



Integration examinations for regular migrants: the difficult search for a balance between national competencies and full effectiveness of EU law

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ABSTRACT: According to Article 79(4) TFEU, integration policies fall under the competence of the Member States, while the EU plays a complementary role. However, the EU has been exercising an increasing influence in this domain: on the one hand, the Commission launched a series of policy initiatives, under the common umbrella of a European Integration Agenda, aiming at coordinating national efforts and best practices; on the other hand, integration clauses were included in some secondary acts concerning regular migration. In this context, Directive 2003/109/EC on long-term residents and Directive 2003/86/EC on family reunification allow Member States to require third country nationals to comply with integration conditions or measures, which often take the shape of basic integration exams. In particular, the enjoyment of the rights conferred by these Directives is often made conditional upon the fulfillment of the integration requirements. The Court of Justice of the European Union (henceforth, CJEU) has recently confirmed these examinations to be compatible with EU law; however, the organization and the contents of these examinations must pass a strict proportionality test. In fact, they must not result in tools to select migrants, rather to favour the integration of third country nationals regularly settled in the hosting States.

KEYWORDS: integration - examination - condition - measure - proportionality.

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1. Introductory remarks: the challenge of integration of regular migrants

While Europe's attention is captured by the increasingly complex implications of irregular migration flows, another decisive game is being played every day within the Member State's borders. The chart-topping players of this match are the third country nationals regularly settled in the EU, who contend with national authorities the coveted trophy of their social and economic integration in the hosting societies. More than 20 million regular migrants are estimated to reside in the Member States and statistics show a clear trend towards the stabilization of their presence.¹ National integration policies are therefore strategic factors for social inclusion and cohesion, especially in times of economic crisis.² However, the "political messianism", which often characterizes the narratives of and on migration at national level risks to oversimplify and consequently underestimate this challenge.³

Indeed, migration policies are often seen as «dramatic stories of consolidation of power», battlefields where the various stakeholders strive to put forward their own interests:⁴ integration policies do not constitute an exception to this defensive and *identitarian* approach to nationality and citizenship.⁵ On the one hand, this subject puts in issue the relationship between the European legal order and the Member States, in the light of the vertical division of competencies enshrined in the Treaties. As we will consider more deeply later in the paper, the Member States have retained sovereignty in this field so far, but at the same time the European institutions have been playing an increasingly important role since twenty years, thereby interfering with national policy choices. On the other hand, the role of the individual is at stake, since the various legal translations of the concept of integration have had extremely different effects on the third country nationals' lives. For instance, migrants can be considered either merely beneficiaries of the institutional efforts to find incentives to their social inclusion or formal recipients of the binding (and sanctioned) duty to display any effort necessary to contribute actively to their own integration process.

In this entangled context, two recent judgments of the CJEU have shed some light on the interpretation of the notion of integration in the EU legal order.⁶ In particular, the Court was asked to answer to some preliminary questions referred by Dutch judicial authorities, willing to understand the correct interpretation of the integration clauses provided for by the Directive 2003/109/EC on long-term residents and the Directive 2003/86/EC on family reunification for regular non-EU migrants.⁷ The national judges aimed to obtain useful remarks on the compatibility

¹ "Migration and migrant population statistics", accessed October 9, 2015, http://ec.europa.eu/eurostat/statistics-explained/index.php/Migration_and_migrant_population_statistics.

² Irene Ponzio, Claudia Finotelli, Jorge Malheiros, Maria Lucinda Fonseca, Ester Salis, "Is the Economic Crisis in Southern Europe Turning into a Migrant Integration Crisis?", in *Politiche Sociali* 2, 2015, 59.

³ John Weiler, "Deciphering the Political and Legal DNA of European Integration", in *Philosophical Foundations of European Union Law*, eds. Julie Dickson and Pavlos Eleftheriadis, Oxford: Oxford University Press, 2012, 137.

⁴ Kathleen D. McNamara, *The Politics of Everyday Europe: Constructing Authority in the European Union*, Oxford: Oxford University Press, 2015, 125.

⁵ Stefano Rodotà, *Il diritto di avere diritti*, Rome-Bari: Laterza, 2012, 4.

⁶ Judgment *P and S*, Case C-579/13, 4 June 2015; Judgment *K and A*, Case C-153/14, 9 July 2015.

⁷ Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents, OJ L 16 of 23 January 2004; Council Directive 2003/86/EC

of some aspects of the Dutch integration policy with these EU secondary law instruments. As a matter of fact, in the *P* and *S* case, two long-term residents pontificated that the application of a heavy financial penalty for having failed to pass or refusing to take the integration examination imposed by the national law implementing Directive 2003/109/EC was unconscionable. In *K* and *A*, instead, two third country nationals contested the refusal of the authorization to enter the Dutch territory for family reunification purposes, which the national government had grounded on the failure to pass the integration test the applicants had to take in their home countries, before exercising the right provided by Directive 2003/86/EC.

These judgments offer useful interpretative tools to better understand the role of the various actors on the stage and to strike a proper balance between the Member States' discretionary power and the limits imposed by the EU legal order to the exercise of the national competencies on integration of regular migrants.

It is also worth underlining that the questions at stake can have a significant practical impact, since various forms of integration exams are currently in place in many Member States.⁸ What is more, from a quantitative point of view, statistics show that family reunification is the main vehicle for regular migration towards Europe: in 2013, for instance, 670,666 residence permits were issued on this basis, while 535,596 and 464,281 were respectively grounded on paid work and study purposes. Also, Eurostat surveys confirm that more than 7 million long-term residents are settled in the EU and that their number increases over time steadily.⁹ Therefore, these preliminary rulings represent a precious opportunity for a comprehensive analysis of the current state of the art of national and European integration policies.

2. Whose competence? The vertical division of competencies between the EU and the Member States in the field of integration policy

Since its inclusion in the Treaties, migration policy has been designed as a field of shared competence between the EU and the Member States. However, the EU has gradually expanded its influence on the whole domain, so that limited aspects of it are now left to the sole responsibility of the national authorities.¹⁰ Integration policy can be listed among these sectors, since the Member States have always tried to maintain an almost exclusive role in this area of intervention. Indeed, even before the Maastricht Treaty and the introduction of migration issues within the Justice and Home Affairs intergovernmental Pillar, the Court of Justice had been asked to rule out any attempt by the Community to encroach on this Member States' territory: in

of 22 September 2003 on the right to family reunification, OJ L 251 of 3 October 2003. In general, on these Directives, see Elspeth Guild, *The Legal Elements of European Identity: EU Citizenship and Migration Law*, Alphen aan den Rijn: Wolters Kluwer, 2004.

⁸ For a general overview see Yves Pascouau and Tineke Strick (eds), *Which Integration Policies for Migrants? Interaction between the EU and its Member States*, Nijmegen: Wolf Publishers, 2012.

⁹ See the Eurostat data on the webpage mentioned above, at footnote 1.

¹⁰ For instance, the granting and withdrawing of the national citizenship is left to the Member States. However, these competences have to be exercised paying due respect for the general principles of the EU legal order and ensuring the full effectiveness of the rights deriving from the EU citizenship, which the Court describes as the fundamental status of the individual in the EU. See Judgment *Rottmann*, Case C-135/08, 2 March 2010, recitals 43-46.

Germany and others v. Commission,¹¹ the Court acknowledged that EC labour and social policies could have a spillover effect on the legal regime of third country nationals, insofar as they regarded the employment market and the working conditions, but at the same time underlined their «extremely tenuous» link with cultural integration, which remained a matter of exclusive national competence.¹²

Member States and EU institutions – *rectius*, the Commission – locked sword on this subject on the occasion of the 1997 Amsterdam reform of primary law. The negotiations culminated in the nebulous wording of Article 63(3) and (4) TEC, which conferred to the Council the competence to adopt Directives on the conditions of entry and residence in the Member States, as well as on the rights and conditions under which legal migrants from third countries could reside in other Member States. However, paragraph (4) pointed out that these measures would “*not prevent any Member State from maintaining or introducing in the areas concerned national provisions which are compatible with this Treaty and with international agreements.*” These provisions expressed the “*opposing driving forces underlying migration policy.*”¹³ on the one hand, their field of application was considered wide enough to enable the EU to adopt secondary acts aiming to foster social and economic integration of regular migrants; on the other hand, they were seen as a key locking the Member States’ secret garden of integration policies. The main initiatives regarding regular migration – namely the above mentioned Directives 2003/109/EC and 2003/86/EC, whose purpose is, *inter alia*, to enhance the migrants’ chances to get integrated into hosting societies¹⁴ – were grounded on these legal bases. Nonetheless, the Community was prevented from adopting binding rules specifically and solely focused on integration strategies, since Article 63 TEC contained no express mention of the competences of the EU in this subject.

This compromise solution left many questions on the relationship between the EC and the national legal orders unanswered. Therefore, the Member States eventually took the opportunity of the Lisbon Treaty negotiations to express their concerns on the need to respect the principle of conferral of competences and to call for a more precise codification of the limits imposed to the intervention of the EU.¹⁵ Former Article 63 TEC underwent a significant reform and became Article 79 TFEU, which is currently the main legal basis for any European initiative regarding regular and irregular migration. For the first time, this Article, at paragraph (4), expressly mentions integration, as it allows the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, to “*establish measures to provide incentives and support for the action of Member States with a view to promoting the integration*

¹¹ Judgment *Germany and others v. Commission*, 9 July 1987, Joined Cases 281/85, 283/85, 285/85 and 287/85, recital 22.

¹² See recitals 23 and 24 of the above mentioned judgment.

¹³ Galina N. Cornelisse, “*What’s wrong with Schengen? Border Disputes and the Nature of Integration in the Area without Internal Borders*”, in *Common Market Law Review*, 51, 2015, 741.

¹⁴ See recital 4 of the 2003/109/EC Directive and recitals 3 and 4 of the family reunification Directive. This fundamental purpose has been acknowledged by the Court of Justice as well: *a contrario*, see Judgment *Singh*, Case C-502/10, 18 October 2012, recital 45.

¹⁵ This trend also applies to other competences of the EU, to the extent that the importance given to the principle of conferral of competences by the Member States during the negotiations of the Lisbon has been described as an «obsession»: Lucia S. Rossi “Does the Lisbon Treaty provide a clearer separation of competences between EU and Member States?”, in *The EU Law after Lisbon*, Andrea Biondi, Piet Eeckhout and Stefanie Ripley (eds), Oxford: Oxford University Press, 2012, 85; Paul Craig, “Competence: Clarity, Conferral, Containment and Consideration?”, in *European Law Review*, 29, 2004, 333.

of third-country nationals residing legally in their territories, excluding any harmonisation of the laws and regulations of the Member States.”¹⁶ In light of this wording, integration policy constitutes a specific example of complementary competence, following the general scheme of Article 6 TFEU: the EU is therefore entitled to support, coordinate or supplement the actions of the Member States, but it can neither impose the direction of national policy choices nor modify existing national legislations.¹⁷

3. The twofold European strategy on integration policy: the European Framework on Integration and the inclusion of integration clauses in secondary law acts

3.1. The political mandate of the Tampere Programme: milestones towards a common integration policy

The Treaty reform formalizes and gives shape to the experience of the last twenty years: as a matter of fact, even before the transfer of the domain of immigration to the EC Pillar, in 1999, several EU policy initiatives were to a certain extent concerned with the integration of third country nationals. Being conscious of the European dimension of the challenge, the Member States themselves were willing to coordinate their national efforts, in order to develop coherent strategies on a common problem. This commitment eventually resulted in the political mandate agreed on the occasion of the Tampere European Council of 15 and 16 October 1999, when the first multiannual programme on a comprehensive approach to the Area of Freedom, Security and Justice was launched.¹⁸ With a view to pave the way for a European policy on immigration and integration, the European Council identified four main priorities, the so called Tampere Milestones: the extension of the scope of application of the principle of the equality to regular non-EU migrants; the need to develop a more vigorous integration policy for third country nationals; the granting of a status and a legal regime as near as possible to the EU citizenship to long-term residents; the approximation of national legal orders as to the conditions for admission and residence.

The milestones received wide support across the political arena and in civil society, but their translation into practice soon proved to be more challenging than expected, due to the resistances of some Member States to an increased role of the EU in this domain.¹⁹ In order to avoid intergovernmental stumbling blocks to the achievement of the Tampere’s goals, the Member States agreed to stand and follow a twofold strategy: the coordination of national integration policies would have been ensured by a series of soft-law instruments and policy initiatives adopted and supervised by the Commission under the umbrella of a European Framework on Integration; in parallel, the Council was asked to put in place any necessary effort to

¹⁶ Another Treaty provision of a certain – indirect but remarkable – importance for the integration of third country nationals is Article 19(2) TFEU, according to which the European legislators can adopt measures to support national efforts to counter sex, racial, ethnical and religious discriminations.

¹⁷ Robert Schütze, *An Introduction to European Law*, Cambridge: Cambridge University Press, 2012, 82.

¹⁸ Tampere European Council, Presidency Conclusions, SN 200/99, 15-16 October 1999.

¹⁹ Reservations on the outcomes of the Tampere Program were limited to the undemocratic nature of the related decision-making processes, which were to a large extent inspired by an intergovernmental approach: Tony Bunyan, “*The Story of Tampere: an Undemocratic Process Excluding Civil Society*”, accessed October 9, 2015, <http://www.statewatch.org/news/2008/aug/tampere.pdf>.

approve binding rules on the legal regime of regular third country nationals migrants.

3.2. The European Framework on Integration: an innovative policy agenda for the integration of regular migrants

The EU framework on integration was built from the ashes of a Commission proposal on the establishment of a comprehensive Open Method of Coordination for EC immigration policy.²⁰ The proposal received no attention by the Council, but its failure opened the way towards a new and innovative model of governance of the subject: in 2002, the Justice and Home Affairs Council underlined the need for greater coherence in the Member States' integration policies and urged the national authorities to enhance the exchange of information and to identify the best practices, thereby allowing for a future cross-fertilization of national legal orders. Since then, the framework has evolved in «non-linear and multilevel fashions»,²¹ resulting in an unprecedented model of governance, which has been described as a quasi-Open Method of Coordination based on entirely innovative institutional arrangements and coordination mechanisms.²² The Commission was asked to take responsibility for implementing and monitoring the framework, whose first output was the establishment of a network of National Contact Points, tasked with the duty to promote information exchange and to disseminate best practices.²³ The network has gradually become a stable and authoritative discussion platform for EU integration policies. In particular, it has played a key role in the preparation and drafting of the three editions of the Handbook on integration for policy makers and practitioners, an effective tool for information exchange and the dissemination of best practices on selected integration aspects.²⁴ In the same vein, the Commission set up a European Integration Forum and a European Website on Integration, both aimed at involving the various actors on the stage, such as civil society organizations, national experts, ministries and NGOs.²⁵

Another stream of the integration framework was urged by the second multiannual program for the AFSJ, The Hague Program of 2004, in which the European Council called for a clearer definition of the principles guiding the European agenda on integration. In response to this request, the JHA Council of 19

²⁰ Communication from the Commission COM(2001)387 final, of 11 July 2001, on an Open Method of Coordination for the Community Immigration Policy. For an in-depth analysis of this document and of its implementation see Samantha Velluti, "What European Union Strategy for Integrating Migrants? The Role of the OMC Soft Mechanism in the Development of an EU Immigration Policy", in *European Journal of Migration and Law*, 9, 2007, 53. See also Micaela Maena and Sonia Morano-Foadi, "Integration Policy at European Union Level", in *Integration for Third-Country Nationals in the European Union. The Equality Challenge*, Micaela Maena and Sonia Morano-Foadi (eds), Cheltenham: Edward Elgar, 2012, 45.

²¹ Sergio Carrera, "Integration of Immigrants in EU Law and Policy: Challenges to Rule of Law, Exceptions to Inclusion", in *EU Migration Law. Legal Complexities and Political Rationale*, Loïc Azoulay and Karin de Vries (eds), Oxford: Oxford University Press, 2014, 161.

²² Sergio Carrera, *In Search of the Perfect Citizen? The Intersection Between Integration, Immigration and Nationality in the EU*, The Hague: Martinus Nijhoff Publisher, 2009.

²³ The meetings of the network are chaired by the Commission and national representatives are selected by each Member State, including UK, Denmark and Ireland, as well as Norway, in the capacity of observer.

²⁴ "Handbook on Integration for Policy-Makers and Practitioners", European Commission, Directorate General Justice, Freedom and Security, accessed October 9, 2015, http://ec.europa.eu/dgs/home-affairs/e-library/docs/handbook_integration/docl_12892_168517401_en.pdf.

²⁵ The website on integration is <https://ec.europa.eu/migrant-integration/>, accessed October 9, 2015.

November 2004 adopted by unanimity the Common Basic Principles for Immigrant Integration Policy, a list of non-binding guidelines and priorities aiming at assisting the Member States in the implementation of national policies in this domain.²⁶ Interestingly, the Basic Principles paid great attention to the debated problem of the conditionality of integration, widely represented by linguistic knowledge and civic education exams at national level, as in the above mentioned cases recently referred to the CJEU.²⁷ In fact, Principle 2 points out that integration implies the respect for the basic values of the EU. Moreover, Principle 4 clarifies that; “*basic knowledge of the host society’s language, history, and institutions is indispensable to integration*” and that; “*enabling immigrants to acquire this basic knowledge is essential to successful integration.*”²⁸ In particular, according to Principle 9, this basic knowledge allows migrants to take active part in the democratic and decision-making processes at local level, thereby influencing the direction of integration policies.

Conditionality of integration is therefore one of the main concerns at the core of the EU framework, also due to the fact that the Member States are particularly not interested in cooperating and sharing successful measures in this domain. Its importance is confirmed by the latest developments of the policy initiatives related to the integration agenda. The 2009-2014 Stockholm Program once again listed integration among the priorities of EU migration policy, with a view to strengthen the chances of social inclusion of regular migrants, in the meanwhile enhancing public security.²⁹ In this context, among various initiatives, the Commission proposed the preparation of European Modules for Migrant Integration, a set of “*building blocks*” which Member States may draw upon when planning integration policies at national and local level.³⁰ The modules provide the national authorities with quality standards and indicators on the main aspects of the integration process. In particular, the Commission’s purpose is to identify the indicators, standards, target and best practices regarding the organization of language and civic courses on the host

²⁶ It is important to remark that the EU has also planned specific financial support in favour of national integration policies: Council Decision 2007/435/EC of 25 June 2007 establishing the European Fund for the Integration of third-country nationals for the period 2007 to 2013 as part of the general programme “Solidarity and management of migration flows”, OJ L 168 of 28 June 2007, 18. See also the Commission’s Communication COM(2011)847 final of 5 December 2011 on the results achieved and on qualitative and quantitative aspects of implementation of the European Fund for the Integration of third-country nationals for the period 2007-2009.

²⁷ Interestingly, the European Council took place under the auspices of the Dutch Presidency: at the time, The Netherlands were the most resolute supporters of integration conditionality and were at the forefront of the new season of integration measures and conditions imposed to regular migrants at national level.

²⁸ See also the Annex to the Principles, which provides for additional explanations on their meaning. The Basic Principles also build on the Presidency Conclusions of the Thessaloniki European Council of 19 and 20 June 2003. See in particular paragraph 28, where the contextual importance of rights and duties is underlined: «The European Council deems it necessary to elaborate a comprehensive and multidimensional policy on the integration of legally residing third country nationals who, according to and in order to implement the conclusions of the European Council of Tampere, should be granted rights and obligations comparable to those of EU citizens».

²⁹ Council of the European Union, Stockholm Programme - An open and secure Europe serving and protecting citizens, 5731/10, 3 March 2010.

³⁰ Commission Staff Working Document SEC(2008)2626 final, of 8 October 2008, Strengthening actions and tools to meet integration challenges Report to the (2008) Ministerial Conference on Integration.

society's history, institutions and values.³¹ Through this tool, the Guardian of the Treaties intends to direct national conditionality measures within the framework of the general principles of the EU legal order – namely the principles of proportionality and equality – and of the obligations stemming from EU secondary law on regular migration. In fact, as we will consider more in detail in the next steps of the analysis, integration policies have sometimes been seen by the national authorities as *carte blanche* to deviate from the limits and targets imposed by the EU.

3.3. Integration clauses in secondary law: towards an identitarian paradigm of integration?

The second aspect of the strategy designed by the Tampere Programme consisted of the adoption of a set of secondary law acts in the legal regime of regular migrants. The implementation of the Tampere political mandate had to face many obstacles, mainly deriving from the resistances of the Member States. The lack of political will was further amplified by the need to reach unanimity, one of the main expressions of the intergovernmental approach to the exercise of the competences of the Community in migration policy. The main consequence of this situation was the withdrawal of the Commission's 2001 proposal for a Directive on the conditions of entry and residence for paid and self-employed migrant workers.³² Also, the proposals of Directives on the *status* of long-term residents and on family reunification underwent exhausting negotiations and were eventually adopted after respectively five and four years of harsh and non-transparent debates within the Council.

Directive 2003/109/EC and Directive 2003/86/EC both address the question of integration of regular migrants from the specific point of view of conditionality.³³ As a matter of fact, on the basis of a joint proposal put forward by Germany, Austria and The Netherlands, these acts provide for clauses allowing Member States to impose to the migrants involved a duty of integration. In the light of Article 5(2) of the long-term residents Directive, Member States may require third-country nationals to comply with "*integration conditions*", in accordance with national law. Moreover, Article 15, which regards the conditions for residence in a second Member State, allows national authorities to require third-country nationals to comply with "*integration measures*", unless the migrant concerned has already complied with "*integration conditions*" in another Member State in order to be granted long-term

³¹ The final report on the modules was adopted on 3 April 2014 and can be downloaded via the EU website on integration: <https://ec.europa.eu/migrant-integration/librarydoc/european-modules-on-migrant-integration---final-report>, accessed 9 October, 2015.

³² Communication from the Commission COM(2001)386 final of 11 July 2001 concerning a proposal for a Council Directive on the conditions of entry and residence of third-country nationals for the purpose of paid employment and self-employed economic activities.

³³ Interestingly, Council Directive 2009/50/EC of 25 May 2009 on the conditions of entry and residence of third country nationals for the purposes of high-qualified employment excludes integration conditionality for high-skilled migrants. Their family members can be required to comply with certain integration requirements, but only after their entry into the Member State's territory has been authorized (Articles 15 and 16). A similar regime applies to refugees and beneficiaries of subsidiary protection, in the light of Directive 2011/95/EU of the Parliament and the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted, OJ L 337 of 20 December 2011, 9: these categories of migrants are required to respect integration programmes only after they have been granted protection.

residence status, under Article 5(2). Conditionality of integration is addressed also by Article 7(2) of the 2003/86/EC Directive, which stipulates that Member States may require third country nationals willing to exercise the right to family reunification to comply with “*integration measures*”, in accordance with national law.³⁴

The Directives introduce a *summa divisio* between conditions and measures of integration, whose legal implications will be analyzed in detail. In general, taking into account the wording of the integration clauses, the Member States are not bound by the duty to introduce these forms of assessment of the migrants’ capability or willingness to comply with pre-determined integration standards. In any case, moreover, the implementation of integration conditions or measures seems to represent an exception and a limit to the scope of these Directives, as the failure to comply with the imposed requirements can be sanctioned by the State and can even preclude the possibility to benefit from the status of long-term resident or the right to family reunification.

According to part of the legal literature, this normative approach highlights an evident shift of paradigm on the notion of integration.³⁵ As a matter of fact, in the ‘70s, the promotion of social and economic inclusion was conceived as a means to enhance EU citizens mobility across the Member States’ borders. The guarantee of equal treatment in the host State, the respect of the right to family life and clear limits to repatriation were intended to boost social inclusion, thereby ensuring the effectiveness on the free movement of persons, an essential component of the internal market. Integration therefore was conceived in a positive – and not “impositive” – perspective, since it represented the natural complement to the legal regime provided for EU workers, later on extended to all EU citizens. Instead, the integration clauses included in the mentioned Directives are deemed to serve an opposite function: in the idea behind them, they were intended to allow the Member States to maintain a certain margin of control over migration flows.³⁶ They enable forms of selection of third country nationals, based on their chances of integration in the host society: in case of a failure to comply with the integration criteria imposed, the «managerial effects» of these clauses entail the preclusion of the status and the denial of the rights conferred to migrants by EU law.³⁷ According to this reading of the integration clauses, the Directives show the identitarian side of this notion,

³⁴ In case of refugees, integration measures may only be applied once the person concerned has been granted family reunification. Another provision has to be mentioned, for the sake of completeness: Article 4, in fact, states that «where a child is aged over 12 years and arrives independently from the rest of his/her family, the Member State may, before authorizing entry and residence under this Directive, verify whether he or she meets a condition for integration provided for by its existing legislation at the date of the implementation of this Directive». This provision has lost its importance, since it merely allowed Member States to introduce this exception until the expiration of the deadline for the implementation of the Directive. Not a single Member State implemented this provision, which has then to be considered *a contrario* an express prohibition to impose integration conditions to minors.

³⁵ S. Carrera, *In Search of the Perfect Citizen? The Intersection between Immigration, Integration and Citizenship in the EU*, Leiden, 2009.

³⁶ S. Carrera, “Integration of Immigrants in EU Law and Policy: Challenges to the Rule of Law, Exceptions to Inclusion”, in *EU Immigration Law. Legal Complexities and Political Rationale*, L. Azoulai, K. de Vries (eds), Oxford, 2014, p. 154 ss.

³⁷ Dora Kostakopoulou, Sergio Carrera, Moritz Jesse, “Doing and Deserving: Competing Frames of Integration in the EU”, in *Illiberal Liberal States: Immigration, Citizenship and Integration in the EU*, Elspeth Guild, Kees Groenendijk and Sergio Carrera (eds), Burlington: Ashgate, 2009, 167.

which appears to pursue primarily the Member States' unconcealed ambitions of control and security.³⁸

This critique raises a fundamental concern on the legal implications of the integration clauses: on the one hand, one of the main purposes of the Directives under consideration is the reinforcement of the chances of social and economic integration of regular migrants; on the other hand, these provisions can deprive these Directives of their effectiveness, since they introduce *ex ante* barriers to integration. It is then necessary to clarify their actual – and highly debated – meaning and material scope of application, in particular as far as margin of action of the Member States is concerned.

4. The absence of a clear definition of the concept of integration and the solutions proposed by scholars and Advocates General

Neither the Directive on long-term residents nor the Directive on family reunification provide for a clear definition of the concept of integration conditions or measures. The lack of indications on what is actually at stake has raised concerns, because of the risk of unilateral deviations of migration policies for the exclusive benefit of the host Member States.³⁹ Also, it has been voiced out that too wide and fuzzy notions would amplify the national authorities' discretionary powers and the heterogeneity of internal implementation laws exponentially, to the detriment of a coherent approach to integration policies.⁴⁰ Indeed, the lack of a set of objective and shared criteria for the assessment of the competences – and the subsequent 'integration potentialities' – of the migrants could open the door to arbitrary evaluations, in spite of the aims pursued by the Directives.

Some useful remarks can be derived from the preparatory works of the Directive 2003/109/EC: during the negotiations, Germany, Austria and The Netherlands clarified that these conditions and measures would entail the successful completion of an integration test, in order to ascertain the "*sufficient knowledge of the country.*" The integration exams would promote "*the self-sufficiency of so-called 'newcomers,'*" since a basic knowledge of the founding pillars of a society is necessary and preliminary step for a positive integration process.⁴¹ A similar approach was followed by the Commission, in its first integration agenda of 2005.⁴² However, the Commission's communication introduced two additional aspects. For the first time, the essential role of the host country was emphasized: according to the Commission, the EU

³⁸ Christian Joppke, Ewa Morawska (eds.), *Toward Assimilation and Citizenship: Immigrants in Liberal Nation-States*, Basingstoke: Palgrave MacMillan, 2003; Rainer Bauböck, Eva Ersboll, Kees Groenendijk and Harald Waldrauch (eds.), *Acquisition and Loss of Nationality: Policies and Trends in 15 European Countries*, Amsterdam: Amsterdam University Press, 2006.

³⁹ Giandonato Caggiano, "L'integrazione dei migranti fra *soft-law* e atti legislativi: competenze dell'Unione europea e politiche nazionali", in *I percorsi giuridici per l'integrazione. Migranti e titolari di protezione internazionale tra diritto dell'Unione e ordinamento italiano*, Giandonato Caggiano, Giappichelli: Torino (ed), 2015, 38.

⁴⁰ Sergio Carrera, "The Nexus between Immigration, Integration and Citizenship", 2006, accessed October 4, 2015, <http://www.ceps.eu/publications/nexus-between-immigration-integration-and-citizenship-eu>.

⁴¹ Justice and Home Affairs Council, document 12217/02 of 23 September 2002.

⁴² Communication from the Commission COM(2005)389 final of 1 September 2005. A common agenda for integration. Framework for the integration of third-country nationals in the European Union.

regime on regular migration bound the Member States to display any necessary effort to encourage and support the third country nationals' integration. In practice, for instance, in the light of the context of the Directives of 2003, the integration clauses require the national authorities to arrange and disseminate training materials and to organize language and civic education courses, even in the home country of the migrant, if needed. Secondly, and interestingly, the Commission underlined that any civic integration exam on the history, institutions and values of a Member State should include relevant questions on the foundations of the European Union and of the integration process.

Scholars have proposed a wide range of possible interpretations of the integration clauses, in particular as far as their legal implications on the migrants are concerned. First, a minority opinion deprives these clauses of any effect, since they are deemed to merely confirm the vertical distribution of powers between the EU and the Member States in the domain of third country nationals' integration.⁴³ However, this approach does not take into account that EU secondary law provisions – even if apparently pleonastic – always have to be read in accordance with the *effet utile* doctrine.⁴⁴ Moreover, the ECJ has repeatedly remarked that the Member States are bound by the duty to respect the general principles of the EU legal order, even when they exercise their exclusive competences or derogate from EU law.⁴⁵ Consequently, the national laws implementing the clauses and their daily application and effects must be carefully scrutinized under the light of these principles, in order to avoid undue deviations from the objectives pursued by the 2003 Directives.

A second view draws a clear dividing line between conditions and measures of integration.⁴⁶ Only the former would introduce compulsory criteria, that the migrants are required to comply with and whose breach can preclude the enjoyment of the rights conferred by the Directives. What is more, in case of a failure to comply with the compulsory conditions, the national authorities would be entitled to exercise their sanctioning powers, for instance imposing a financial penalty on the migrant concerned. On the contrary, integration measures would represent a mere opportunity for the migrant's direct and active involvement in its own social integration process: as such, neither binding obligations would stem from them, nor the Member States could sanction their violation. Advocate General Szpunar followed a similar approach in its opinion in the *P and S* case: integration measures are not additional mandatory criteria imposed on the third country nationals, rather tools to enhance their chances of integration. Nevertheless, the Advocate General does not exclude the possibility of imposing a penalty in the form of a fine on a person who «persistently refuses to fulfil the obligations imposed [...] as part of integration measures».⁴⁷ In this context, in his opinion in *Dogan*,⁴⁸ Advocate General Mengozzi upheld this approach, but led it to different conclusions: the *summa divisio* between conditions and measures of integration is formally correct, but it has no practical effects, since the latter category is broad enough to encompass «obligations

⁴³ Giandonato Caggiano, "L'integrazione dei migranti", 54.

⁴⁴ See for instance in Judgment *Achughbabian*, Case C-329/11, 6 December 2011, recital 33.

⁴⁵ Judgment *Finnish Seamen's Union v. Viking*, Case C-438/05, 11 December 2007.

⁴⁶ Kees Groenendijk, "Legal Concepts of Integration in EU Migration Law", in *European Journal of Migration and Law*, 6, 2004, 111.

⁴⁷ Recital 104, in any case, these sanctions must be proportional to the offence and also take account of the reasons why such action is considered undesirable.

⁴⁸ Opinion in Judgment *Dogan*, Case C-138/13, 30 April 2014.

to reach a result».⁴⁹

Lastly, in *K and A*, Advocate General Kokott expressed the view that the words “*condition*” under Article 5 of the Directive 2003/109/EC and “*measure*” provided in Article 7 of Directive 2003/86/EC actually share the same meaning. In fact, the distinction between the two concepts in the former Directive aims at ensuring that long-term residents, who have already satisfied an integration condition in one Member State, are not required to take further integration tests in another Member State. Instead, the family reunification Directive concerns first entry of family members into the EU and the “*measures*” are listed among the “*requirements*” for family reunification. Consequently, the Member States are entitled to verify whether these criteria for the exercise of the right to family reunification have been satisfactorily complied with. This means that the notion of “*measure*”, for the purposes of the 2003/86/EC Directive, has to be interpreted autonomously and is broad enough to encompass an exam designed to demonstrate that an integration-related condition of family reunification has been met. Moreover, since Article 7 rules out integration prior to family reunification only for refugees,⁵⁰ the migrant can, as a rule, be required to pass the integration test in advance, before its entry into the territory of the host Member State.

Contested between autonomous interpretation and the aim to foster integration pursued by the Directives, the notions of condition and measure of integration can have a significant adverse impact on the status of the individuals concerned. It is therefore necessary to strike a proper balance between the mentioned ambitions of control pursued by many Member States and the need preserve and support a positive attitude towards integration policies. This is a difficult task, but one which the CJEU tried to carry out in the recent *P and S* and *K and A* judgments.

5. The Court of Justice acknowledges the compatibility of integration examinations with EU law

The Court of Justice endorses the Advocate General Kokott’s view and clarifies that the conditions under Article 5 of the 2003/109/EC Directive and the measures mentioned in Article 7 of the family reunification Directive share the same basis and have similar effects. Both clauses actually permit the Member States to require the third country nationals to comply with integration requirements imposed by national laws. Therefore, the Directives allow the national authorities to make the issue of a long-term residence permit or of an entry permit for family reunification contingent upon the fulfillment of preliminary and predetermined integration criteria. Conversely, the Member States are under a duty to ensure the full effectiveness of the rights conferred by these secondary acts, in case these requirements have been successfully met.

This approach is highly influenced by the vertical division of competences

⁴⁹ Recital 56. The Advocate General refers to Article 7(2) of the Directive 2003/86/EC, but his reasoning appears to apply to the notion of integration measure *per se*. The Court found that there was no need to answer to the preliminary questions directly regarding the compatibility with this Directive of integration tests imposed in Germany. For a note on the judgment see Emmanuelle Bribosia, Sarah Ganty, “Arrêt Dogan: quelle légalité pour les tests d’intégration civique?”, in *Journal de droit européen*, 11, 2014, 378.

⁵⁰ See also Article 15(3) of the highly-qualified employment Directive, which makes similar provision in the case of family members of this privileged category of immigrants.

between the European Union and the Member States, enshrined in Article 79 TFEU, and the subsequent discretionary powers reserved to national authorities. However, such power has to be carefully balanced with the need to ensure the achievement of the objectives pursued by the Directives under consideration. In fact, the Court has already and clearly underlined that the exercise of national competences cannot hamper the effectiveness of the EU regime on regular migration, which is aimed at fostering the chances of integration of third country nationals permanently residing in a Member State.⁵¹

Therefore, the conditions and measures of integration are compatible with EU law only insofar as they contribute to favour the social inclusion of the migrants concerned. On the contrary, they cannot result in “*managerial tools*” for the selection of worthy migrants. Consequently, the content and the nature of the integration duty imposed to third country nationals, as well as its practical implementation, must be oriented to these fundamental concerns.

It follows that, first, the issue of the long-term resident permit and the authorization of family reunification are the general rules, while the integration conditions or measures represent a limit which has to be interpreted narrowly and strictly. Second, the integration exams must comply with the principle of proportionality, in particular as far as the knowledge required to the migrants is concerned: the tests have to verify only the acquisition of elementary language skills and of the basic notions of civic education. In fact, according to the Court, the acquisition of such basic knowledge is “*undeniably useful for establishing connections with the host Member State,*”⁵² since it facilitates communications with the nationals of the host Member State and encourages the development of social relations, also favouring access to vocational training opportunities and to the labour market. Third, integration requirements cannot be absolute: they cannot systematically prevent the enjoyment of the rights conferred by the EU legal order, especially where, despite having failed to pass the test, the migrants have made every effort to achieve this objective. In the same vein, lastly, the fulfillment of the integration criteria must be assessed on a case-by-case basis, taking into due account the objective circumstances of the case and the personal situation of each migrant.⁵³ Indeed, the national legal orders have to provide for exemptions from the duty of integration, the so called hardship clauses, where the situation of the person involved makes the compliance with these requirements impossible or excessively difficult.⁵⁴ In this respect, the national authorities have to take into consideration factors such as mental or physical disabilities, severe diseases, the level of education and training, illiteracy, the different cultural background of the third country of origin, age.

Bearing in mind the aims pursued by the Directives, moreover, the Member States must display any necessary effort to guide the migrants towards a successful completion of their integration process. Therefore, the Court confirms that national authorities have to arrange preparatory courses and materials, even in the migrant’s mother tongue. Also, these formative opportunities and the examinations

⁵¹ Judgment *Chakroun*, Case C-578/08, 4 March 2010, recital 43. The judgment refers to the family reunification Directive, but the reasoning of the Court can be extended to the whole domain of regular migration.

⁵² Judgment *K and A*, recital 54.

⁵³ The individual approach is also urged, for instance, by Article 17 of the family reunification Directive.

⁵⁴ Order *Imran*, Case C-155/11, PPU, 10 June 2011.

themselves must be easily accessible, in practical and financial terms. In this respect, the Court had already censured the Dutch laws on the costs for the issue of resident permits for third country nationals, whose amount was evidently disproportioned if compared to the burdens imposed to Dutch nationals for the issue of similar documents.⁵⁵ In the cases at hand, in the light of this case-law, the Court has censured the courses and examination fees, considered to be an excessive obstacle to the enjoyment of the rights provided by the Directives.⁵⁶

6. Concluding remarks: the need for a strict proportionality test

As a rule, the Court “saves” integration conditionality and confirms the compatibility of integration examinations with EU law. However, at the same time, the Court fills in the *carte blanche* the States longed for, setting clear limits to the exercise of their competence in the domain of integration policy. The general principles of the EU legal order and the aims pursued by the Directives preclude any temptation of filtering effects and bind the national authorities to adopt a proactive approach to the integration of third country nationals permanently settled in the EU. Even if this subject will continue to raise criticism and to fuel scholarly debates,⁵⁷ the judges in Luxembourg seem to have struck a careful balance between the respect for national competences and the need to safeguard the effectiveness of EU law, thereby also preventing undue restrictions of the rights conferred to regular migrants. Indeed, the judgments under consideration will have a significant practical impact: on the one hand, the Court resorts to the recurrent refrain according to which it is for the national judges to verify whether national laws comply with the principle of proportionality; on the other hand, the judgments provide something more than a mere guidance for national judges and list a set of strict and “tangible” criteria that integration examinations have to meet. In this respect, the Court is inspired by a remarkable dose of legal realism, which reflects the sociological theories on the daily challenges that the members of modern and complex societies are confronted with, in terms of democratic participation, awareness of rights and duties, knowledge of the functioning of a social system.⁵⁸

What is more, the reasoning of the Court offers a chance to reconcile the two souls of the Janus-faced EU approach to integration policy. So far, the soft-law Framework on integration has proved to be an effective tool to coordinate and support national efforts towards “more Europe and more integration”; on the contrary, as argued above, the integration binding clauses introduced in secondary acts have been considered as a generous leeway allowing for forms of control over migration flows. Now, the Court brings back these clauses to their primary – and opposite – objective, namely the support to integration, thus paving the way for a more coherent integration policy at national and European levels.

Of course, some gaps may remain and mainly refer to the so called external

⁵⁵ Judgment *Commission v. The Netherlands*, Case C-508/10, 26 April 2012.

⁵⁶ It is worth underlining that in the *P* and *S* judgment also the financial sanction imposed to the third country nationals concerned was considered manifestly disproportionate, because of its excessive amount.

⁵⁷ See for instance Rainer Bauböck, Christian Joppke, “How Liberal Are Citizenship Tests?”, EUI Working paper 2010/41, accessed October 10, 2015, http://eudo-citizenship.eu/docs/RSCAS_2010_41.pdf.

⁵⁸ Michael Banton (ed.), *Social Anthropology of Complex Societies*, London and New York: Routledge, 2004.

dimension of integration. While implementing the family reunification Directive, in fact, The Netherlands set up a system under which integration examinations are held abroad, in the home countries of the migrants concerned.⁵⁹ The Court has acknowledged these practices, stating that the compliance with integration requirements can be assessed in advance, that is to say before the authorization of family reunification is issued. Nonetheless, it is worth underlining that in these cases the proportionality test on the content of the exams and the methods used to evaluate the third country nationals' knowledge should be particularly stringent. It is indeed a contradiction in terms to require the preliminary compliance with a duty of integration to persons not having a direct experience of the host society yet.⁶⁰ A contradiction that the UN Committee on the Elimination of Racial Discrimination has recently criticized, in a report focused on the Dutch integration policy.⁶¹ A similar concern was expressed by the Committee of the European Social Charter, according to which the German legal order unduly obstructs family reunification – and therefore breaches Article 19(6) of the Charter – by making reunification conditional upon the documental evidence of a sufficient German linguistic skills.⁶²

A remedy to the criticalities raised by the civic integration abroad paradigm is represented by the system adopted in some Member States, such as Italy, Austria and Denmark.⁶³ In these cases, the third country national and the host State conclude an integration agreement, whereby the migrant commits himself to the achievement of certain integration objectives, including the acquisition of basic language skills. The individual concerned is therefore under the duty to respect the agreement, otherwise taking the risk of (usually) pecuniary sanctions.

⁵⁹ Saskia Bonjour, “Between Integration Provision and Selection Mechanism: Party Politics, Judicial Constraints and the Making of French and Dutch Policies of Civic Integration Abroad”, in *European Journal of Migration and Law*, 12, 2010, 299.

⁶⁰ The need for a stricter proportionality test also derives from the fact that at the time the Directive 2003/86/EC was adopted and implemented at national level the Charter of Fundamental Rights of the EU had no binding value, while nowadays its provisions - and in particular, for what concerns the case at hand, Article 7 on the right to family life - are to be considered EU primary law.

⁶¹ Report on the UN Committee on the Elimination of Racial Discrimination, GAOR, Sixty-Fifth Session, Supplement No. 18 (A/65/18), 31 October 2013.

⁶² European Social Charter Committee Report, 13 February 2013, Concerning Conclusions XIX-4 (2011) of the 1961 European Social Charter.

⁶³ Karin de Vries, “Integration Requirements in EU Migration Law”, EUI Working Paper 2012/20, accessed on October 9, 2015, <http://cadmus.eui.eu/handle/1814/23427>.