Conditionality through the lens of the CJEU: a “blurry” view

verfassungsblog.de/conditionality-through-the-lens-of-the-cjeu-a-blurry-view/

Antonia Baraggia Do 30 Jun 2016

From the very beginning of the Eurozone crisis, conditionality progressively entered into the vocabulary and the normative sphere of the EU economic governance. At the time of the first assistance package to Greece, conditionality was just an emergency tool set in the bilateral Loan Agreements, signed by Greece and other Members States. However, after the establishment of emergency funds like the European Financial Stabilisation Mechanism (EFSM) and the European Financial Stability Facility (EFSF), and especially after the creation of a permanent institution, a sort of “European mirror image of the IMF” (Ruffert, 2011) – the ESM – conditionality has become a sort of leitmotiv of the European response to the economic crisis or, even, a necessary requirement according to the ECJ (see M. Ioannidis, 2014).

Despite being widespread within the so-called euro-crisis law and its “constitutionalization” in art. 136 TFUE, conditionality still represents a controversial instrument, whose legal nature within the EU and the national legal frameworks has yet to be clearly defined.

Among the several problematic profiles of conditionality, on which the debate recalls the one on IMF’s conditionality, we will focus on two main issues: its legitimacy and its relationship with the EU law.

The legitimacy of conditionality, given the huge impact on national core business like health care, pension, education, is probably the most contested issue: it has been argued that conditionality, as prescribed in a Memorandum of Understanding (MoU), ‘amounts to a sell-out of the political autonomy and responsibility of democratically legitimate institutions, an exchange of obedience for money’ (Joerges, 2014)

As for the second aspect that is up for debate – the legal nature of MoUs – some scholars argue that they constitute ‘simplified agreements’, with no binding value. According to this reasoning, they are just political programmes, containing programmatic provisions; in contrast, others recognize MoUs as international law sources having binding force.

The unsolved issue of the nature of MoUs has an impact also on their status within EU law, and, in particular, on the question of whether or not they represent an implementation of EU law, and therefore whether they are justiciable in light of the European Charter of Fundamental Rights.

We can dare to say that the ECJ case law on this topic, far from being clear and coherent at all, is the most emblematic evidence of the ambiguity that we are discussing. We can identify two main categories of case law in which the ECJ had the chance to pronounce – more o less directly – on conditionality.

The first one concerns the legitimacy of the measures and programs adopted within the Eurozone crisis: namely the Pringle case (C-370/12) and the Gauweiler case (C-62/14); the second broad category includes decisions regarding nature of the MOUs and their relationship within the EU law. As I will try to show in this brief comment the ECJ perception of conditionality is somehow contradictory and inconsistent.

In Pringle, that deals with the compatibility of the ESM Treaty with several provisions of EU law (and in particular with the no-bail out clause of art. 125 TFUE), conditionality is considered a necessary element for the legality of financial assistance. The Court affirmed:

“while it is true that the financial assistance provided to a Member State that is an ESM Member is subject to strict conditionality, appropriate to the financial assistance instrument chosen, which can take the form of a macro-economic adjustment programme, the conditionality prescribed nonetheless does not constitute an instrument for the coordination of the economic policies of the Member States, but is intended to ensure that the activities of the ESM are compatible with, inter alia, Article 125 TFEU and the coordinating measures adopted by

the Union" (par.111).

Even in the Gauweiler case on the legality of the OMT program, the ECJ, differently from the Bundesverfassungsgericht in its first preliminary reference and from the Advocate General Cruz Villalón, seems to address conditionality as a "justifying cause" of the ECB operations. As we may know, the OMT program can be triggered only for those member states already entered in an ESM financial program. The ECB will purchase bonds as long as the State complies with conditionality policy. This parallelism caused the German court to argue that the OMT program forms an instrument of economic policy. On the contrary, the ECJ seems to escape from this claim, stressing the ECB independence. It argues that the ECB has established the link with the ESM conditionality to exclude moral hazard, in particular the risk that states no longer consider it necessary to comply with adjustment programmes one the ECB purchased their bonds. In a way, one could say that conditionality has been "transfigured" by the ECJ in order to give legitimation to the ECB program, which falls into the monetary policies realm according to the Luxemburg court.

If we move on considering the second category of ECJ decisions, we are looking at a completely different story.

In several preliminary ruling on the legality of national measures adopted on the basis of MOUs, the court has denied to have jurisdiction to answer, not finding a link between such national measure and EU law. The Court ruled in such a sense in case C-128/12 (Sindicato dos Bancários do Norte and Others v BPN – Banco Português de Negócios, SA) and in case C-665/13 (Sindacatos Nacional dos Profissionais de Seguros e Afins). We cannot go into the details of such case law. However, this reticence of the ECJ is highly problematic and contestable, in particular if we consider that in several cases the content of the MoU has been implemented by a Council decision. One could say that the ECJ decided not to decide, leaving some fundamental questions on the legitimacy of conditionality and of the MoUs open, as for example their justiciability in light of the Charter of fundamental rights, even when EU institutions act within the scope of the ESM – as the Commission for example.

To draw some conclusion from this brief survey of the ECJ approach to conditionality I argue that the ECJ case law parable in this area is still incomplete. The Court will have the chance to clarify its position in the upcoming Ledra Advertising Case (C-8/15), concerning the role of the Commission and of the ECB in the negotiating and signing of the MoU concluded between the Republic of Cyprus and the ESM, a case in which conditionality is clearly at stake.

Now the crucial question is: will the ECJ be willing to deal with the legal status of the crisis-related measure, or will it just keep avoiding entering in such a politically sensitive matter?

Short references:

. Christian Joerges, 'Three Transformations of Europe and the Search for a Way Out of its Crisis' in Christian Joerges and Carolina Glinski (eds), The European Crisis and the Transformation of Transnational Governance: Authoritarian Managerialism Versus Democratic Governance (Hart Publishing 2014)

. Alicia Hinarejos, The Euro Area Crisis in Constitutional Perspective, OUP, 2015

. Michael Ioannidis, 'EU Financial Assistance Conditionality After Two Pack' (2014) 7 ZaöRV 61, 64;

. Matthias Ruffert, The European Debt Crisis and European Union Law, CMLR, 48, 1783, 2011.

SUGGESTED CITATION Baraggia, Antonia: *Conditionality through the lens of the CJEU: a "blurry" view, VerfBlog,* 2016/6/30, http://verfassungsblog.de/conditionality-through-the-lens-of-the-cjeu-a-blurry-view/.