



EDITORIAL

NEITHER REPRESENTATION NOR VALUES? OR, “EUROPE’S MOMENT” – PART II

Part I of this *Editorial* dealt with the interrelation between representation and taxation reflected in the measures adopted or envisaged by the EU institutions to face the COVID-19 pandemic. It argued that a more courageous approach in each phase of this virtuous circle could have significantly enhanced the legitimacy of the Union as an entity expressing the sentiment of the European citizenry and taking action to fulfil its common interest.

There is, however, another relationship which is at stake in these turbulent days. Representation also entails the existence of a set of distinctive values shared by a community, whose protection and promotion should be shared by its representatives. This conceptual scheme, simplistic as it may be, can help us understand the story of the conditionality mechanism designed to exclude EU Member States (MS) which violate the Union’s fundamental values from the financial assistance provided for by the Next Generation EU (NGEU) project.

As is well known, this mechanism is established by Regulation 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. It is equally notorious that, prior to its approval, the European Council adopted, with the usual method of *consensus*, a declaration related to its implementation, incorporated in its Conclusions of the meeting of 10 and 11 December 2020.

This declaration is composed of two parts. First, it directs the Commission not to implement, or to propose the implementation, of the Regulation before the adoption of guidelines to be drafted “in close consultation with the Member States”, and before the adoption of a decision of the CJEU following an action for annulment which, presumably, some MS will soon lodge (para. 2, let. c). As noted by early commentators, this part of the declaration interferes with the prerogatives of the Commission to ensure the application of the law under the Treaties, conferred on it by Art. 17 TEU. Moreover, it will undermine the effectiveness of the substantive obligation to respect the rule of law, by relaxing its means of control.

In a different and perhaps even more insidious way, the declaration tends to use the notions contained in the Regulation to empty it of its very essence. This logical operation



unfolds along three steps. First the declaration highlights the functional link between the mechanism and its objective, namely, to protect the Union's budget (para. 2, let. a). Second, on the basis of this assumption, it stresses the subsidiarity role of the new mechanism *vis-à-vis* other mechanisms specifically aimed to supervise the implementation of the budget (para. 2, let. d). Finally, the declaration draws the ultimate consequence of that functional link by imposing a standard of strict proportionality between the consequences produced by a possible breach of the rule of law on the financial interests of the Union and the measures to be adopted to remedy it (para. 2, let. e). This link is further enhanced by the requirement that the relevance and use of evidence demonstrating the existence of a breach of the rule of law "will be determined exclusively in light of the Regulation's aim to protect the Union's financial interests" (para. 2, let. h).

This test appears to be a *probatio diabolica*; one which will presumably render inoperative the conditionality mechanism. If it is the case that any breach of the rule of law must be causally linked to the Union's financial interests in order to be sanctioned, the mechanism appears to be doomed to fail. While political regimes inspired by the principle of democracy and the rule of law have proved throughout history to be the most virtuous (or, perhaps, the least vicious), it is much more difficult to demonstrate, on the basis of the properly grounded empirical evidence, their link with mundane interests of a financial nature. By imposing a causal link between a breach of the rule of law and a damage to the financial interests of the Union, the European Council has *de facto* blocked the operation of the mechanism and deprived the Regulation of its *effet utile*.

This, presumably, was the ultimate aim of the European Council when trying to square the circle: to be nominally uncompromising on the Unions' values whilst rendering it particularly difficult, if not even impossible, to establish their breach.

The legal method used by the European Council to attain its objective deserves close attention. If at first sight it constitutes a faithful implementation of the principle of conferral – establishing a link between the objectives of the Union and the means designed to attain them – on closer inspection, it appears technically wrong and politically perverse.

Regulation 2020/2092 is based on Art. 322, para. 1, let. a), which gives the EU the power to adopt "financial rules" to implement the budget and to attain the objectives laid down by Art. 310, paras 4 and 5, namely, to ensure the sound financial management and to counter fraud and any other illegal activities affecting the financial interests of the Union.

At first sight, the technical analysis conducted on the legal basis of Regulation 2020/2092 seems to lead to the conclusion that, in spite of the clear interferences by the European Council on the prerogatives of other Institutions of the Union – alas, a frequent occurrence – the interpretive declaration of the European Council has simply stated the obvious, namely that the mechanism of the Regulation must only pursue its objectives, according to the classic doctrine of conferred competences.

This conclusion, however, is not only cynical. It may also prove to be undermined by a proper understanding of the relationship between the Union's values as laid down in Art. 2 TEU and its system of competences.

Art. 3, para. 1, TEU expressly describes the promotion of its values as one of the Union's aims. Beyond its rhetorical effect, this provision can hardly be devoid of legal effect. The promotion of the values as one of the aims of the Unions' action rather suggests that they form part of the standards against which the legality of Union's legal acts must be assessed. This view is not unrealistic. It appears to be consistent with the broad logic of the Treaties and was upheld by recent case law of the Court of Justice.

The logic of the EU competences was significantly altered by the Lisbon Treaty, which added a number of general objectives cutting across the policies and actions of the Union. The effect of these cross-cutting objectives is determined by Art. 7 TFEU, which directs the Union to "ensure consistency between its policies and activities, taking all of its objectives into account and in accordance with the principle of conferral of powers". If such an effect is produced by provisions enshrined in the TFEU, which protect interests relevant but not of a fundamental character, it can be logically inferred that it must also be produced by Art. 3, para. 1, TEU, which protects the fundamental values of the Union. This assumption is further upheld by Articles 3, para. 5, and 21, paras 1 and 2, which specify, albeit with a varying phraseology, that the Union's values must guide the full range of the Union's actions and policies within the scope of the EU's external action. If such an effect is expressly imposed by the Treaties in the domain of the Union's external action, *a fortiori*, it should apply to its internal action.

In addition, the role exerted by the Union's values has been acknowledged by the Court of Justice, which has dismissed the idea that the Union's values have no effect on the system of competence. It has actively developed the doctrine that values must "integrate" the set of the "objectives and principles" which must be attained by the Union's policies and actions (See Opinion 1/15, paras 143-144).

Regulation 2020/2092 seems to constitute the perfect implementation of this doctrine. It is apparent that measures of financial assistance to political regimes repudiating the Union's values could not be further from the promotion of these values under the terms of Art. 3 TEU.

The idea promoted by the political declaration of the European Council – that violations of the rule of law come within the scope of the Regulation only if this violation produces a detrimental impact of the principle of the sound financial management – is therefore untenable, in legal logic no less than legal ethics. There would be no need to make a Regulation to determine that conduct of a MS affecting the sound financial management of EU funds are in breach of EU law; Art. 310, para. 5, and the existing rules implementing it would have been more than sufficient.

Nor should the declaration be regarded as an intelligent expedient necessary to overcome the objections of Poland and Hungary. These MS perceived Regulation 2020/2092

as a serious obstacle to the pursuit of their own model of illiberal democracy within the Union and did not shy away from threatening to veto the new decision on own resources and on the Multiannual financial framework *i.e.* the financial sources of NGEU.

The option of adopting the acts contributing to the NGEU project through enhanced cooperation was never seriously considered. Yet this move could have made it technically possible, though laborious, to adopt the decisions on financial resources by unanimous voting of the MS participating in that enterprise. Incidentally, such a road would have radically changed the role of values in this troubled context; from a means of avoiding financial sanctions to a premise for being part of a project aimed at re-founding the Union from its very foundations.

The European Council chose the opposite path. This is not only the latest exercise in intergovernmentalism, a disease which is gradually perverting the entire edifice of the European integration. It is also an exercise in political hyperrealism, which creates the illusion of reality while remaining in the realm of art.

Beyond the problems surrounding its application, Regulation 2020/2092 symbolically expresses a very basic paradigm: participation in the integration project entails the sharing of its fundamental values. Its unconditioned adoption, therefore, would have transposed the discourse on Union's values from axiology to law; it would have definitively established the Union as a community of values; it would have constituted a revolutionary start for a new phase of the process of integration. To have given all this up in the name of a political compromise has indelibly stained this European moment.

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