With the support of the Erasmus+ Programme of the European Union

EU Mobility and Migration Law Course

Academic Year 2019-2020

INTEGRATION CONDITIONALITY IN THE EUROPEAN AND ITALIAN LEGAL ORDERS*

Davide Audrito, Giovanni Ceglie, Mattia Elia, Davide Falcomatà

ABSTRACT: This factsheet presents the sources of EU law dealing with integration conditionality of third country nationals and the CJEU case law interpreting them.

KEYWORDS: Regular Migrants – Integration – Conditionality – Agreement – Compatibility

1. INTRODUCTION

When dealing with the topic of integration conditionality in European and Italian law, a preliminary definition of the concept of integration - at least two of its dimensions – is needed. Sociologists usually categorise some models of inclusion (discussing and criticizing them) which should describe social integration of immigrants in hosting societies. One of these categorizations (Castles, 1995; Melotti, 1992; Pollini e Scidà, 2002; Ambrosini, 2011) identifies

- a *temporary model*, in which immigrants are considered as mere temporary labour force
- an *assimilative model*, where the domestication of immigrants into the autochthon culture is a priority
- a *multicultural model*, which focuses on furthering the importance of human diversity and trying to facilitate social interconnections among the various cultural groups.

* This *factsheet* was drafted by the students of the EU Mobility and Migration Law course of the Law Department of the University of Turin (A.Y. 2019-2020), with the support of the Erasmus+ Programme of the European Union, in the framework of the Jean Monnet Module "EU Mobility and Migration Law" (2019-2022), www.eumomi.unito.it. The European Commission support for the production of this publication does not constitute an endorsement of the contents which reflects the views only of the Author, and the Commission cannot be held responsible for any use which may be made of the information contained therein.

However, what is integration from a legal perspective? The answer highly depends on social and political orientations concerning integration. In reason of that, legal orders provide for different criteria to define a person as being integrated in the host society.

Given that States promote – or try to promote - different models of integration through public policies, the formula "integration conditionality" identifies a set of requisites and sometimes prerequisites codified by law, which impose duties on the migrants and upon which the exercise of some rights is conditioned. Integration conditionality requirements often reflect the underlying political and social approaches to migration and therefore represent an interesting viewpoint to address migration phenomena.

Building on these premises, the main purpose of this paper is to present the sources of EU law dealing with integration conditionality of third country nationals and to investigate how and whether Italian law is promoting the objectives established at EU level.

2. The EU Legal Framework

2.1 Primary and secondary EU law

Only one provision of EU primary law concerns integration of third country nationals (TCNs). Article 79(4) TFEU enshrines that the EU may (and not "shall") support Member States in the promotion of integration of TCNs legally residing in their territories. Art. 79(4) clarifies that these measures should be adopted through the ordinary legislative procedure. The action of the Union in this matter falls into the scope of complementary competences (Montaldo, 2017), in accordance with Art. 6 TFEU. Additionally, Art. 79(4) TFEU excludes any process of harmonization of the national legislations about TCNs' integration measures. Then, the Member States enjoy wide discretion on defining the criteria of integration of immigrants in their societies, whereas the EU is basically entitled to support their action.

Certain provisions of EU secondary law set out the power of Member States to establish integration conditionality requirements. One of the most relevant provisions in this regard is Art. 7(2) Dir. 2003/86/EC, establishing that Member States can make family reunification conditional upon the fulfilment of certain integration conditions. Consequently, the right to family reunification could be denied if the integration requirements codified at national level were not met.

Also Directive 2003/109/EC on the status of long-term resident addresses the issue of integration. Recitals 4 and 12 assert that integration of TCNs who obtained the long-term residence in the European Union is a key element to

promote economic and social cohesion, and that higher equality of treatment in social and economic matters of these residents compared with EU citizens constitutes a genuine instrument to pursue integration. These statements outline the rationale underpinning the EU's approach to the status long-term resident. However, Art. 5(2) of the Directive again introduces the opportunity for Member States to test the level of integration of TCNs applying for the long-term residence, whereas Art. 15(3) provide for the same requirement in relation to a long-term resident in a Member State willing to obtain the same status in another Member State.

Lastly, Directive 2004/114/EC (admission of TCNs for the purposes of study) and Directive 2009/50/EC (TCNs who are qualified workers) refer integration conditionality too (Montaldo, 2017). In particular, recital 23 of the latter instrument states that even if highly qualified workers enjoy generally more favorable conditions of entry and residence in the European Union, every Member State still maintain the right to establish integration requirements. The rationale of the Directive regards the higher possibility to enter in and to become resident of the European Union given the higher capacity of the addressed category to integrate in the host society. In conclusion, even the Regulation (EU) No 2014/514 on the establishment of Asylum, Migration and Integration Fund refers to integration among its objectives .

The most relevant aspect that emerges from the EU primary and secondary legal provisions analysed in this paragraph is that they provide for a framework of clauses allowing exclusively Member States to define the degree of integration of TCNs in their societies.

2.2 Soft-law instruments

Alongside Article 79(4) TFEU and the Directives governing the subject, there are several soft law documents which, over the years, have addressed the policies of the Member States and have fostered legislative reforms in the EU and in the Member States. Among them, it is important to mention the Handbook on integration for policy makers and practitioners, that «gathers studies, best practices and national legal solutions to the challenge of integrating third country nationals» (Montaldo, 2017), adopted in the context of the network of nationals contact points.

Despite the reticence of Member States to harmonize legislation in the area of TCNs' integration, several initiatives have tried to put forward guiding principles to address the policies of the Member States and try to set a clearer framework for legislators. In this sense, we can mention the Common Basic Principles for

Immigration Integration Policy adopted within the JHA Council of 2004, which pay great attention to integration conditionality as a tool to promote social inclusion. This principle has been reaffirmed the following year, with the first Integration Agenda, and by the 2009-2014 Stockholm Program, which sought to identify a series of common practices of the Member States, within the framework of their integration policies. The Commission, in the light of recent migratory flows and the need to establish rules for the redistribution of migrants, has also promoted a new action plan concerning the integration of TCNs (Communication from the Commission COM (2016) 377 final of 7 June 2016) which, among other things, focuses on pre-departure and pre-arrivals measures.

3. The Main Case Law Of The Court Of Justice

On the other hand, a more concrete role has been played by the EU Court of Justice, which has shown increasing activism in outlining the limits of Member States' discretion regarding conditionality for integration of TCNs. This attitude appears clear in at least two cases, both concerning integration exams for TCNs established by the Dutch government: *P and S*, and *K and A*, of 2015.

Both cases concern obligatory civic integration exams that TCNs must pass and which are based on knowledge of Dutch language, history, culture and political and social assistance systems. In the *P and S* case, the applicants had already acquired a long-term residence before participating in the civic integration measure. The evaluation of the Court is based on a test of proportionality between the objective pursued by the exam - namely to promote integration and to facilitate access to labour market - and the effectiveness of Directive 2003/109. In particular, the Court considers that the fees for registration and penalty in case of a failure can potentially represent a disproportionate obstacle to the effectiveness of the Directive, as they place significant burdens on the TCNs involved. A similar position is adopted by the Court in the *K and A* case, specifically concerning a pre-departure integration condition, that is to say an exam to be taken in a diplomatic post outside the Netherlands, in order to receive a permit for family reunification. This measure is considered, *a priori*, legitimate, as allowed by Article 7(2) of Directive 2003/86. The Court, however, performs a proportionality test and considers that, in order not to undermine the objective and the effectiveness of the Directive, the measure must take into account the individual circumstances of each TCN, such as age, literacy, level of education, economic situation and, in the specific case, the health situation of the applicants, by means of an appropriate saving clause. The principle that the registration fees

must not represent an excessive obstacle is reaffirmed as well. As the Court does on a regular basis, it leaves the actual outcome of the proportionality assessment to the national judge, but it establishes some clear limits and criteria to the discretionality of the Member States. Firstly, the national authorities cannot hamper the objectives of the Directives; secondly, the measures and conditions of integration must respect the principle of proportionality; finally, «integration requirements cannot be absolute. A failure to pass a test cannot automatically prevent the enjoyment of the rights conferred by the EU legal order» (Montaldo, 2019).

Another problemis that of the differentiation of two notions present in the Directives, that is, "integrations measures" and "integrations conditions"(Jesse M., 2016). Several scholars, as well as Advocate General Szpunar in the opinion on the *P and S* affair, and Advocate General Mengozzi in the opinion on the *Dogan* case, have tried to point out the difference, in particular trying to assert the fact that the "integrations measures", must be, by their nature, less restrictive, as they are entitled to contribute to the integrations of the TCNs.

However, the Court has decided to adopt the same standard of review, leaving wide discretion to the Member States regarding the definition of "civic integration" and basically neutralising the difference between "measures" and "conditions".

With the support of the Erasmus+ Programme of the European Union

BIBLIOGRAPHY

Case law:

Court of Justice, judgement of 2 September 2015, case C-309/14, CGIL e INCA c. Italia.

Court of Justice, judgement of 4 June 2015, case C-579/13, P and S c. Commissie Sociale

Court of Justice, judgement of 9 July 2014, case C-153/14, Minster van Buitenlandse Zaken c. K and A

Court of Justice, judgement of 10 July 2014, case C-138/13, Naime Dogan c. Bundesrepublik Deutschland

Court of Justice, Judgement of 27 June 2006, case C-540/03, European Parliament c. Council of the European Union

Italian Administrative Tribunal, judgement of 24th may 2018, n° 6095/2016.

Academic Publications:

Ambrosini, M., *Sociologia delle migrazioni*, il Mulino, 2011.

Carrera, S., *A Comparison of Integration Programmes in the EU, Trends and Weaknesses,,* in Challenge Papers, No.1/ 2006, CEPS, 2006.

Colaianni, N., *Una "carta" post-costituzionale?*, in Stato, Chiese e pluralismo confessionale, 2007.

Cuttitta, P., *L'accordo di integrazione come caso di discriminazione istituzionale in Italia*, in Razzismi, discriminazioni e confinamenti, a cura di Mario Grasso, 2013.

Ferrari, S., *La Carta dei valori della cittadinanza e dell'integrazione*, in Fondazione ISMU (a cura di), *Tredicesimo rapporto sulle migrazioni: 2007*, Franco Angeli, 2008

Jesse, M., *Integration measure, integration exam and immigration control: P and S* and *K and A*, in Common Market Law Review n° 53/2016, pp. 1065-1088.

Locchi, M.C., *L'accordo di integrazione tra lo Stato e lo straniero (art. 4-bis T.U. sull'immigrazione n° 286/98) alla luce dell'analisi comparata e della critica al modello europeo di integrazione forzata*, in AIC n° 1/2012, pp. 1-10.

Montaldo, S., *Regular migrants' integration between European law and national legal orders: a key condition for individual and social development*, CNR Edizioni, 2017.

Murphy, C., *The Concept of Integration in the Jurisprudence of the European Court of Human Rights*, in European journal of Migration and Law, n° 12/2010, pp. 23-43.

Pascouau, Y., *Measures and rules developed in the EU member States regarding integration of Third Country Nationals*, Comparative Report of European Policy Center, 2014.

Websites

European Website on Integration of the European Commission
https://ec.europa.eu/migrant-integration/

Italian Interministerial Website on Integration
http://www.integrazionemigranti.gov.it/

Italian Ministry of Interior (Department for civil liberties and immigration) Website on the Integration Agreement
http://www.libertaciviliimmigrazione.dlci.interno.gov.it/it/accordo-dintegrazione