A. Von Bogdandy et al., *Defending Checks and Balances in EU Member States*, 2021, p. 385-399.

[21] *Hungary v Parliament and Council* (C-156/21) ECLI:EU:C:2021:974 at 127; *Poland v Parliament and Council* (C-157/21) ECLI:EU:C:2021:975 at 145.

[22] *Hungary v Parliament and Council* (C-156/21) ECLI:EU:C:2021:974 at 233.

deliberately decided to adopt a constitutional register – the highest one – in a specific moment of the EU "integration fatigue": the EU must defend its common values, which are not merely political and aspirational statements, but enforceable values vis-à-vis the Member States.

For this reason, the paragraphs on the EU identity – although limited in space – have several constitutional implications, as the first commentators of the decisions have already noticed[23]. The conceptualization of European identity is posed in tension with the national identities in a way that, in case of conflict, EU identity cannot be contradicted or denied by national identities. As has been argued, there is no space for unconstitutional identities in the EU[24]. This statement may help address the never resolved tension between the EU and Members States. Before the decisions in question, national identities could have been invoked as a trump card to resist the EU's influence in sensitive fields. The principle of conferral intrinsically has limited the EU. With this decision, the EU can now play the same card of identity, which seems even more robust vis-à-vis national identity, because of the free adherence to the EU by the Member States: at the moment of accession, the Member States embraced the EU identity and «whilst they have separate national identities, inherent in their fundamental structures, political and constitutional, which the European Union respects, the Member States adhere to a concept of 'the rule of law' which they share, as a value common to their own constitutional traditions, and which they have undertaken to respect at all times»[25].

However, even in light of this possible transformation fostered by the decisions at hand, we must be aware that the EU can protect its own identity but only within the limits of the conferred competencies such that, while advancing a possible constitutional moment, the ECJ stays within the limits of its jurisdiction and the limits of EU competences.

4. Conclusions

The CJEU has deliberately adopted the register of the Europe identity in the cases dealing with the legitimacy of Regulation 2020/2092, even though it could have decided the case only on the bases of more technical arguments, rather than adopting a broader constitutional approach.

---

[23] P. Pohjankoski, *The Unveiling of EU's Constitutional Identity*, 2022, EULawLive Weekend Edition no. 91; N Kirst, *Rule of Law Conditionality before the Court – A Judgement of Constitutional Nature*, 2022, EULawLive Weekend Edition no. 91.

[24] P. Faraguna, T. Drinóczi, *Constitutional Identity in and on EU Terms,* 2022,, *VerfBlog.*

[25] *Hungary v Parliament and Council* (C-156/21) ECLI:EU:C:2021:974 at 234; *Poland v Parliament and Council* (C-157/21) ECLI:EU:C:2021:975 at 266.

With no doubts the court intended to bring the case in the realm of the constitutional relationship between the EU and its Member States.

In light of this, what will be the constitutional implications of the judgments? Can the use of the "identity register" contribute to prevent the rule of law crisis and democratic backsliding?

The path traced by the concept of European identity is still to be unveiled: it is early to assess the systemic impact of the use of the concept of identity by the EU institutions. However, we can reasonably affirm that the use of the language of identity by the CJEU represents a powerful occasion to foster a dialogue between the EU and the Members States, which is fundamental in order to define the EU identity itself.

***

ABSTRACT: This contribution addresses the relationship between identity and conditionality in light of the implications of the Regulation n. 2020/209226 and the Court of Justice of the European Union's decisions C-156/21 and C-157/21.

Identity and conditionality are not new concepts in the vocabulary of European integration. However, identifying their contents and boundaries brings us in an area of ambiguity and uncertainty, which ultimately relates to the tensions between Member States and the European Union also in light of the "unfinished" constitutional nature of the European Union and the lack of a supremacy clause like it happens in classical federal arrangements. As we will see, conditionality and identity are strictly intertwined and the contribution aims at disentangling the two concepts in light of Regulation 2020/2092 and of the CJEU's decisions on the legitimacy of the rule of law conditionality regime.

KEYWORDS: identity – conditionality - EU funds - rule of law - militant democracy

***

Antonia Baraggia – Professoressa associata di Diritto pubblico comparato, Università degli Studi di Milano (antonia.baraggia@unimi.it)

[26] Regulation (EU, Euratom) 2020/2092 of the European Parliament and of the Council of 16 December 2020 on a general regime of conditionality for the protection of the Union budget.