

Article 4(2) TEU: The respect for national identity in the context of European integration

di Teresa Capelli¹

Table of Content

<u>Introduction</u>	4
<u>I. Article 4(2): the notion of national constitutional identity</u>	11
<u>I. Introduction</u>	11
<u>II. Between national and European law</u>	11
<u>III. The notion of national constitutional identity</u>	14
<u>A. A textual analysis</u>	14
<u>B. A systemic analysis</u>	16
<u>IV. Analysis of a selected case law of the CJEU</u>	18
<u>A. Language</u>	19
<u>B. Fundamental constitutional structures and related fundamental rights</u>	23
<u>C. Regional and local self-government</u>	28
<u>D. Religious matters</u>	31
<u>V. Conclusions</u>	33

¹ Menzione speciale per il diritto del Premio Jo Cox 2023.

L'elaborato è la tesi di Laurea in Studi di diritto internazionale presso l'Università Bocconi.

<u>II. The legal implications of the identity clause</u>	36
I. <u>Introduction</u>	36
II. <u>The question of the attribution of competences</u>	37
III. <u>The primacy of EU law</u>	39
A. <u>An overview of the jurisprudence of national constitutional courts</u>	40
B. <u>An exception to the primacy of EU law?</u>	45
IV. <u>Derogation from free movement provisions</u>	47
A. <u>Assessing the legitimacy of a national identity claim: the proportionality test and fundamental rights</u>	49
B. <u>Traditional grounds of derogation to EU law and national identity</u>	52
V. <u>Criteria for the validity of EU secondary law</u>	54
VI. <u>A criterion for the interpretation of EU law</u>	58
VII. <u>Conclusions</u>	60
<u>III. Populist autocracies and the abuses of the identity clause</u>	65
I. <u>Introduction</u>	65
II. <u>Constitutional pluralism and abuses of the identity clause</u>	66
III. <u>The case of Hungary: national identity, migration policies and the retention of sovereignty</u> 69	
IV. <u>The case of Poland: the principle of the independence of the judiciary</u>	72
V. <u>Hungary and Poland: the ruling on the rule-of-law conditionality mechanism</u>	76
VI. <u>The case of Romania: the reform of the judiciary and the position of the Constitutional Court</u> 78	
VII. <u>Conclusions</u>	84
<u>IV. National identity and fundamental rights. A case-study: the Taricco saga</u>	86
I. <u>Introduction</u>	86

<u>II.</u>	<u>Preliminary observations: fundamental rights in EU law</u>	87
<u>III.</u>	<u>The Taricco saga</u>	91
<u>A.</u>	<u>The Court of Justice <i>Taricco I</i> ruling</u>	91
<u>B.</u>	<u>The Italian Constitutional Court’s Reference for a preliminary ruling, order 24/2017</u> 95	
<u>C.</u>	<u>The answer of the Court of Justice in “<i>Taricco II</i>”</u>	99
<u>D.</u>	<u>The Italian Constitutional Court’s judgement No. 115/2018</u>	101
<u>IV.</u>	<u>Commentary</u>	102
<u>V.</u>	<u>Conclusions</u>	107
<u>V. Conclusions</u>		109
<u>Sources</u>		116
<u>Bibliography</u>		124

Introduction

“*United in diversity*” is the motto the European Union has adopted since the year 2000 to describe the way that Europeans have come together in the form of the EU to strive for peace and prosperity while also benefiting from the diversity of the continent’s various cultures, customs, and languages.

While the EU motto suggests an unfailing and peaceful coexistence between the concepts of diversity and unity, the accommodation of the different national identities of the Member States and the commonality and unity European integration brings about is a core challenge of the EU² as the two notions are inherently in tension with each other³.

In the context of the EU, national identity has a twofold dimension: on the one hand, it concerns the cultural specificities of each Member State, such as national language and religious matters, which might be threatened by European integration. To ensure protection of domestic culture, many provisions of EU law bind the European Union to respect and promote this component of national identity⁴.

On the other hand, identity is also connotated in terms of the Member States’ individuality, statehood and constitutional autonomy – *i.e.* the fact that the internal organisation of the Member States in terms of form of state, centralisation or decentralisation of public powers *etc.* is exclusively left to their discretion⁵. More in general, European law constitutes an autonomous legal order⁶ as such separate from that of the Member States. However, as argued by Besselink⁷, while Member States have an

² F. BIEBER, R. BIEBER, “*Negotiating Unity and Diversity in the European Union*”, Springer Nature Switzerland, 2021.

³ L F.M. BESSELINK, 'The Persistence of a Contested Concept: Reflections on Ten Years Constitutional Identity in EU Law', *European Public Law*, Vol. 27 Issue No. 3, 2021, pp. 597-612, available at <https://kluwerlawonline.com/journalarticle/European+Public+Law/27.3/EURO2021028>.

⁴ See *inter alia* Article 3 of the Treaty on the European Union (TEU), Article 6 of the Treaty on the Functioning of the European Union (TFEU), Article 165 of the Treaty on the Functioning of the European Union (TFEU), Article 167 of the Treaty on the Functioning of the European Union (TFEU), Article 22 of the European Charter of Fundamental Rights. Article 4(2) TEU has also been interpreted as protecting cultural declinations of national identity.

⁵ See Š. IMAMOVIĆ, M. CLAES L. F.M. BESSELINK, J. H. REESTMAN, “*National constitutional avenues for further EU integration*”, European Parliament Report, February 2014, available at <https://op.europa.eu/s/w7qn>.

⁶ Case 6/64 *Flaminio Costa v E.N.E.L.* ECLI:EU:C:1964:66 para. 3; Case 11/70 *Internationale Handelsgesellschaft mbH v Einfuhr- und Vorratsstelle für Getreide und Futtermittel* ECLI:EU:C:1970:114 para. 3.

⁷ L F.M. BESSELINK, 2021.

autonomous national legal system, the absolute primacy of the European legal order over the national one results in the fact that the powers Member States exercise, even of a constitutional nature, are more and more often curtailed by EU law. The reconciliation between those two conflicting circumstances lies at the heart of this type of identity claims. Such claims therefore ultimately concern the extent to which the national and the European political and legal systems may be recognised as coexisting in parallel without giving up on each one's *essentialia*⁸ – *i.e.* fundamental components of a given polity, in the case of the Member States established in the Constitution. The national Constitution can be in fact regarded as the basic order of a legally constituted community and as a reflection of the identity of such community⁹.

This matter has for a long time been unproblematic: as recognised by Fromage and De Witte¹⁰, due to the limited scope of European competencies and the tangible benefits the then European Community brought about, European integration and EU law were hardly ever contested.

Nevertheless, as the European project advanced and deepened, tensions between national identity and European integration started to increase.

In the first place, EU law started to encroach upon fundamental constitutional provisions of the Member States, most notably fundamental rights provisions¹¹.

Subsequently, the European Union's legislative competences progressively widened until including fields strongly related to national sovereignty such as migration law and, for the Eurozone, monetary policy¹². While these reforms constitute a fundamental change in the institutional framework of the European Union, they were unanimously agreed upon by all Member States, codified through Treaty amendments and limited to specific areas. Accordingly, this development was not the main source of tension.

⁸ Ibid.

⁹ A. SCHNETTGER, "Article 4(2) TEU as a Vehicle for National Constitutional Identity in the Shared European Legal System" in *Constitutional Identity in a Europe of Multilevel Constitutionalism* (Cambridge University Press 2019).

¹⁰ D. FROMAGE, B. DE WITTE, 'National Constitutional Identity Ten Years on: State of Play and Future Perspectives', (2021), 27, *European Public Law*, Issue 3 *European Public Law*, Vol. 27 Issue No. 3, 2021, pp. 411-426, available at <https://kluwerlawonline.com/journalarticle/European+Public+Law/27.3/EURO2021019>.

¹¹ This resulted in the development by some national Constitutional Courts, most notably the Italian and the German ones, of judicial review powers of EU law. See Italian Constitutional Court, Decision No. 183/1973 (*Frontini*) and BVerfGE 37, 271 (*Solange I*) [1974] CMLR 540.

¹² M. BONELLI, 'National Identity and European Integration Beyond 'Limited Fields'' in *European Public Law*, Vol. 27, No. 3 (2021), pp. 537-538, available at <https://doi.org/10.54648/euro2021025>.

By contrast, as noted by Bonelli¹³, the broadening of the EU's legislative power through the so-called *negative integration* is by far more complex and controversial. This term refers to the fact that, when interpreting and implementing free movement provisions, equality and non-discrimination rights and, in more limited circumstances, the rights deriving from the EU citizenship, the European Court of Justice recognised that even in areas that do not fall in the purview of the EU, Member States must exercise their powers in accordance with European law. In the words of the European Court of Justice, “*whilst Community law does not detract from the power of the Member States [...], the fact remains that, when exercising that power, Member States must comply with Community law*”¹⁴.

Crucially, as a consequence of negative integration, Member States are subject to the influence of the EU beyond limited fields, notably even in areas where they have not conferred competence on the European Union¹⁵. As a result, European law becomes applicable even beyond the fields over which the EU has direct powers and, consequently, its reach becomes indifferent to the Treaty-based framework on competences and could potentially capture all areas of Member States' activity¹⁶. In other words, the scope of application of EU law broadened way beyond the fields in which the EU had legislative competence, with the result that the two concepts no longer overlap¹⁷.

Provided that, as argued by Bonelli¹⁸, acceptance by Member States of the principles of primacy and direct effect of European law also depended on the limited scope of European integration, the unlimited expansion of European law's reach created significant tensions.

On the occasion of the Treaty of Maastricht (1992), these tensions resulted in the adoption of a provision that, for the first time, expressly¹⁹ mentioned the concept of national identity and stated

¹³ See, among others, Case C-148/02 *Garcia Avello* ECLI:EU:C:2003:539, Case CJEU, C-73/08 *Bressol*, ECLI:EU:C:2010:181, para. 28; Case C-76/05 *Schwarz and Gootjes-Schwarz* ECLI:EU:C:2007:492, para. 70; Joined Cases C-11/06 and C-12/06 *Morgan and Bucher* ECLI:EU:C:2007:626, para. 24.

¹⁴ Case C-76/05 *Schwarz and Gootjes-Schwarz* ECLI:EU:C:2007:492.

¹⁵ See e.g. Case C-279/93 *Schumacker*, ECLI:EU:C:1995:31, para. 21 in the context of direct taxation. See C. TIMMERMANS, “ECJ Doctrines on Competences”, in L. AZOULAI, “*The ‘Retained Powers’ Formula in the Case Law of the European Court of Justice: EU Law as Total Law?*”, 4(2) *European Journal of Legal Studies*, 2011, available at <http://hdl.handle.net/1814/31371>; S. GARBEN, “Collective Identity as a Legal Limit to European Integration in Areas of Core State Powers”, *JCMS: Journal of Common Market Studies*, Vol. 58, 2020, available at <https://doi.org/10.1111/jcms.12975>.

¹⁶ M. BONELLI, 2021.

¹⁷ *Ibid.*

¹⁸ M. BONELLI, 2021.

¹⁹ It could be argued that the obligation of the EU to respect the national identity of the Member States existed even before: in the words of Advocate General Poiares Maduro, it “forms part of the very essence of the European project” and existed from the beginning of the European Union. In his view, European integration always foresaw the maintenance of the political existence of the Member States. Thus, Article 4(2) TEU allegedly only reinforced this obligation, recognizing that the European Union must not violate the

that: “*The Union shall respect the national identities of its Member States, whose systems of government are founded on the principles of democracy*”²⁰. The provision was then amended with the Treaty of Amsterdam (1997) with the removal of the second sentence, and then further developed with the (failed) Constitutional Treaty. In this context, the Chair of the working group on “*complementary competence*”, Mr. Henning Christophersen, proposed the extension of the identity clause and a redefinition of the concept of national identity in order to carve out fundamental areas of national sovereignty and delimit the Union’s competence²¹. In the view of the working group, the so-called “*Christophersen clause*” was meant to constitute a general principle regulating the exercise of competences, comparable as such to the principles of subsidiarity, proportionality and others²². After the failure of the Constitutional Treaty, the Christophersen clause flowed with very little amendments²³ into the Lisbon Treaty, and now constitutes Article 4(2) TEU.

At present, Article 4(2) TEU – the so-called “*identity clause*” – provides that:

“The Union shall respect the equality of Member States before the Treaties as well as their *national identities*²⁴, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government.”

From the perspective of the Member States, the identity clause was meant to defend the core state functions from supranational competence creep and delimit hard core features of national sovereignty on which the Union could not interfere²⁵. While other provisions introduced with the Lisbon Treaty had the purpose of delimiting the sphere of competence of the Union²⁶, it was considered that the national identity clause, as well as the “*essential state functions*” clause, could put an obstacle also to negative integration through free movement, non-discrimination and EU citizenship provisions²⁷.

constitutional identity of Member States. See Opinion of Mr Advocate General Poirares Maduro, Case C-213/07 (*Michaniki AE v Ethniko Symvoulío Radiotileorasis and Ypourgos Epikrateias*) para. 31.

²⁰ Article F(1) Treaty on European Union (TEU) 1992.

²¹ B. GUASTAFERRO, “Beyond the Exceptionalism of Constitutional Conflicts: The Ordinary Functions of the Identity Clause”, Jean Monnet Working Paper 01/12, 01/2012, available at <https://jeanmonnetprogram.org/wp-content/uploads/2014/12/JMWP01Guastafarro.pdf>.

²² *Ibid.*

²³ The only addition was the reference to national security, which is now expressly reserved to the sole responsibility of each Member State.

²⁴ Emphasis added.

²⁵ *Ibid.*

²⁶ Notably Article 5 TEU, Article 51 of the Charter, Article 352 TFEU and the subsidiarity-control system via national parliaments.

²⁷ M. BONELLI, 2021.

After its adoption, as held by Garben²⁸, Article 4(2) TEU has been regarded to as a potential platform for mediating constitutional disputes over the protection of national identity. Thus, as recognised by Cloots²⁹, this provision has, in the context of identity questions, drawn increasing judicial attention, flourished as a subject of literature, and generated significant debates over its exact legal significance. In fact, the provision raised various interpretative issues, both as to the boundaries of the notion of constitutional identity and as to the legal implications of the provision itself.

At present, the European Court of Justice has issued a number of decisions on Article 4(2) TEU. Nevertheless, they do not provide clear and exhaustive indications as to the interpretation and the implementation of the clause. Hence, mostly with respect to its effects, the clause has been the object of dialogue and, at times, conflict between the European Court of Justice and National Constitutional Courts, as well as of significant abuses by some Member States.

As argued by many scholars and experts³⁰, there is little doubt that the European Union is nowadays at a pivotal point that will affect its future role and operating mode: this is evidenced by a number of phenomena, including the withdrawal of the UK's participation to the Union and the increasing and frequent threatening of the EU's core values, as well as the growth of Euroscepticism and sovranism, in a context in which the EU is also called upon to play a significant role in countering the negative effects of the pandemic. Against this background, identity questions pose a key challenge for the EU. Indeed, as affirmed by Shnettger:

“Every new step of the [European] integration process will be confronted with the question of whether the direction European integration is taking infringes the fundamental elements or values of a particular Member State's constitutional order as an expression of its individuality – in short, its constitutional identity”³¹.

Given the cruciality of the question of national identity, this study aims at clarifying the content and the legal effects of Article 4(2) TEU.

²⁸ S. GARBEN, “Collective Identity as a Legal Limit to European Integration in Areas of Core State Powers”, *JCMS: Journal of Common Market Studies*, Vol. 58, 2020, available at <https://doi.org/10.1111/jcms.12975>.

²⁹ E. CLOOTS, *National Identity in EU Law*, Oxford Studies in European Law, Oxford online edn, 19 Mar. 2015.

³⁰ See e.g. D. FROMAGE, B. DE WITTE, 2021.

C. ALTOMONTE, A. VILLAFRANCA (eds.) “*Europe in Identity Crisis. The Future of the EU in the Age of Nationalism*”, Milano: Ledizioni LediPublishing, 2019, available at <https://www.ispionline.it/it/pubblicazione/europe-identity-crisis-future-eu-age-nationalism-24606>.

³¹ A. SCHNETTGER, “Article 4(2) TEU as a Vehicle for National Constitutional Identity in the Shared European Legal System” in *Constitutional Identity in a Europe of Multilevel Constitutionalism* (Cambridge University Press 2019).

This will be done in the first place by analysing the concept of “*national identity*” for the scope of Art. 4(2) TEU, taking into account its permeable nature, and by analysing the text of the provision, the systemic context in which it is collocated and the relevant case-law of the European Court of Justice (Chapter I).

Subsequently, the nature and the extent of the legal effects of the identity clause will be studied (Chapter II). To this regard, the position of some national constitutional courts will be compared to that of the European Court of justice, most notably with regard to the formers’ conception of the identity clause as a “competence clause” and as an exception to the primacy of EU law. Moreover, the potential for Article 4(2) TEU to act as a ground of derogation to the fundamental freedoms, to influence the validity of EU secondary law and to act as a parameter for the interpretation of EU law will be assessed.

Finally, two specific situations in which national identity and Article 4(2) TEU have been relied on will be analysed, namely the abuses of the provisions carried out by populist autocracies (Chapter III) and the dialogue underwent between the European Court of Justice and the Italian Constitutional Court in the context of the so-called Taricco saga (Chapter IV).

This analysis will draw to the conclusion that not only the Court of Justice has refrained from fully engaging with Article 4(2) TEU but has also adopted a conservative approach in its interpretation and has generally been reluctant to admit and accept claims strictly³² grounded on this provision. As it will be extensively discussed in the Conclusions, there are many reasons for this: on the one hand, supporting the innovative understanding of Article 4(2) TEU supported by some national Courts would have encroached upon the pillars on which the EU legal system stands, most notably the absolute primacy of EU law. On the other hand, when flexibility as to the implementation of EU law was deemed necessary by the CJEU, the language of the “*Common Constitutional Traditions*”, inherently more pluralistic and less divisive than that of national identity, has been preferred³³.

Moreover, it will be inferred that national identity should not be interpreted regardless of the fundamental constitutional choice of each Member States to adhere to the European Union, to which their identities are inextricably intertwined. This consideration most notably concerns the

³² The Court has often agreed that national identity may justify a derogation from fundamental economic freedoms. However, as it will be highlighted in Chapter II, the same result achieved in these cases by the Court of Justice could have been reached without reliance on Article 4(2) TEU by exclusively referring to “traditional” grounds of derogation.

³³ See Case C-42/17 *M.A.S. and M.B.* ECLI:EU:C:2017:936.

fundamental values on which the EU stands such as democracy, the rule of law, and human rights and that constitute the common European identity³⁴.

Finally, it will be suggested that fundamental questions such as that of national identity and its balancing against European integration cannot be solved merely through reliance on legal provisions and judicial dialogue. Rather, the contribution of the Court of Justice and of National Constitutional Courts may only take part to this endeavour.

³⁴ Article 2 Treaty on the Europe Union (TUE).

I. Article 4(2): the notion of national constitutional identity

I. Introduction

Article 4(2) TEU, a provision inserted in the European legal framework by the Lisbon Treaty, includes the so-called “*identity clause*”, according to which the European Union is bound to respect the Member States’ national identities “*inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government*”.

The first step to understand the content and implications of this provision is the definition of the notion of national identity as deriving from Article 4(2) TEU, which is the objective of this chapter.

For instance, the *permeable* nature of Article 4(2) TEU and its collocation in between the EU and the national legal systems will be addressed. In fact, as it will be discussed extensively in the following pages, the provision constitutes an example of *shared normativity*, with the result that the content of constitutional identity must be defined in the light of both the European and the national legal frameworks.

Moreover, both a textual and a systemic analysis of the provision will be carried out. This will show that the provision has been consistently read as referring to the Constitutional identity of the Member States and, in particular, the constitutional *essentialia* of the legal frameworks of the Member States. Furthermore, the appropriateness of reading the clause in conjunction with other principles established in Article 4 will be highlighted, notably with respect to the principles of conferral and of sincere cooperation, and of the other prescriptions of Article 4(2) TEU itself.

In addition, a selection of the jurisprudence of the European Court of Justice on Article 4(2) TEU will be examined as it provides important guidelines as to the definition of what can be referred to as the “*European notion of national identity*”.

II. Between national and European law

The notion of constitutional identity under Article 4(2) TEU constitutes an example of shared normativity – *i.e.* of a situation in which the normative content of a provision of law results from a

link between EU law and national law³⁵. Shared normativity is achieved in this case through permeability, a notion that stands for the ability of, in this case, the EU legal system to recognise an external – in this case, belonging to the national legal order – normative content and link it with internal principles and provisions³⁶.

For instance, the interpretation of the concept of national constitutional identity, provided that it derives from a piece of EU legislation, is in principle subject to the jurisdiction of the CJEU. In fact, the CJEU has full jurisdiction over the interpretation and implementation of EU law in most matters of EU action³⁷. However, the interpretation of the content of the provision necessarily involves the interpretation of national constitutional law, clearly outside the competences of CJEU³⁸. A different conclusion would in fact clash against the protection of the diversity of Member States and the conception of identity as self-definition and self-understanding. As a consequence, the determination of what falls in the notion of constitutional identity highly depends on the interpretation by national authorities of their Constitutions: for example, some States may regard to national language as forming part of the *essentialia* of the constitution, while others may not³⁹.

The importance of national constitutional law in determining the significance of Article 4(2) TEU does not imply that the normative content of the provision should exclusively result from national law: as argued by Schnettger⁴⁰, this would in fact result in the suppression of the legal objectives, principles, and interests at the basis of this provision of EU law. Conversely, permeability does not determine the full subordination of a national legal content to the principles of the European legal order⁴¹.

³⁵ A. SCHNETTGER, “Article 4(2) TEU as a Vehicle for National Constitutional Identity in the Shared European Legal System” in C. CALLIESS AND G. VAN DER SCHYFF (eds), *Constitutional Identity in a Europe of Multilevel Constitutionalism* (Cambridge: Cambridge University Press 2019).

³⁶ A. SCHNETTGER, 2019.

³⁷ The jurisdiction of the CJEU in fact includes the provisions in the area of freedom, security, and justice (with the limits established by Article 276 TFEU). By contrast, the CJEU does not have jurisdiction over common foreign and security policy matters, except for what provided in Article 275 TFEU. Furthermore, the jurisdiction of the Court to review acts of the European Council or the Council concerning the determination that a Member State has committed a serious and persistent breach of Article 2 TEU is subject to limitations. See for reference A. ALBORS-LLORENS, “Judicial protection before the Court of Justice of the European Union” in C. BARNARD AND S. PEERS (eds), *European Union Law*, Second Edition, Oxford University Press, Oxford, 2017, p. 288.

³⁸ See, in a different context, the ruling of the Court in C-621/18 *Andy Wightman and a. v Secretary of State for Exiting the European Union* [2018] ECLI:EU:C:2018:999 para. 30.

³⁹ See, eg, Belgian Constitution, art 4; French Constitution, art 2; Irish Constitution, art 8; Lithuanian Constitution, art 14; Slovenian Constitution, art 11; Spanish Constitution, art 3.

⁴⁰ A. SCHNETTGER, 2019.

⁴¹ A. SCHNETTGER, 2019.

It is essential to clearly distinguish between the European framework and the specifications given by Member States within this framework: as affirmed by Villotti⁴², it is in fact necessary to ensure some degree of uniformity and, therefore, establish a minimum common conception of the substantive contours of Article 4(2) TEU. Otherwise, as held by Van Der Schyff⁴³, the concept of national identity would become too vague to be functional and could be used by Member States as a deliberate instrument to shape European law at their will.

It follows from this reasoning that, in the first place, it is a prerogative of the Member States to express their national identity, to which the European Union is then required to respond⁴⁴. Hence, in the view of Villotti⁴⁵, the competence of the CJEU in determining the content of the identity clause is limited to establishing guidelines for the identification by the relevant Member State of national constitutional identity.

When the national specification of the notion of constitutional identity is considered, particular importance is given to the opinion of Constitutional Courts or analogous bodies⁴⁶ in defining Member State identity as they represent the ultimate interpreter of the Constitution itself.

Yet, while the decisions of national constitutional courts are surely an essential tool to determine what composes the constitutional identity of a Member State, it is not enough to only rely on this source. In fact, as suggested by Villotti⁴⁷, the text of Article 4(2) TEU provides for a broad understanding of national identity, inclusive of other means of expressing it such as legislative acts specifying fundamental constitutional choices and the Government's position. This was confirmed in the case *Runevič-Vardyn and Wardyn*⁴⁸ where, in determining whether or not the country's official language

⁴²J. VILLOTTI, 'National constitutional identities and the legitimacy of the European Union – two sides of the European coin', *Zeitschrift für europarechtliche Studien*, January 2015, available at https://www.nomos-elibrary.de/10.5771/1435-439X-2015-4-475.pdf?download_full_pdf=1.

⁴³ G. VAN DER SCHYFF, "The constitutional relationship between the European Union and its Member States: the role of national identity in article 4(2) TEU" *European Law Review*, October 2012, available at <https://uk.westlaw.com/Document/I90DC21B1136011E2886FA474C1AE060E/View/FullText.html>.

⁴⁴ G. VAN DER SCHYFF, 2012.

⁴⁵ J. VILLOTTI, 2015.

⁴⁶ Case C-391/09, *Malgožata Runevič-Vardyn and Łukasz Paweł Wardyn v Vilniaus miesto savivaldybės administracija and Others* ECLI:EU:C:2011:291.

See also the Opinion of AG Maduro in Case C-180/04 *Cristiano Marrosu and Gianluca Sardino v Azienda Ospedaliera Ospedale San Martino di Genova e Cliniche Universitarie Convenzionate* [ECLI:EU:C:2005:569], para. 40. In his view, National Constitutional Courts "are best placed to define the constitutional identity of the Member States which the European Union has undertaken to respect".

⁴⁷ J. VILLOTTI, 2015.

⁴⁸ Case C-391/09, *Malgožata Runevič-Vardyn and Łukasz Paweł Wardyn v Vilniaus miesto savivaldybės administracija and Others* ECLI:EU:C:2011:291.

constituted part of its national identity, the CJEU not only took into account the position of the Lithuania’s Constitutional Court, but also the one of the Lithuanian Government.

The definition by national authorities of what amounts to national identity is to some extent self-limiting: as indicated by AG Bot in the *Melloni*⁴⁹ case, if a Member State affirms that a determinate issue is not part of its national identity at an early stage of a proceeding instituted before the European Court of Justice, the same Member State cannot later modify its position on the matter.

III. The notion of national constitutional identity

While it is true that the interpretation of Article 4(2) TEU necessarily involves the interpretation of national constitutional law, it is possible to elaborate a “*European framework of national identity*” through the interpretation of the identity clause in its dimension as a provision of EU law.

The text of Article 4(2) TEU in its final version as resulting from the amendments of the Lisbon Treaty reads as follow:

*“The Union shall respect the equality of Member States before the Treaties as well as their national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government. It shall respect their essential State functions, including ensuring the territorial integrity of the State, maintaining law and order and safeguarding national security. In particular, national security remains the sole responsibility of each Member State.”*⁵⁰

A. A textual analysis

The notion of *national identity* in Article 4(2) TEU relates to the variety of elements such as values, structures, and peculiarities from different areas of society, which express the collective understanding of each Member State⁵¹.

⁴⁹ Case C-399/11 *Stefano Melloni*, Opinion of AG Bot, ECLI:EU:C:2012:600.

⁵⁰ Article 4(2) TEU. This obligation is further strengthened by the preamble of the EU Charter, which states that “*The Union contributes to the preservation and to the development of these common values while respecting the diversity of the cultures and traditions of the peoples of Europe as well as the national identities of the Member States and the organisation of their public authorities at national, regional and local levels [...]*”.

⁵¹ A. SCHNETTGER, 2019.

This notion is further qualified in Article 4(2) TEU as relating to the fundamental, political and constitutional, structures of the Member States. Because of this qualification, the clause is consistently interpreted by the CJEU as well as by national Constitutional Courts as protecting the *constitutional* national identity of the Member States – *i.e.* identity as emerging from the Constitution of the relevant Member State. This understanding of national identity is linked to the conception of Constitutions as basic orders of a legally constituted community and as a reflection of the identity of such community⁵².

It is worth mentioning that cultural aspects of national identity are of high importance for the European legal framework: not only they have been recognised under the Treaties, but also accepted by the European Court of Justice as overriding reasons of public interest, able as such to justify limitations of fundamental freedoms⁵³. Nevertheless, when art. 4(2) TEU is concerned, only the constitutional declination of national identity as interpreted by national constitutional courts, the government and other national authorities is relevant. This does not imply that cultural aspects of national identity can never fall under art. 4(2) TEU. In fact, as recognised by Schnettger⁵⁴, there clearly is a link between cultural aspects of national identity and the Constitution: in fact, the constitution represents the basic order of a people, is inherently tied to the people's national identity, and reflects this identity in its provisions. As shown in the case *Runevič-Vardyn and Wardyn*⁵⁵ which will be further discussed later, cultural identity may be covered by the identity clause inasmuch as it is interpreted by the relevant Member State as part of national constitutional identity. Conversely, cultural identity features are relevant only to the extent that they inform the constitution.

Therefore, whenever a question related to Art. 4(2) TEU is raised, the logical starting point in the quest is the constitution, be it written or not, of the relevant Member State.

⁵² See E. BULMER, “*What is a Constitution? Principles and Concepts*”, Stockholm, International Institute for Democracy and Electoral Assistance, 2017 Second edition, available at <https://www.idea.int/sites/default/files/publications/what-is-a-constitution-primer.pdf>, p. 6.

⁵³ See, *inter alia*, C-169/91 *Council of the City of Stoke-on-Trent and Norwich City Council v B&Q plc*, EU:C:1992:519, para. 11; C-531/07 *Fachverband der Buch- und Medienwirtschaft v LIBRO Handelsgesellschaft mbH*, EU:C:2009:276, paras. 32–34; C-198/89 *Commission v Greece* [1991] ECLI:EU:C:1991:79, and C-153/02 *Neri* [2003] ECLI:EU:C:2003:614, para. 46.

⁵⁴ A. SCHNETTGER, 2019.

⁵⁵ Case C-391/09 *Malgożata Runevič-Vardyn and Łukasz Paweł Wardyn v Vilniaus miesto savivaldybės administracija and Others* [2011] ECR I-03787. See also the Opinion of AG Kokott in Case C-222/07 *UTECA* ECLI:EU:C:2009:190 para. 93.

Importantly, as argued by Van Der Schyff⁵⁶, Art. 4(2) TEU does not protect every detail of the national constitutional order, but only what can be regarded to as *fundamental* and as constituting an essential feature of the constitutional framework that forms its very core and identity, without which the relevant State and its organisation would be fundamentally altered. As affirmed by Schnettger⁵⁷, to determine what falls in this hard core of constitutional identity it is possible to rely on either formal, such as eternity clauses, or substantial features of the Constitution, or both.

Finally, Article 4(2) also refers to aspects of national identity linked to *regional and local self-government*. It is important to highlight that, as recognised by the CJEU in the *Remondis*⁵⁸ judgement, the identity clause cannot ground the inclusion of certain national normative provisions within the Member States' constitutional identity; by contrast, it is the Member State that may recognise national provisions, in this case those concerning the existence of self-government and the extent of local and regional authorities' powers, as constituting part of its national identity, that the EU is then required to respect. Therefore, the explicit mention of regional and local self-government does not constitute a European guarantee for the existence of such orders⁵⁹.

B. A systemic analysis

Article 4(2) TEU subjects the EU not only to respect the national identity of the Member States, but also their equality (*principle of equality of the Member States*) and essential State functions. Moreover, the article expressly establishes that national security remains within the exclusive competence of the Member States. As recognised by Dobbs⁶⁰, this final phrase guarantees Member States' continued autonomy on the matter in response to the eradication by the Treaty of Lisbon of the three-pillars structure.

⁵⁶ G. VAN DER SCHYFF, 2012.

⁵⁷ A. SCHNETTGER, 2019.

⁵⁸ Case C-51/15, *Remondis GmbH & Co. KG Region Nord contro Region Hannover*, ECLI:EU:C:2016:985.

⁵⁹ A. SCHNETTGER, 2019.

⁶⁰ M. DOBBS, "Sovereignty, Article 4(2) TEU and the Respect of National Identities: Swinging the Balance of Power in Favour of the Member States?" in *Yearbook of European Law*, Vol. 33, No. 1, 2014, pp. 298–334.

Some scholars⁶¹ affirm that these obligations are inter-related and compose together the principle of Member States' self-governance. Yet, other scholars⁶² argued that the duties imposed by Art. 4(2) TEU have different roots and purposes.

In particular, Martinico⁶³ argues that, while the principle of equality of Member States constitutes a legacy of the international public law origins of the European integration process, the identity clause opens the EU legal framework towards the constitutional diversity of the Member States. Villotti⁶⁴ further recognises that the fact that the principle of equality is stated before the reference to national identity suggests that equality is a prerequisite for the respect of the identity clause.

Moreover, Van der Schyff⁶⁵ argues that the distinction between national identity and the essential state functions hints a difference between the two terms. In doing so, he highlights that the CJEU has not yet definitely developed the concept of State functions⁶⁶ and that there are some analogies between this notion and Article 72 TFEU⁶⁷. The duty to respect the Member States' "State functions" should therefore be interpreted in the light of this provision.

Systematically, the identity clause is positioned in the Treaty alongside the principles governing the relationship between the EU and the Member States, namely the principle of conferral and the principle of sincere cooperation.

To begin with, Art. 4(1) TEU states that, according to the principle of conferral (Article 5 TEU), "*competences not conferred upon the Union in the Treaties remain with the Member States*".

Moreover, Art. 4(3) TEU establishes instead the principle of sincere cooperation, according to which "*the Union and the Member States shall, in full mutual respect, assist each other in carrying out tasks*

⁶¹ D. CHALMERS, G. DAVIES, G. MONTI, *European Union Law*, 2nd edn (Cambridge: Cambridge University Press, 2010), p.201. With respect to an interpretation that equates the concepts of national identity and essential state functions see for example B. GUASTAFERRO, "Beyond the Exceptionalism of Constitutional Conflicts: The ordinary functions of the Identity Clause", *Yearbook of European Law*, 2012, pp. 263-289.

⁶² G. VAN DER SHYFF, 2012; M. G. PASCUAL, "Criminal Law as an Essential Function of the State: Last Line of Resistance?", in A. SAIZ ARNAIZ & C. ALCOBERRO *National Constitutional Identity and European Integration* (Llivina eds, Intersentia 2013) p. 161-163.

⁶³ G. MARTINICO, "Taming National Identity: A Systematic Understanding of Article 4.2 TEU" in *European Public Law*, no. 3, 2021.

⁶⁴ J. VILLOTTI, 2015.

⁶⁵ G. VAN DER SCHYFF, 2012.

⁶⁶ G. MARTINICO, "Taming National Identity: A Systematic Understanding of Article 4.2 TEU" in *European Public Law*, no. 3, 2021.

⁶⁷ "This Title shall not affect the exercise of the responsibilities incumbent upon Member States with regard to the maintenance of law and order and the safeguarding of internal security."

which flow from the Treaties". This principle can be seen as "an enhanced obligation of good faith, which is incumbent upon Member States of the European Union as regards their relations with one another and with the institutions of the European Union as a result of their membership of the EU"⁶⁸.

Accordingly, all EU institutions and the Member States are required to mutually assist each other in the execution of their competences⁶⁹. The principle of sincere cooperation moreover binds the Member States to on the one hand take the appropriate positive measures to implement EU law and, on the other hand, negatively refrain from jeopardising the achievement of EU's objectives⁷⁰.

This structuring of the Article suggests a link between the EU's duty to respect Member States' national identities and the Member States' duty to cooperate in the fulfilment of the EU's objectives⁷¹. Moreover, national identity and sincere cooperation have been referred to jointly in the Opinions of Advocate General Wathelet in the *Coman*⁷² case and of Advocate General Cruz Vilallón in the *Gauweiler* case⁷³. Indeed, in the words of AG Wathelet, national identity "cannot be construed independently of the obligation of sincere cooperation set out in Article 4(3) TEU"⁷⁴.

IV. Analysis of a selected case law of the CJEU

As introduced in the previous chapter, the notion of national identity is not fixed and definitely established in Article 4(2) TEU: in fact, the article allows for flexibility in determining what can amount to an expression of national identity and can accordingly be afforded protection under the identity clause or not. Yet, the case law of the European Court of Justice has provided some guidelines as to what falls within the scope of Article 4(2) TEU

⁶⁸ C-203/07, *Greece v Commission*, Opinion of AG Mazák [2008] EU:C:2008:606, para. 83.

⁶⁹ See Case C-600/14, *Federal Republic of Germany v Council of the European Union* [2017], ECLI:EU:C:2017:935, paras. 104–7.

⁷⁰ See, *inter alia*, Joined Cases C-231-233/06, *Office national des pensions v Emilienne Jonkman and Hélène Vercheval and Noëlle Permesaen v Office national des pensions* [2007] ECLI:EU:C:2007:373 para. 38; C-129/96 *Inter-Environnement Wallonie ASBL v. Région wallonne* [1997] ECLI:EU:C:1997:628 ; C-212/04 *Konstantinos Adeneler and others v. Ellinikos Organismos Galaktos (ELOG)* [2006] ECLI:EU:C:2006:443.

⁷¹ *Ibid.*

⁷² C-673/16, *Relu Adrian Coman*, Opinion of AG Wathelet [2018] ECLI:EU:C:2018:2.

⁷³ C-62/14, *Peter Gauweiler and Others v Deutscher Bundestag*, Opinion of Advocate General Cruz Villalón [2015] ECLI:EU:C:2015:7.

⁷⁴ C-673/16, *Relu Adrian Coman*, Opinion of AG Wathelet [2018] ECLI:EU:C:2018:2 para. 40.

A. Language

In several Member States, the national language constitutes a legally expressed component of national identity. In fact, many domestic constitutions recognise and establish an official language of the State or more than one⁷⁵. In addition, as recognised by Cloots⁷⁶, the linguistic identity of a State is often reflected in ordinary law, for example in provisions requiring certain private actors to use the national language (or one of them) or certain situations to be regulated in the official language(s). Even in States where express constitutional provisions recognising an official language lack, a *de facto* official language can be identified based on the language in which public institutions such as the legislature, the administration or courts operate⁷⁷.

The requirement to use national language can create conflicts with fundamental EU principles such as the freedom of movement and the prohibition of discrimination. For instance, in transnational context, linguistic diversity can easily constitute an obstacle to the exercise of free movement rights and, conversely, the use of a *lingua franca* such as English, while risking threatening the existence of less spoken languages, can smooth the exercise of both economic freedoms and mobility rights⁷⁸. Moreover, national language requirements can easily amount to an indirect discrimination based on nationality – *i.e.* a situation in which an apparently neutral provision, criterion or practice concretely puts persons having a particular protected characteristic at a disadvantage compared with others⁷⁹. Therefore, such provisions may constitute a violation of the principle of non-discrimination.

Nevertheless, language diversity is afforded protection and recognition by various EU treaty provisions in the light of the consideration that “*languages are the most direct expression of our culture*”⁸⁰. For instance, Article 3 TEU establishes that the Union “*shall respect its rich cultural and linguistic diversity*”. In addition, Article 165(1) TFEU binds the EU to fully respect the Member States’ language diversity. This obligation is further strengthened by Article 22 of the EU Charter of Fundamental Rights. Furthermore, Article 165(2) TFEU states that: “*Union action shall be aimed at*

⁷⁵ See, eg, Belgian Constitution, art 4; French Constitution, art 2; Irish Constitution, art 8; Lithuanian Constitution, art 14; Slovenian Constitution, art 11; Spanish Constitution, art 3.

⁷⁶ E. CLOOTS, 'National Identity and Primary EU Law: Methods of Adjudication', in *National Identity in EU Law*, Oxford Studies in European Law, Oxford online edn, 19 Mar. 2015.

⁷⁷ *Ibid.*

⁷⁸ *Ibid.*

⁷⁹ See, among other pieces of legislation, Directive 2000/78/EC of 27 November 2000 and Directive 2000/43/EC of 29 June.

⁸⁰ K. A. ISKRA, “*Fact Sheets on the European Union*”, published by the European Parliament, 04/2022, available at www.europarl.europa.eu/factsheets/en, lastly accessed 19/09/2022.

[...] developing the European dimension in education, particularly through the teaching and dissemination of the languages of the Member States”.

The importance of protecting language diversity was also recognised by the CJEU in *Groener*⁸¹ in 1989, before the adoption of the treaty of Lisbon and the insertion in the treaties of the identity clause.

The case was dealt with by the CJEU in a preliminary ruling concerning the freedom of movement of workers (Article 48(3) of the Treaty and Article 3 of Regulation No. 1612/68 of the Council of 15 October 1968). Ms Groener, a Dutch national, instituted a proceeding against the Irish Minister for Education and the City of Dublin Vocational Educational Committee after having been rejected for the position of permanent full-time art teacher due to her lack of adequate knowledge of the Irish language. In the view of the applicant, the conditionality of the employment in the education sector upon proof of an adequate knowledge of the Irish language constituted a limitation to her freedom of movement as a worker and, accordingly, a violation of European law.

Hence, the question referred to the Court concerned in the first place whether language requirements in employment relationship constituted a violation of EU law on the ground that their exclusive or principal effect was to discriminate against nationals of other Member States. Moreover, the referring judge asked the CJEU if regard should be given to a policy of the Irish State according to which persons holding the post should have a sufficient knowledge of the Irish language, even if such knowledge was not necessary for the execution of the job. Lastly, the referring judge interrogated the Court as to whether the term 'public policy' in Article 48(3) of the EEC Treaty was to be construed as applying to the Irish policy under scrutiny and, if so, the limitation of free movement rights lamented by the applicant was justified on the grounds of such policy.

The Court did not answer the first and the third questions, but recognised that:

“As is apparent from the documents before the Court, although Irish is not spoken by the whole Irish population, the policy followed by Irish governments for many years has been designed not only to maintain but also to promote the use of Irish as a means of expressing national identity and culture. [...] The obligation imposed on lecturers in public vocational education schools to have a certain knowledge of the Irish language is one of the measures adopted by the Irish Government in furtherance of that policy.”⁸²

The CJEU affirmed that Community law allowed for a derogation to fundamental economic freedoms based on the adoption of a policy for the protection and promotion of a language of a Member State

⁸¹ Case C-379/87, *Anita Groener v Minister for Education and the City of Dublin Vocational Educational Committee* [1989], ECLI:EU:C:1989:599.

⁸² *Ibid*, par. 18.

which constituted both the national and the first official language. In line with the jurisprudence on the derogation to fundamental freedoms, as it will further be discussed in the next chapter, the Court however established that the policy should be non-discriminatory – *i.e.* applied to workers of all nationalities, included nationals of the Member States adopting the policy – and consistent with the principles of proportionality and necessity.

The insertion of Article 4(2) TEU provided another instrument for the protection of language diversity. In fact, in addition to but also in line with all the above, the CJEU recognised in a variety of cases national language as constituting a component of national constitutional identity for the purpose of Article 4(2) TEU.

For instance, in the case *Runevič-Vardyn and Wardyn*⁸³, the CJEU relied on Article 4(2) TEU in giving a preliminary ruling concerning the principle of equal treatment between persons irrespective of racial or ethnic origin (Articles 18 TFEU and 21 TFEU, and of Article 2(2)(b) of Council Directive 2000/43/EC of 29 June 2000) and freedom of movement (Article 21 TFEU).

The applicants, the Lithuanian national belonging to the Polish minority in the country Mrs. Malgožata Runevič-Vardyn, and her husband, the Polish national Łukasz Paweł Wardyn, instituted a proceeding against the Ministry of Justice of the Republic of Lithuania, the State Commission on the Lithuanian Language and the Civil Registry Division of the Legal Affairs Department of the Municipal Administration of the City of Vilnius concerning the latter's refusal to change the names and surnames of the applicants on the certificates of civil status which were issued to them. The spelling of the name of Ms Malgožata Runevič-Vardyn as such on both her birth and marriage certificates was in fact the Lithuanian version of the name of the applicant. The request concerned the amendment of the name to its Polish version, Małgorzata Runiewicz.

Significantly, in the main proceeding, the Lithuanian Constitutional Court delivered a decision declaring that a person's forename and surname had to be entered on a passport in the official national language and in accordance with its spelling rules in order to preserve the constitutional status of that language.

The first and second question referred to the CJEU concerned whether Article 2(2)(b) of Directive 2000/43/EC should have been construed as prohibiting Member States from indirectly discriminating against individuals on grounds of their ethnic origin in a case where national legislation provided that forenames and surnames may only be written on certificates of civil status respectively: (i) in the

⁸³ Case C-391/09, *Malgožata Runevič-Vardyn and Łukasz Paweł Wardyn v Vilniaus miesto savivaldybės administracija and Others* ECLI:EU:C:2011:291.

national language; and (ii) using only Roman characters and not employing modifications to those characters which are used in other languages.

In addition, the referring judge interrogated the Court as to whether also Article 21(1) TFEU and Article 18 TFEU established the aforementioned prohibitions on the exclusive use of the national language (question no. 3) and Roman characters (question no. 4) on certificates of civil status.

The Court, while dismissing the first and the second question due to the inapplicability to the case of Directive 2000/43/EC, admitted the third and the fourth question based on the Treaty provisions on citizenship of the Union. In answering those questions, the Court recalled its ruling in *Groener* and restated that EU law did not preclude the adoption of a policy for the protection and promotion of a language of a Member State which constituted both the national and the first official language. The Court also referred to Article 3(3) EU and Article 22 of the Charter of Fundamental Rights of the European Union, eventually recognising also that: “*Article 4(2) TEU provides that the Union must also respect the national identity of its Member States, which includes protection of a State’s official national language*”⁸⁴.

As it will be extensively analysed in the next chapter, the Court concluded that measures aimed at the protection of the official national language such as the ones at issue constituted, in principle, a legitimate objective capable of justifying restrictions on the freedom of movement and residence.

Subsequently, the CJEU addressed again the question of language requirements as an expression of national identity and their compatibility with EU law in the *Las*⁸⁵ judgement. Also in this case the Court answered a preliminary ruling concerning freedom of movement of workers (Article 45 TFEU). The case originated in a labour dispute between a multinational corporation incorporated in Belgium, PSA Antwerp, and a Dutch national, Mr. Las. The latter instituted a proceeding against his employer claiming that the provisions of the employment contract not drafted in Dutch were to be considered null and void on the basis of the Belgian Decree on Use of Languages. In fact, the latter provided that all documents concerning the employment relationship in the Dutch-speaking part of Belgium should be drawn up by employers in the Dutch language on pain of nullity. By contrast, PSA Antwerp insisted that the Decree violated EU law as it constituted an obstacle to the freedom of movement of workers exercised by Mr. Las.

The question deferred to the CJEU concerned the compatibility of the Belgian Decree with Art. 45 TFEU.

⁸⁴ Ibid, par. 86.

⁸⁵ Case C-202/11, *Anton Las v PSA Antwerp NV* [2013] ECLI:EU:C:2013:239.

The CJEU recalled the judgements in *Groener* and in *Runevič-Vardyn and Wardyn* in restating that EU law did not prevent Member States from the adoption of a policy for the protection and promotion of one or more of their official languages⁸⁶. Then the Court referred to the identity clause and stated that: “*In accordance with Article 4(2) TEU, the Union must also respect the national identity of its Member States, which includes protection of the official language or languages of those State*”.

In conclusion, the Court affirmed that the objective of promoting and encouraging the use of Dutch, which is one of the official languages of Belgium, constituted a legitimate interest which, in principle, could justify a restriction on the freedom of movement of workers. However, the Court deemed the Belgian measure inconsistent with the principle of necessity and accordingly with EU law.

B. Fundamental constitutional structures and related fundamental rights

It could be argued that specific understandings of fundamental rights or constitutional principles amount to an expression of national constitutional identity for the purpose of Article 4(2) TEU.

Indeed, although all Member States adhere to a common set of fundamental rights, notably those enshrined in the European Convention on Human Rights (ECHR) and, since 2009, the Charter of Fundamental Rights of the EU (EU Charter), the national conception of those rights may vary from State to State⁸⁷.

Furthermore, national constitutions may outline additional rights than the ones provided for in the aforementioned Charters and Member States may differently strike a balance between competing fundamental rights⁸⁸.

Hence, the CJEU has been faced with questions relating to specific understandings of fundamental rights in a variety of cases⁸⁹. In this context, before the insertion of Article 4(2) TEU in the treaties, the Court had confirmed that the safeguarding of fundamental rights by a Member State may constitute a valid justification for limiting free movement rights established by the Treaty.

⁸⁶ Case C-202/11, *Anton Las v PSA Antwerp NV* [2013] ECLI:EU:C:2013:239, para. 25.

⁸⁷ E. CLOOTS, 2015.

⁸⁸ E. CLOOTS, 2015.

⁸⁹ See also Case C-112/00 *Schmidberger, Internationale Transporte und Planzüge v Republik Österreich*, EU:C:2003:333.

A first example of this jurisprudence is constituted by the *Omega*⁹⁰ case of 2004, a preliminary ruling on the compatibility with EU law of the prohibition by national law to operate an installation where shooting games were practiced.

The case arose when Omega, a German company, instituted a proceeding against the German administration after the latter forbade Omega from operating its business activity claiming that, in doing so, Germany had restricted its freedom to provide services and free movement of goods. The prohibition was established because of the contrariety of Omega's activity to a fundamental value prevalent in public opinion and enshrined in the German Basic Law⁹¹, namely human dignity.

The question referred to the Court concerned the compatibility with the provisions on freedom to provide services and the free movement of goods of the prohibition under national law of a particular commercial activity involving simulated killing action on the ground that it offended the values enshrined in the constitution.

The CJEU, in deciding Omega, referred to the treaty-based derogation to fundamental economic freedoms of public policy, which was interpreted as including the prohibition of an activity that constitutes an affront to human dignity. This interpretation was based on the consideration that in Germany, the respect for human dignity “*has a particular status as an independent fundamental right*”⁹² and that: “*It is not indispensable in that respect for the restrictive measure issued by the authorities of a Member State to correspond to a conception shared by all Member States as regards the precise way in which the fundamental right or legitimate interest in question is to be protected.*”⁹³ Thus, the Court recognised that human dignity constituted under German constitutional law a particularly important human right which could be afforded by national law special protection irrespective of whether or not the same conception of the right in question was shared by other Member States.

This jurisprudence of the CJEU was expressly referred to by the Court of Justice itself in the solution of subsequent cases where Article 4(2) TEU was at stake. For instance, as argued by Claes⁹⁴, in this context “*the national identity argument under Article 4(2) TEU do relate, be it rather indirectly, to*

⁹⁰ Case C-36/02 *Omega Spielhallen- und Automatenaufstellungs-GmbH v Oberbürgermeisterin der Bundesstadt Bonn* [2004] ECLI:EU:C:2004:614.

⁹¹ First sentence of Paragraph 1(1) of the Grundgesetz.

⁹² Par. 34.

⁹³ Par. 37.

⁹⁴ M. Claes, 'National Identity and the Protection of Fundamental Rights', *European Public Law*, Vol. 27 Issue No. 3, 2021, pp. 517-535, available at <https://kluwerlawonline.com/journalarticle/European+Public+Law/27.3/EURO2021024>.

the particular national conceptions of the protection of fundamental rights". While it could be argued that in those cases what is specific to the Member State is the conception of relevant fundamental rights, it is nevertheless true that the fundamental structures of the State, rather than purely fundamental rights claims, were at the very origin of the cases. In fact, the Court of Justice admitted that the specific national understandings of fundamental rights were comprised within Article 4(2) TEU only inasmuch as they related to fundamental structures of the State. Indeed, as it will be further explained later, in *Sayn-Wittgenstein*⁹⁵ the argument of Austria favouring the principle of equality to the rights to identity and private life was raised in relation to the Republican choice of the Austrian State; in *Coman*⁹⁶, the understanding of the right to private and family life was linked to the constitutional institution of marriage. When this connection lacked, the Court of justice dismissed national arguments based on Article 4(2) TEU: hence, arguments purely based on the protection of fundamental rights cannot be grounded on the identity clause. This is the case of *Taricco*⁹⁷, which, due to its specificities, will be specifically analysed in Chapter IV.

A first ruling in which Article 4(2) TEU was used to protect national identity as inherent in fundamental structures of the State and related specific understandings of fundamental rights is the *Sayn-Wittgenstein*⁹⁸ ruling. In this case, the CJEU was referred a preliminary ruling on the interpretation of Article 21 TFEU and its compatibility with the refuse by the Austrian authorities to correct the surname of the applicant after her adoption by a German national due to indications in the German surname of nobility, not permitted under Austrian constitutional law.

In fact, the Austrian Law on the abolition of the nobility of 1919, a law of constitutional status implementing the principle of equal treatment, precluded an Austrian citizen from bearing titles of nobility. The applicant claimed that this prohibition by the Austrian authorities undermined her freedom to move in the EU.

Hence, the question referred to the Court was: "*Does Article 21 TFEU preclude legislation pursuant to which the competent authorities of a Member State refuse to recognise the surname of an (adult)*

⁹⁵ Case C-208/09, *Ilonka Sayn-Wittgenstein v. Landeshauptmann von Wien* [2010] ECLI:EU:C:2010:806. See also, for an analogous ruling, Case C-438/14, *Bogendorff von Wolffersdorff*, ECLI:EU:C:2016:401.

⁹⁶ Case C-673/16, *Relu Adrian Coman e a. v. Inspectoratul General pentru Imigrări and Ministerul Afacerilor Interne* [2018] ECLI:EU:C:2018:385.

⁹⁷ See e.g. Italian Constitutional Court, Order no. 24/2017 and the reply of the CJEU Case C-42/17 *M.A.S. and M.B.* ECLI:EU:C:2017:936. The case is extensively analysed in Chapter IV.

⁹⁸ Case C-208/09, *Ilonka Sayn-Wittgenstein v. Landeshauptmann von Wien* [2010] ECLI:EU:C:2010:806. See also, for an analogous ruling, Case C-438/14, *Bogendorff von Wolffersdorff*, ECLI:EU:C:2016:401.

adoptee, determined in another Member State, in so far as it contains a title of nobility which is not permissible under the (constitutional) law of the former Member State?”.

In the view of the Austrian Government, this restriction was a "*fundamental decision in favour of the formal equality of treatment of all citizens before the law*"⁹⁹ and was justified "*in the light of the history and fundamental values of the Republic of Austria*"¹⁰⁰. While the Court noted that names were a constituent element of a person's identity and right to private life, protected by both the EU Charter of Fundamental Rights and the European Convention on Human Rights¹⁰¹, the CJEU stressed that art.4(2) TEU required the EU to respect the national identities of its Member States, which included a country's status of Republic. The Court recognised the importance attributed by Austria to interpreting the principle of equal treatment in the light of its republican constitutional history and recalled *Omega* in stating that:

“[...] it is not indispensable for the restrictive measure issued by the authorities of a Member State to correspond to a conception shared by all Member States as regards the precise way in which the fundamental right or legitimate interest in question is to be protected and that, on the contrary, the need for, and proportionality of, the provisions adopted are not excluded merely because one Member State has chosen a system of protection different from that adopted by another State”.

Republicanism was afforded protection by the Court as specifically interpreted by the Austrian authorities, and according to its specific implementation in the Austrian context¹⁰²: again, Article 4(2) TEU "*accepts the legitimacy and guarantees the continuity of the Member States as individual constitutional units against the demands of growing European integration*"¹⁰³.

A more recent decision on Article 4(2) TEU and national declinations of fundamental rights was taken by the CJEU in the *Coman*¹⁰⁴ case. The case arose from a request for a preliminary ruling concerning the interpretation of various provisions¹⁰⁵ of Directive 2004/38/EC (the so-called

⁹⁹ Ibid, para. 74.

¹⁰⁰ Ibid, para. 75.

¹⁰¹ Ibid. para. 66.

¹⁰² J. VILLOTTI, 2015.

¹⁰³ G. VAN DER SCHYFF, “The constitutional relationship between the European Union and its Member States: the role of national identity in article 4(2) TEU” *European Law Review*, October 2012, available at <https://uk.westlaw.com/Document/I90DC21B1136011E2886FA474C1AE060E/View/FullText.html>, p. 570.

¹⁰⁴ Case C-673/16, *Relu Adrian Coman e a. v. Inspectoratul General pentru Imigrări and Ministerul Afacerilor Interne* [2018] ECLI:EU:C:2018:385.

¹⁰⁵ Namely Article 2(2)(a), Article 3(1) and (2)(a) and (b) and Article 7(2) of Directive 2004/38/EC.

“*Citizenship Directive*”) on the right of European citizens and their families to move and reside freely within the territory of the Member States and hence freedom of movement.

In particular, the case originated from the request of the applicant, Mr. Coman, that his husband, in his capacity as member of Mr Coman’s family, could obtain the right to lawfully reside in Romania for more than three months. On the grounds of national legislation prohibiting marriage between people of the same sex, the Romanian authorities had denied this request. Against this denial Mr Coman had instituted a proceeding.

The first question deferred to the CJEU concerned the interpretation of the term “*spouse*” in Article 2(2)(a) of Directive 2004/38, specifically whether it included a national of a State which is not a Member to the Union who is the same-sex spouse of a citizen of the European Union. Depending on whether the answer to this question was affirmative or negative, the Court was asked if Mr. Coman’s husband, respectively, should have been granted the right of residence in the Member State’s territory for more than three months (question no. 2) or, conversely, should be classified as “*any other family member*” or a “*partner with whom the Union citizen has a durable relationship*”, with the corresponding obligation for the host Member State to facilitate entry and residence for that spouse (question no. 3). Lastly, the referring judge asked the CJEU if, should the answer to the third question be affirmative, the host Member State was required to grant the same-sex spouse of a Union citizen with the right of residence in its territory for a period of longer than three months to.

On the one hand, the case concerned different conceptions of the institution of marriage which, in some Member States, is designed by the Constitutions as exclusively between a man and a woman. The Romanian conceptions of marriage resulted in a affecting the applicant’s right to private and family life¹⁰⁶, a right which has hugely different understandings and declinations in the various Member States, notably when marriage between people of the same sex is taken into account.

On the other hand, the case involved the applicant’s rights inherent in the European citizenship, in particular the right to live a normal family life with his family members, both when moving to another Member State and upon returning to the Member State of which he was national.

The CJEU recognised that, according to Union law, Directive 2004/38 applied also to same-sex couples as the term “*spouse*” was gender-neutral. Moreover, the CJEU recognised that civil status

¹⁰⁶ Notably protected under Article 7 of the EU Charter of the Fundamental Rights and Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms.

was a matter that fell within the competence of the Member States, but that Member States were nevertheless bound to comply with EU law when exercising their powers.

The CJEU recalled that the European Union is required, under Article 4(2) TEU, to respect the national identity of the Member States, implying that the aim of protecting national identity may justify a derogation from EU law. Implicitly, the Court admits that the institution of marriage can constitute a component of national identity. Yet, in the view of the Court:

“An obligation to recognise such marriages for the sole purpose of granting a derived right of residence to a third-country national does not undermine the national identity [...] of the Member State concerned”¹⁰⁷.

The Court eventually applied its jurisprudence on the matter of derogations to free movement rights. Hence, the Court concluded that EU law precluded Member States from the possibility of refusing a derived right of residence to Mr. Coman’s husband: such measure would not find justification in the protection of national identity nor would be consistent with fundamental rights guaranteed by the Charter, namely the right to private and family life. Accordingly, the Court dismissed the third and fourth question.

C. Regional and local self-government

As explicitly stated in Article 4(2) TEU and in various occasions recognised by the CJEU¹⁰⁸, the notion of national identity also includes a State’s organisation in terms of regional and local self-government.

Indeed, the governance structure of a State is usually intricately linked to the process whereby the State was established, the language(s) spoken within the State’s boundaries, the State’s territory and its demography, the self-image of citizens (notably, as a single national people or multiple groups), etc¹⁰⁹. Moreover, these features also have an impact on the scope and extension of the powers deferred to regional authorities: for instance, groups of a federal State that identify themselves as different due to historical, cultural, or other reasons, will likely strive for more political autonomy, with the result

¹⁰⁷ Case C-673/16, *Relu Adrian Coman e a. v. Inspectoratul General pentru Imigrări and Ministerul Afacerilor Interne* [2018], par. 46.

¹⁰⁸ Case C-156/13, *Digibet Ltd, Gert Albers v. Westdeutsche Lotterie GmbH & Co. OHG* [2014], ECLI:EU:C:2014:1756 para. 34; Case C-51/15, *Remondis GmbH & Co. KG Region Nord v. Region Hannover*, [2016], ECLI:EU:C:2016:985.

¹⁰⁹ E. CLOOTS, “Member State Federalism and Primary EU Law”, in *National Identity in EU Law*, Oxford Studies in European Law (Oxford, 2015; online edn, Oxford Academic, 19 Mar. 2015).

that the composition of powers between central and decentralised government will be shaped accordingly¹¹⁰.

Fromage¹¹¹ argues that the specific mention of the regional and local dimension in Article 4(2) TEU may be seen as part of a wider and longer-standing tendency in favour of the recognition and preservation of the sub-national level of governance within the EU. In fact, the Single European Act, and, later, the Maastricht Treaty, originated a trend whereby the regional dimension of the Member States started to be recognized at the European level, most notably through the constitution of the Committee of the Regions. This focus was further enhanced by the Lisbon Treaty¹¹².

The importance of local and regional entities is nowadays recognised in various treaty provisions, such as Article 3(3) TEU, which defines territorial cohesion as one of the objectives of the Union, and Art. 10(3) TEU, according to which decisions should be taken as closely as possible to citizens. Moreover, Protocol No. 2 to the TEU¹¹³ binds the Commission, when conducting pre-legislative consultations, to take the local and the regional dimensions into account, and provides that, in the framework of the Early Warning System for the respect of the principle of subsidiarity, regional parliaments having legislative competences may be consulted by their national parliaments ‘where appropriate’.

In this context, Article 4(2) TEU further acknowledges the importance of decentralised powers. This conclusion is confirmed by the relevant case-law of the Court of Justice. In fact, as recognised by the CJEU in *Digibet*¹¹⁴, the division of competences between central and decentralised level “cannot be called into question, since it benefits from the protection conferred by Article 4(2) TEU”. Moreover, as stated by the Court in the *Remondis*¹¹⁵ judgement, such allocation of competences is afforded

¹¹⁰ Ibid.

¹¹¹ D. FROMAGE, 'National Constitutional Identity and Its Regional Dimension Post-Lisbon as Part of a General Trend Towards Multilevel Governance Within the EU', *European Public Law*, Vol. 27 Issue No. 3, 2021 pp. 497-516, available at <https://kluwerlawonline.com/journalarticle/European+Public+Law/27.3/EURO2021023>

¹¹² For example, the Treaty reinforced the position of the Committee of Regions and added an express mention of the regional and local levels in the definition of the principle of subsidiarity. See D. FROMAGE, 2021.

¹¹³ Consolidated version of the Treaty on European Union, Protocol (No 2) on the Application of the Principles of Subsidiarity and Proportionality, OJ C 326, 26 Oct. 2012, at Art. 2.

¹¹⁴ Case C-156/13, *Digibet Ltd and Gert Albers v Westdeutsche Lotterrie GmbH & Co. OHG* [2014], ECLI:EU:C:2014:1756 para. 34.

¹¹⁵ Case C-51/15, *Remondis GmbH & Co. KG Region Nord v. Region Hannover*, [2016], ECLI:EU:C:2016:985 para. 40 and 41.

protection under art. 4(2) TEU not only as originally established, but also in their development and reorganisation.

As affirmed by Toniatti¹¹⁶, while Article 4(2) TEU recognises regional and local authorities, it cannot support the claim for the constitution of, for example, national parliaments and decentralised governmental institutions, which continue to depend only and exclusively on the national law.

While the identity clause states that EU membership must not and cannot result in any change to the institutional structure of government of the Member States, it could be argued that the effective protection of national identity as expressed in the allocation of competences between on the one hand the central government and, on the other hand, local and regional authorities might require more than simply not calling into question the issue.

This was evident in the case *Scotch Whisky*¹¹⁷, in which the CJEU was referred the evaluation of the compatibility with EU law of a UK legislation that delegated to the Scottish Parliament the determination of a minimum price for the selling of alcohol.

The ruling of the Court is very complex and touches upon many issues. In this context, it is relevant to recall that, having recognised that the measure under scrutiny was able of hindering access to the UK market, but was in principle justified by the objective of protecting health and life of humans and adequate to the achievement of this objective, the Court questioned the necessity of the measure¹¹⁸. In particular, the Court suggested that other measures, less restrictive of trade and competition within the European Union, were available, namely fiscal measures.

From the standpoint of the United Kingdom and of Scotland, this suggestion was however problematic: in fact, the Scottish government was pursuing a public health policy, over which it had devolved authority, but lacked competence in fiscal policies and taxation. Hence, the Scotland Government could not implement such policy through the adoption of fiscal measures¹¹⁹. Should EU

¹¹⁶ R. TONIATTI, “Sovereignty Lost, Constitutional Identity Regained in A. SAIZ ARNAIZ & C. ALCOBERRO *National Constitutional Identity and European Integration* (Llivina eds, Intersentia 2013) p. 161-163. For a similar argument see also A. SCHNETTGER, “Article 4(2) TEU as a Vehicle for National Constitutional Identity in the Shared European Legal System” in C. CALLIESS AND G. VAN DER SCHYFF (eds), *Constitutional Identity in a Europe of Multilevel Constitutionalism* (Cambridge: Cambridge University Press 2019).

¹¹⁷ Case C-333/14, *Scotch Whisky Association, spiritsEUROPE, Comité de la Communauté économique européenne des Industries et du Commerce des Vins, Vins aromatisés, Vins mousseux, Vins de liqueur et autres Produits de la Vigne (CEEV) v. Lord Advocate, Advocate General for Scotland* [2015] ECLI:EU:C:2015:845.

¹¹⁸ *Ibid.*, paras 40-48.

¹¹⁹ E. SPAVENTA, “Drinking Away Our Sorrows?: Regulatory Conundrums after Scotch Whisky” in F. AMTENBRINK, G. DAVIES, D. KOCHENOV AND J. LINDEBOOM, *The Internal Market and the Future*

law have been interpreted as only allowing for the adoption of fiscal measures, the Scottish Parliament would have in substance been deprived of its power to regulate the matter.

As argued by Spaventa¹²⁰, to ensure that EU law is not only neutral to the domestic distribution of regulatory competences, but also respectful of national identity as expressed in the devolution of regulatory powers and the internal allocation of competences, the assessment to be carried out when evaluating the proportionality of a measure hindering trade between Member States should also include whether there is an actual possibility of the alternative policy being implemented. This might involve the consideration of whether the same authority that adopted the measure under scrutiny has competence over the adoption of alternative policies.

This was not the case in *Scotch Whisky*, where the CJEU however deferred the determination as to the necessity of the measure to the referring judge. The Supreme Court of the UK, which the parties appealed to, was accordingly able to work around the problem by considering the measure at issue consistent with the principle of necessity and more effective for the achievement of its objective than fiscal measures¹²¹.

D. Religious matters

The CJEU has been confronted with questions related to religion in a variety of cases. Very often, the reason why the issue was brought to the European Court was the alleged violation of the principle of non-discrimination¹²². Indeed, Member States approach religious questions very differently, consequently rendering those questions particularly complex.

The concept of national identity did not play a significant role in the solution of those cases. Yet, the identity clause has sometimes been employed in related Advocate Generals' opinions.

In the first place, Advocate General Kokott discussed the national identity clause in her opinion in the *Achbita*¹²³ case. In this case, the Court dealt with a question of religious discrimination in the

of European Integration: Essays in Honour of Laurence W. Gormley (Cambridge: Cambridge University Press 2019).

¹²⁰ E. SPAVENTA, 2019.

¹²¹ In fact, the UK measure not only generally aimed at protecting health and human life, but also at disincentivising the consumption of alcoholic drink of consumers whose consumption was hazardous or harmful. Hence, provided that those people generally consume cheap alcohol, only the setting of a minimum selling price was deemed adequate to achieve the objective.

¹²² Bonelli, 2021.

¹²³ Opinion of Advocate General Kokott in C-157/15 *Achbita*, ECLI:EU:C:2016:382.

employment relationship: the applicant complained that an apparently neutral policy of a private employer resulted in a discrimination against her based on her religious faith, more specifically on the fact that, being a Muslim woman, she wore a veil on the workplace.

Although the case concerned Belgium, France intervened arguing that the Employment Equality Directive was “*not intended to apply to situations concerning the national identities of the Member States*”¹²⁴. To uphold this argument, France highlighted that the scope of application of the Directive should have been confined in the light of the principle of *laïcité*, which constitutes a component of the French constitutional identity the protection of which is mandated by Article 4(2) TEU.

*“This may mean that, in Member States such as France, where secularism has constitutional status and therefore plays an instrumental role in social cohesion too, the wearing of visible religious symbols may legitimately be subject to stricter restrictions (even in the private sector and generally in public spaces) than in other Member States the constitutional provisions of which have a different or less distinct emphasis in this regard.”*¹²⁵

In the view of AG Kokott, secularism should be afforded protection under the identity clause in the specific declination it has at the national level: the fact that a determinate Member States, such as France, understands this concept in a way which is different from the other Member States does not impede the legitimacy and the consistency with EU law of the specific mechanism of protection.

Another case which concerned religious questions and where, in the AG Opinion, the relevance of Article 4(2) TEU was discussed is *Egenberger*¹²⁶.

The case originated in Germany and concerned a possible religious discrimination in recruitment procedures and the interpretation of Article 4(2) of Directive 2000/78. For instance, the applicant had applied for a position as spokesperson of the Diaconie of Germany at Evangelisches Werk für Diakonie und Entwicklung, an association exclusively pursuing charitable, benevolent and religious purposes. Her application had however been rejected due to her lack of confessional faith.

The questions deferred to the CJEU concerned, *inter alia*, whether the adherence to a specified religion could amount to a genuine, legitimate and justified occupational requirement and whether national legislations allowing for discrimination on the ground of religion in the context of employment with religious bodies was consistent with EU law.

¹²⁴ Ibid, para. 31.

¹²⁵ Ibid, para. 125.

¹²⁶ Opinion of Advocate General Tanchev in CJEU, C-414/16 Egenberger, ECLI:EU:C:2017:851.

In delivering its opinion, Advocate General Tachev analysed the identity clause in connection with Article 17 TFEU¹²⁷, arguing that the latter complemented and gave specific effect to Article 4(2) TEU. In doing so, AG Tachev affirmed that Article 17(1) and (2) TFEU ensured Member States with absolute discretion as to how to inform their relations with religious organisations and communities. In respect to this decision, the Union is obliged to remain in a neutral position. He further recognised that this conclusion was linked to the duty of the EU, enshrined in Article 4(2) TEU, to respect the fundamental political and constitutional structures of the Member States.

Again, in delivering its decision, the CJEU did not take on the reference to Article 4(2) TEU.

V. Conclusions

As the analysis carried out in this chapter shows, it is possible to set a series of criteria to determine the scope of the notion of national identity as provided in Article 4(2) TEU.

Indeed, it has been clarified that the concept of national identity is permeable in nature, in the sense that, while being a notion of EU law, its content is inherently dependent on the interpretation of national constitutional law¹²⁸. To this regard, it is therefore appropriate to distinguish the European notion of national identity, necessary to ensure uniformity in the interpretation and implementation of EU law as well as to prevent the use of the identity clause as a trump card, and the national specification of this notion. The necessity of the latter springs from the consideration that national identity represents the self-definition of a people. Hence, the specification of national identity depends on the interpretation of national constitutional law, which falls outside of the competence of the CJEU¹²⁹, by national constitutional courts and other national authorities¹³⁰, an activity which has been recognised as being self-limiting¹³¹.

Subsequently, the analysis has focused on the notion of national identity under European law only. Hence, it has been clarified that national identity refers to the constitutional essentialia of the national

¹²⁷ “The Union respects and does not prejudice the status under national law of churches and religious associations or communities in the Member States.”

¹²⁸ A. SCHNETTGER, 2019.

¹²⁹ C-621/18 *Andy Wightman and a. v Secretary of State for Exiting the European Union* [2018] ECLI:EU:C:2018:999.

¹³⁰ Case C-391/09, *Malgožata Runevič-Vardyn and Lukasz Paweł Wardyn v Vilniaus miesto savivaldybės administracija and Others* [2011] ECLI:EU:C:2011:291.

¹³¹ C-399/11 *Stefano Melloni*, Opinion of AG Bot [2012] ECLI:EU:C:2012:600.

legal framework, which might include cultural features of the relevant Member State¹³² and surely includes dispositions related to local and regional self-government¹³³. In addition, it has been pointed out that the determination as to whether a determinate constitutional provision is to be deemed fundamental might be grounded on both formal and substantial criteria.

A systemic study of the provision has also been carried out. This study highlighted that the identity clause must be read together with the other provisions of Article 4 TEU, notably the principles of conferral, of sincere cooperation and of equality of the Member States¹³⁴.

Finally, a selection of relevant decisions of the CJEU and AG opinions has been analysed. This has showed that the CJEU in its jurisprudence and the AG in their opinions provide some examples of interests, principles and values that Member States can legitimately indicate as specifications of the European framework protecting the national identity of the Member States, such as the official language¹³⁵, a specific declination of a fundamental right or principle when related to a fundamental constitutional structure, the organisation of the State in terms of regional and local self-government and issues related to religion.

With respect to the national official language, Article 4(2) TEU adds to the various provisions of EU law aimed at protecting language diversity, such as Article 3 TEU, Article 165(1) and (2) TFEU, Article 22 of the EU Charter of Fundamental Rights, and the treaty provisions relating to the derogation to fundamental economic freedoms based on “*public policy*”.

Similarly, Article 4(2) TEU constitutes an instrument of protecting specific understanding and conceptions of fundamental rights and principles¹³⁶ in addition to the derogation on the ground of “*public policy*”¹³⁷ when they are related to the protection of a fundamental structure of the State. In such cases, it is the national way in which a right or principle is interpreted and implemented to be ensured protection under Article 4(2) TEU, irrespective of whether other Member States share the same understanding of the right or principle in question.

¹³² G. VAN DER SCHYFF, 2012; A. SCHNETTGER, 2019.

¹³³ Article 4(2) TEU.

¹³⁴ G. MARTINICO, 2012; G. VAN DER SCHYFF, 2012.

¹³⁵ Case C-391/09, *Malgožata Runevič-Vardyn and Lukasz Paweł Wardyn v Vilniaus miesto savivaldybės administracija and Others* [2011] ECLI:EU:C:2011:291; Case C-202/11, *Anton Las v PSA Antwerp NV* [2013] ECLI:EU:C:2013:239.

¹³⁶ Case C-208/09, *Ilonka Sayn-Wittgenstein v. Landeshauptmann von Wien* ECLI:EU:C:2010:806; Case C-673/16, *Relu Adrian Coman e a. v. Inspectoratul General pentru Imigrări and Ministerul Afacerilor Interne* [2018] ECLI:EU:C:2018:385.

¹³⁷ Case C-36/02 *Omega Spielhallen- und Automatenaufstellungs-GmbH v Oberbürgermeisterin der Bundesstadt Bonn* [2004] ECLI:EU:C:2004:614.

Moreover, the extent to which the powers of the State have been devolved to local or regional authorities and the resulting allocation of competences between central and decentralised authorities are aspects of national identity which fall within the scope of application of Article 4(2) TEU¹³⁸. While the CJEU has recognised that those matters cannot be questioned by the EU in both their static and dynamic dimensions, the case *Scotch Whisky*¹³⁹ suggests that an effective protection of forms of regional and local self-government might require additional consideration of this equilibria on behalf of the EU¹⁴⁰.

Lastly, Article 4(2) TEU has been relied on by Advocate General Kokott¹⁴¹ and Tanchev¹⁴² with respect to religious matters. The reliance in those cases on the identity clause suggests that also principles such as that of laicity and the relationship between the State and religious body and organisation falls within the notion of national identity.

¹³⁸ Case C-156/13, *Digibet Ltd and Gert Albers v Westdeutsche Lotterie GmbH & Co. OHG* [2014], ECLI:EU:C:2014:1756 para. 34; Case C-51/15, *Remondis GmbH & Co. KG Region Nord v. Region Hannover*, [2016], ECLI:EU:C:2016:985 para. 40 and 41.

¹³⁹ Case C-333/14, *Scotch Whisky Association, spiritsEUROPE, Comité de la Communauté économique européenne des Industries et du Commerce des Vins, Vins aromatisés, Vins mousseux, Vins de liqueur et autres Produits de la Vigne (CEEV) v. Lord Advocate, Advocate General for Scotland* [2015] ECLI:EU:C:2015:845.

¹⁴⁰ E. SPAVENTA, 2019.

¹⁴¹ Opinion of Advocate General Kokott in C-157/15 *Achbita*, ECLI:EU:C:2016:382.

¹⁴² Opinion of Advocate General Tanchev in CJEU, C-414/16 *Egenberger*, ECLI:EU:C:2017:851.

II. The legal implications of the identity clause

I. Introduction

After having clarified the notion of national constitutional identity for the purposes of Article 4(2) TEU and outlined the scope of application of the provision, it is worth focusing on what are the legal effects of the identity clause.

To date, the Member States have relied on the duty to respect their national identities for a variety of purposes. Moreover, scholars have put forth divergent interpretations of the legal implications of Article 4(2) TEU, not always in line with the position of the CJEU.

In the first place, Article 4(2) TEU has been relied on as a “competence clause”, able as such to delimit the extension of EU law and carve out from the reach of EU law core areas of state sovereignty.

Moreover, the identity clause has been at times interpreted, in more or less cooperative and EU-friendly terms, as an exception to the primacy of EU law, allowing as such national constitutional courts to review EU law and, in case of contrariety with the identity of the relevant member State, disapply it to the specific case.

In addition, Article 4(2) TEU has been applied as a treaty-based ground of derogation to fundamental economic freedoms. To this regard, the provision presents many analogies with traditional grounds of derogation to free movement provisions, most notably to the notion of “public policy”.

Furthermore, Article 4(2) TEU has been used to evaluate the validity of EU secondary law on the ground of the consideration and respect afforded to national constitutional identity. In fact, it can be argued that, while the validity of EU law is a matter of EU law only, Article 4(2) TEU incorporates the constitutional *essentialia* of the Member States in EU law. Accordingly, it has been argued that the latter have become parameters of the validity of EU law.

Lastly, in the light of the aforementioned incorporation of the national constitutional identities of the Member States in EU law, it has been claimed that Article 4(2) TEU constitutes a parameter for the interpretation by the CJEU of EU primary and secondary law.

This Chapter aims at addressing all these possible understandings of the identity clause, taking into account the position of the Member States, the view of the scholarship and, most of all, the position of the European Court of Justice.

II. The question of the attribution of competences

One of the grounding principles of the institutional framework of the European Union is the principle of conferral. The principle aims at regulating the relationship between the Union and the Member States as well as delimiting and defining their respective fields of competence. According to this principle, “*the Union shall act only within the limits of the competences conferred upon it by the Member States in the Treaties*” and “*Competences not conferred upon the Union in the Treaties remain with the Member States*”¹⁴³.

The national identity clause and its introduction in the Treaty on the European Union are inherently linked to this principle.

To begin with, the introduction of the provision in the Treaties was meant to settle the unsolved question of competence as made evident by the *travaux préparatoires* of the already mentioned Christophersen clause, later flowed into the Treaty of Lisbon¹⁴⁴. For instance, as argued by many scholars¹⁴⁵, the unlimited expansion of European law's reach as an effect of negative integration created significant tensions that eventually led to the codification of the national identity clause. In the view of Bonelli¹⁴⁶, this was also the result of the fact that acceptance by Member States of the principles of primacy and direct effects of European law depended, among other things, on the constrained scope of European integration.

This connection between Article 4(2) TEU and the attribution of competence is made evident by the structure of article 4 TEU itself: as highlighted in the previous chapter, also paragraph 1 and 3 of Article 4(2) TEU are related to the matter. In fact, Art. 4(1) TEU states that, according to the principle of conferral (Article 5 TEU), “*competences not conferred upon the Union in the Treaties remain with the Member States*”. In addition, Art. 4(3) TEU establishes the principle of sincere cooperation,

¹⁴³ Art. 5(2) TEU.

¹⁴⁴ See Introduction.

¹⁴⁵ See F. FABBRINI and A. SAJO, “The Dangers of Constitutional Identity”, *European Law Journal*, 2019; M. BONELLI, ‘National Identity and European Integration Beyond ‘Limited Fields’ in *European Public Law*, Vol. 27, No. 3 (2021), pp. 537-538, available at <https://doi.org/10.54648/euro2021025>;

¹⁴⁶ M. BONELLI, 2021.

according to which “*the Union and the Member States shall, in full mutual respect, assist each other in carrying out tasks which flow from the Treaties*”.

Finally, in line with the history of Article 4(2) TEU, Member States¹⁴⁷ have often interpreted the identity clause as a principle regulating the relationship between the EU and Member States, as well as considered the domains falling within the scope of national identity as outside the reach of the EU’s action and, accordingly, not covered by EU law. Significantly, as it will be extensively discussed in Chapter III, populist autocrats have attempted to exploit this argument to prevent the EU’s interference with democratic backsliding in their respective States.

By contrast, the CJEU has always rejected the view that Article 4(2) TEU excluded certain matters from the reach of EU law.

For example, the Court affirmed with respect to a person’s name and surname that:

“*Although, as European Union law stands at present, the rules governing a person’s surname and the use of titles of nobility are matters coming within the competence of the Member States, the latter must none the less, when exercising that competence, comply with European Union law*”¹⁴⁸.

This claim was referred to and restated also in *Runevič-Vardyn and Wardyn*¹⁴⁹ and *Bogendorff von Wolffersdorff*¹⁵⁰.

To the same conclusion the Court came with respect to more sensitive issues, such as a person’s status and marriage. Indeed, in its ruling in *Coman* the Court affirmed that:

“*It is well-established case-law that, in exercising that competence [i.e. whether or not to allow marriage for persons of the same sex], Member States must comply with EU law, in particular the Treaty provisions on the freedom conferred on all Union citizens to move and reside in the territory of the Member States*”¹⁵¹

¹⁴⁷ E.g., Czech Government’s argument in Case C-208/09, *Ilonka Sayn-Wittgenstein v. Landeshauptmann von Wien* ECLI:EU:C:2010:806 para. 48; Case C-156/21, *Hungary v. European Parliament and Council of the European Union* ECLI:EU:C:2022:97.

¹⁴⁸ Case C-208/09, *Ilonka Sayn-Wittgenstein v. Landeshauptmann von Wien* [2010] ECLI:EU:C:2010:806 para. 38.

¹⁴⁹ C-391/09 *Runevič-Vardyn and Wardyn* EU:C:2011:291, para. 63.

¹⁵⁰ C-438/14 *Bogendorff von Wolffersdorff* EU:C:2016:401, para. 32.

¹⁵¹ Case C-673/16, *Relu Adrian Coman e a. v. Inspectoratul General pentru Imigrări and Ministerul Afacerilor Interne* ECLI:EU:C:2018:385, para. 38.

The same conclusion was reached by Advocate General Kokott and Tachev with respect to religious matters in their opinions in, respectively, *Achbita*¹⁵² and *Egenberger*¹⁵³. For instance, in its opinion in *Achbita*, later recalled by AG Tachev, AG Kokott affirmed that the EU's obligation under Article 4(2) TEU to respect the national identities of its Member States did not in itself imply that certain subject areas were entirely carved out from the scope of EU law nor that the scope of the EU law was restrained to issues falling outside the notion of national identity¹⁵⁴.

As it will be discussed later (see sections IV and V of this chapter) and as argued by many scholars¹⁵⁵, concerns related to the protection of national identity may in specific cases influence the concrete implementation of EU law. However, Article 4(2) TEU does not in principle carve out some areas, not even extremely sensitive ones, from the reach of Union law.

This is the necessary conclusion that must be drawn from the interpretation of Article 4(2) TEU in connection with the principle of sincere cooperation. As recognised by Advocate General Wathelet in his Opinion in *Coman*¹⁵⁶, the requirement to respect national identity outlined in Article 4(2) TEU cannot be interpreted separately from the requirement of sincere cooperation provided in Article 4(3) TEU. It is in conformity with this commitment that Member States are required to fulfil the obligations originating from EU law.

In the light of all the above, Article 4(2) TEU is unable to act as a competence clause and prevent the application of EU law to some areas, thereby limiting negative integration.

III. The primacy of EU law

The questions of the hierarchy between norms and the resolution of antinomies are crucial in any pluralistic legal structure in which norms springing from different legislative powers and, to various

¹⁵² Opinion of Advocate General Kokott in C-157/15 *Achbita*, ECLI:EU:C:2016:382.

¹⁵³ Opinion of Advocate General Tachev in CJEU, C-414/16 *Egenberger*, ECLI:EU:C:2017:851.

¹⁵⁴ Opinion of Advocate General Kokott in C-157/15 *Achbita*, ECLI:EU:C:2016:382, para. 32.

¹⁵⁵ E.g. G. DI FEDERICO, "The Potential of Article 4(2) TEU in the Solution of Constitutional Clashes Based on Alleged Violations of National Identity and the Quest for Adequate (Judicial) Standards", *European Public Law*, Vol. 25 Issue no. 3, 2019; M. BONELLI, 'National Identity and European Integration Beyond 'Limited Fields'', *European Public Law*, Vol. 27 Issue no. 3, <https://kluwerlawonline.com/journalarticle/European+Public+Law/27.3/EURO2021025>

¹⁵⁶ Opinion of Advocate General Wathelet delivered on 11 January 2018, *Relu Adrian Coman e a. v. Inspectoratul General pentru Imigrări and Ministerul Afacerilor Interne* [2018], ECLI:EU:C:2018:2, para. 40.

extents, belonging to different legal orders coexist. In the case of the European Union, the question of conflicts between legal rules is inherently soaked with political meanings and has significant repercussions as to the role of the Union and its relationship with the Member States.

In the resolution of these questions, the principle of primacy – or supremacy – of European law has a prominent role. According to this principle, whenever a piece of national legislation conflicts with a piece of European legislation having direct effect, the latter is to prevail over national law, which must be disapplied in the specific case.

Conversely to this principle, Member States and their national constitutional courts have, also on the basis of the national identity clause, questioned the ability of EU law to prevail over national law and have asserted the right of national courts to resist the CJEU's rulings.

A. An overview of the jurisprudence of national constitutional courts

Nearly all Member States consider that the basis for the system of EU law are the Treaties they signed and that they retain the last say in establishing the Union and its laws, thereby remaining, in the words of the German Federal Court, the “Masters of the Treaties”¹⁵⁷.

Moreover, from the perspective of the Member States, it is the national constitutional mandate to join the EU, often encapsulated in the relevant "Euro-article", that, within a given Member State, justifies the application of EU law, including its primacy and direct effect¹⁵⁸. Therefore, from the standpoint of national constitutional law, EU law can only be hierarchically either below or beyond the national constitution, but not above it. Accordingly, some Member States argue that it is within the rights of the national guardian of constitutionality to, at some conditions, review European law¹⁵⁹.

¹⁵⁷ In particular BVerfGE 37, 271 (*Solange I*) (in English [1974] CMLR 540). See also BVerfGE 73, 339 (*Solange II*) ([1987] 3 CMLR 225); BVerfGE 89, 155 (*Maastricht*) ([1994] 1 CMLR 57); BVerfGE 123, 267 (*Lisbon*) ([2010] 3 CMLR 276); and BVerfGE 126, 286 (*Honeywell*) ([2011] 1 CMLR 1067).

¹⁵⁸ See, *inter alia*, Italian Constitutional Court, judgement 14/1964; Conseil Constitutionnel, Decision no. 2006-540 DC, JORF, 3 August 2006, 11541; Trybunał Konstytucyjny, Judgment of 11 May 2005, K 18/04, para 10(2), and Decision of 24 November 2010, K 32/09, paras 2(1)-2(2) in their English versions and as analysed in S. SCHMAHL, “The National Identity Criterion in the Crossfire Between European Integration and the Preservation of National Sovereignty”. In: M. BREUER, (eds) *Principled Resistance to ECtHR Judgments - A New Paradigm?*, Beiträge zum ausländischen öffentlichen Recht und Völkerrecht, vol 285, 2019. Springer, Berlin, Heidelberg.

And M. BOBEK, 'The effects of EU law in the national legal systems'. In: C. BARNARD and S. PEERS, eds., *European Union Law*, 3rd edn. Oxford: Oxford University Press, 2020, pp. 154-190.

¹⁵⁹ In particular, several Member States have no specific or clearly articulated substantive obstacles to the primacy of EU law (e.g. Estonia, the Netherlands, the United Kingdom, Croatia and Slovenia); in other Member States (Ireland and Cyprus) the Constitution explicitly grants constitutional immunity to EU law

In the 1970s, national Courts grounded their power of review of EU law on the absence within the European legal framework of provisions ensuring protection to fundamental rights¹⁶⁰.

After the Maastricht Treaty, and due to the continuous growth of the Union's competences, national constitutional jurisprudence began to express worries about placing restrictions on future integration¹⁶¹. National constitutions' "hardcore" or "unalterable" cores started to receive attention, which later merged with worries about protecting national constitutional identity¹⁶². As argued by Schmahl¹⁶³, the insertion of the identity clause in EU primary law provided the constitutional courts of the Member States with the opportunity to develop the notion of constitutional identity in more detail.

While many national Constitutional Courts or Tribunals have referred in their jurisprudence to the concept of national identity, their intention as well as their conclusions vary significantly from each other.

On the one hand, many national constitutional courts have identified a core of national identity springing from the national constitution that must be respected by the EU and in the implementation of EU law. Yet, they either recognised that the same values forming the national constitutional identity were also protected at the European level or accepted that, by amending the constitution, the conflict between EU law and national law could be overcome.

This was the case for instance of the Spanish Constitutional Tribunal, according to which, while the EU is founded on the respect of the Member States' national identities, the values enshrined in Article

and national measures implementing EU law; finally, in other Member States (e.g. France, Spain, Italy, the Czech Republic, Germany, Sweden, Denmark, Bulgaria, Malta and Poland) the Constitutional Courts claimed the right to review, at some conditions, the compatibility of EU law with the national Constitution. See for a more detailed analysis Š. IMAMOVIĆ, M. CLAES L. F.M. BESSELINK, J. H. REESTMAN, "National constitutional avenues for further EU integration", European Parliament Report, February 2014, available at <https://op.europa.eu/s/w7qn>.

¹⁶⁰ See Italian Constitutional court, Judgment 232/1989 and German Federal Court 37, 271, 29 May 1974 in their English versions.

¹⁶¹ M. BOBEK, 'The effects of EU law in the national legal systems'. In: C. BARNARD and S. PEERS, eds., *European Union Law*, 3rd edn. Oxford: Oxford University Press, 2020, pp. 154-190.

¹⁶² See Federal Court of Germany *Maastricht* judgment of 1993;

¹⁶³ S. SCHMAHL, "The National Identity Criterion in the Crossfire Between European Integration and the Preservation of National Sovereignty". In: M. BREUER, (eds) *Principled Resistance to ECtHR Judgments - A New Paradigm?*, Beiträge zum ausländischen öffentlichen Recht und Völkerrecht, vol 285, 2019. Springer, Berlin, Heidelberg.

2 TEU and 53 of the EU Charter correspond to the constitutional identity of Spain¹⁶⁴. Hence, the Court concluded that a violation of the Spanish constitutional identity would also constitute a breach of EU law.

The Spanish Court's position changed after the CJEU's decision in *Melloni*¹⁶⁵. For instance, in response to this ruling, the Spanish Constitutional Court¹⁶⁶ recognised the existence of implicit constitutional limits to European integration including the respect for fundamental rights, the respect of which was the precondition for the primacy of EU law. While the Spanish Court recognised that the CJEU was charged with the duty of securing the protection of fundamental rights, it also affirmed that, in the remote event that EU law became irreparably incompatible with the Spanish Constitution, the Constitutional Court might have to confront these conflicts with the corresponding constitutional procedures. Hence, the Court claimed to retain the last word as to any potential (and unlikely) clash between the Spanish Constitution and EU law. Nevertheless, this solution seems to constitute an *extrema ratio*: in fact, in the *Melloni* case, rather than exercising this power, the Spanish Court argued that, in order to ascertain content of a right, international fundamental rights treaties such as the ECHR and the EU Charter should be taken into account. Accordingly, the Court revisited its jurisprudence on the relevant constitutional provision, thereby solving the conflict between the constitutional framework and the EU legal system.

On a different note, the French Conseil Constitutionnel affirmed that the French constitutional identity represented a limit to the implementation of EU secondary law and that EU law, only if national identity was involved, could be subject to the review of the Conseil¹⁶⁷. However, the Court recognised that the reservation to EU law based on national identity was not absolute: once a contrast would be recognised by the Court, the constitutional legislature may overcome the conflict by amending the constitution.

A peculiar case is that of the Italian Constitutional Court in the so-called *Taricco* saga: in this context, as it will be extensively discussed in Chapter IV, before implementing its *controlimiti* doctrine with respect to a principle established by the CJEU that clashed against the Italian Court's understanding

¹⁶⁴ Spanish Constitutional Tribunal Declaration 1/2004 as analysed in M. CLAES, "National Identity: Trump Card or Up for Negotiation?", in A. S. ARNAIZ, C. A. LLIVINA eds. *National Constitutional Identity And European Integration*, Cambridge: Intersentia (2013).

¹⁶⁵ Case C-399/11 *Stefano Melloni v Ministerio Fiscal* ECLI:EU:C:2013:107.

¹⁶⁶ Spanish Constitutional Court, STC 26/2014, 13 Feb. 2014 as analysed in A. T. PÉREZ, "Melloni in Three Acts: From Dialogue to Monologue," *European Constitutional Law Review* Vol. 10 Issue no. 2, 2014, available at doi: 10.1017/S1574019614001199.

¹⁶⁷ French Constitutional Court Decision no. 2006-540 DC of 27 July 2006 as analysed in M. CLAES, "National Identity: Trump Card or Up for Negotiation?", in A. S. ARNAIZ, C. A. LLIVINA eds. *National Constitutional Identity And European Integration*, Cambridge: Intersentia (2013).

of the principle of legality, which constitutes a component of Italian national identity, the Italian Constitutional Court sought for dialogue with the CJEU. In fact, by requesting a preliminary reference to the CJEU¹⁶⁸, the Corte Costituzionale envisaged an interpretation by the latter of EU law that would be consistent with Italian constitutional identity.

On the other hand, other national courts have interpreted national identity in more contentious terms.

It was in the first place the Federal Constitutional Court of Germany (FC) that, in its *Maastricht* ruling¹⁶⁹, affirmed that, in order to defend the German Constitutional identity, the integration process should not weaken the Bundestag as the democratic representative of the citizens of Germany, and reserved itself the power of exercising *ultra vires* review. Later, in *Lisbon* judgment, the FC identified the concept of national identity as constituted by the values and principles enshrined in Article 1¹⁷⁰ and 20¹⁷¹ of the German Basic Law, both qualified as eternal clauses under Article 79(3) of the Basic Law. In the view of the German Federal Court, those articles constitute essential provisions of the constitution that are inviolable by any constitutional modification.

The Court further affirmed that this core of German identity was hierarchically ranked higher than EU law and that, in case of violation of this identity, EU law might have to be declared inapplicable in exceptional individual cases. Otherwise, in the view of the Court, progressing European integration would endanger the fundamental political and constitutional structures of sovereign Member States, the protection of which is mandated by Article 4(2) TEU¹⁷². Hence, the Court affirmed to retain the power to exercise *identity reviews* – i.e. the revision of *ultra vires* acts of the Union which constitute a breach of the German constitutional identity. The Court later reframed its jurisprudence in more cooperative terms¹⁷³ and further clarified that identity reviews occur when those provisions

¹⁶⁸ Italian Constitutional Court's Reference for a preliminary ruling, order 24/2017.

¹⁶⁹ BVerfGE 89, 155, 12 October 1993, english translation.

¹⁷⁰ “(1) Human dignity shall be inviolable. To respect and protect it shall be the duty of all state authority. (2) The German people therefore acknowledge inviolable and inalienable human rights as the basis of every community, of peace and of justice in the world.

(3) The following basic rights shall bind the legislature, the executive and the judiciary as directly applicable law.”

¹⁷¹ “(1) The Federal Republic of Germany is a democratic and social federal state.

(2) All state authority is derived from the people. It shall be exercised by the people through elections and other votes and through specific legislative, executive and judicial bodies.

(3) The legislature shall be bound by the constitutional order, the executive and the judiciary by law and justice.

(4) All Germans shall have the right to resist any person seeking to abolish this constitutional order if no other remedy is available.”

¹⁷² Federal Constitutional Court, BVerfG, Judgment of the Second Senate of 30 June 2009 - 2 BvE 2/08.

¹⁷³ BVerfGE126, 286, 6 July 2010 in its english translation.

constituting the core of German national identity “*are exceeded by such acts in a manifest and structurally significant manner and thereby violate the principle of the sovereignty of the people*”¹⁷⁴. As argued by Eleftheriadis, while in the aforementioned judgements the GFC framed the power of review of EU law as a last resort instrument for serious violations of the constitutional fundamentals, in its subsequent ruling in *Weiss*¹⁷⁵ the GFC changed its approach. In this ruling, the GFC affirmed that:

*“The democratic legitimation by the people of public authority exercised in Germany belongs to the essential contents of the principle of the sovereignty of the people and thus forms part of the Basic Law’s constitutional identity protected in Art. 79(3) GG; it is therefore beyond the reach of European integration in accordance with Art. 23(1) third sentence in conjunction with Art. 79(3) GG”*¹⁷⁶

Therefore, the German Constitutional Court concluded that even small or merely procedural transgressions of EU competences would result in depriving the German people from its inherent powers and would accordingly constitute a threat to the German constitutional identity.

Drawing from the jurisprudence of the German Federal Court, the illiberal governments and the captured constitutional Courts of Hungary¹⁷⁷, Poland¹⁷⁸ and Romania¹⁷⁹ have challenged the primacy of EU law to shield from EU interference autocratic reforms. Given the specificity of those claims, they will extensively be analysed in Chapter III.

Finally, more complex is the position of the Constitutional Court of the Czech Republic. For instance, in its case law¹⁸⁰, the Court rejected the absolute nature of the primacy of EU law and highlighted the constitutional limits of the Czech participation in the EU. Despite this, the Court declined to define those limits definitively as well as to establish substantive restrictions to the transfer of powers. The Court affirmed that it would review whether European Union bodies had exceeded the powers that the Czech Republic had transferred to the EU in three situations: in the hypothesis of non-functioning

¹⁷⁴ BVerfG, Judgment 21 June 2016, 2 BvR 2728/13, Gauweiler.

¹⁷⁵ BVerfG, Judgment of 5 May 2020 - 2 BvR 859/15 as analysed in P. ELEFTHERIADIS, “Germany’s Failing Court”, *VerfBlog*, 2020/5/18, available at DOI: [10.17176/20200519-013420-0](https://doi.org/10.17176/20200519-013420-0).

¹⁷⁶ *Ibid*, para. 101.

¹⁷⁷ Decision 22/2016 (XII. 5.) AB of the Hungarian Constitutional Court as translated in English.

¹⁷⁸ See Constitutional Tribunal of Poland, *K 3/21*.

¹⁷⁹ Romanian Constitutional Court, Decision No 390 of 8 June 2021 as translated in English.

¹⁸⁰ Constitutional Court of the Czech Republic, Decisions: 08/03/2006 ÚS 50/04, 26/11/2008 ÚS 19/08 (*Lisbon I*), 03/11/2009 ÚS 29/09 (*Lisbon II*) as analysed in M. CLAES, J.-H. REESTMAN, “The Protection of National Constitutional Identity and the Limits of European Integration at the Occasion of the Gauweiler Case,” *German Law Journal*. Cambridge University Press, 16(4), 2019, pp. 917–970. doi: 10.1017/S2071832200019957.

of EU institutions, if the material core of the Constitution was endangered, and, finally, as *ultima ratio* – i.e. should the EU exceed conferred powers. This review power was exercised only once in *Holubec*¹⁸¹, where the Czech Constitutional Court held that the CJEU, in issuing its ruling in the *Landtovi* case, had acted ultra vires. Nevertheless, as argued by Vyhnanek the significance of this decision should not be overstated: in fact, it can be claimed that this exception was driven primarily by local considerations¹⁸² rather than a desire to challenge the Court of Justice of the European Union and should not therefore be regarded to as an actual reflection of the Czech Constitutional Court's attitude towards EU law.

B. An exception to the primacy of EU law?

In line with the jurisprudence of some national constitutional courts, some scholars have argued in favour of the interpretation of Article 4(2) TEU as an exception to the primacy of EU law¹⁸³.

Nonetheless, when developing and interpreting the principle of the primacy of EU law, the CJEU has constantly emphasised that the autonomous nature of European law necessarily demands coherence, consistence, unity, and effectiveness throughout its Member States¹⁸⁴. This is due to the EU law's character as Community law and is a necessary condition to ensure that the legal basis of the Community is not called into question¹⁸⁵.

¹⁸¹ Constitutional Court of the Czech Republic Decision 31/01/2012, US 5/12, as analysed in L. VYHNANEK, "The Eternity Clause in the Czech Constitution as Limit to European Integration," *Vienna Journal on International Constitutional Law*, Vol. 9, no. 2, 2015, available at <https://heinonline.org/HOL/P?h=hein.journals/vioincl9&i=243>.

¹⁸² The Czech Constitutional Court's act of defiance should be contextualised in a protracted and occasionally contentious battle with the Supreme Administrative Court, which ultimately opted to include the Court of Justice in the conflict after refusing to adopt the Constitutional Court's case law.

¹⁸³ See e.g. A. VON BOGDANDY AND S. SCHILL, "Overcoming Absolute Primacy: Respect for National Identity Under the Lisbon Treaty", *Common Mkt. L. Rev.* 1417, 1440 (2011); M. KUMM AND V. FERRERES COMELLA, "The Primacy Clause of the Constitutional Treaty and the Future of Constitutional Conflict in the European Union", *International Journal of Constitutional Law*, Vol. 3 Issue no. 2-3, 2005. See also the thesis of constitutional pluralism (e.g. Miguel Poiares Maduro, "Contrapunctual Law: Europe's Constitutional Pluralism in Action" in N. WALKER (ed.), *Sovereignty in Transition* (London: Hart Publishing, 2003)).

¹⁸⁴ See *inter alia*: Case 26-62 *Van Gend & Loos* ECLI:EU:C:1963:1; Case 6/64 *Flaminio Costa v E.N.E.L.* ECLI:EU:C:1964:66; Joined cases 90/63 and 91/63, *Commission v Luxembourg and Belgium* ECLI:EU:C:1964:80; Opinion 1/09, EU:C:2011:123; Opinion 2/13 ECLI:EU:C:2014:2454.

¹⁸⁵ Case 314/85 *Foto Frost* ECLI:EU:C:1987:452.

In the view of the Court, the principle of the primacy of EU law applies irrespective of whether the national legislation in question has been adopted prior or subsequently to the relevant provision of EU law¹⁸⁶ and is absolute in the sense that it applies irrespective of the nature of the piece of national legislation at stake¹⁸⁷. In the view of the CJEU, every piece of European law is to prevail over all national legislations, with the result that even fundamental rules of national constitutional law are subject to the supremacy of a directly applicable piece of EU legislation. In the view of the Court: “*by virtue of the principle of primacy of EU law, which is an essential feature of the EU legal order, rules of national law, even of a constitutional order, cannot be allowed to undermine the effectiveness of EU law in the territory of that State*”¹⁸⁸.

As argued by Bonelli¹⁸⁹, even when the CJEU has not explicitly rejected the national Constitutional Court’s readings of Article 4(2) TEU as an exception to the primacy of EU law¹⁹⁰, its approach to national identity issues leaves little room for doubt: even when accepting the identity claims put forth by the Member States, the CJEU made it clear that national identity is not a trump card that domestic actors can use to their advantage, but rather that it must be balanced against a number of other interests and factors, most notably the primacy and effectiveness of EU law, and that the CJEU itself must carry out this exercise.

In addition, in addressing the compatibility with the principle of the rule of law of the Romanian reforms of the judiciary in *Asociația ‘Forumul Judecătorilor din România’*¹⁹¹ case (“AFJR” case), the CJEU emphasised that there can be no exceptions to the rule that EU legislation takes precedence over national constitutional requirements. In fact, the Court affirms once more that EU law supersedes national law, regardless of the character of the pertinent domestic standard or the position of the domestic court in the judicial hierarchy. The AFJR decision thus reiterates that constitutional courts must adhere to EU law's supremacy and are not permitted to derogate to this principle on their own.

¹⁸⁶ Case 106/77 *Amministrazione delle Finanze dello Stato v Simmenthal SpA* ECLI:EU:C:1978:49.

¹⁸⁷ Case 11/70 *Internationale Handelsgesellschaft mbH v Einfuhr- und Vorratsstelle für Getreide und Futtermittel* ECLI:EU:C:1970:114.

¹⁸⁸ Case C-476/17 *Pelham and Others* EU:C:2019:624, para. 78.

¹⁸⁹ M. BONELLI, ‘National Identity and European Integration Beyond ‘Limited Fields’’ in *European Public Law*, Vol. 27, No. 3, 2021, pp. 537-538, available at <https://doi.org/10.54648/euro2021025>.

¹⁹⁰ Lastly in *Taricco II* (C-42/17 *M.A.S. & M.B* ECLI:EU:C:2017:936) the CJEU had the opportunity to provide its opinion on the matter but chose not to do so. Indeed, despite not specifically referencing Article 4(2) TEU, the third preliminary inquiry in the “*Taricco II*” case addressed whether the controlimiti theory had been incorporated into EU law by the establishment of Art. 4(2).

¹⁹¹ Joined Cases C-83/19, C-127/19, C-195/19, C-291/19, C-355/19 and C-397/19, *Asociația ‘Forumul Judecătorilor din România’*, 18 May 2021, ECLI:EU:C:2021:393.

Furthermore, as argued by Kelemen and Pech with respect to constitutional pluralism theories¹⁹², accepting that Article 4(2) TEU could justify an exception to the primacy of EU law would result in a breach of the equality of the Member States as stated in Article 4(2) TEU itself, as some Member States would in fact be subject to certain rules while others would not. Additionally, this would have a detrimental effect on the principle of legality as legal certainty and the generality of EU law would be infringed.

In conclusion, the consistent position of Court of Justice in interpreting primacy as an absolute principle that accepts no derogation as well as the general principles of EU law such as the equality of the Member States and the principle of legality leave no doubt as to the fact that Article 4(2) TEU has no impact on the principle of primacy of EU law. Hence, the identity clause cannot be interpreted as providing for an exception to the primacy of EU law.

IV. Derogation from free movement provisions

While as analysed in the previous section the primacy of EU is and admits no exception, it is also true that Member States may, at some conditions, derogate from both primary and secondary EU law providing for and implementing free movement rights¹⁹³. For instance, free movement rights are not absolute: while their realisation is at the core of the European project, other interests and values might, at certain conditions, prevail over the former¹⁹⁴. The Treaty themselves establish derogation grounds to free movement provisions¹⁹⁵ with the aim of ensuring accommodation of different objectives, interests and values.

To do so, as established by the CJEU through its case-law, Member States must rely on a ground of justification and comply with the principle of proportionality – i.e. the national measure must be adequate to the achievement of the objective pursued and must not go beyond what is strictly necessary to achieve the objective. In its jurisprudence with respect to Article 4(2) TEU, the Court

¹⁹² R. D. KELEMEN, L. PECH, “*Why autocrats love constitutional identity and constitutional pluralism Lessons from Hungary and Poland*”, Reconnect, September 2018, available at <https://reconnect-europe.eu/wp-content/uploads/2018/10/RECONNECT-WorkingPaper2-Kelemen-Pech-LP-KO.pdf>.

¹⁹³ N. NIC SHUIBHNE, ‘Exceptions to the free movement rules’ in C. BARNARD and S. PEERS (eds), *European Union Law* (3rd edn, OUP 2020)

¹⁹⁴ N. N. SHUIBHNE, “Exceptions to the free movement rules” in C. BARNARD, S. PEERS, *European Union Law*, Second Edition, Oxford University Press, Oxford, 2017, p. 477.

¹⁹⁵ See Article 21 TFEU, Article 36 TFEU, Article 45(3) and (4) TFEU, Article 51 TFEU, Article 52 TFEU, Article 62 TFEU and Article 65 TFEU.

has admitted that the identity clause might operate as a ground of derogation to EU law, in particular with respect to free movement rights.

Significantly, when there is harmonization and, accordingly, Member States wish to derogate from a provision of secondary EU law, grounds of derogations are generally provided for in the relevant piece of EU legislation. Thus, with respect to EU secondary law, national identity can only be upheld where EU legislation remains loose and relies on general concepts that can be interpreted in an accommodating manner¹⁹⁶. Therefore, it is not surprising that Article 4(2) TEU has been generally successful in supporting derogations to primary EU law. As a matter of facts, because both the principles that primary law establishes and the derogations to those rules are frequently vague and undefined, Member State action is more frequently permissible under EU primary law provisions than under secondary law. In contrast, as harmonization advances, the scope of secondary legislation's latitude decreases.¹⁹⁷

This is reflected in the case-law of the CJEU, where Article 4(2) TEU has been used in various occasions as a ground of derogation from free movement rights as established by the Treaties. For example, in *Runevič-Vardyn and Wardyn*¹⁹⁸ and *Las*¹⁹⁹ the Court held that the objective of protecting the official national language constituted, in principle, a legitimate objective able to justify restrictions on free movement and residence rights provided for in Article 21 TFEU²⁰⁰. Similarly, in *Sayn-Wittgenstein*²⁰¹ the Court concluded that the objective of the Austrian authorities' restriction was in principle legitimate. In addition, in *Coman*²⁰², the Court admitted that in principle it was possible to derogate from the freedom of people to move and reside in other Member States based on the protection of national identity.

As it will be further explained in the next section, in all these cases, the Court subjected the national provision resulting in a restriction to free movement rights to the traditional test of proportionality and verified its consistency with fundamental rights granted by EU law.

¹⁹⁶

¹⁹⁷ F. X. MILLET, "Successfully Articulating National Constitutional Identity Claims: Strait Is the Gate and Narrow Is the Way", in *European Public Law*, 2021, Vol. 27, Issue 3, pp. 571-596, <https://kluwerlawonline.com/journalarticle/European+Public+Law/27.3/EURO2021027>.

¹⁹⁸ Case C-391/09, *Malgožata Runevič-Vardyn and Łukasz Paweł Wardyn v Vilniaus miesto savivaldybės administracija and Others* [2011] ECR I-03787

¹⁹⁹ Case C-202/11, *Anton Las v PSA Antwerp NV* [2013].

²⁰⁰ Par. 87.

²⁰¹ Case C-208/09, *Ilonka Sayn-Wittgenstein v. Landeshauptmann von Wien* [2010] ECR I-13693.

²⁰² Case C-673/16, *Relu Adrian Coman e a. v. Inspectoratul General pentru Imigrări and Ministerul Afacerilor Interne* [2018] ECLI:EU:C:2018:385.

A. Assessing the legitimacy of a national identity claim: the proportionality test and fundamental rights

When a Member State invokes Article 4(2) TEU as a justification with regard to a possible restriction to the internal market freedoms, the case-law shows that the national measure should be subject to the traditional proportionality test.

For instance, in *Runevič-Vardyn and Wardyn*²⁰³, the CJEU stated that national measures derogating from free movement rights with the aim of protecting the official language must be proportionate, necessary and adopted only as far as those objectives cannot be achieved by less restrictive measures. Similarly, in *Las*²⁰⁴, the Court conducted a proportionality test, according to which it however eventually did not consider the Belgian decree a necessary measure to protect Belgian national identity as it did not allow for flexibility in transnational employment relationships. Likewise, in *Sayn-Wittgenstein*²⁰⁵, the Court concluded that the Austrian authorities' restriction on the use of title of nobilities was in principle legitimate and conform with the principle of proportionality. Hence, the derogation from EU law was deemed legitimate. Conversely, the Court made it clear in *Commission v. Luxembourg*²⁰⁶ that, despite being a valid objective, the preservation of national identity could not support the imposition of a nationality requirement for access to the profession of civil-law notary as the interest pleaded by the Grand Duchy could be effectively safeguarded otherwise.

In those circumstances, the Court did not defer to the national judge the implementation of the proportionality test with respect to the balancing of EU market freedoms and national identity concerns²⁰⁷. In spite of this, AG Emiliou has argued that National Courts are best positioned not only to determine the national specifications of national identity, but also to carry out the proportionality test within the boundaries set by the CJEU. In the view of AG Emiliou:

“National identity is normally the result of the history, culture, and sociopolitical characteristics of a specific country. It may not be an easy task, for a supranational court, to grasp fully the importance of a given element of national identity, identify the level of protection desired by the

²⁰³ Case C-391/09, *Malgožata Runevič-Vardyn and Lukasz Pawel Wardyn v Vilniaus miesto savivaldybės administracija and Others* [2011] ECR I-03787

²⁰⁴ Case C-202/11, *Anton Las v PSA Antwerp NV* [2013].

²⁰⁵ Case C-208/09, *Ilonka Sayn-Wittgenstein v. Landeshauptmann von Wien* [2010] ECR I-13693.

²⁰⁶ Case C-51/08 *Commission v. Luxembourg*, EU:C:2011:336, para. 124.

²⁰⁷ As it will be explained later, the Court sometimes deferred to the national judge the evaluation of the proportionality of the contraction of fundamental rights.

*national authorities, and evaluate whether there is a reasonable relationship between the objective pursued and the means used to pursue it to that end.”*²⁰⁸

In general, as argued by Millet²⁰⁹, it is possible to distinguish between two categories of cases in the case law of the European Court on Article 4(2) TEU: those where the classical free movement logic predominates and those with a significant fundamental rights component. In solving the latter, the Court not only relies on the traditional proportionality test, but also undoubtedly heavily weighs the protection of fundamental rights²¹⁰.

To this regard, it is generally true that when Member States act within the scope of EU law – i.e. when they limit a right directly conferred on the individuals by the Treaties – they must respect all the constitutional principles of the EU, including fundamental rights²¹¹. Hence, any derogation from free movement provisions liable to obstruct the exercise of freedom of movement for persons must not only be justified and proportionate, but also consistent with fundamental rights²¹². Nevertheless, it is possible to distinguish some Article 4(2)-related cases addressed by the CJEU in which the protection of fundamental rights had a major relevance.

Indeed, in *Runevič-Vardyn* the Court stressed that a person’s forename and surname are a constituent component of his identity and of his private life. Yet, the Court left it up to the referring judge to determine whether the refusal of the Lithuanian authorities to change the applicants' joined surnames according to the rules governing Polish spelling was likely to cause the involved parties a too serious burden. Hence, the balancing of fundamental rights and national identity concerns - specifically, of the applicants' right to respect for their private lives and Lithuania’s interest in the protection of its official national language- were left to the referring court.

²⁰⁸ Case C-883/19 *HSBC Holdings and Others v Commission* Opinion Of Advocate General Emiliou, ECLI:EU:C:2022:384 para. 92.

²⁰⁹ F. X. MILLET, “Successfully Articulating National Constitutional Identity Claims: Strait Is the Gate and Narrow Is the Way”, in *European Public Law*, 2021, Vol. 27, Issue 3, pp. 571-596, <https://kluwerlawonline.com/journalarticle/European+Public+Law/27.3/EURO2021027>.

²¹⁰ F. X. MILLET, “Successfully Articulating National Constitutional Identity Claims: Strait Is the Gate and Narrow Is the Way”, in *European Public Law*, 2021, Vol. 27, Issue 3, pp. 571-596, <https://kluwerlawonline.com/journalarticle/European+Public+Law/27.3/EURO2021027>.

²¹¹ Case C-260/89 *Elliniki Radiophonia Tileorassi AE (ERT) v. Dimotiki Etairia Pliroforissis and Sotirios Kouvelas* [1991] ECLI:EU:C:1991:254; C-617/10 *Åkerberg Fransson*, ECLI:EU:C:2013:105. See E. SPAVENTA, “Fundamental rights in the European Union”, in C. BARNARD, S. PEERS, *European Union Law*, Second Edition, Oxford University Press, Oxford, 2017, pp.233-234.

²¹² See Case C-368/95 *Familiapress* [1997] ECLI:EU:C:1997:325, Case C-60/00 *Carpenter* [2002] ECLI:EU:C:2002:434, Case C-36/02 *Omega Spielhallen- und Automatenaufstellungs-GmbH v Oberbürgermeisterin der Bundesstadt Bonn* [2004] ECR I-9609.

Differently, in *Sayn-Wittgenstein*, the CJEU admitted that national characteristics could prevail over individual and free movement rights. To this regard, while the Court recognised that the name is a constituent element of a person’s identity and of his or her private life, it stated that respect should be afforded to Austrian national identity as expressed in the Republican form of State.

Even more significantly, in *Coman*²¹³, while the Court recognised that a non-discriminatory²¹⁴ restriction on the right to freedom of movement for persons, may be justified if based on public-interest considerations and proportionate, it highlighted that:

*“A national measure that is liable to obstruct the exercise of freedom of movement for persons may be justified only where such a measure is consistent with the fundamental rights guaranteed by the Charter.”*²¹⁵

The CJEU then highlighted that the right to private and family life was protected by Article 7 of the EU Charter of fundamental rights and should have been interpreted in line with the correspondent Article 8 of the European Convention of Human Rights – i.e., as including the relationship of a same-sex couple within the notion of private life and that of family life. Consequently, the CJEU concluded that Article 21(1) TFEU should be interpreted as precluding a Member State from refusing a derived right of residence in its territory to a family member of one of its nationals on the ground that the law of that Member State prohibited marriage between persons of the same sex. Hence, in this case the Court gave precedence to fundamental rights (and freedom of movement) over national features.

It is remarkable that in *Sayn-Wittgenstein* and *Coman* the Court has come to rather different conclusions with respect to the balancing of national identity and fundamental rights. This manifests that the importance attributed to national identity and fundamental rights might change based on the peculiarities of the concrete case under scrutiny. For instance, as made evident by the difference in the rulings, the Court has been (reasonably) less concerned with the protection of personal identity and private life as inherent in the recognition of the name than with the respect of private and family life in the context of same-sex marriage. This discrepancy constitutes an example of the Court's broad discretion in the interpretation and application of fundamental rights²¹⁶. For instance, as argued by

²¹³ Case C-673/16, *Relu Adrian Coman e a. v. Inspectoratul General pentru Imigrări and Ministerul Afacerilor Interne* [2018] ECLI:EU:C:2018:385.

²¹⁴ I.e. independent of the nationality of the person involved.

²¹⁵ Case C-673/16, *Relu Adrian Coman e a. v. Inspectoratul General pentru Imigrări and Ministerul Afacerilor Interne* [2018] ECLI:EU:C:2018:385, par. 47.

²¹⁶ F. X. MILLET, “Successfully Articulating National Constitutional Identity Claims: Strait Is the Gate and Narrow Is the Way”, in *European Public Law*, 2021, Vol. 27, Issue 3, pp. 571-596, <https://kluwerlawonline.com/journalarticle/European+Public+Law/27.3/EURO2021027>.

Advocate General Pitruzzella, also fundamental rights must be taken into account when carrying out the proportionality test. In his words:

*“The individual rights guaranteed by EU law may come into conflict with the national identities of the Member States which the European Union is also committed to respecting, as is clear from Article 4(2) TEU. In such a case, the Court must strike a necessary but delicate balance between those two a priori competing interests by applying the principle of proportionality.”*²¹⁷

B. Traditional grounds of derogation to EU law and national identity

As pointed out before, Article 4(2) TEU has been applied by the CJEU in line with the traditional approach of the CJEU on derogation to fundamental freedoms – *i.e.* verifying that any limitation to fundamental rights was justified on the ground of Article 4(2) TEU, was proportionate and was consistent with fundamental rights.

For various reasons, it could be argued that, in those cases, Article 4(2) TEU did not cover a decisive role.

In fact, in such cases, Article 4(2) TEU is usually not the only ground of derogation referred to by the Court, the parties in the proceeding or the referring judge. Rather, these subjects rely in the first place on more “traditional” grounds of derogation such as Treaty-based derogations to free movement are often referred to, above all the one of public policy²¹⁸ – *i.e.*, according to the case-law of the CJEU, a ground of derogation which may be relied on only if there is a genuine and sufficiently serious threat to a fundamental interest of society²¹⁹. In addition, in language cases, the Court, the parties and the referring judge also rely on cultural diversity as protected by Article 3(3) TEU and Article 22 of the Charter²²⁰. Rodin²²¹ argues that in those cases Article 4(2) TEU has hardly any added value for the legal reasoning of the Court. In his view, the same outcome resulting from the reference to Article 4(2) TEU could, in those cases, have been reached by the Court the same regardless of that provision.

In general, the same claim raised on the basis of Article 4(2) TEU could be upheld on the basis of other provisions. In the first place, it is worth noting that, when a measure is indirectly discriminatory

²¹⁷ Case C-89/18, A, Opinion of Advocate General Pitruzzella, EU:C:2019:210, para. 1

²¹⁸ See e.g. *Sayn-Wittgenstein* (C-208/09, EU:C:2010:806, para. 84); *Bogendorff von Wolffersdorff* (C-438/14, EU:C:2016:401, para. 65).

²¹⁹ C-438/14 *Bogendorff von Wolffersdorff* EU:C:2016:401, para. 67; C-193/16, *E* EU:C:2017:542, para. 18.

²²⁰ *Runevič-Vardyn and Wardyn* (C-391/09, EU:C:2011:291, para. 86) and *Las* (C-202/11, EU:C:2013:239, para. 26).

²²¹ S. RODIN, “National Identity And Market Freedoms After The Treaty Of Lisbon”, *Review of European Law*, Vol. 13, Issue 2-3 (2011), pp. 5-40. See also MILLET, 2021.

or not discriminatory, overriding reasons in the public interest are capable of justifying restrictions on the fundamental freedoms guaranteed by the Treaty²²². Among other things, these “overriding reasons of public interest” include the protection of national or regional socio-cultural characteristics²²³. While the Court has not yet referred to this ground of derogation, to some extent – i.e. with respect to the protection of cultural aspects of national constitutional identity – it also partially overlaps with the identity clause. In addition, the principle according to which different levels of protection of fundamental rights afforded by the Member States’ legal systems could constitute a legitimate basis on which to restrict the free movement rights had been recognised by the CJEU²²⁴ before the Treaty of Lisbon.

Furthermore, there is a continuity between the concept of public policy and of national identity.

To this regard, it is worth recalling that in the aforementioned *Christophersen* clause two areas of “core national responsibility” that the EU should respect were identified²²⁵: on the one hand, the fundamental structures and essential functions of a Member State and listed political and constitutional structure²²⁶; on the other hand, basic *public policy* choices and social values of a Member State²²⁷. In the end version of the Constitutional Treaty, and later the Treaty of Lisbon, this part of the clause was not retained, as those policy choices and social values were thought to be sufficiently protected by other provisions of EU primary law²²⁸.

Additionally, various cases decided before the entry into force of Art. 4(2) TEU on the basis of the “public policy” derogation to fundamental freedoms were at times cited by the CJEU as implicit

²²² Case C-55/94 *Gebhard v Consiglio dell’Ordine degli Avvocati e Procuratori di Milano*, EU:C:1995:411, para 37.

²²³ Case C-169/91 *Council of the City of Stoke-on-Trent and Norwich City Council v B&Q plc*, EU:C:1992:519, para 11.

²²⁴ Case C-112/00 *Schmidberger, Internationale Transporte und Planzüge v Republik Österreich*, EU:C:2003:333, paras 81, 82.

²²⁵ M. CLAES, 'National Identity and the Protection of Fundamental Rights', *European Public Law*, Vol. 27 Issue 3, 2021, pp. 517-535,

<https://kluwerlawonline.com/journalarticle/European+Public+Law/27.3/EURO2021024>;

B. DE WITTE, 'Article 4(2) TEU as a Protection of the Institutional Diversity of the Member States', *European Public Law*, Vol. 27 Issue 3, 2021, pp. 559-570,

<https://kluwerlawonline.com/journalarticle/European+Public+Law/27.3/EURO2021026>

²²⁶ Those included: regional and local self-government; national citizenship; territory; the legal status of churches and religious societies; national defence and the organization of armed forces; choice of languages.

²²⁷ e.g., policy for distribution of income; imposition and collection of personal taxes; system of social welfare benefits; educational system.

²²⁸ B. DE WITTE, 2021.

precedents of the jurisprudence on the national identity clause. This is the case of the *Groener*²²⁹ ruling, subsequently cited in cases on the protection of national language, and *Omega*²³⁰, which may be regarded to as a constitutional identity case *avant l'heure*, later recalled in *Sayn-Wittgenstein* and in *Bogendorff von Wolffersdorff*.

Indeed, in *Groener*, the Court admitted that the protection of national official languages could justify a derogation to free movement provisions. Similarly, in *Omega*, the Court recognised that specific national conceptions and sensibilities with respect to a given human right could justify a derogation from EU law when fundamental principles such as free movement rights were taken into account.

While the jurisprudence of the Court suggests that, with respect to the derogation to fundamental freedoms, Article 4(2) TEU did not constitute a novelty nor a crucial criterion for the adoption of the final decision, it is also true that the identity clause anyway resulted in adding value to the EU framework. In fact, as argued by Millet²³¹, by citing Article 4(2) TEU and explicitly acknowledging certain national characteristics as elements of national identity, the Court has nevertheless managed to provide a further textual basis to its established case law and to avoid undermining the primacy of EU law since the solution achieved through balancing national identity and EU core provisions is ultimately to the benefit of both EU and national law.

V. Criteria for the validity of EU secondary law

With respect to secondary legislation, it can be argued that Article 4(2) TEU can be used to either challenge the validity of the contested legislation or to question whether it can be interpreted in a manner that safeguards the relevant Member State's national identity²³².

It is worth recalling that, according to the CJEU, the validity and applicability of European law is only a question of EU law itself, as such subject to the exclusive jurisdiction of the European Court

²²⁹ Case C-379/87, *Anita Groener v Minister for Education and the City of Dublin Vocational Educational Committee* [1989], ECLI:EU:C:1989:599.

²³⁰ Case C-36/02 *Omega Spielhallen- und Automatenaufstellungs-GmbH v Oberbürgermeisterin der Bundesstadt Bonn* [2004] ECLI:EU:C:2004:614.

²³¹ MILLET, 2021.

²³² E. CLOOTS, 'National Identity and Secondary EU Law', in *National Identity in EU Law*, Oxford Studies in European Law (Oxford, 2015; online edn, Oxford Academic, 19 Mar. 2015), available at <https://doi.org/10.1093/acprof:oso/9780198733768.003.0010>.

of Justice²³³. In fact, admitting that legal rules or concepts of national law could impact on the validity of EU law would have an adverse effect on the uniformity and efficacy of EU law²³⁴.

To this regard, as argued by G. Van Der Schyff²³⁵, through Article 4(2) TEU, the national identity of the Member States become part of EU law and can be used to raise a validity claim before the CJEU. In this way, national constitutions are qualified under EU law in the sense that they not only operate in parallel with EU law, but also within EU law. Therefore, constitutional individuality becomes a factor able to affect the substance or the quality of EU decision-making²³⁶, representing as such a further element of the European legal framework allowing for flexibility and diversity²³⁷.

Even so, as argued by Cloots²³⁸, the invalidation of a piece of EU law might be a too strong reaction to the contrast of the latter with the Constitutional identity of one Member State. For instance, the fact that one Member State's identity is disregarded by a given EU legislation does not necessarily mean that the national identities of other Member States are also under pressure. Conversely, it is likely that an inquiry into the compatibility of EU law with Article 4(2) TEU will have different outcomes for each Member State. While it can be argued that the contrariety of a piece of EU legislation with a single Member States' national identity is a sufficient reason to invalidate it, it is also true that the outright removal from the EU legal framework of the contested legislation for all Member States is a potentially excessive remedy, likely to have an impact on Member States whose identities were not affected by it or even protected by it²³⁹. It seems therefore fair to argue that this remedy should not be employed lightly.

²³³ Case 314/85 *Foto Frost* ECLI:EU:C:1987:452.

²³⁴ Case 11/70 *Internationale Handelsgesellschaft mbH v Einfuhr- und Vorratsstelle für Getreide und Futtermittel* [1970] ECR 1125 p. 1134.

²³⁵ G. VAN DER SCHYFF, "The constitutional relationship between the European Union and its Member States: the role of national identity in article 4(2) TEU" *European Law Review*, no. 37, October 2012, available at <https://uk.westlaw.com/Document/I90DC21B1136011E2886FA474C1AE060E/View/FullText.html>, pp. 563-583.

²³⁶ *Ibid.*

²³⁷ L. F.M. BESSELINK, M. CLAES, Š. IMAMOVIC, J.H. REESTMAN, 2014.

²³⁸ E. CLOOTS, 'National Identity and Secondary EU Law', in *National Identity in EU Law*, Oxford Studies in European Law (Oxford, 2015; online edn, Oxford Academic, 19 Mar. 2015), available at <https://doi.org/10.1093/acprof:oso/9780198733768.003.0010>.

²³⁹ E. CLOOTS, 2015.

Some scholars argue that a provision of secondary EU law which is not consistent with the national identity of a Member State is contrary to the Treaties themselves and accordingly invalid²⁴⁰. In the view of Van der Schyff, for an EU act to be validly adopted, sufficient attention to the question of national identity must be paid when deciding to act and how to act.²⁴¹ To uphold this argument, he points out that Art. 4(2) TEU not only definitely recognises the interaction between the EU and the Member States, but also mandates it.

Moreover, Advocate General Emiliou has recognised that Article 4(2) TEU:

*“requires the EU legislature to take into account Member States’ national identities when adopting legislation. [...] In that respect, national identity may thus function also as a parameter of validity: any EU act that would irredeemably conflict with the national identity of one or more Member States would be invalid for a breach of Article 4(2) TEU.”*²⁴²

Despite this, it could be argued that the involvement of the Member States in the legislative process through their participation in the Council should ensure, mostly when the relevant State has voted in favour of the draft law, that an adopted legislation is consistent with their constitutional identity. As recognised by Schnettger²⁴³, if Member States raise possible inconsistencies between their constitutional identity and EU secondary law provisions early in the European legislative process, they can be allowed some discretion and be secured with a flexible and adaptable design of the EU legal Act as to accommodate the discrepancy. Accordingly, it could be held that it is the prerogative of the Member States to inform, in the context of legislative procedures, the EU about any potential conflict as soon as they become aware of it.

²⁴⁰ G. VAN DER SCHYFF, ‘The Constitutional Relationship between the European Union and its Member States: The Role of National Identity in Article 4(2) TEU’ *European Law Review* no. 37, October 2012, p. 563; A. VON BOGDANDY and S. SCHILL, ‘Overcoming Absolute Primacy: Respect for National Identity under the Lisbon Treaty’ *Common Market Law Review* no. 48, 2011, pp. 1443–4.

²⁴¹ G. VAN DER SCHYFF, “The constitutional relationship between the European Union and its Member States: the role of national identity in article 4(2) TEU” *European Law Review*, no. 37, October 2012, available at <https://uk.westlaw.com/Document/I90DC21B1136011E2886FA474C1AE060E/View/FullText.html>, pp. 563-583.

²⁴² Case C-391/20 *Boriss Cilevičs and Others* Opinion Of Advocate General Emiliou, ECLI:EU:C:2022:384 para. 83.

²⁴³ A. SCHNETTGER, “Article 4(2) TEU as a Vehicle for National Constitutional Identity in the Shared European Legal System” in C. CALLIESS AND G. VAN DER SCHYFF (eds), *Constitutional Identity in a Europe of Multilevel Constitutionalism* (Cambridge: Cambridge University Press 2019).

Nevertheless, it should be noted that rather than the Government, it is usually²⁴⁴ the Constitutional Court or an analogous judicial body to be charged with the duty of defending the integrity of the Constitution²⁴⁵. Such bodies are clearly not involved in the legislative process at the EU level and can only fulfil their task by establishing a dialogical relationship with the CJEU.

The validity of EU law has been questioned by the Member States on the basis of national identity in few circumstances²⁴⁶. Among them, this was the case in the *Torresi*²⁴⁷ judgement.

The case concerned EU Directive 98/5/EC of the European Parliament and of the Council of 16 February 1998, which aimed at facilitating the practice of the profession of lawyer in a Member State other than that in which the qualification was obtained. In order to do so, the Directive established that lawyers who wished to practise in another Member State could register with the competent authority in that State upon presentation of a certificate of registration in the home Member State.

The applicants in the main proceedings had obtained a university law degree in both Italy and Spain and were registered as lawyers in the Bar of Santa Cruz de Tenerife (Spain). Pursuant to Article 6 of the Legislative Decree No 96/2001, which transposed Directive 98/5 into national law, the applicants later lodged an application to be registered in the lawyers' register as "lawyers qualified abroad" – a qualification attributed to lawyers holding a professional title issued in a Member State other than Italy but established in Italy. Against the refusal of the Bar Council to execute this registration, the applicants instituted a proceeding.

The Consiglio Nazionale Forense, called to decide on the validity of such refusal and considering the behaviour of the applicants as an abuse of the provisions in question, interrogated the CJEU as to whether Article 3 of Directive 98/5, in cases such as the one at issue, obliged national authorities to

²⁴⁴ It should be noted that other Constitutional bodies might be charged with the duty of safeguarding the constitutional order (e.g. the President of the Republic in Italy, see S. GALEOTTI, *Il Presidente della Repubblica garante della Costituzione. La concezione garantistica del Capo dello Stato negli scritti dell'Autore dal 1949 ad oggi* (Milan: Giuffrè, 1992)).

²⁴⁵ A. STONE SWEET, "Constitutional Courts", in M. ROSENFELD, A. SAJÓ (eds), *The Oxford Handbook of Comparative Constitutional Law* (2012; online edn, Oxford Academic, 21 Nov. 2012). See also C. CALLIESS, G. VAN DER SCHYFF, eds. "Constitutional Identity and Its Member State Law Dimension." In *Constitutional Identity in a Europe of Multilevel Constitutionalism*, 39–302. Cambridge: Cambridge University Press, 2019.

²⁴⁶ See Case C–344/01 *Germany v Commission* ECLI:EU:C:2004:121, para. 77; Case C–3/10 *Affatato* ECLI:EU:C:2012:110.

²⁴⁷ Joined cases C-58/13, *Angelo Alberto Torresi* and C-59/13 *Pierfrancesco Torresi v Consiglio dell'Ordine degli Avvocati di Macerata* ECLI:EU:C:2014:2088.

register Italian nationals who obtain their professional title abroad and, if so, if Article 3 of Directive 98/5 was to be regarded as:

*“invalid in the light of Article 4(2) TEU, in that it permits circumvention of the rules of a Member State which make access to the legal profession conditional on passing a State examination, given that the Constitution of that Member State makes provision for such an examination and that the examination forms part of the fundamental principles of protecting consumers of legal services and the proper administration of justice”*²⁴⁸.

The CJEU stressed that the contested provisions of EU law did not regulate on the matter of the access to the profession of lawyer, but only implemented the right of establishment in another Member State. Accordingly, the Court excluded that Article 3 of Directive 98/5 was capable of: *“affecting either the fundamental political and constitutional structures or the essential functions of the host Member State within the meaning of Article 4(2) TEU.”*²⁴⁹ Hence, the Court did not address the question of whether the violation of national identity could determine the invalidity of a piece of EU law.

The question of whether the incompatibility with the national identity of Member State determines the invalidity of EU law cannot be solved based on the case-law of the CJEU. In fact, the cases in which Member States contested the validity of EU law based on the violation of their national identity were dismissed by the CJEU without an indication as to whether this claim could in principle succeed²⁵⁰.

VI. A criterion for the interpretation of EU law

While, as argued in the previous section, Article 4(2) TEU is not frequently invoked to challenge the validity of EU secondary legislation, Member States have often resorted to preliminary references in order to gain support for their own particular interpretation of EU law as to ensure its compatibility with the national constitution²⁵¹.

²⁴⁸ Ibid, para. 14.

²⁴⁹ Ibid, para. 58.

²⁵⁰ See also the argument of the Latvian Government, which intervened in the proceeding, that the application of the Framework Agreement on part-time work to the judiciary would result in the violation of the national identities of the Member States, contrary to Article 4(2) TEU, was dismissed as, in the view of the CJEU *“Directive 97/81 and the Framework Agreement on part-time work cannot have any effect on national identity”*.

²⁵¹ See E. CLOOTS, 'National Identity and Secondary EU Law', in *National Identity in EU Law*, Oxford Studies in European Law (Oxford, 2015; online edn, Oxford Academic, 19 Mar. 2015), available at <https://doi.org/10.1093/acprof:oso/9780198733768.003.0010>.

This is due to the fact that, as argued with respect to the validity of EU law, the national identities of the Member States are incorporated into EU law through Article 4(2) TEU and thus not only function in conjunction with EU legislation, but also inside it²⁵². Hence, as recognised by AG Emiliou:

“Article 4(2) TEU requires the EU institutions and bodies – including the EU judiciary – to take into account Member States’ national identities when interpreting and applying EU law”²⁵³

While in most cases no express reference was made by the referring jurisdiction to national identity and Art. 4(2) TEU²⁵⁴, some preliminary references concerned an interpretation of EU law that was consistent with fundamental principles of the national constitutional framework. For example, in *Michaniki*²⁵⁵, the Greek government put forth an interpretation of EU law that was conform with national constitutional provisions on the independence and the plurality of the media in the context of public procurement procedures. In *Melloni*²⁵⁶, the Spanish government instead argued in favour of an interpretation of EU law that was consistent with the protection of the Spanish constitutional right to a fair trial and could therefore justify the non-execution of an Arrest Warrant if the process in the issuing Member State had been carried out *in absentia* even if the requirements set by EU law²⁵⁷ were met. Differently, in *O’ Brian*²⁵⁸, the national organisation of the judiciary and EU provisions on the status of part-time workers were at stake. Lastly in the so-called *Taricco II*²⁵⁹ ruling, as it will be extensively analysed in chapter IV, the Italian Constitutional Court made a preliminary reference to the CJEU seeking for an interpretation of the Member States’ duty to defend the financial interests of the Union enshrined in Article 325 TFEU which was consistent with the Italian understanding of the principle of legality.

Significantly, in all the aforementioned cases except for *Taricco II*, the CJEU was confronted with the interpretation of EU secondary law. Moreover, in deciding on the referred question, the CJEU, while taking into account the instances of the national courts and showing consideration to national constitutions, provided an interpretation that did not deviate from the principles and the provisions of EU law.

²⁵² VAN DER SHYFF, 2012.

²⁵³ Case C-391/20 *Boriss Cilevičs and Others* Opinion Of Advocate General Emiliou, ECLI:EU:C:2022:384 para. 83.

²⁵⁴ The only reference to Article 4(2) TEU was done by the Latvian Government in its intervention in the *O’ Brian* case.

²⁵⁵ Case C–213/07 *Michaniki* ECLI:EU:C:2008:731.

²⁵⁶ Case C–399/11 *Melloni* ECLI:EU:C:2013:107.

²⁵⁷ Notably in Article 2 of Framework Decision 2009/299.

²⁵⁸ Case C-393/10 *Dermod Patrick O’Brien v. Ministry of Justice* ECLI:EU:C:2012:110.

²⁵⁹ C-42/17 *M.A.S. e M.B.* ECLI:EU:C:2017:936.

This is mostly evident in *Melloni*, where the CJEU rejected Spain's instance on the ground that the EU Parliament had already taken into account the accused's right to defence in defining common grounds for the non-execution of an arrest warrant issued in the context of a process *in absentia*.

As argued by Cloots²⁶⁰, in such cases, not only there is a need to balance European integration and the national identities of the Member States, but also to ensure respect to the allocation of powers between the EU legislature and the CJEU, an issue which eventually concerns which EU body is best positioned to carry out the balancing between European integration and national individuality.

On the one hand, provided that the Member States are represented in it, it is conceivable that the Council pays due respect to both integrative goals and the national identities of the Member States. Moreover, as argued in the previous section, Member States should raise potential conflicts between EU law and national identity early in the legislative process: in this way, national identity can be taken into account in the drafting of the provision and result in the attribution of discretion to the Member States. Statutory interpretation would then be exercised within the limits of this discretion: indeed, as affirmed by Schnettger²⁶¹, it is within this margin of appreciation that the identity clause can act as a relevant normative basis.

On the other hand, it can be argued that it is the Court's responsibility to overrule statutory legislation in case, in the light of the specificities of the concrete case, more weight to either integration or accommodation should be ensured. This is mostly true in the hypothetical circumstance in which the Member State concerned, in the context of European legislative procedures, has voted against the provision under scrutiny.

An extensive discussion as to which should be the boundaries of statutory interpretation by the CJEU is beyond the scope of this work. It is nevertheless worth highlighting that the issue might become relevant when the interpretation of EU secondary law in the light of the obligation to respect the national constitutional identities of the Member States is at stake.

VII. Conclusions

In conclusion, while the Court has never fully engaged with definitively clarifying the legal implications of Article 4(2) TEU, its case-law, be it directly related to the concept of national identity

²⁶⁰ E. CLOOTS, 2015.

²⁶¹ A. SCHNETTGER, 2019.

or not, provides significant guidelines as to what could be the consequences of the applicability in a given case of the identity clause.

In the first place, the CJEU has consistently rejected the view according to which the matters covered by the notion of national identity are excluded from the application of EU law. In fact, as highlighted by the Court in *Sayn-Wittgenstein*²⁶², *Runevič-Vardyn and Wardyn*²⁶³, *Bogendorff von Wolffersdorff*²⁶⁴ and *Coman*²⁶⁵, Member States are bound to respect European law even when exercising retained competences. This reading is the necessary conclusion of the interpretation of the identity clause together with the obligation of sincere cooperation enshrined in Article 4(3) TEU. Hence, even very sensitive questions such as same-sex marriage and religion, while being subject to the legislative competence of the Member States, are not carved out from the interference of EU law nor excluded from the jurisdiction of the CJEU. Accordingly, Article 4(2) TEU cannot be used as a competence clause – i.e., as an instrument to exclude EU interference in areas where competence to take legislative action remains at the national level²⁶⁶.

In the second place, the view according to which Article 4(2) TEU constitutes an express exception to the principle of the primacy of EU law on the basis of which Member States can review and disapply EU law must also be rejected.

On the one hand, this was made clear by the Court of Justice in its jurisprudence. In fact, the traditional position of the Court of Justice with respect to the primacy of European law is that, because of the autonomous character of the European legal framework and the need for unity and coherence in the implementation of EU law, primacy of European law is an absolute principle that admits no derogation, and which must be enforced with respect to all types of national legislations and by all judicial bodies of the national system. Even when not explicitly rejecting contrasting views, in its case-law on the identity clause the CJEU always remained firm on this position and put forth this understanding of the primacy of EU law. More recently, in its decision in *Asociația 'Forumul Judecătorilor din România'*²⁶⁷, the Court of Justice has explicitly denied the possibility for national

²⁶² Case C-208/09, *Ilonka Sayn-Wittgenstein v. Landeshauptmann von Wien* [2010] ECLI:EU:C:2010:806 para. 38.

²⁶³ C-391/09 *Runevič-Vardyn and Wardyn* EU:C:2011:291, para. 63.

²⁶⁴ C-438/14 *Bogendorff von Wolffersdorff* EU:C:2016:401, para. 32.

²⁶⁵ Case C-673/16, *Relu Adrian Coman e a. v. Inspectoratul General pentru Imigrări and Ministerul Afacerilor Interne* [2018] ECLI:EU:C:2018:385.

²⁶⁶ M. BONELLI, 2021.

²⁶⁷ Joined Cases C-83/19, C-127/19, C-195/19, C-291/19, C-355/19 and C-397/19, *Asociația 'Forumul Judecătorilor din România'*, 18 May 2021, ECLI:EU:C:2021:393.

Constitutional Courts to unilaterally set aside the primacy of EU law for the purpose of protecting national identity.

On the other hand, holding that national identity cannot justify an exception to the primacy of EU law is also the only reading of this aspect of the provision to be consistent with the principle of equality of the Member States and the principle of legality. The possibility of unilaterally disapplying EU law would in fact detract from both of these fundamental principles: in this scenario, Member States could easily cherry-pick favourable obligations deriving from EU law to comply with and discard the others. The result would be that Member States would not be equally bound by the same provisions of European law, and legal certainty of those provisions would not be respected.

Thirdly, the rulings of the Court confirmed that Article 4(2) TEU can operate as a treaty-based ground of derogation to economic freedoms and the free movement of persons. In line with its traditional approach as to the derogation to free movement rights, the Court nonetheless requires that derogations justified by the objective of protecting national identity must comply with the principle of proportionality (*i.e.* must be necessary and proportionate *strictu sensu*) and must not result in a disproportionate contraction of fundamental rights. In this way, Article 4(2) operates as a mechanism that balances the constitutional diversity of the Member States and European integration.

As highlighted by the comparison of *Sayn-Wittgenstein* and *Coman*, the Court retains wide discretion in determining whether on the one hand the referring judge is best positioned to carry out the proportionality test or not and, on the other hand, in the specific case fundamental rights or national identity should be ensured prevailing consideration.

The application of the identity clause as a ground of derogation to free movement rights presents analogies to the “traditional” grounds of derogation in addition to the subjection of national measures to proportionality tests and to the respect of fundamental rights. Not only Art. 4(2) TEU partially overlaps with other grounds of derogation such as that of public policy but is also used by the Court in continuity with, and by Member States besides, other grounds of derogation. Therefore, with respect to derogation to free movement provisions, the added value of Article 4(2) TEU is mainly that it provides the Court and the Member States with another express legal basis to justify accommodation between integration and other objectives. By interpreting the identity clause in this way, the Court has also prevented further challenges to the primacy of EU law.

In the fourth place, it can be claimed that Article 4(2) TEU, provided that it incorporates national constitutional provisions recognised as constituting the national identity by the authorities of the

various Member States, can be used on the one hand as a criterion to assess the validity of EU secondary law and, on the other hand, as a canon of interpretation of EU primary and secondary law.

With respect to the matter of the validity of EU law, it could be argued that the invalidation of a piece of EU legislation is a proportionate remedy to its incompatibility with the national identity of a single Member State²⁶⁸. Conversely, the opposite could also be put forth: the invalidation of a piece of EU law can be regarded to as an excessive measure provided that all Member States have different national identities and that it is unlikely that the same provision would infringe most of them. By contrast, the invalidation of the piece of EU law could damage the Member States whose identity is not endangered²⁶⁹. In addition, it could be held that it is the duty of the Member States to raise, in the context of legislative procedures, any potential contrast between the draft law and their national constitutional identity. In such circumstances, the piece of EU law could be designed in a manner that ensures flexibility and a margin of appreciation to the Member State concerned²⁷⁰. However, it is also true that Constitutional Courts and analogous bodies, which are the ultimate guardians of the Constitutional framework, are not directly involved in legislative procedures. It would therefore be the duty of the national authorities to take their opinions into account.

In any case, Member States have rarely (and unsuccessfully) relied on the identity clause to claim the invalidation by the CJEU of European statutory law²⁷¹. Given that in those cases the Court denied that national identity was at stake, there is no indication from the case-law as to whether or not Article 4(2) TEU can affect the validity of European law.

Lastly, with respect to the matter of the interpretation of European law, Member States have often sought from the Court of Justice an interpretation of EU legislation consistent with fundamental principles and rights established by their Constitutions²⁷². When statutory interpretation is at stake, however, the Court is confronted with a double matter of contention: not only it has to balance European integration and the national identities of the Member States, but it also has to refrain from overstepping the powers of the European legislators and infringing the separation of powers²⁷³. The

²⁶⁸ G. VAN DER SHYFF, 2012.

²⁶⁹ E. CLOOTS, 2015.

²⁷⁰ A. SCHNETTGER, 2019.

²⁷¹ See Case C-344/01 *Germany v Commission* ECLI:EU:C:2004:121, para. 77; Case C-3/10 *Affatato* ECLI:EU:C:2012:110; Joined cases C-58/13, *Angelo Alberto Torresi* and C-59/13 *Pierfrancesco Torresi v Consiglio dell'Ordine degli Avvocati di Macerata* ECLI:EU:C:2014:2088.

²⁷² Case C-213/07 *Michaniki* ECLI:EU:C:2008:731; Case C-399/11 *Melloni* ECLI:EU:C:2013:107; Case C-393/10 *Dermod Patrick O'Brien v. Ministry of Justice* ECLI:EU:C:2012:110; C-42/17 *M.A.S. e M.B.* ECLI:EU:C:2017:936.

²⁷³ E. CLOOTS, 2015.

latter issue would not subsist in the case in which Member States are attributed discretion as a result of an early plead for the respect of their constitutional identity in the context of legislative procedures²⁷⁴.

All in all, it is clear that the national identity clause does not allow for the unilateral disapplication by national authorities of EU law: Article 4(2) TEU constitutes neither a competence clause nor an exception to the primacy of EU law. By contrast, Article 4(2) offers a framework to signal to the Court of Justice the need to consider sensitive national interests and balance them against the background of European integration. This balancing exercise can surely result in a derogation to free movement provisions. Conversely, it is more open for debate if the same is true with respect to the invalidation of EU statutory law and to what extent the same can be done in the interpretation of EU law. In any case, the final decision and balancing exercise is exclusively left to the CJEU.

²⁷⁴ A. SCHNETTGER, 2019.

III. Populist autocracies and the abuses of the identity clause

I. Introduction

Some Member States of the EU, namely Hungary, Poland and Romania, have tried to apply the national identity clause enshrined in Article 4(2) TEU to limit the scope of application of EU law and challenge its primacy over national law in a way that constitutes an evident abuse of the provision. Indeed, with the excuse of protecting national constitutional identity, Hungary, Poland and Romania have tried to either prevent the application of EU law to specific matters or challenged the capability of EU law to prevail over national constitutional law, thereby upholding the claim that their national constitutional identities represented an absolute limitation to the legislative powers of the EU.

Significantly, the interpretation provided by the national authorities of these Member States of their constitutional identity has nothing to deal with cultural specificities or specific constitutional features of the State. Conversely, the identity clause has been called into question in situations where the involvement of actual differences of those Member States from the rest of the Members of the EU can hardly be found. Rather, autocratic governments and Constitutional Courts invoked respect for national identity with the objective of escaping EU obligations, on the one hand in situations concerning sensitive areas of EU intervention and, on the other hand, in case of obvious violations of the principle of the rule of law.

It is well known that the Member States in question have in recent year undergone a process of erosion of the democratic values and principles²⁷⁵. This process of democratic backsliding is inherently linked to the constitutional battle these States undertook on the basis of Article 4(2) TEU. In fact, most of the times, the identity clause has been used to obstruct the EU's intervention against the degradation in these States of the rule of law. To begin with, the identity clause has been abused to deprive of their effects judgements of the CJEU recognising a violation of the principle of the rule of law and condemning the relevant Member State, with the aim of ensuring exclusive jurisdiction on those

²⁷⁵ See to this regard: IDEA (Institute for Democracy and Electoral Assistance), “*The State Of Democracy In Europe 2021, Overcoming the Impact of the Pandemic*”, available at <https://www.idea.int/gsod/sites/default/files/2021-11/state-of-democracy-in-europe-2021.pdf>.

matters to the government-captured Constitutional Courts. Moreover, the clause has also been used to carve out from the reach of EU law fields of national sovereignty considered within the exclusive competence of the Member States or to request the annulment of mechanisms such as Regulation 2020/2092²⁷⁶. Furthermore, the tensions between autocratic governments and the EU represented the real reason behind the grab on to Article 4(2) TEU and the concept of national constitutional identity of the formers even when this aim was not evident. This is the case of the regulation of migration in Hungary and the Hungarian's fight against resettlement quota.

These claims have been at times expressly grounded on the thesis of constitutional pluralism and on the jurisprudence of the German Federal Court. Examples of this borrowing activity are constituted by the Polish White Paper on the Reform of the Polish Judiciary (Warsaw, 7 March 2018) and the Hungarian Constitutional Court's fundamental rights review and *ultra vires* review.

The CJEU has consistently rejected those claims, lastly in its decision in case *Hungary v. European Parliament and Council of the European Union*²⁷⁷ and in case *Poland v. European Parliament and Council of the European Union*²⁷⁸. As it will be further discussed in the following paragraphs, the rulings of the CJEU not only restate the principle of the absolute primacy of EU law established in *Internationale Handelsgesellschaft*²⁷⁹, but also determine that Article 4(2) TEU cannot be used to violate fundamental principles of the European Union's legal framework, such as the principle of the rule of law. Hence, the position of the CJEU seems to be that there are limits to constitutional tolerance as provided by Article 4(2).

II. Constitutional pluralism and abuses of the identity clause

Constitutional pluralism is a theory that aims at solving *Kompetenz-Kompetenz* controversies – i.e. controversies on whether the ultimate authority of ruling boundary disputes between the European Union and the national legal systems belongs to the CJEU or to national constitutional courts. This theory rejects hierarchical views of the European and national legal frameworks in favour of a

²⁷⁶ Regulation (EU, Euratom) 2020/2092 of the European Parliament and of the Council of 16 December 2020.

²⁷⁷ -156/21, *Hungary v. European Parliament and Council of the European Union*, [2022], ECLI:EU:C:2022:97.

²⁷⁸ Case C-157/21, *Poland v. European Parliament and Council of the European Union*, [2022], ECLI:EU:C:2022:98.

²⁷⁹ Case 11/70 *Internationale Handelsgesellschaft mbH v Einfuhr- und Vorratsstelle für Getreide und Futtermittel* [1970] ECR 1125.

heterarchical system: neither the CJEU nor national constitutional courts are recognised as having definitive primacy on *Kompetenz-Kompetenz* issues. By contrast, both are expected to engage in continuous dialogue, self-restraint, and reciprocal accommodation²⁸⁰.

The theory was elaborated by some scholars in order to resolve the conflict between the European Court of Justice and some national constitutional courts, notably the German Federal Constitutional Court. However, it has been exploited by autocratic regimes such as the Polish and the Hungarian ones to escape EU obligations on the rule of law and shield processes of democratic backsliding from EU interference²⁸¹.

As argued by Kelemen and Pech²⁸², the issue with constitutional pluralism is that it allows for a degradation of, on the one hand, the unity and uniformity of EU law and, on the other hand, of the principle of legality. In their view, constitutional pluralism justifies Member States' unilateral exception to the principle of the primacy of EU law. As pointed out by Fabbrini²⁸³, this also results in a violation of the principle of equality of the Member States enshrined in Article 4(2) TEU itself: in fact, if Member States could unilaterally disapply EU law, the result would be that some Member States would be bound by specific rules, while others would not. In addition, this affects legal certainty and the generality of EU law, negatively impacting on the principle of legality.

In the view of constitutional pluralism supporters, dialogue, sincere cooperation and mutual accommodation by both the CJEU and national authorities were supposed to smooth this set of problems²⁸⁴. Clearly, this has not been the case with respect to autocratic regimes: by contrast, constitutional pluralism provided autocrats with a justification to ignore democratic values, notably the principle of the rule of law.

Indeed, as it will be extensively shown in the next sections of this Chapter, by express or implicit reference to constitutional pluralism theories, autocrats in Europe have argued against the absolute

²⁸⁰ R. D. KELEMEN, L. PECH, “*Why autocrats love constitutional identity and constitutional pluralism Lessons from Hungary and Poland*”, Reconnect, September 2018, available at <https://reconnect-europe.eu/wp-content/uploads/2018/10/RECONNECT-WorkingPaper2-Kelemen-Pech-LP-KO.pdf>.

²⁸¹ For an explicit reference to constitutional pluralism see White Paper on the Reform of the Polish Judiciary, Warsaw, 7 March 2018. See also section IV of this Chapter.

²⁸² R. D. KELEMEN, L. PECH, 2018.

²⁸³ F. FABBRINI, ‘After the OMT Case: The Supremacy of EU Law as the Guarantee of the Equality of the Member States’, in *German Law Journal*, Vol. 16, 1015.

²⁸⁴ See M. POIARES MADURO, ‘Contrapunctual Law: Europe’s Constitutional Pluralism in Action’ in N. WALKER (ed.), *Sovereignty in Transition*, London: Hart Publishing, p. 501.

primacy of EU law²⁸⁵, claiming that, due to the absence of a hierarchical relationship between the EU and Member States' legal systems, EU legislation cannot always override national law. This claim has been frequently upheld also through reliance on Article 4(2) TEU, which has been opportunistically interpreted as configuring a positive exception to the primacy of EU law. Hence, autocratic regimes asserted that issues falling within the notion of national identity were not subject to the jurisdiction of the CJEU nor to the primacy of EU law.

This interpretation of the identity clause is undoubtedly against the principle of sincere cooperation enshrined in Article 4(3) TEU, according to which Member States are bound to “*ensure, in their respective territories, the application of and respect for EU law*”²⁸⁶.

In addition, it results in a serious infringement of the principles enshrined in Article 2 TEU, notably of the principle of democracy and of the rule of law. Significantly, grounding an infringement of those values on the protection of national identity is at the very least contradictory: “*These values are common to the Member States*” as expressly recognised in Article 2 TEU, and constitute part of the common constitutional traditions of the Member States.

As affirmed by the European Parliament in its resolution of 3 July 2013:

“the European core values set out in Article 2 TEU result from the constitutional traditions common to the Members States and cannot therefore be played off against the obligation under Article 4 TEU, but make up the basic framework within which Member States can preserve and develop their national identity.”²⁸⁷

As it will be explained in Section V, the same was recognised by the CJEU. Furthermore, AG Emiliou also later recognised that:

“*The core elements of national identity invoked by a Member State must necessarily be compatible with the European Union’s constitutional framework and, more specifically, with its founding values (Article 2 TEU) and its aims (Article 3 TEU). Article 4(2) TEU lays down the key principles governing the relationship between the European Union and the Member States, and cannot be construed as re-defining what the European Union is and what it stands for. In particular, as far*

²⁸⁵ Hungarian Constitutional Court, ruling 22/2016 in its english translation; White Paper on the Reform of the Polish Judiciary, Warsaw, 7 March 2018.

²⁸⁶ Case C-46/16, *Associação Sindical dos Juizes Portugueses*, ECLI:EU:C:2018:117, para. 34.

²⁸⁷ European Parliament resolution of 3 July 2013 on the situation of fundamental rights: standards and practices in Hungary (pursuant to the European Parliament resolution of 16 February 2012) (2012/2130(INI)), OJEU 2016 C 75/09, recital K

as the founding values are concerned, the Member States themselves have – again, with the Treaty of Lisbon – accepted them as being values that are also ‘common’ to them. Consequently, Article 4(2) TEU cannot be considered to derogate from Articles 2 and 3 TEU.”²⁸⁸

III. The case of Hungary: national identity, migration policies and the retention of sovereignty

With the excuse of redefining the migration policies of the EU, in particular with respect to resettlement quota, the Hungarian government and the Hungarian national authorities attempted to exploit the concept of national constitutional identity to call into question the definition of the relationship between the Member State and the EU, and to justify non-compliance by Hungary with EU legislation.

For instance, a constitutional battle between Hungary and the EU on the theme of migration arose after the adoption of the so-called “Quota decisions”²⁸⁹, according to which third-country nationals who requested international protection upon arriving in Greece and Italy in 2015 should be relocated to other EU Member States pursuant to certain quotas. The Hungarian government, together with Slovakia, the Czech Republic, and Romania, had opposed this decision. In reaction to its adoption, and after having strongly campaigned against immigration in the summer of 2015, the Hungarian government promoted a referendum the question of which was: “Do you want the European Union to impose the mandatory settlement of non-Hungarian citizens in Hungary without the support of the Hungarian Parliament?”.

While, as argued by Uitz²⁹⁰, the referendum represented a constitutional non-sense both under Hungarian and EU law, and although less than half of the rightful claimant voted, the 98 per cent support to the referendum gave the opportunity to the Government to launch a propaganda campaign against migrants and refugees and with a strong anti-EU tone.

²⁸⁸ Case C-883/19 *HSBC Holdings and Others v Commission* Opinion Of Advocate General Emiliou, ECLI:EU:C:2022:384 para. 87.

²⁸⁹ Council Decision (EU) 2015/1523, 2015 OJ (L239/146) (establishing provisional measures in the area of international protection for the benefit of Italy and of Greece); Council Decision (EU) 2015/1601, 2015 OJ (L248/80) (establishing provisional measures in the area of international protection for the benefit of Italy and Greece).

²⁹⁰ R. UITZ, “National Constitutional Identity in the European Constitutional Project: A Recipe for Exposing Cover Ups and Masquerades”, *VerfBlog*, 2016/11/11, available at 10.17176/20161111-103427.

Hence, a constitutional amendment bill²⁹¹ proposing four changes to the Fundamental Law was tabled. The changes concerned the insertion in a variety of provisions of a reference to Hungary's constitutional identity, which the amended constitution would define as rooted in the historic constitution and as an aspect of sovereignty that should not be violated by the transfer of powers to the EU, but conversely protected by all state institutions. Moreover, the amended constitution would expressly prohibit the settlement of immigrants in Hungary: foreign citizen, included European citizens, may only reside in Hungary in accordance with Hungarian law.

The constitutional bill eventually concerned way more the definition of the relationship with the EU than migration. This manifests that the Prime Minister's fight against "EU oppression" was the very core of the proposal. In fact, while the Hungarian Prime Minister claimed that the reform of the Constitution was necessary to empower him to oppose EU law on migration, notably with respect to resettlement quota, it is arguable that this was not his main objective. For instance, Kelemen and Pech²⁹² maintain that the primary aim of the amendment bill was to provide the Hungarian government with a legal instrument recognised by EU law itself in Article 4(2) TEU to disregard EU law when convenient.

Hence, as recognised by Halmai²⁹³, after the failure of the constitutional amendment, Prime Minister Orbán, with the support of the Hungarian Constitutional Court, managed to recast this battle into a crusade aimed at defending Hungary's constitutional identity.

Indeed, the loyal²⁹⁴ Constitutional Court, based on an abandoned petition of the Commissioner for Fundamental Rights, delivered an abstract constitutional interpretation in connection with the aforementioned quota decision. In its *decision 22/2016*²⁹⁵, the Court expressly relied on the German Federal Court's jurisprudence on constitutional review of EU law to elaborate a fundamental rights review and an *ultra vires* review, the latter comprising of a sovereignty review and an identity review²⁹⁶.

²⁹¹ Seventh amendment of the Basic Law of Hungary, T/332 in its english translation available at <https://helsinki.hu/wp-content/uploads/T332-Constitution-Amendment-29-May-2018-ENG.pdf>.

²⁹² R. D. KELEMEN, L. PECH, 2018.

²⁹³ G. Halmai, "The Hungarian Constitutional Court and Constitutional Identity", *VerfBlog*, 2017/1/10, available at 10.17176/20170111-091119.

²⁹⁴ Because of a 2011 revision to the selection process, ten judges of the Court had been appointed by the legislative majority.

²⁹⁵ Hungarian Constitutional Court, Decision 22/2016 (XII.5), AB on the Interpretation of Article E) (2) of the Fundamental Law (Nov. 30, 2016), in its english version available at http://hunconcourt.hu/letoltesek/en_22_2016.pdf

²⁹⁶ *Ibid*, para. 44.

With respect to the identity review, the Court argued that the conferral of competences to the EU must not infringe Hungary's constitutional identity and that it might review EU law to ensure respect of the Hungarian constitutional identity²⁹⁷. Somewhat cautiously, the Court affirmed that it would exercise this power of review in exceptional cases and as a resort of *ultima ratio* - i.e. respecting the constitutional dialogue between the Member States.

The Hungarian Court grounded its power of identity review on Article 4(2) TEU and on the principles of continuous cooperation, mutual respect, and equality. Furthermore, the Court affirmed that it would determine the content of constitutional identity on a case-by-case basis, taken into account the Fundamental Law as a whole and Article R) (3), which states that “*the provisions of the Fundamental Law shall be interpreted in accordance with their purposes, the National Avowal contained therein and the achievements of our historical constitution*”²⁹⁸. In the view of the Court, the achievements of the historical constitution are not an exhaustive enumeration of values, but include, *inter alia*, fundamental freedoms, the division of power, the republican form of state, freedom of religion, legality, parliamentarism, equality before the law, recognition of judicial power and the protection of other nationalities within the Hungarian State. Notably, this definition of national identity is extremely vague and broad, as such easily applicable as a trump card against inconvenient pieces of EU legislation.

Furthermore, the Court held that:

*“[...] [T]he constitutional self-identity of Hungary is a fundamental value not created by the Fundamental Law – it is merely acknowledged by the Fundamental Law. Consequently, constitutional identity cannot be waived by way of an international treaty – Hungary can only be deprived of its constitutional identity through the final termination of its sovereignty, its independent statehood. Therefore, the protection of constitutional identity shall remain the duty of the Constitutional Court as long as Hungary is a sovereign State. Accordingly, sovereignty and constitutional identity have several common points, thus their control should be performed with due regard to each other in specific cases.”*²⁹⁹

Hence, Hungary's Constitutional Court concluded that, should Hungary's self-identity based on its historical constitution be presumed to have been violated due to the exercise of competences, the

²⁹⁷ Ibid, para. 54-55.

²⁹⁸ Article R) (3) of the Hungarian Fundamental Law.

²⁹⁹ Hungarian Constitutional Court, Decision 22/2016 (XII.5), AB on the Interpretation of Article E) (2) of the Fundamental Law (Nov. 30, 2016), in its english version available at http://hunconcourt.hu/letoltesek/en_22_2016.pdf, para. 67.

Constitutional Court may examine the existence of an alleged violation on the basis of a relevant petition³⁰⁰.

In February 2021, the Constitutional Court partly deviated from this position in an abstract interpretation of the Fundamental Law³⁰¹ requested by the Hungarian Minister of Justice and provided in response to the CJEU's judgement in *European Commission v Hungary*³⁰², where the Grand Chamber found Hungary in breach of the EU asylum acquis. Indeed, while stating that the territorial unity, the population and the form of government are inalienable rights of Hungary following from its constitutional identity, the Court did not engage in an identity review nor with the issue of the primacy of EU law, avoiding further conflict with the CJEU³⁰³.

However, as it will be discussed in Section V, Hungary later recast its position as to the primacy of EU law as emerged in the context of migration policy with respect to the so-called rule of law conditionality mechanism.

IV. The case of Poland: the principle of the independence of the judiciary

Democratic backsliding in Poland has been characterised by the increasing interference of the Government with the independence of the judiciary and the dismantling of guarantees of this democratic value. Indeed, already in 2016 reforms concerning the Constitutional Tribunal and aimed at ensuring the President's control over its composition and organisation were carried out³⁰⁴. This was followed by the capture of the National Council of the Judiciary (NCJ), a body which plays a key role in judicial appointments and intended to safeguard the independence of the judiciary. Through the transfer of the appointment power of the majority of its members from the judiciary to the Parliament, the majority party ensured its control over judicial designation. In addition, the government promoted reforms of ordinary courts prohibiting ordinary judges from expressing hostility or criticism against other Polish authorities, Poland's constitutional organs or the basic

³⁰⁰ Ibid, para. 69.

³⁰¹ Hungarian Constitutional Court Decision no. X/477/2021 on the interpretation of the provisions of the fundamental law allowing the joint exercise of powers, in its english version available at https://hunconcourt.hu/uploads/sites/3/2021/12/x_477_2021_eng.pdf.

³⁰² C-808/18, *Commission v Hungary*, ECLI:EU:C:2020:1029.

³⁰³ N. CHRONOWSKI, A. VINCZE: "Full Steam Back: The Hungarian Constitutional Court Avoids Further Conflict with the ECJ", *VerfBlog*, 2021/12/15, <https://verfassungsblog.de/full-steam-back/>

³⁰⁴ T. T. KONCEWICZ, "Constitutional Capture in Poland 2016 and Beyond: What is Next?", *VerfBlog*, 2016/12/19, available at <https://verfassungsblog.de/constitutional-capture-in-poland-2016-and-beyond-what-is-next/>

principles of the Republic of Poland. Finally, a reform of the retirement age of judges of the Constitutional Tribunal resulted in the dismissal of many non-captured judges of the Supreme Court. In response, the European Commission issued an opinion according to which the aforementioned reforms enabled the executive or legislative powers to systematically “*interfere significantly with the composition, the powers, the administration and the functioning of these authorities and bodies*”³⁰⁵. To defend the reforms of the judiciary, the Chancellery of the Prime Minister issued a White Paper³⁰⁶ where it openly relied on constitutional pluralism to uphold the legislative interventions. In fact, the Prime Minister mentioned that:

*“The legal system of the European Union is based on constitutional pluralism of the member states. It means that there are multiple constitutional systems – on one side there are national systems of the Member States, on another, the European framework, having its “constitutional charter” in the Treaties: Treaty of the European Union and Treaty on the Functioning of the European Union.”*³⁰⁷

In addition, the White Paper purported that the European legal framework expressly recognised constitutional pluralism in Article 4 TEU, claiming that this provision provided a guarantee that Member States would retain absolute sovereignty on the organisation of the judicial system. In the words of the document:

*“The European legal system is founded on the recognition of constitutional pluralism enshrined in Article 4 of the Treaty on European Union which also guarantees that each member state may shape its own judicial system in a sovereign manner, as long as it does not threaten judicial independence.”*³⁰⁸

The White Paper also refers to national identity, claiming that each Member State has specific constitutional solutions rooted in its history and legal traditions and protected in their differences by Article 4(2) TEU. The text of the document goes on affirming that constitutional identity constitutes “the limit for regulatory intervention of the European Union”, hence interpreting Article 4(2) TEU as a competence clause.

More in particular, the White Paper stated that:

³⁰⁵ European Commission, Reasoned proposal in accordance with Article 7(1) of the Treaty on European Union regarding the rule of law in Poland, COM(2017) 835 final, 20 December 2017, para. 173.

³⁰⁶ White Paper on the Reform of the Polish Judiciary, Warsaw, 7 March 2018.

³⁰⁷ Ibid, para. 169.

³⁰⁸ Ibid, para. 206.

*“The Treaty on European Union safeguards constitutional identity of the member states as their exclusive national competence, which means that reforms of the judiciary should be assessed at the national level by competent authorities.”*³⁰⁹

All in all, the Polish Government in the 2018 White Paper attempted to use the concepts of constitutional pluralism and constitutional identity to legitimise before the European institutions the legislative reforms.

Irrespective of the efforts of the Polish Government to shield the reforms of the judiciary from the interference of the EU, these reforms have been the subject matter of various rulings of the CJEU. In these occasions, the European Court consistently highlighted the incompatibility of the Polish legislation as resulting from the aforementioned amendments with democratic principles, notably with the principle of the rule of law³¹⁰, and the Member States’ obligations under EU law, notably as deriving from art.19(1) TEU – i.e. the duty to ensure the effective application of, and protection under, EU law³¹¹.

Importantly, in the context of the CJEU’s *AB v Krajowa Rada Sadownictwa*³¹² ruling, the Polish Government, when arguing against the admissibility of a question raised before the CJEU concerning the right of candidates for a position as judge to appeal against a decision not to appoint them, submitted that the European Union’s lack of competence on the matter precluded an interpretation of EU law as obliging the Member States to confer such right³¹³. In the view of the Polish Government, such an interpretation of EU law would constitute an infringement of Article 4(2) TEU inasmuch as it would have a normative rather than interpretative effect³¹⁴.

The CJEU rejected the question of admissibility, and, based on the procedure for judicial appointment, expressed its scepticism on the independence of Polish judges.

In reaction to this ruling, Poland’s Prime Minister, Mateusz Morawiecki, submitted a written request to Poland’s Constitutional Court for it to rule on the compatibility of EU law with the whole constitutional order of Poland and in substance asking whether or not Poland’s domestic courts were bound by the judgments of the European Court of Justice.

³⁰⁹ Ibid, para. 207.

³¹⁰ See, *inter alia*: Case C-192/18, *European Commission v Republic of Poland*, 5 November 2019, ECLI:EU:C:2019:924; Joined cases C-585/18, C-624/18 e C-625/18, *A. K. v. Krajowa Rada Sadownictwa and CP and DO v. Sąd Najwyższy*, 19 novembre 2019, ECLI:EU:C:2019:982.

³¹¹ See, *inter alia*, Case C-791/19, *Commission v. Poland*, 15 July 2021, ECLI:EU:C:2021:596.

³¹² C-824/18, *AB v Krajowa Rada Sadownictwa*, EU:C:2021:153.

³¹³

³¹⁴ C-824/18, *AB v Krajowa Rada Sadownictwa*, EU:C:2021:153; [2021] 3 C.M.L.R. para. 78.

For instance, the Prime Minister’s application interrogated the Constitutional Tribunal as to the conformity with the Polish Constitution of various treaty provisions, namely: Article 1 TEU, in conjunction with Article 4(3) TEU, if interpreted as allowing or necessitating for the disapplication of the Polish Constitution or the application of legal provisions against the Constitution; Article 19(1) TEU, in conjunction with Article 4(3) TEU, if construed as to enable or oblige a law-enforcing authority to apply provisions in a way that is inconsistent with the Constitution for the purpose of ensuring effective legal protection; and Article 19(1), in conjunction with Article 2 TEU, interpreted so that a court may examine the independence of judges chosen by the President of the Republic of Poland as well as the decision made by the National Council of the Judiciary to recommend a request for a judge to the President of the Republic.

The Constitutional Tribunal, in its ruling *K 3/21*³¹⁵, affirmed that all these provisions were inconsistent with the Polish constitution, and openly challenged the primacy of EU law over national constitutional law. In fact, the Court found that Article 1 TEU allowed the EU to act outside the scope of the competences conferred upon it in the Treaties, that it resulted in the Constitution not being the supreme law of the Republic of Poland and in the Republic of Poland not functioning as a sovereign and democratic state. Moreover, the Tribunal found that Article 19(1) TEU was inconsistent with the Polish Constitution for two sets of reasons. On the one hand, the Court found that it granted domestic courts the competence to bypass the provisions of the Constitution in the course of adjudication and adjudicate on the basis of provisions which, having been revoked by the Sejm and/or ruled by the Constitutional Tribunal to be inconsistent with the Constitution, are not binding. On the other hand, it considered that it allowed for the review on the basis of EU law of the legality of the procedure for appointing a judge and of the National Council of the Judiciary’s resolution to refer a request to the President of the Republic to appoint a judge, and that it resulted in the defectiveness of the process of appointing a judge.

Significantly, the Constitutional Tribunal had previously confirmed the EU Treaties’ compliance with the Constitution in 2005 and again after the adoption of the Treaty of Lisbon³¹⁶. As the wording of neither the Treaties nor the Polish Constitution have changed since, the Court should have declared the application of the Prime Minister inadmissible³¹⁷, let alone recognised the incompatibility with the Constitution of the aforementioned EU provision.

³¹⁵ Constitutional Tribunal of Poland, Ref. No. K 3/21, 07/10/2021.

³¹⁶ See Constitutional Tribunal of Poland K 32/09 and SK 45/09.

³¹⁷ M. LASEK-MARKEY, “*Poland’s Constitutional Tribunal on the status of EU law: The Polish government got all the answers it needed from a court it controls*”, European Law Blog, 21/10/2021,

Thus, as recognised by Polanski³¹⁸, despite its claims to be protecting Poland's sovereignty and democracy and denouncing the alleged competence creep on the part of the EU, the CT found the very same treaty provisions relied on by the CJEU to review the ongoing judicial reforms in Poland to be incompatible with the Polish Constitution and, accordingly, non-binding.

The *K 3/21* ruling has been heavily criticised, significantly also by retired judges of the Constitutional Tribunal in a joint statement³¹⁹ and in Judge Piotr Pszczółkowski's dissenting opinion. Indeed, as argued by Lasek-Markey, it appears that what the government really sought to obtain was an excuse to set aside a series of inconvenient CJEU judgments rather than an interpretation of the Polish Constitution³²⁰.

V. Hungary and Poland: the ruling on the rule-of-law conditionality mechanism

As a further attempt to defend the anti-democratic measures adopted by their respective governments and prevent the EU intervention to contrast them, Poland and Hungary promoted an action for the annulment of 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. This Regulation empowers the Commission to propose to the Council the adoption of measures such as a suspension of the disbursement of EU funds whenever the breaches by a Member State of the rule of law affect or seriously risk affecting in a sufficiently direct way the sound management of the EU budget or the protection of the EU financial interests.

When ruling on both actions for annulment, the CJEU asserted that the values contained in Article 2 TEU, including the principle of the rule of law, do not merely constitute policy guidelines or a statement of intentions. By contrast, they define the very identity of the European Union, and contain legally binding obligations for the Member States.

Hence, the Court rejected Hungary's claim that the mechanism introduced by the regulation was not consistent with Article 4(2) TEU. For instance, Hungary argued that the procedure established by the

available at <https://europeanlawblog.eu/2021/10/21/polands-constitutional-tribunal-on-the-status-of-eu-law-the-polish-government-got-all-the-answers-it-needed-from-a-court-it-controls/>

³¹⁸ O. POLANSKI, "Poland - Constitutional Tribunal judgment K 3/21 - a continued assault on the integrity of the EU legal order", *Public Law*, 2022, pp. 344-347 available at

<https://uk.westlaw.com/Document/IF6A7A9D09E7811EC8C32C2E4AD87A234/View/FullText.html>.

³¹⁹ Statement of Retired Judges of the Polish Constitutional Tribunal, 10 October 2021.

³²⁰ M. LASEK-MARKEY, 2021

regulation allowed “*the legislation or practice of a Member State to be examined even where it falls outside the scope of EU law.*”³²¹ By contrast, the Court held that, although Article 4(2) TEU obliges the European Union to respect the national identities of the Member States, inherent in their fundamental structures, political and constitutional and, accordingly, the Member 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*”³²². Indeed, Member States are all bound to achieve the same result: while they have different national identities, which the European Union is bound to respect, “*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*”³²³.

The CJEU answered analogously to Poland’s request for annulment, which was grounded on the claim that the Regulation breached the other principles expressed in Article 4(2) TEU, namely the duty of the EU to observe Member States’ essential functions and the remaining of national security within the exclusive competence of the Member States³²⁴. Indeed, the CJEU affirmed also in this case that Article 4(2) TEU in no way indicates that Member States are not bound to respect the principle of the rule of law: in fact, this concept is shared by all Member States and constitutes a value common to their constitutional traditions, which they have committed to always respect.

In addition to enabling the activation by the EU Commission of the budget conditionality mechanism against Hungary³²⁵, these rulings of the CJEU have two major implications for the understanding and implementation of the concept of national constitutional identity and the identity clause.

In the first place, the decisions of the CJEU made clear that the values enshrined in Article 2 TUE such as democracy, the rule of law, and human rights are part of the identity of the EU. As also pointed out by many scholars³²⁶, the identities of the Member States are inextricably intertwined to

³²¹ Case C-156/21, *Hungary v. European Parliament and Council of the European Union*, [2022], ECLI:EU:C:2022:97, para. 202.

³²² *Ibid*, para. 233.

³²³ *Ibid*, para. 234.

³²⁴ Case C-157/21, *Poland v. European Parliament and Council of the European Union*, [2022], ECLI:EU:C:2022:98 para. 257.

³²⁵ L. BAYER, “In major first, EU triggers power to cut Hungary’s funds over rule-of-law breaches”, *Politico*, 27/04/2022 available at <https://www.politico.eu/article/eu-european-commission-rule-law-mechanism-hungary-funds/>

³²⁶ See e.g. S. RODIN, “National Identity and Market Freedoms after the Treaty of Lisbon” in *Croatian Yearbook of European Law and Policy* vol. 11, 2011, available at <https://doi.org/10.3935/cyelp.07.2011.130>; P. FARAGUNA and T. DRINÓCZI: “Constitutional Identity in and on EU Terms”, *VerfBlog*, 2022/2/21,

the membership to the EU. As a result of participation in the EU the values enshrined in Article 2 TEU, provided that the EU is founded on them, are regarded to be a part of the national identities of the Member States as well. Hence, the national constitutional identities of the Member States and their various components cannot be contrary to the identity of the EU. This suggests that Article 2 and Article 4(2) TEU must be considered as on the same level: therefore, any attempt to justify national measures that violate Article 2 TEU by referring to Article 4(2) TEU shall be recognized as an abusive use of the identity clause.

In the second place, as maintained by Faraguna and Drinóczy³²⁷, with respect to the rule of law, the decisions suggest the existence of a common rule of law understanding within the EU, which constitutes a benchmark for assessing the state of the rule of law within the various Member States: in fact, the Court recognised that Member States adhered to a conception of the rule of law which they share.

In conclusion, the decision of the CJEU suggests that Constitutional tolerance of the EU towards the Member States has a limit, which is constituted by the fundamental democratic principles that constitute the identity of the EU itself. While the CJEU admits that, according to Article 4(2) TEU, Member States might have specific conceptions and might implement differently those principles and fundamental rights, Member States cannot substantially deviate from the common European *aquis*, nor construe their constitutional identities as a *carte blanche* to disapply fundamental EU principle such as the rule of law, nor prevent the adoption by the EU of mechanisms for uniform assessment such as Regulation 2020/2092.

VI. The case of Romania: the reform of the judiciary and the position of the Constitutional Court

Following the general elections of December 2016, also Romania started undergoing a process of democratic backsliding characterised by the executive's interference with the organisation and functioning of the judiciary: indeed, between 2017 and 2019, a series of reforms involving the

<https://verfassungsblog.de/constitutional-identity-in-and-on-eu-terms/>; L. PECH, "No More Excuses: The Court of Justice greenlights the rule of law conditionality mechanism", *VerfBlog*, 2022/2/16, <https://verfassungsblog.de/no-more-excuses/>.

³²⁷ P. FARAGUNA and T. DRINÓCZI: "Constitutional Identity in and on EU Terms", *VerfBlog*, 2022/2/21, <https://verfassungsblog.de/constitutional-identity-in-and-on-eu-terms/>.

judiciary which significantly undermined judicial independence were approved³²⁸. These measures included the adoption of major, quick legislative reforms in absence of public debates that diminished, *inter alia*, the powers of the prosecutorial section charged with the fights against corruption. Moreover, they involved the (in some cases attempted) dismissals of chief-prosecutors of the General Prosecution Office as to ensure political capture of these high positions in the judiciary, the silencing of criticism through the creation of an executive-controlled “special section for the investigation of offences within the judiciary” and an intense mediatic campaign against the judiciary³²⁹.

The legislative reforms notably affected the criminal law system and, in particular, the provisions concerning the fight against corruption: in fact, the legislative interventions limited prosecutors and judges’ anti-corruption powers, and obstructed or dismissed investigations in high corruption cases³³⁰.

Importantly, Romania, on the basis of the Commission’s Decision 2006/928/EC 13 December 2006, was (and still is) part of a mechanism for cooperation and verification - the so-called CVM - aimed at assessing on the basis of a set of benchmarks the progress of the Member State in the areas of judicial reform and fight against corruption. In this context, the European Commission regularly reported as a possible systemic threat to the rule of law the aforementioned reforms³³¹.

As argued by Moraru and Bercea³³², the Constitutional Court played a key role in defending the legality of the justice reform in the context of the institutional conflict between the judiciary and the executive powers. In fact, starting from 2018, the Court delivered many controversial decisions, supporting some of the most criticised justice reforms³³³. In these rulings, the Court changed its

³²⁸ B. SELEJAN-GUTAN “New Challenges against the Judiciary in Romania”, *VerfBlog*, 2019/2/22, <https://verfassungsblog.de/new-challenges-against-the-judiciary-in-romania/>.

³²⁹ *Ibid.*

³³⁰ M. MORARU, R. BERCEA, “The First Episode in the Romanian Rule of Law Saga: Joined Cases C-83/19, C-127/19, C-195/19, C-291/19, C-355/19 and C-397/19, Asociația ‘Forumul Judecătorilor Din România, and Their Follow-up at the National Level”, *European Constitutional Law Review*, 26 April 2022, pp. 82 – 113, DOI: <https://doi.org/10.1017/S1574019622000074>.

³³¹ See: Report from the Commission to the European Parliament and the Council on Progress in Romania under the Cooperation and Verification Mechanism COM(2018) 851 final of 13 November 2018 (the CVM 2018 Report); Report from the Commission to the European Parliament and the Council on Progress in Romania under the Cooperation and Verification Mechanism, COM(2017) 44 final of 25 January 2017 (the CVM 2017 Report).

See also E.S. TĂNĂȘESCU, B. SELEJAN-GUTAN, “A Tale of Primacy: The ECJ Ruling on Judicial Independence in Romania”, *VerfBlog*, 2021/6/02, available at <https://verfassungsblog.de/a-tale-of-primacy/>.

³³² M. MORARU, R. BERCEA, 2022.

³³³ See Romanian Constitutional Court, Decisions No. 33/2018 of 15 February 2018 and No. 104/2018 of 29 May 2018.

position as to the legal bindingness of the CVM and the related reports of the EU Commission: on the basis of the constitutional duty arising from Article 148(4) of the Constitution to comply with EU law obligations, the Constitutional Court's case law in 2011 and 2012 recognised the CVM Decision and its benchmarks for the efficiency of the justice system and the fight against corruption, along with the Commission reports, as legally binding and as a standard for constitutionality review of some justice laws³³⁴. However, in the 2018 rulings, the court determined that the CVM Decision could not serve as a point of reference for a constitutionality examination of the judicial reform because it was adopted prior to Romania's entry into the EU and the Court of Justice had not yet defined the Decision's legal nature and effects. Additionally, the Constitutional Court determined that the CVM Decision only met the criteria for a "recommendation," not the requirements of an immediately effective and legally enforceable provision.

From 2019, the CJEU was called by Romanian Courts through 17 preliminary requests to provide an interpretation of the EU standards on judicial independence and the rule of law in relation to the Romanians reforms of the judicial liability regime. More in particular, the preliminary references concerned the compatibility of EU law of the amendments concerning the organisation of the Judicial Inspectorate (Case C-83/19), the establishment of the SIIJ within the Public Prosecutor's Office (Cases C-127/19, C-195/19, C-291/19 and C-355/19) and the rules on the personal liability of judges (Case C-397/19).

The requests were joined and answered by the Court in the *Asociația 'Forumul Judecătorilor din România'*³³⁵ case (AFJR case).

In preliminarily assessing the admissibility of the request, the Court of Justice rejected the claims of Romania and Poland – that intervened in the proceeding – according to which the administration of justice fell within the exclusive competence of the Member States and was therefore outside the scope of EU law. In line with what discussed in Chapter II Section II, the Court affirmed that:

“[T]he arguments of the Polish and Romanian Governments concerning the alleged lack of competence of the European Union in relation to the organisation of justice and State liability in the event of judicial error relate, in fact, to the actual scope and, therefore, to the interpretation of the provisions of EU primary law mentioned in the questions referred, that interpretation clearly falling within the jurisdiction of the Court under Article 267 TFEU. Indeed, the Court has

³³⁴ See Romanian Constitutional Court Decision No. 1519/2011 of 15 November 2011 and Decision No. 2/2012 of 11 January 2012.

³³⁵ Joined Cases C-83/19, C-127/19, C-195/19, C-291/19, C-355/19 and C-397/19, *Asociația 'Forumul Judecătorilor din România'*, ECLI:EU:C:2021:393.

*held that although the organisation of justice in the Member States falls within the competence of those Member States, they are nonetheless required, when exercising that competence, to comply with their obligations deriving from EU law*³³⁶.

Inter alia, the Court further clarified the binding nature of the obligations arising from Decision 2006/928 and, in the light of the principle of sincere cooperation, of the Commission’s report adopted on the basis of the Decision.

Subsequently, the Court provided the referring judged with a framework on the primacy of EU law. In doing so, the judgement restated the principle of the primacy of EU law over national constitutional provisions, even of a constitutional order, and reiterated that this principle does not accept any derogation as this would “*undermine the unity and effectiveness of EU law*”³³⁷. The Court reasserted that EU legislation prevails over national law irrespective of both the nature of the relevant domestic norm and the position of judicial hierarchy of the domestic court involved: in fact, the Court affirmed that the effects of the principle of the primacy of EU law are binding on all the bodies of a Member State. Hence, the AFJR judgment reconfirmed that also constitutional courts are fully obliged to respect and cannot unilaterally make exceptions to the primacy of EU law.

On the 8th of June 2021, in response to the CJEU ruling, the Romanian Constitutional Court delivered a decision which essentially deprived the European Court’s judgment of any effect. In fact, the Romanian Court relied on the identity clause to limit the primacy of EU law and prevent the judiciary from disapplying the national legislation on judicial matters³³⁸. To uphold this argument, the Court affirmed that:

*“Of the essence of the European Union is the allocation by the Member States of competences — increasing in number — with a view to achieving their common objectives, admittedly without prejudice, ultimately, by that transfer of powers, to national constitutional identity. [...] On that line of thought, the Member States retain powers which are inherent for the preservation of their constitutional identity, and the transfer of powers, as well as the rethinking, enhancement or establishment of new guidelines in the context of the competences already transferred fall within the scope of the constitutional discretion of the Member States.”*³³⁹

³³⁶ Joined Cases C-83/19, C-127/19, C-195/19, C-291/19, C-355/19 and C-397/19, *Asociația ‘Forumul Judecătorilor din România’*, ECLI:EU:C:2021:393 para. 111.

³³⁷ *Ibid*, para. 245.

³³⁸ B. SELEJAN-GUTAN, “A Tale of Primacy, part III: Game of Courts”, *VerfBlog*, 2021/11/17, available at <https://verfassungsblog.de/a-tale-of-primacy-part-iii/>.

³³⁹ Romanian Constitutional Court, Decision No 390 of 8 June 2021, para. 72.

Based on this reasoning, the Romanian Constitutional Court concluded that: *“By virtue of that constitutional identity, the Constitutional Court is empowered to ensure the primacy of the Basic Law in Romania”*³⁴⁰. Indeed, in the view of the Court, Article 4(2) TEU enshrines a limit to the process of constitutional integration within the EU, constituted by the fundamental political and constitutional structures of the Member States³⁴¹. These ideas were later reiterated in a letter addressed by the Romanian Constitutional Court to the acting minister of justice.

The view of the Romanian Constitutional Court is evidently inconsistent not only with Article 4(2) TEU, but also with the fundamental principles of the EU legal system such as the primacy of EU law and the principle of sincere cooperation. This inconsistency was scrutinised by the CJEU in its *Euro Box* ruling³⁴², where the Court rejected the position of the Romanian constitutional court restating that the primacy of EU law is in no way affected by national law, even when of a constitutional nature.

The case arose from a set of criminal proceedings in connection with which the referring judges asked whether they could, on the basis of EU law, disapply certain decisions delivered by the Romanian Constitutional Court.

Again Romania, with the support of Poland, questioned the jurisdiction of the CJEU based on the consideration, rejected by the European Court of Justice in the same way as in the *AFJR* judgement³⁴³, that the organisation of the judicial system and the decisions of National Constitutional Court were areas in which the EU had no competence. Moreover, Romania argued that, provided that EU law did not provide for any rules on the scope and the effects of national constitutional court’s decisions, the questions were not concerned with EU law but with national law. However, as clarified by the Court, the CJEU still maintained competence to interpret relevant provisions of EU law.

The Court then restated that Decision 2006/928 establish legally binding obligations on Romania and recalled its jurisprudence on the matter of the primacy of EU law. In this context, the Court argued that:

“Article 4(2) TEU provides that the Union is to respect the equality of Member States before the Treaties. However, the Union can respect such equality only if the Member States are unable,

³⁴⁰ Ibid, para. 74.

³⁴¹ Ibid, para. 75.

³⁴² Joined Cases C-357/19, C-379/19, C-547/19, C-811/19 and C-840/19, *SC Euro Box Promotion SRL*, ECLI:EU:C:2021:1034.

³⁴³ Ibid, para. 133.

*under the principle of the primacy of EU law, to rely on, as against the EU legal order, a unilateral measure, whatever its nature.”*³⁴⁴

For instance, as mentioned in Chapter II, the principle of the primacy of EU law is a necessary precondition for the implementation of the principle of equality of the Member States as it is essential to ensure that all Member States are subject to the same obligations and conditions within the EU legal framework. The court therefore concluded that by virtue of the primacy of EU law, a Member State’s reliance on rules of national law, even of a constitutional nature, cannot undermine the unity and effectiveness of EU law.

Nevertheless, the Romanian Constitutional Court, in response to the CJEU ruling, issued on the 23rd of December 2021 a press release³⁴⁵ in which once again it refused to conform to the Court’s interpretation of the primacy of EU law. In this occasion, the Romanian Court asserted that: *“From a practical point of view, this judgment can only produce effects after the revision of the Constitution in force, which, however, cannot be done by operation of law, but only on the initiative of certain subjects of law, in compliance with the procedure and under the conditions laid down in the Romanian Constitution itself.”*

It is true that press-release can be considered to some extent harmless as they do not constitute binding rulings of the Constitutional Court, nor have legal force, nor reflect the official position of the whole Court³⁴⁶. However, it demonstrates the willingness of the Constitutional Court of Romania not to adhere to the jurisprudence of the CJEU on Article 4(2) TEU.

³⁴⁴ Joined Cases C-357/19, C-379/19, C-547/19, C-811/19 and C-840/19, *Euro Box Promotion and others* [2021] ECLI:EU:C:2021:1034.

³⁴⁵ Available at <https://www.ccr.ro/en/press-release-23-december-2021/>.

³⁴⁶ B. Selejan-Gutan, “Who’s Afraid of the „Big Bad Court”?”, *VerfBlog*, 2022/1/10, <https://verfassungsblog.de/whos-afraid-of-the-big-bad-court/>

VII. Conclusions

Autocratic governments in Hungary, Poland and Romania, with the loyal collaboration of their Constitutional Courts, have relied on Article 4(2) TEU to challenge the primacy of EU law with respect to specific pieces of EU legislation or to deprive of effects rulings of the CJEU which found them in breach of obligations deriving from the EU legal framework. Indeed, by grabbing on to the concept of national constitutional identity, they have tried to shield from the EU's interference national legislations endangering the independence of the judiciary or democracy in general, and to retract the terms of their participation to the EU as to ensure themselves with a *carte blanche* to disregard EU law on occasion.

The CJEU has consistently rejected this interpretation of the identity clause, denying the possibility that Article 4(2) TEU constituted an express exception to the principle of the absolute primacy of EU law. As mentioned at the beginning of the Chapter, this is the only reading of the provision under scrutiny that ensures the equality of the Member States, guarantees the full implementation of the principle of legality and, as made evident by the case law analysed in this Chapter, prevents the abusive exploitation of the clause as a trump card not to comply with EU law. The primacy of EU law does not accept any derogation: EU legislation is to prevail over national law irrespective not only of the nature of the relevant domestic norm, but also the position of judicial hierarchy of the relevant domestic court. In the same way in which national constitutional law cannot prevail over any piece of EU legislation, Constitutional Courts cannot claim exclusive jurisdiction on constitutional matters and are conversely always subject to the rulings of the CJEU.

Furthermore, the CJEU has clarified that Member States cannot legitimately ground a violation of the principles enshrined in Article 2 TEU, included the principle of the rule of law, on Article 4(2) TEU: in fact, these principles constitute the identity of the European Union and, as such, are common to all the Member States. National constitutional identity cannot therefore be invoked to justify a degradation of the rule of law at the national level.

Member States cannot justify a violation of the Union's common principles and values by the expression of a national identity if such a violation results in the deterioration of the European identity: hence, a referral to Article 4(2) TEU is only applicable in so far as a Member State respects the values enshrined in Article 2 TEU³⁴⁷.

In addition, as recognised by AG Maduro:

³⁴⁷ Ibid, recital M.

“Respect owed to the constitutional identity of the Member States cannot be understood as an absolute obligation to defer to all national constitutional rules. [...] Just as Community law takes the national constitutional identity of the Member States into consideration, national constitutional law must be adapted to the requirements of the Community legal order”³⁴⁸.

The national identity of the Member States cannot be understood and interpreted in isolation from the EU legal framework, mostly when the fundamental principles and obligations the Member States have committed to by adhering to the European Union are taken into account. It is therefore evident that justifying restrictions to democratic values on the basis of Article 4(2) TEU is illegitimate.

³⁴⁸ Opinion of Advocate General Poiares Maduro in Case C-213/07, 8 October 2008, para 3.

IV. National identity and fundamental rights. A case-study: the Taricco saga

I. Introduction

A remarkable case in which national identity and Article 4(2) TEU were taken into account is that of the so-called Taricco saga.

On the one hand, while not all scholars agree on this, it can be argued that the case represented a virtuous example of cooperative dialogue over the matter of national identity between a national constitutional court, the Italian Corte Costituzionale, and the European Court of Justice. In fact, both Courts took a cooperative stance rather than engaging in an open conflict by on the one side supporting an absolute identity claim or challenging the primacy of EU law, and, on the other side, disregarding national concerns as to the respect, in the implementation of EU law, of fundamental constitutional provisions.

On the other hand, on the basis of the reasonings of the Italian Constitutional Court and the CJEU, it is possible to make some observations as to the relationship between the concepts of national identity and that of common constitutional traditions, and as to how those two concepts can differently be raised in the context of claims relating to the protection of fundamental rights.

Before analysing in detail the exchange of decisions of the CJEU and of the Italian Constitutional Court, some preliminary considerations on the matter of the system of protection of fundamental rights in the EU will be carried out. This will be followed by an extensive study of the *Taricco I* decision³⁴⁹, the subsequent order of reference for a preliminary ruling of the Italian Constitutional Court³⁵⁰, the ruling delivered in response to this request by the CJEU³⁵¹ and the final decision of the Corte Costituzionale³⁵², which ended the Taricco saga. Finally, some comments on significant and often controverted points of those rulings will be addressed.

³⁴⁹ Case C-105/14, *Ivo Taricco and others*, ECLI:EU:C:2015:555.

³⁵⁰ Italian Constitutional Court, Order no. 24/2017.

³⁵¹ Case C-42/17 *M.A.S. and M.B.* ECLI:EU:C:2017:936.

³⁵² Italian Constitutional Court Decision no. 115/2018.

II. Preliminary observations: fundamental rights in EU law

As a result of the development of EU law on the matter of fundamental rights, this subject is now regulated not only at the national level by the Member States' constitutions, but also by EU law, most notably by the European Union's Charter of Fundamental Rights (EUCFR).

According to Article 51 of the EU Charter, the Charter binds all the institutions and bodies of the Union and the Member States when they are implementing Union law to respect the principles enshrined therein. More in detail, the scope of application of the EUCFR and, accordingly, the extent of the jurisdiction of the CJEU are not limited to the European Institutions, which are bound by the Charter irrespective of whether or not they act within the scope of EU law³⁵³, but also cover the actions undertaken by the Member States in the implementation of EU law. The Court of Justice has considered the Member States to be "implementing" EU law in a broad set of scenarios: Member States are bound by the EU Charter not only when implementing or giving effect to a piece of EU legislation, but also when limiting one of the rights granted by the Treaties³⁵⁴, when exercising a power reserved to them in a piece of statutory legislation³⁵⁵, but also when they act under an express mandate contained in a rule of EU law and, accordingly, their action has a strong connection with European interests such as VAT-related matters³⁵⁶.

As argued by Spaventa³⁵⁷, the protection of fundamental rights at the EU level by the CJEU is quite conflicted: on the one hand, the level of protection afforded by EU law is not always accepted as sufficient and, on the other hand, the centralization of the protection of fundamental rights poses a threat to constitutional diversity. As a matter of facts, it enables the Court of Justice to syndicate on the balancing of conflicting rights carried out at the national level, which reflects the constitutional priorities of a given country. Additionally, this balancing activity also reflects a democratic discourse and compromise process, both of which have so far been notably lacking from the EU constitutionalisation process.

³⁵³ See Joined Cases C-8/15 and 10/15 P *Ledra Advertising*, EU:C:2016:701.

³⁵⁴ Case C-390/12 *Pfleger*, EU:C:2014:281; C-182/15 *Petruhhin*, EU:C:2016:630; C-650/13 *Delvigne*, EU:C:2015:648; and C-221/17 *Tjebbes*, EU:C:2019:189.

³⁵⁵ Joined Cases C-411/10 and C-493/10 *NS v Secretary of State for the Home Department*, EU:C:2011:13905.

³⁵⁶ Case C-617/10 *Åklagaren v Hans Åkerberg Fransson* EU:C:2013:105.

³⁵⁷ E. SPAVENTA, 'Should we "harmonize" fundamental rights in the EU? Some reflections about minimum standards and fundamental rights protection in the EU composite constitutional system', *Common Market Law Review*, Vol. 55 Issue 4, 2018, pp. 997-1023, available at <https://kluwerlawonline.com/journalarticle/Common+Market+Law+Review/55.4/COLA2018091>.

What is more, the CJEU has consistently restated an absolute conception of the primacy of EU law also to this regard. More specifically, in its decision in *Melloni*³⁵⁸, the Court has clarified that also higher standards of protection ensured by national constitutional law, in principle recognised by Article 53 of the EUCFR³⁵⁹, cannot be applied to EU law when EU law, as interpreted by the Court of Justice, has fully determined how Member States must act. In such cases, the Charter supersedes national constitutional law, which cannot be used in a way that undermines the unity and the effectiveness of EU law. By contrast, as recognised by the Court in its judgement in *Åkerberg Fransson*³⁶⁰, in cases in which EU law has not entirely regulated the matter at issue, Member States retain some discretion, and their internal legal systems may take precedence³⁶¹.

Yet, similarly to what analysed in Chapter II with respect to the identity clause, not all Member States accept this absolute understanding of the primacy of EU law with respect to fundamental rights³⁶².

Notably, the Italian Constitutional Court has to this respect formulated the so-called *controlimiti* (counter limits) doctrine, according to which EU law is entitled to prevail upon inconsistent national law as long as EU law does not infringe upon core fundamental principles and inalienable human rights provided for in the Italian Constitution. Conversely, should the latter be infringed, the Constitutional Court could prevent EU law from having effect into the domestic legal order by invalidating the Law ratifying EU Treaties in the part empowering EU law to have effect into the domestic legal order. As a result of the implementation of this doctrine, a piece of EU law that violates fundamental principles and rights of the Italian Constitution would be rendered inapplicable in the Italian legal system³⁶³.

³⁵⁸ Case C-399/11 *Stefano Melloni v Ministero Fiscal* ECLI:EU:C:2013:107.

³⁵⁹ “Nothing in this Charter shall be interpreted as restricting or adversely affecting human rights and fundamental freedoms as recognised, in their respective fields of application, [...] by the Member States’ constitutions.” See for an extensive analysis of the provision B. DE WITTE, “Article 53 - Level of Protection” in S. PEERS, T. HERVEY, J. KENNER, A. WARD (eds.) *European Charter of Fundamental Rights*, 2021, pp. 1531-1532.

³⁶⁰ Case C-617/10 *Åklagaren v Hans Åkerberg Fransson* EU:C:2013:105.

³⁶¹ For an extensive analysis of this issue see D. SARMIENTO, 'Who's afraid of the Charter? The Court of Justice, national courts and the new framework of fundamental rights protection in Europe', *Common Market Law Review*, Vol. 50 Issue No. 5, 2013 pp. 1267-1304, available at <https://kluwerlawonline.com/journalarticle/Common+Market+Law+Review/50.5/COLA2013132>.

³⁶² This was the case e.g. of the German Federal Court. However, in its Decision in *Solange II* (BVerfGE 73, 339, 22 October 1986), the FCC found that, due to the developments at the EU level of human rights law, its preoccupation on the matter of the protection of Fundamental Rights in the enforcement of EU law had disappeared.

³⁶³ A. BERNARDI, “I Controlimiti: Primate Delle Norme Europee E Difesa Dei Principi Costituzionali”, Naples: Jovene Editore, 2017.

The Court elaborated the *controlimiti* doctrine in its Judgement in *Frontini*³⁶⁴, and then confirmed it in the *Granital* judgment³⁶⁵ and in the *Fragd* judgment³⁶⁶. In particular, in *Granital*, the Court recognised the European and the Italian legal orders as autonomous systems (so-called dualistic theory). Accordingly, the Court affirmed that EU law could not enter the Italian legal system but was valid and effective according to specific rules in its scope of application³⁶⁷. The Court further acknowledged that, by adhering to the EU, the Italian legislature admitted that EU law could be enforced in the Italian legal system on the ground of the Treaty, and according to the allocation of competence provided therein. Furthermore, the Court affirmed that, in case of antinomy between EU law and Italian law, the allocation of competence should be used as a diriment criterion – i.e. if the matter falls within the competence of the EU, Italian law must be disapplied to the specific case. Finally, the Italian Constitutional Court restated that, as already affirmed in *Frontini*, it retained the power to review law ratifying EU Treaties in case the application of EU law resulted in an infringement of the fundamental principles and the inalienable rights provided for in the Italian Constitution.

While the absolute primacy of EU law has never been questioned by the CJEU, not even with respect to fundamental rights' protection, the Court has at times admitted that national conceptions of fundamental rights might find place in the EU legal framework.

Significantly, the notions of national identity and fundamental rights can be regarded to as a Venn diagram in which some components of the former notion also belong to the set of elements that constitute the latter concept. In fact, fundamental rights might be regarded to by Member States as components of their national identity. Thus, Member States have relied on both Article 4(2) TEU and on solely fundamental-rights-related arguments to support their claims as to the recognition within the EU legal system of specific understanding of fundamental rights.

With respect to Article 4(2) TEU, the CJEU admitted that, as analysed in Chapters I and II, specific understandings of fundamental rights could be afforded protection on the ground of the safeguard of national identity³⁶⁸. In these cases, the Court recognised that, while the EU does have its own system

³⁶⁴ Italian Constitutional Court, Decision No. 183/1973.

³⁶⁵ Italian Constitutional Court, Decision No. 170/84.

³⁶⁶ Italian Constitutional Court, Decision No. 232/1989.

³⁶⁷ Italian Constitutional Court, Decision no. 170/1984, para. 4.

³⁶⁸ See Case C-36/02 *Omega Spielhallen- und Automatenaufstellungs-GmbH v Oberbürgermeisterin der Bundesstadt Bonn* [2004] ECLI:EU:C:2004:614; Case C-208/09, *Ilonka Sayn-Wittgenstein v. Landeshauptmann von Wien* [2010] ECLI:EU:C:2010:806; Case C-438/14, *Bogendorff von Wolffersdorff*,

of protection of fundamental rights, Member States may conceive or protect differently the same fundamental rights, or establish, within their constitutions, additional rights. Those rights might be regarded by Member States as components of their constitutional identity. Hence, national identity has been in various occasions relied on to ensure, in the implementation of EU law, the respect of fundamental rights amounting to constitutional *essentialia*. In those cases, the Court admitted that Member States could derogate from the fundamental economic freedoms provided by the treaties, subject to the verification of the proportionality of the adopted measures.

Moreover, as it is the case in the so-called *Taricco II* judgement³⁶⁹, the concept of national constitutional traditions (CCT) has been employed to integrate national constitutional provisions on the matter of fundamental rights in EU law. In the first place, it should be recollected that, as recognised by the CJEU in the already mentioned *Internationale Handelsgesellschaft* case:

*“Respect for fundamental rights forms an integral part of the general principles of law protected by the court of justice. The protection of such rights, whilst inspired by the constitutional traditions common to the member states, must be ensured within the framework of the structure and objectives of the community .”*³⁷⁰

The continued relevance of these common constitutional traditions is ensured even after the adoption of the EUCFR; in fact, Article 6(3) TEU provides that: *“Fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union’s law.”*

Importantly, Article 6(3) TEU allows the Court of Justice to go beyond the rights protected by the EU Charter³⁷¹. Moreover, general principles, such as the common constitutional traditions, may be applied in circumstances beyond the scope of the analogous rights set down in the Charter. A general concept, as inspired by CCTs, is therefore capable of having a scope or expansion potential that is

ECLI:EU:C:2016:401; Case C-673/16, *Relu Adrian Coman e a. v. Inspectoratul General pentru Imigrări and Ministerul Afacerilor Interne* [2018] ECLI:EU:C:2018:385.

³⁶⁹ Case C-42/17 *M.A.S. and M.B.* ECLI:EU:C:2017:936.

³⁷⁰ Case 11/70 *Internationale Handelsgesellschaft*, ECLI:EU:C:1970:114, para 4

³⁷¹ See, in different contexts, Case C-166/13 *Mukarubega*, EU:C:2014:2336, paras 44 and 45 and Case C-230/18 *PI v Landespolizeidirektion Tirol*, EU:C:2019:383.

wider than the EU Charter³⁷², and of integrating within EU law national perspectives on fundamental rights³⁷³.

As evidenced by the Taricco saga, the concepts of national identity and of common constitutional traditions are to some extent related: both can in fact be used to uphold a claim for the protection of fundamental constitutional rights³⁷⁴, but with substantial differences. For instance, as argued by Fichera and Pollicino³⁷⁵, the constitutional tradition language is, by definition, pluralistic in nature; conversely, the reference to constitutional identity, by design, is not.

III. The Taricco saga

A. The Court of Justice *Taricco I* ruling

The first preliminary reference to the CJEU of the Taricco saga arose from the Court of Cuneo's investigations over some VAT frauds allegedly committed by Mr. Taricco and other individuals between 2005 and 2009, the prosecution of which was however likely to be impeded by the expiration of the limitation period as provided under Italian law.

In the view of the Judge for Preliminary Hearing, the involvement of very complex investigations in criminal proceedings related to tax evasion and the time limitation for their prosecution as provided by Italian law, determined that, in that type of case, a *de facto* impunity was a normal occurrence. Hence, the referring judge took the view that, by introducing a *de facto* impunity for the commission of VAT fraud, the Italian legislation indirectly allowed for an infringement of Article 101 TFEU, introduced a form of aid prohibited by Article 107 TFEU and a *de facto* VAT exemption and, finally,

³⁷² See e.g. CJEU, Case C 279/09, *DEB Deutsche Energiehandels und Beratungsgesellschaft mbH v. Bundesrepublik Deutschland*, ECLI:EU:C:2010:811 as analysed in M. FICHERA, O. POLLICINO, "The Dialects between Constitutional Identity and Common Constitutional Traditions: Which Language for Cooperative Constitutionalism in Europe," in *German Law Journal*, Vol. 20, no. 8 (2019), pp. 1097-1118, available at <https://heinonline.org/HOL/P?h=hein.journals/germlajo20&i=1093>.

³⁷³ See C-42/17 *M.A.S. and M.B.* ECLI:EU:C:2017:936.

³⁷⁴ With respect to Article 4(2) TEU, see all the case-law analysed in Chapter II, section IV B; with respect to the common constitutional traditions, see e.g. the response of the CJEU to the Italian Constitutional Court in the Taricco saga, case C-42/17 *M.A.S. and M.B.* ECLI:EU:C:2017:936.

³⁷⁵ See e.g. Case C 279/09, *DEB Deutsche Energiehandels und Beratungsgesellschaft mbH v. Bundesrepublik Deutschland*, ECLI:EU:C:2010:811. See also, for an extensive analysis of the matter, M. FICHERA, O. POLLICINO, 2019.

led to the breach of the principle of sound public finances laid down by Article 119 TFEU. Therefore, the Judge for Preliminary Hearing questioned the compatibility of the Italian provisions with EU law.

As argued by Bassini and Pollicino³⁷⁶, the question referred by the Italian judge was quite speculative: in reality, the objective of the reference to the CJEU was to obtain the authorization from the CJEU to prosecute the case irrespective of the time-barring effects. Basing in particular its judgement on the interpretation of Article 325 TFEU³⁷⁷, the CJEU, in its decision *Taricco I*³⁷⁸, delivered a decision which substantially provided the Italian court with the authorization to proceed despite the time limitation otherwise applicable.

The Court dismissed the first, the second and the fourth question arguing that the provision at stake did not, respectively, amount to an incentive to collusive conducts between undertaking, nor to a form of state aid, nor to a violation of the principle according to which Member States must ensure that their public finances are sound.

By contrast, the Court carried out an extensive analysis in relation to the third question. In this context, the Court recalled that, in relation to VAT, it followed from Directive 2006/112, read in conjunction with Article 4(3) TEU, that “*Member States are not only under a general obligation to take all legislative and administrative measures appropriate for ensuring collection of all the VAT due on their territory, but must also fight against tax evasion*”³⁷⁹. In addition, the CJEU argued that Article 325 TFEU obliged the Member States of the EU to defend the financial interests of the Union with effective and deterrent measures, and in the same way as they would protect their own financial interests. Although the Member States are free to determine the applicable penalties, in the view of the Court criminal penalties may be essential to combat in an effective and dissuasive manner certain serious cases of VAT evasion³⁸⁰. The Court additionally recalled that, under Article 2(1) of the PFI Convention, the Member States must ensure that conduct constituting fraud affecting the European

³⁷⁶ M. BASSINI, O. POLLICINO: “The Taricco Decision: A Last Attempt to Avoid a Clash between EU Law and the Italian Constitution”, *VerfBlog*, 2017/1/28, available at DOI: 10.17176/20170130-094500.

³⁷⁷ Article 325(1) and (2) TFEU: “The Union and the Member States shall counter fraud and any other illegal activities affecting the financial interests of the Union through measures to be taken in accordance with this Article, which shall act as a deterrent and be such as to afford effective protection in the Member States, and in all the Union's institutions, bodies, offices and agencies.

Member States shall take the same measures to counter fraud affecting the financial interests of the Union as they take to counter fraud affecting their own financial interests.”

³⁷⁸ Case C-105/14, *Ivo Taricco and others*, ECLI:EU:C:2015:555, para. 25.

³⁷⁹ *Ibid*, para. 36.

³⁸⁰ *Ibid*, para. 39.

Union's financial interests is punishable by effective, proportionate and dissuasive criminal penalties, including, at least in cases of serious fraud, penalties involving deprivation of liberty³⁸¹.

The Court concluded that national provisions on the interruption of the limitation period the application of which results in a considerable number of cases in impunity for the commission of serious fraud, could not be regarded to as effective and dissuasive measures to combat fraud and any other illegal activity affecting the financial interests of the European Union. Such national provisions are accordingly incompatible with EU law, with the consequence that they must be disapplied in criminal proceedings by national judges.

Moreover, the CJEU affirmed that the national rule on the statute of limitations was also incompatible with the principle of equivalence enshrined in Article 352(2) TFEU inasmuch as it did not apply to similar cases of VAT fraud affecting Italy's own financial interests.

Importantly, the CJEU excluded that the disapplication of limitation period provisions would amount to a violation of the principle of legality, enshrined in Article 49 of the EU Charter of Fundamental Rights. In the view of the Court, based also on the case-law of the European Court of Human Rights, statute of limitations were merely procedural matters, as such outside the scope of the principle of legality and the principle of non-retroactivity of criminal law³⁸².

Nevertheless, the CJEU affirmed that the national courts should also make sure that the fundamental rights of the people involved were maintained when deciding to disregard the relevant national provisions. In fact, in that situation, sanctions may be imposed on those individuals that, most likely, would not have been imposed if those national law requirements had been enforced (see paras. 53 and 55).

In conclusion, the CJEU affirmed that:

“If the national court concludes that the application of the national provisions in relation to the interruption of the limitation period has the effect that, in a considerable number of cases, the commission of serious fraud will escape criminal punishment, since the offences will usually be time-barred before the criminal penalty laid down by law can be imposed by a final judicial decision, it would be necessary to find that the measures laid down by national law to combat fraud and any other illegal activity affecting the financial interests of the European Union could not be regarded as being effective and dissuasive, which would be incompatible with Article

³⁸¹ Ibid, para. 40.

³⁸² Ibid, paras 54-56.

325(1) TFEU, Article 2(1) of the PFI Convention as well as Directive 2006/112, read in conjunction with Article 4(3) TEU.”

In addition to raising a wide range of uncertainty as to the implications of the decision³⁸³, this conclusion was extremely problematic with respect to the conception and interpretation of the principle of legality under Italian law.

On the one hand in fact, as argued by Manacorda³⁸⁴, the Court introduced a set of vague criteria for the national judge to evaluate the appropriateness of disapplying national law. For instance, it is not clear what a “considerable number of cases” amounts to, nor how the national judge should reach this determination. Hence, the decision risked endowing national judges with powers beyond their traditional role.

On the other hand, according to a consistent and well-settled interpretation of Article 25(2) of the Italian Constitution³⁸⁵, the Italian Constitutional Court considered criminal procedural aspects such as limitation periods to be covered by the principle of legality³⁸⁶. Hence, compliance with the ruling of the CJEU would result, from the perspective of Italian law, in a violation of the prohibition of retroactive application *in peius* of criminal law.

Eventually, the different understandings of the CJEU and of the Italian Constitutional Court and, arguably, the different consideration³⁸⁷ they attributed to the principle of legality resulted in a potential conflict between EU law and the Italian Constitution: on the one hand, if domestic Courts refrained from implementing the *Taricco* judgement, the primacy of EU law would be undermined. On the other hand, doing otherwise would result in a violation of a fundamental principle of the Italian Constitution, namely the prohibition of retroactive application of criminal law *in malam partem*, which constitutes a component of Italy’s constitutional identity³⁸⁸.

³⁸³ The Court did not consider the issue of the precision of the law, which is an aspect of the principle of legality, nor specified whether in cases such as the one under scrutiny national courts should apply longer limitation periods or entirely disregard limitation periods.

³⁸⁴ S. MANACORDA, “Le garanzie penalistiche nei rapporti con il diritto dell’Unione” in A. BERNARDI eds., *I Controlimiti. Primato Delle Norme Europee E Difesa Dei Principi Costituzionali*, Jovene editore, 2017.

³⁸⁵ “No punishment may be inflicted except by virtue of a law in force at the time the offence was committed.”

³⁸⁶ See e.g. Italian Constitutional Court Decision n. 143 del 2014.

³⁸⁷ As argued by Sarmiento, it could be held that the Court of Justice, in its first ruling, did not extensively think through the outcomes of its decision in terms of consistency with the principle of legality. See D. SARMIENTO, “To bow at the rhythm of an Italian tune”, in *Despite our differences*, 2017, available at <https://despiteourdifferencesblog.wordpress.com/2017/12/05/to-bow-at-the-rhythm-of-an-italian-tune/>.

³⁸⁸ This was later recognised by the Italian Consulta in its order of reference to the CJEU.

As a result, a few days after the CJEU delivered its decision, the Italian Constitutional Court was asked to rule on whether the doctrine of counter-limits impeded national courts from enforcing the *Taricco I* ruling.

As clarified in Section II of this Chapter, the Italian Constitutional Court admits that European law and decisions of the CJEU may not only prevail over national legislation, but also derogate from the Constitution. Nevertheless, when the implementation of EU law results in the violation of the fundamental principles of the Constitution, the Constitutional Court claims to maintain jurisdiction and competence to intervene in protection of the core principles of the Italian constitution³⁸⁹.

Crucially, the Italian Constitutional Court made the decision to begin a second preliminary ruling to the CJEU in order to avoid having to invoke its controlimiti jurisprudence, thereby manifesting the willingness to favour cooperation and dialogue with the European counterpart.

B. The Italian Constitutional Court’s Reference for a preliminary ruling, order 24/2017

In response to the CJEU’s decision in *Taricco*, and after many constitutional claims raised by various bodies of the Italian judiciary, the Italian Constitutional Court requested a preliminary reference to the European Court of Justice with the objective of obtaining an interpretation of the principles established by the CJEU in its decision that was compatible with the Italian understanding of the principle of legality.

In its order of reference³⁹⁰ the Corte Costituzionale in the first place recalled its jurisprudence on the matter of the primacy of EU law. For instance, the Court recollected that, according to its jurisprudence, EU law could be afforded primacy on the basis of Article 11 of the Italian Constitution inasmuch as this would not result in a violation of the supreme principles and of fundamental rights established by the Italian Constitution. The Italian Constitutional Court also recognised that the principle of legality, provided for in Article 25 of the Italian Constitution and according to which criminal law provisions must be determinate and non-retroactive, constituted a fundamental constitutional principle in the Italian legal framework and a component of the “*constitutional identity of the Republic of Italy*”³⁹¹. Accordingly, the Constitutional Court clarified that, should Article 345

³⁸⁹ P. FARAGUNA: “The Italian Constitutional Court in re *Taricco*: “Gauweiler in the Roman Campagna””, *VerfBlog*, 2017/1/31, available at DOI: [10.17176/20170131-132708](https://doi.org/10.17176/20170131-132708).

³⁹⁰ Italian Constitutional Court, Order no. 24/2017.

³⁹¹ *Ibid*, para. 8.

TFEU as interpreted by the CJEU result in an infringement of this understanding of the principle of legality, it would have the duty to prevent its incorporation in the Italian legal system³⁹².

Subsequently, the Italian Consulta highlighted that under Italian law prescription provisions are conceived as substantial matters as they affect criminal liability. Accordingly, the Italian Constitutional Court pointed out that the interpretation of the CJEU of Article 325 TFEU violated this understanding of the principle of legality. The Constitutional Court also recalled that there are various understandings of the principle of legality in the EU, and that the EU had in many occasions recognised that also specific national understandings of shared principles were worth of protection³⁹³. In the view of the Italian Consulta, even if the majority of the Member States regarded to the statute of limitations as a merely procedural issue that has no bearing on the concept of legality, neither Italy nor the European Union were bound by this relatively widespread viewpoint: the application of EU legislation and the statute of limitations were deemed by the Italian Court as totally unrelated matters.

To this regard – i.e. to justify the claim for the respect of the Italian specific understanding of the principle of legality – the Italian Constitutional Court later in its ruling highlighted three points.

In the first place, the Constitutional Court concluded that there was no need to harmonise the pertinent rules, and Member States were free to treat the statute of limitations as a matter of procedural or substantive criminal law. On this matter, importantly, the Court affirmed that:

“The legitimation for (Article 11 of the Italian Constitution) and the very force of unity within a legal order characterised by pluralism (Article 2 TEU) result from its capacity to embrace the minimum level of diversity that is necessary in order to preserve the national identity inherent within the fundamental structure of the Member State (Article 4(2) TEU). Otherwise, the European Treaties would seek, in a contradictory fashion, to undermine the very constitutional foundation out of which they were born by the wishes of the Member States.”³⁹⁴

In the second place, the Court suggests that ensuring the respect for the national conception of the principle of legality was in the aims of the CJEU itself when delivering the *Taricco I* decision. To uphold this argument, the Consulta affirmed that the European judgement did not evaluate whether the regulation was compatible with the fundamental principles of the Italian constitutional system but appeared to have explicitly outsourced this job to the competent national bodies. In particular, the Court referred to paragraph 53 and 55 of the *Taricco I* judgment, according to which the

³⁹² Ibid, para. 2.

³⁹³ E.g. Case C-36/02 *Omega Spielhallen- und Automatenaufstellungs-GmbH v Oberbürgermeisterin der Bundesstadt Bonn* ECLI:EU:C:2004:614.

³⁹⁴ Italian Constitutional Court Order no. 24/2017, para. 6 in its English translation available at https://www.cortecostituzionale.it/documenti/download/doc/recent_judgments/O_24_2017.pdf.

disapplication of the national legislation in question should have been subject to the confirmation of the respect of the accused's fundamental rights by national courts in the specific case. The Italian Consulta therefore asked the Court of Justice to confirm that the Taricco rule was only applicable if consistent with the Member State's constitutional identity, a determination deferred by the CJEU to the responsibility of the State's competent authorities. To this regard, the Italian Constitutional Court affirmed that:

*“Naturally, the Court of Justice is not exempt from the task of defining the scope of EU law and cannot be further encumbered by the requirement of assessing in detail whether it is compatible with the constitutional identity of each Member State. It is therefore reasonable to expect that, in cases in which such an assessment is not immediately apparent, the European court will establish the meaning of EU law, whilst leaving to the national authorities the ultimate assessment concerning compliance with the supreme principles of the national order.”*³⁹⁵

In the third place, the Court highlighted that the Italian understanding of limitation periods as substantive matters resulted in a higher level of protection of the rights of accused persons which should be safeguarded by EU law itself, pursuant to Article 53 of the Charter. In the view of the Court, the situation under scrutiny was different from that of the *Melloni* ruling: in the latter, the European Court recognised that no additional requirements for the execution of an EAW may be imposed on the ground of a Member State's constitution in addition to those unanimously agreed upon by all Member States. In this case, any alternative conclusion would have limited the application of Framework Decision 2009/299/JHA of February 26, 2009, and accordingly breached the unity of EU law. By contrast, in the view of the Italian Constitutional Court, in the Taricco case the primacy of EU law was not at stake: according to the Court, it was not the rule laid down by the judgment in the Taricco case inferred from Article 325 TFEU to be questioned; rather, the existence of a constitutional bar on its direct application by the courts was identified. Hence, the Constitutional Court took the view that the higher standard of protection of the principle of legality provided for by Italian law should be enforced. It is important to highlight that the Court, rather than threatening to implement its *controlimiti* doctrine, argues against the existence of a breach of the principle of the primacy of EU law. Indeed, it affirms that:

“[W]hilst the aim of the interpretation set out above is to preserve the constitutional identity of the Republic of Italy, it does not however compromise the requirements of uniform application of

³⁹⁵ Ibid, para. 6.

*EU law and is thus a solution that complies with the principle of loyal cooperation and proportionality.*³⁹⁶

In addition to those considerations as to why the principle of legality as interpreted by the Italian Constitutional Court should be, in the cases before the Italian judiciary, respected, the Court analysed the compatibility of the Taricco rule with this understanding of the principle of legality.

In particular, the Consulta highlighted the need to verify on the one hand the foreseeability of the disapplication of the Italian rules on the statute of limitation and, on the other hand, the consistency of the rule with the reservation to primary legislation and of the principle of legal certainty.

With respect to the first issue, the Constitutional Court excluded that an individual could reasonably foresee, on the basis of the legal framework in place at the time when the offence was committed, that EU law, and in particular Article 325 TFEU, would have required the courts to disregard limitation rules in the event that the conditions laid down by the Court of Justice in the Taricco case obtained.

With respect to the second issue, the Italian Court highlighted that the criteria for the disapplication of national law set forth by the ECJ, notably that of a “considerable number of cases”, were by their very nature ambiguous and left too much discretion to judges. In the view of the Court: *“it is not possible for EU law to set an objective as to the result for the criminal courts and for the courts to be required to fulfil it using any means available within the legal order, without any legislation laying down detailed definitions of factual circumstances and prerequisites”*³⁹⁷.

Finally, the Corte Costituzionale considered that, irrespective of whether procedural matters were considered as within or outside the scope of the principle of legality, the judgment in *Taricco I* did not take sufficient account of another aspect inherent to the principle of legality apart from that of non-retroactivity, namely the requirement the regime of punishment must be defined by provisions of law – not by a judicial decision – that are sufficiently precise. Crucially, the Court highlighted that this principle was: *“a requirement common to the constitutional traditions of the Member States, which also features within the ECHR system of protection and as such encapsulates a general principle of EU law”*³⁹⁸. In the view of the Italian Constitutional Court, even though, according to the Court of Justice's opinion, Article 325 TFEU stated that a clear and unconditional outcome must be obtained, it did not sufficiently specify the steps the criminal courts must take to accomplish that

³⁹⁶ Ibid, para. 8.

³⁹⁷ Ibid, para. 5.

³⁹⁸ Ibid, para. 9.

goal. This might potentially have the effect of permitting judges to ignore any normative aspect of criminal liability or to the trial whenever it could be deemed that they constitute a barrier to the punishment of the offence. As affirmed by the Italian Consulta, this result appeared to violate the principle of legality outlined in Article 49 of the Nice Charter and would go beyond the bounds of what can be done with judicial authority in a state that upholds the rule of law, at least in the civil law tradition.

In conclusion, the Italian Constitutional Court referred three questions to the CJEU. To begin with, the Constitutional Court asked the European Court of Justice whether Article 325(1) and (2) TFEU were to be interpreted as requesting criminal courts to disregard national limitation periods rules even in cases where (1) a sufficiently precise legal basis for setting aside such legislation lacks and when (2) limitation is part of the substantive criminal law in the Member State's legal system and is as such subject to the principle of legality. Finally, the Italian Court interrogated the CJEU as to whether the judgment in *Taricco I* was to be interpreted as requiring the criminal courts to disregard national legislation concerning limitation periods even when the setting aside such legislation would contrast with the supreme principles or with the inalienable human rights recognised under the Constitution of the Member State.

As argued by Pollicino and Amalfitano³⁹⁹, while the order of the Italian Constitutional Court did not specifically take position in these respects, it is quite evident that the order is a final, rather polemical cooperation effort to avoid a *de plano* decision that would apply the counter-limits doctrine and prevent the *Taricco* decision from affecting the basic principle of legality. Indeed, it can be argued that the reference is a call for "revisitation" rather than for clarifications and is the final effort to prevent a constitutional clash between the two legal systems.

C. The answer of the Court of Justice in “*Taricco II*”

In response to the request for a preliminary ruling on behalf of the Italian Constitutional Court, the CJEU delivered a conciliatory decision⁴⁰⁰ in which it accepted that, with the view of ensuring respect to the principle of legality as understood by the Corte Costituzionale, the national judges could apply

³⁹⁹ C. AMALFITANO, O. POLLICINO, “Two Courts, two Languages? The *Taricco* Saga Ends on a Worrying Note”, *VerfBlog*, 2018/6/05, available at [10.17176/20180605-204156-0](https://doi.org/10.17176/20180605-204156-0).

⁴⁰⁰ Case C-42/17 *M.A.S. and M.B.* ECLI:EU:C:2017:936.

the Italian provisions concerning the statute of limitations even if this would result in a violation of the Member States' duty to protect the financial interests of the Union.

In this ruling, the CJEU addressed together the first two questions referred by the Consulta and, on the ground of the decision with respect to them, dismissed the third question.

In the first place, the CJEU recalled its ruling in *Taricco I* as to the interpretation of Article 325(1) and (2) TFEU and reaffirmed that Member States had an obligation to adopt effective measures to combat crimes affecting the financial interests of the EU and that, in doing so, Member States should adopt the same measures used to fight crimes affecting their own financial interests. This obligation, as already previously recognised by the Court, also covered statute of limitations provisions: should national law on the matter allow for impunity, the obligations arising from Article 325 TFEU would be breached.

Secondly, the Court affirmed that, in light of the factors mentioned by the Court in paragraph 58 of the *Taricco* ruling, it is principally the responsibility of the national legislature to establish limiting restrictions that permit compliance with the requirements under Article 325 TFEU.

In the third place, the CJEU highlighted that the protection of the Union's financial interests with respect to the collection of VAT revenues was a competence shared by the EU and the Member States. Moreover, the Court pointed out that, at the time of the main proceeding, no harmonization of procedures and statute of limitations provisions had been carried out. Accordingly, the European Court of Justice affirmed that the Italian legislature and judiciary could have legitimately conceived limitations period as a matter of substantial criminal law. Through this consideration, the Court admitted that, in absence of harmonization at the European level, Member States were allowed to exercise a certain degree of discretion. The Court further affirmed that national authorities and courts are free to uphold national standards for the protection of fundamental rights, so long as doing so does not jeopardise the degree of protection guaranteed by the Charter, as interpreted by the Court, or the primacy, unity, or effectiveness of EU law.

Furthermore, the CJEU recalled the importance of the principle of legality within the EU legal framework, notably intended as establishing that criminal law should be foreseeable, precise and non-retroactive. The Court drew then attention to the fact that the principle was enshrined in Article 49 of the EU Charter of Fundamental Rights, which could not be countered by the obligation to ensure the effective collection of the Union's resources, and which should be interpreted in the light of the ECHR. The CJEU further pointed out that the principle was also a component of the Member States common constitutional traditions. Finally, the Court analysed the content of Article 7(1) of the ECHR,

which establish that criminal law must be in conformity with the principles of accessibility and foreseeability, that of precision and that of non-retroactivity. The Court pointed out that, under the Italian legal system, provided that also procedural provisions are included, the principle of non-retroactivity of criminal law would be violated if limitation periods provisions were disapplied. Hence, the Court concludes that:

*“If the national court were thus to come to the view that the obligation to disapply the provisions of the Criminal Code at issue conflicts with the principle that offences and penalties must be defined by law, it would not be obliged to comply with that obligation, even if compliance with the obligation allowed a national situation incompatible with EU law to be remedied (see, by analogy, judgment of 10 July 2014, Impresa Pizzarotti, C-213/13, EU:C:2014:2067, paragraphs 58 and 59). It will then be for the national legislature to take the necessary measures, as stated in paragraphs 41 and 42 above.”*⁴⁰¹

In conclusion, in its *Taricco II* decision, the European Court of Justice continued to uphold the doctrine of EU law's supremacy, including that of Article 325 TFEU, but gives Member States discretion with regards to ongoing criminal cases in a procedural field of law, namely limitation periods, provided that the matter has not yet been harmonised by EU law. Thus, the CJEU in *Taricco II* does not accept an attenuation of nor an exception to the primacy of EU law, but shows itself conciliatory. At the same time, the Court avoids a direct confrontation over whether and how to resolve a discrepancy between EU law and national constitutional law principles.

D. The Italian Constitutional Court's judgement No. 115/2018

In light of the interpretative clarification provided by the European Court of Justice in its *M.A.S. and M.B.*, the Italian Constitutional Court, in its judgement A. No. 115/2018, declared that all the questions related to the constitutional compatibility of the decision in *Taricco I* were unfounded, because the “*Taricco rule*” did not apply in pending proceedings.

In the view of the Italian Constitutional Court, however, this did not mean that the questions raised were irrelevant: according to the Court, the “*Taricco rule*” could not be applied to any circumstance, whether they occurred before or after the *Taricco I* ruling, because it violated the constitutionally guaranteed principle of legal certainty in criminal proceedings, enshrined in Article 25(2) of the Italian Constitution.

⁴⁰¹ Ibid, para. 61.

To this regard, the Italian Constitutional Court recalls what already highlighted in its Order no. 24/2017: in the Italian legal system, the principle of legality also covers procedural provisions such as statute of limitations; as such, those provisions are also covered by the corollary principle of legal certainty; both Article 325(1) and (2) TFEU and the “Taricco rule” are characterised by a significant lack of certainty: the definition of the “considerable number of cases” that trigger the disapplication of Italian law is extremely vague and does not provide national courts with precise criteria to evaluate concrete scenarios. Moreover, Article 325 TFEU is vague, because its text does not allow persons to foresee whether or not the “Taricco rule” will apply to them. In the view of the Court:

“At least in countries with civil law traditions, and certainly in Italy, this supports (even under EU law, given its respect for the constitutional identities of the Member States) the unavoidable requirement that choices of this kind take the form of legislative documents available to any interested parties.”⁴⁰²

According to the Court, even if the “Taricco rule” would be progressively refined by European and national case law, this would not suffice to make up for the original lack of precision in the criminal precept.

In conclusion, the Court affirmed that, while the Court of Justice had the sole authority to interpret EU law uniformly and determine whether it has direct effect, it was also undeniable that, as recognised by the *M.A.S. and M.B.* judgement, the Italian legal system could not accept an interpretive result that violated the principle of legal certainty in criminal matters.

IV. Commentary

As made evident by the analysis carried out in the previous section, various points and issues were raised by the CJEU and the Italian Constitutional Court in their judgements. For the purposes of this work, it is worth highlighting some of them.

To begin with, the Italian Constitutional Court in its order of reference made various significant considerations.

In the first place, the Court referred to the concept of national identity and to Article 4(2) TEU: in fact, the court highlighted that the principle of legality constituted a component of the Italian national identity (paras. 2 and 8) and that it was the duty of the Constitutional Court to ensure its respect in the context of the implementation of EU law in the Italian legal system.

⁴⁰² Italian Constitutional Court Decision no. 115/2018, para. 11.

In the view of the Italian Constitutional Court, national identity should be understood as a value that EU law can only protect if it accepts a minimum level of diversity and that must be guarded to ensure that EU law does not undermine its very constitutional foundation (para. 6). Hence, the concept is understood by the Court as an expression of value for diversity or pluralism.

Moreover, the Court affirmed that the CJEU must interpret EU law but cannot be encumbered by the duty of assessing its compatibility with the identity of the Member States, a duty that conversely remains with the national authorities.

As argued by Bonelli⁴⁰³, the Italian Constitutional Court tried to construe the concept of constitutional identity in a Euro-friendly way rather than as a fully autonomous internal standard of review for EU measures. In fact, in its order of reference, while recalling at the very beginning of its order its *controlimiti* doctrine, the Court highlighted that the pursuit of protection the national identity of Italy would not jeopardise the primacy of EU law (para. 8).

In the second place, the Court referred to the concept of the common constitutional traditions of the Member States with respect to the principle of legality. As highlighted by many scholars⁴⁰⁴, the Italian Constitutional Court made this reference to present the CJEU a valid alternative to the language of “national identity” and to ensure the development of a more inclusive, pluralist and tolerant conversation on the matter of the protection of the principle of legality.

Furthermore, the Italian Court argued against the very existence of a conflict between European and national law, thereby affirming that the primacy of EU law was not at stake.

Finally, it is worth highlighting that in submitting a preliminary reference to the CJEU as to establish dialogue with the European Court rather than enforcing *tout court* the *controlimiti* doctrine, the Corte Costituzionale took a fundamental choice in favour of dialogue and cooperation.

Taken all these aspects into account, it can be affirmed that the Italian Court demonstrated the intention to foster cooperation with the European Court of Justice.

⁴⁰³ M. BONELLI, 'The Taricco Saga and the consolidation of judicial dialogue in the European Union', *Maastricht Journal of European and Comparative Law*, 2018, vol. 25, no. 3, pp. 357-373. <https://doi.org/10.1177/1023263X18773046>.

⁴⁰⁴ M. BASSINI, O. POLLICINO, 2017.

By contrast, Gallo⁴⁰⁵ has argued that the whole order is in reality grounded on the *controlimiti* doctrine, and that the Italian Constitutional Court threatened the CJEU to enforce this doctrine rather than taking a cooperative stance. In his view, while the *controlimiti* jurisprudence is merely referred to and not implemented by the Italian Constitutional Court, the whole preliminary reference is informed to the doctrine, which appears as the only legal ground at the disposal of the Consulta with respect to the relationship with the EU legal order.

With respect to the decision of the CJEU in *Taricco II*, there are many controverted aspects.

Firstly, it is noticeable that the CJEU did not address the argument of the higher level of protection (Art. 53 EUCFR) raised by the Italian Constitutional Court, nor that of national identity.

As affirmed by Bruggeman and Larik⁴⁰⁶: “*The CJEU’s silence on constitutional identity in Taricco II speaks louder than words*”. For instance, while the concept itself was not expressly mentioned in the questions submitted to the CJEU, the third question of the Italian Constitutional Court was strictly related to the safeguarding of the constitutional identity of Italy. Moreover, as aforementioned, this concept played in general a significant role in the reasoning of the Corte Costituzionale and pervades the judicial discussion over the *Taricco* rule as a whole. By contrast, in the Court's decision, the word "identity" is not even mentioned.

In the view of Bruggeman and Larik, the omission of a discussion on Article 4(2) TEU is the most critical shortcoming of the *Taricco II* judgment⁴⁰⁷: as evidenced by the case-law on populist autocracies analysed in Chapter III, leaving the concept of national identity undefined allows for the abusive exploitation of the concept.

These authors suggest that the reluctance of the Court of Justice to engage with the identity clause is due to a twofold reason: on the one hand, the willingness to avoid opening the “Pandora box” of the exceptions to the primacy of EU law; on the other, the consideration that reaffirming the absolute primacy of EU law by denying any possibility to raise Article 4(2) TEU in cases concerning analogous constitutional conflicts would realistically be met with fierce criticism, mostly from autocratic regimes and their constitutional courts. To this regard, it is worth highlighting that the CJEU, in *Taricco II*, held that the primacy of EU law was not at stake, not only because, as it will later be

⁴⁰⁵ See e.g. D. GALLO, “Controlimiti, identità nazionale e i rapporti di forza tra primato ed effetto diretto nella saga *Taricco*” in *Diritto dell’Unione Europea*, Vol.2, 2017, available at <http://www.dirittounioneeuropea.eu/identita-nazionale-forza-primato-effetto-diretto-taricco>.

⁴⁰⁶ R. BRUGGEMAN, J. LARIK, “The Elusive Contours of Constitutional Identity: *Taricco* as a Missed Opportunity” in *Utrecht Journal for International and European Law*, Vol. 35 Issue no. 1, 2020, available at doi:10.5334/ujiel.489

⁴⁰⁷ R. BRUGGEMAN, J. LARIK, 2020.

discussed more in detail, it shifted the discussion to the matter of common constitutional traditions, but also because, in its view, there was no EU rule to derogate from as, at the time of the original ruling, there was no harmonization on the matter of statutes of limitations at the EU level.

Secondly, instead of addressing the matter of constitutional identity to answer the questions referred by the Italian Consulta, the Court of Justice employed the language of the common constitutional traditions in the solution of the (apparent?) constitutional conflict between the EU and the Italian legal systems.

In fact, the CJEU framed the issue of the compatibility between the principle of legality and the Taricco rule as a matter of EU law only: in fact, the focus was shifted from the Italian constitution to the common constitutional traditions of the Member States.

In order to do so, as recognised by Bonelli⁴⁰⁸, the Court of Justice established a connection between on the one hand the Italian choice to include limitation provisions in substantive criminal law and, on the other hand, the shared concern for the principle of legality in criminal matters and the corollary principles of foreseeability, precision, and non-retroactivity.

As argued by Bassini and Pollicino⁴⁰⁹, the language of the common constitutional traditions is inherently pluralistic: for this reason, even if Article 6(3) TEU is not directly referred to, this provision is preferred to Article 4(2) TEU as a reference to allow for a more in-depth analysis of the principle of legality than the one carried out in Taricco I. Moreover, the reference to the common constitutional traditions had the result that the issue was not framed as a matter of primacy of EU law.

In this way, as argued by Bonelli⁴¹⁰, the CJEU's decision averted a direct conflict between the European and Italian legal systems and prevented the Italian Constitutional Court from having to play the *controlimiti* card. In his view, in fact, the European court of Justice fully considered the national constitutional aspect at issue and found a way to take into account national preferences as to the means and extent of protection of basic rights.

The existence of a derogation to the primacy of EU law, as highlighted by Sarmiento⁴¹¹, was excluded also on the ground of the CJEU's recognition that, differently from Melloni, in the Taricco case there

⁴⁰⁸ M. BONELLI, 2018.

⁴⁰⁹ M. BASSINI, O. POLLICINO: "Defusing the Taricco Bomb through Fostering Constitutional Tolerance: All Roads Lead to Rome", *VerfBlog*, 2017/12/05, available at DOI: [10.17176/20171206-095420](https://doi.org/10.17176/20171206-095420).

⁴¹⁰ M. BONELLI, 2018.

⁴¹¹ D. SARMIENTO, 2017.

was no harmonization of EU law and, accordingly, Member States were left a wide discretion as to how to prosecute VAT frauds.

Conversely, Burchardt⁴¹² argued that the decision of the CJEU in *Taricco II* attenuated the extent of the primacy established in *Internationale Handelsgesellschaft*: in her view, by referring to the principle of legality as understood in national legislation rather than relying on article 49 and 53 of the EU Charter, the Court resolved the disagreement between domestic law and EU law in favour of the national constitution rather than EU law's primacy. In her view, while, formally, the decision of the European Court is taken on the basis of Article 49 EUCFR and Article 6(3) TEU, its real point of reference is the principle of legality as understood by the Italian Constitutional Court. Accordingly, *Taricco II* would implicitly provide for an exception to the primacy of EU law.

Lastly, some considerations should be done with respect to the Decision of the Italian Constitutional Courts after the delivery by the CJEU of its *Taricco II* ruling.

In this context, the Italian Constitutional Court not only dismissed the questions as to the constitutionality of the *Taricco* rule on the ground of the renewed position of the CJEU, but also ended up clarifying other fundamental principles of the Italian constitutional system as to criminal matters, namely the subjection of the judge to the law, the mandatory nature of the law and the reservation of law. After affirming the absolute incompatibility of the *Taricco* rule with those principles, the Court established that such rule could find no place in the Italian legal order.

Crucially, it could be wondered why the Italian judges felt the need of clarifying with a strong emphasis their perspective as to the radical contrast of the *Taricco* rule with the principles of legal certainty and precision in criminal matters when, to end the *Taricco* saga, it would have been sufficient to accept the “clarification” made by the CJEU as to the non-retroactivity of the *Taricco* rule. To this regard, two opposite positions can be supported.

On the one hand, as argued by Ferrante⁴¹³, it can be upheld that this was a final manifestation of cooperation and dialogue: in the spirit of “good fences make good neighbours”, the Italian Constitutional Court stated clearly what its position was as to the *Taricco* rule to prevent further contrasts with the CJEU.

⁴¹² D. BURCHARDT: Belittling the Primacy of EU Law in *Taricco II*, *VerfBlog*, 2017/12/07, available at DOI: 10.17176/20180907-161259-0.

⁴¹³ M. L. FERRANTE, “La sentenza n. 115/2018 con la quale la Corte costituzionale ha posto fine all'affaire *Taricco*: una decisione ferma ma diplomatica.” In *Dirittifondamentali.it*, Vol. no. 2, 2018, available at <http://dirittifondamentali.it/wp-content/uploads/2019/06/Ferrante-La-sentenza-n.-115-2018-con-la-quale-la-Corte-costituzionale-ha-posto-fine-all%E2%80%99affaire-Taricco.pdf>.

On the other hand, as suggested by Amalfitano and Pollicino⁴¹⁴, the final ruling of the Italian Consulta could be deemed to conclude the Taricco saga on a non-cooperative stance. As highlighted by those authors, the Court referred to the notion of national identity twice in the Decision, whereas it abandoned the language of the common constitutional traditions. A potential reading of this attitude could be that the arguments of the Court were intended to have an internal resonance, rather than calling into question the European Court of Justice: as argued by Amalfitano and Pollicino, the Consulta seems to address the Italian judiciary rather than the Court of Justice, as to admonish national judges not to marginalise the role of the Constitutional Court itself in favour of the European Court of Justice when fundamental rights are at stake.

V. Conclusions

All in all, while ending on an ambivalent tone, the Taricco saga can be regarded to as an example of how national Courts and the Court of Justice can dialogue to prevent and, at need, solve conflicts between the European and the national legal systems.

This cooperative attitude was first adopted by the Italian Constitutional Court that, rather than immediately enforcing its controlimiti jurisprudence, sought from the European Court of Justice a revisitation of its Taricco rule as to ensure its consistency with the Italian understanding of the principle of legality. In addition, the Consulta put forth arguments and considerations suggesting that such consistency was the very objective of the CJEU itself, and that could be relied on by the Court of Justice to deliver the requested judgement. Moreover, even when referring to the potentially divisive concept of national identity, the Italian Constitutional Court framed its reasoning in a Euro-friendly way.

The same approach was followed by the Court of Justice: in fact, rather than disregarding the concerns of the Italian judges as to the protection of a fundamental principle of the national legal system, the Court recognised the legitimacy of their claim, and found in Article 6(3) TEU a legal tool suitable to integrate in the EU legal system their specific vision of the principle of legality. Thus, while reaffirming the position held in *Melloni* and delimiting the Member States' discretion to those matters

⁴¹⁴ C. AMALFITANO, O. POLLICINO, “Jusqu’ici tout va bien... ma non sino alla fine della storia. Luci, ombre ed atterraggio della sentenza n. 115/2018 della Corte costituzionale che chiude (?) la saga Taricco”, in *Diritti Comparati*, 2018, available at <https://www.diritticomparati.it/jusquici-tout-va-bien-ma-non-sino-alla-fine-della-storia-luci-ombre-ed-atterraggio-della-sentenza-n-115-2018-della-corte-costituzionale-che-chiude-la-saga-taricco/>.

not fully harmonized by EU law, the CJEU enabled Italian judges to apply the contested national legislation even if detrimental for fundamental EU interests.

In doing so, the Court suggested that fundamental rights' concerns might be better framed in terms of "common constitutional traditions" claims than as identity claims: by ensuring that the controversy can be solved by the exclusive application of EU law, not only the primacy of European law is not questioned, but also actual concerns of the national authorities as to the violation of a fundamental rights can be ensured effective consideration.

As argued by Bonelli⁴¹⁵, in the light of this approach, fundamental rights claims are not treated as purely local oddities, but as a particular expression of a shared European value. Furthermore, in this way, Constitutional courts are enabled to express concerns that might be relevant for other Member States and CJEU itself, thereby contributing even more significantly to the safeguard of constitutional rights and traditions.

⁴¹⁵ M. BONELLI, 2018.

V. Conclusions

In conclusion, the study carried out in the previous chapters can be summarised as follows.

The concept of national identity for the purposes of Article 4(2) TEU is of a permeable nature⁴¹⁶: indeed, while being a notion of European law, its content is inherently dependent on the interpretation of national constitutional law carried out by the competent national authorities⁴¹⁷. With respect to the “European” dimension of the notion, the textual analysis of Article 4(2) TEU clarifies that only essential provisions of the national Constitution from either a formal or a substantial standpoint can be regarded to as components of national identity. Moreover, the provision should be read systematically and by taking into consideration the legal framework in which it is collocated, most notably the principles of conferral, sincere cooperation and equality of the Member States⁴¹⁸.

Whereas, as evidenced in the Introduction, the identity clause was inserted in the Treaty of Lisbon for concerns other than the protection of cultural identity, the Court of Justice has considered also purely cultural matters as falling within the notion of national identity, such as the official national language⁴¹⁹. The Court has moreover recognised that the organisation of the State in terms of regional and local self-government⁴²⁰ was included in the scope of application of Article 4(2) TEU. Also fundamental constitutional rights and principles have at times been admitted as constituting components of the national constitutional identity if they were linked to fundamental constitutional structures of the State⁴²¹. However, in *Taricco II*⁴²², the Court did not address the Italian’s argument that configured the principle of legality as a component of national identity. Finally, it is disputable whether religious matters can amount to expression of national identity: while Advocate General

⁴¹⁶ A. SCHNETTGER, 2019.

⁴¹⁷ Case C-391/09, *Malgožata Runevič-Vardyn and Lukasz Paweł Wardyn v Vilniaus miesto savivaldybės administracija and Others* ECLI:EU:C:2011:291.

⁴¹⁸ G. MARTINICO, 2012; G. VAN DER SCHYFF, 2012.

⁴¹⁹ Case C-391/09, *Malgožata Runevič-Vardyn and Lukasz Paweł Wardyn v Vilniaus miesto savivaldybės administracija and Others* [2011] ECLI:EU:C:2011:291; Case C-202/11, *Anton Las v PSA Antwerp NV* [2013] ECLI:EU:C:2013:239.

⁴²⁰ Case C-156/13, *Digibet Ltd and Gert Albers v Westdeutsche Lotterie GmbH & Co. OHG* [2014], ECLI:EU:C:2014:1756 para. 34; Case C-51/15, *Remondis GmbH & Co. KG Region Nord v. Region Hannover*, [2016], ECLI:EU:C:2016:985 para. 40 and 41.

⁴²¹ Case C-208/09, *Ilonka Sayn-Wittgenstein v. Landeshauptmann von Wien* [2010] ECLI:EU:C:2010:806; Case C-438/14, *Bogendorff von Wolffersdorff*, ECLI:EU:C:2016:401; Case C-673/16, *Relu Adrian Coman e a. v. Inspectoratul General pentru Imigrări and Ministerul Afacerilor Interne* ECLI:EU:C:2018:385.

⁴²² Case C-42/17 *M.A.S. and M.B.* ECLI:EU:C:2017:936.

Kokott⁴²³ and Tanchev⁴²⁴ have referred to Art. 4(2) TEU in this context, the Court of Justice has not relied on this provision to solve the respective cases.

Moreover, the case-law of the CJEU has clarified that, against the expectations and the claims of some Member States⁴²⁵, Article 4(2) TEU cannot act as a “competence clause”⁴²⁶ nor as an exception to the principle of the primacy of EU law⁴²⁷. Conversely, the CJEU has often admitted that the respect for national identity could justify a derogation from free movement provisions, provided that, in line with its traditional approach, the national measures at stake complied with the principle of proportionality and did not result in a disproportionate contraction of fundamental rights⁴²⁸. As the CJEU has not expressly defined the question⁴²⁹, it is disputable if, and to what extent, national identity as encapsulated in Article 4(2) TEU can act as a parameter for the validity of EU secondary law and as a canon of interpretation of EU law. In general, with respect to EU secondary law, it could be argued that it is the duty of the Member States to raise any potential conflict between the draft EU law provision and their national constitutional identity early in the legislative process⁴³⁰. In this way, some discretion could be left to concerned Member States as to ensure accommodation between the unity and uniformity of EU law and the respect for national identity. Within these margins of

⁴²³ Opinion of Advocate General Kokott in C-157/15 *Achbita*, ECLI:EU:C:2016:382.

⁴²⁴ Opinion of Advocate General Tanchev in CJEU, C-414/16 *Egenberger*, ECLI:EU:C:2017:851.

⁴²⁵ With respect to the possibility that Article 4(2) could act as a competence clause, see e.g., Czech Government’s argument in Case C-208/09, *Ilonka Sayn-Wittgenstein v. Landeshauptmann von Wien* ECLI:EU:C:2010:806 para. 48; Case C-156/21, *Hungary v. European Parliament and Council of the European Union* ECLI:EU:C:2022:97.

With respect to the issue of the primacy of EU law, see e.g. Federal Constitutional Court, BVerfG, Judgment of the Second Senate of 30 June 2009 - 2 BvE 2/08 and BVerfG, Judgment of 5 May 2020 - 2 BvR 859/15.

⁴²⁶ Case C-208/09, *Ilonka Sayn-Wittgenstein v. Landeshauptmann von Wien* [2010] ECLI:EU:C:2010:806 para. 38. C-391/09 *Runevič-Vardyn and Wardyn* EU:C:2011:291, para. 63. C-438/14 *Bogendorff von Wolffersdorff* EU:C:2016:401, para. 32. Case C-673/16, *Relu Adrian Coman e a. v. Inspectoratul General pentru Imigrări and Ministerul Afacerilor Interne* [2018] ECLI:EU:C:2018:385.

⁴²⁷ See Joined Cases C-83/19, C-127/19, C-195/19, C-291/19, C-355/19 and C-397/19, *Asociația ‘Forumul Judecătorilor din România’*, 18 May 2021, ECLI:EU:C:2021:393. See also the traditional position of the CJEU on the matter of primacy as expressed, e.g., in Case 11/70 *Internationale Handelsgesellschaft mbH v Einfuhr- und Vorratsstelle für Getreide und Futtermittel* ECLI:EU:C:1970:114.

⁴²⁸ Case C-208/09, *Ilonka Sayn-Wittgenstein v. Landeshauptmann von Wien* [2010] ECLI:EU:C:2010:806 para. 38. C-391/09 *Runevič-Vardyn and Wardyn* EU:C:2011:291, para. 63. C-438/14 *Bogendorff von Wolffersdorff* EU:C:2016:401, para. 32. Case C-673/16, *Relu Adrian Coman e a. v. Inspectoratul General pentru Imigrări and Ministerul Afacerilor Interne* [2018] ECLI:EU:C:2018:385.

⁴²⁹ See Case C-344/01 *Germany v Commission* ECLI:EU:C:2004:121, para. 77; Case C-3/10 *Affatato* ECLI:EU:C:2012:110; Joined cases C-58/13, *Angelo Alberto Torresi* and C-59/13 *Pierfrancesco Torresi v Consiglio dell’Ordine degli Avvocati di Macerata* ECLI:EU:C:2014:2088; Case C-213/07 *Michaniki* ECLI:EU:C:2008:731; Case C-399/11 *Melloni* ECLI:EU:C:2013:107; Case C-393/10 *Dermod Patrick O’Brien v. Ministry of Justice* ECLI:EU:C:2012:110; C-42/17 *M.A.S. e M.B.* ECLI:EU:C:2017:936.

⁴³⁰ A. SCHNETTGER, 2019.

appreciation, Article 4(2) TEU could also act as a normative basis for the interpretation of the relevant piece of EU law.

In short, it is unambiguous that the national identity clause precludes the possibility for national authorities to unilaterally disapply EU law. Contrarily, Article 4(2) TEU provides a framework to inform the Court of Justice of the necessity of weighing delicate national interests against the backdrop of European integration, a balancing exercise which is left to the CJEU and that can only be derogated to national authorities by the Court of Justice itself⁴³¹.

Exploiting the lack of a clear definition of the scope and effects of Article 4(2) TEU, Hungary, Poland and Romania attempted to employ the provision to challenge the primacy of European law. Their effort was aimed at shielding from the EU's interference national legislations endangering the respect for the rule of law and ensuring themselves with a trump card to disregard EU law when convenient. The Court of Justice not only categorically rejected such claims, but also clarified that Member States cannot express their identities in a way that clashes against the European identity, which includes the principles enshrined in Article 2 TEU such as the rule of law.

Against the background of the conflictual position of populist autocracies' Constitutional Courts and Governments, the Taricco saga stands as a virtuous example of judicial cooperation between the CJEU and the Italian Constitutional Court. In this case, judicial dialogue resulted in the (partial) reception of the Italian Corte Costituzionale's position as to the principle of legality and the delineation of the Taricco rule. In order to do so, the Court of Justice did not rely on Article 4(2) TEU nor on Article 53 of the EU Charter; by contrast, the Court referred to the Common Constitutional Traditions of the Member States. This reference ensured that the controversy would be solved through the exclusive application of EU law and not calling into question the primacy of European law.

All in all, a key point in the interpretation of Article 4(2) TEU is that the provision cannot and should not be read in isolation from the rest of the European legal framework, especially with respect to the basic values and commitments that the Member States made when they joined the European Union. This is true not only when the principle of sincere cooperation is considered, but also when the fundamental values that constitute the common European identity are taken into account. These values, as recognised by the European Court of Justice in the context of the request of annulment of

⁴³¹ Case C 208/09, *Ilonka Sayn-Wittgenstein v. Landeshauptmann von Wien* ECLI:EU:C:2010:806.

the rule of law conditionality mechanism⁴³², include the principles enshrined in Article 2 TEU, such as the rule of law and democracy. Indeed, as recognised by the Article itself: “*These values are common to the Member States*”⁴³³. In addition, it could be argued that this might be true with all other sorts of obligation deriving from EU law; as acknowledged by AG Maduro:

“*Respect owed to the constitutional identity of the Member States cannot be understood as an absolute obligation to defer to all national constitutional rules. [...] Just as Community law takes the national constitutional identity of the Member States into consideration, national constitutional law must be adapted to the requirements of the Community legal order*”⁴³⁴.

Furthermore, it is evident that the Court of Justice has still made limited use of the identity clause and has never fully clarified which is the correct interpretation of the provision. Indeed, it could be held that the Court has applied the identity clause in a functional rather than a systemic way, in the sense that the CJEU developed a discourse on the provision only inasmuch as this was strictly necessary for the solution of the concrete case it was addressing.

What is more, the Court seems reluctant to give full expression to the identity clause: not only it at times disregarded Member States’ claims grounded on Article 4(2) TEU with little to no explanation⁴³⁵, but it also refused to take on arguments concerning this provision developed by its own Advocate Generals⁴³⁶.

In addition, as argued by Bonelli⁴³⁷, it can be concluded that Article 4(2) TEU has not essentially remodelled the relationship between the European and the domestic legal orders. In contrast with the innovative interpretation of the provision Member States put forth⁴³⁸, the Court of Justice has interpreted the identity clause in a very conservative way: the only successful claims grounded on Article 4(2) TEU were the ones that could be framed according to the CJEU’s consolidated jurisprudence on derogations to free movement rights. Besides, the comparative analysis of

⁴³² Case C-156/21, *Hungary v. European Parliament and Council of the European Union*, [2022], ECLI:EU:C:2022:97; Case C-157/21, *Poland v. European Parliament and Council of the European Union*, [2022], ECLI:EU:C:2022:98.

⁴³³ Article 2 TEU.

⁴³⁴ Opinion of Advocate General Poiares Maduro in Case C-213/07, 8 October 2008, para. 33. The case concerned the implementation at the national level of Directive 93/37/EEC on public procurement procedures.

⁴³⁵ See e.g. *Taricco II* and *Melloni*.

⁴³⁶ This was the case in *Achbita* and *Egenberger*.

⁴³⁷ M. BONELLI, 2021.

⁴³⁸ For instance, Member States at times interpreted the identity clause as delimiting the scope of application of EU law (see e.g. the position of France in *Achbita*) or as allowing for an exception to the primacy of EU law (see e.g. the jurisprudence of the German Federal Court).

“traditional” grounds of derogation to economic freedoms and that of national identity highlighted the many analogies between the two categories, both as to their scope of application and as to the assessment of their legitimacy in terms of proportionality. As pointed out in Chapter II, in these cases, the same arguments raised on the basis of Article 4(2) TEU could have been justified on the basis of other provisions. These provisions include Treaty-based and jurisprudential grounds of derogation from free movement, above all the one of public policy and the “overriding reasons of public interest”⁴³⁹, as well as specific Articles of the Treaties protecting determinate aspects of national identity⁴⁴⁰. On this matter, the added value of Article 4(2) TEU mainly lies in that it provides another express legal basis to justify accommodation between integration and other objectives.

The unwillingness of the Court of Justice to engage with Article 4(2) TEU and to confer it legal effects beyond what already existing in the EU legal framework suggests a certain unease of the Court with the provision. This might be due to a set of reasons.

In the first place, accepting the position of the Member States that support an understanding of the identity clause as a competence clause and as an exception to the primacy of EU law would compromise the very pillars on which the European legal order stands, such as the direct effects⁴⁴¹, absolute primacy and uniform application of EU law. Moreover, reliance on Article 4(2) TEU implies the existence of a conflict between the national and the European legal systems: even when no express challenge to the principle is raised, this circumstance would open the “Pandora box”⁴⁴² of the primacy of EU law.

In the second place, as argued by Bassini and Pollicino⁴⁴³, the language of “national identity” is inherently individualistic and divisive. For this reason, the Court may prefer other legal instruments

⁴³⁹ Case C-169/91 *Council of the City of Stoke-on-Trent and Norwich City Council v B&Q plc*, EU:C:1992:519, para 11.

⁴⁴⁰ See, for the national language, Article 3 TEU and Article 165 TFEU.

⁴⁴¹ For instance, in countries where Constitutional review of legislation is centralised and exclusively left to the Constitutional Court or Tribunal, the incapability of EU law to prevail over essential constitutional provisions may result in the paradoxical situation in which, anytime constitutional essentialia may be at stake, ordinary judges would be obliged to defer the matter to the Constitutional Court. This would substantially deprive EU law of its direct effects as the EU provision would not act as an immediate source of law.

⁴⁴² For a similar argument see E. X. MILLET, “The Respect for National Constitutional Identity in the European Legal Space: An Approach to Federalism as Constitutionalism”, in L. AZOULAI (ed.), *The Question of Competence in the European Union* (Oxford, 2014; online edn, Oxford Academic, 16 Apr. 2014), available at <https://doi.org/10.1093/acprof:oso/9780198705222.003.0013>.

⁴⁴³ M. BASSINI, O. POLLICINO: “Defusing the Taricco Bomb through Fostering Constitutional Tolerance: All Roads Lead to Rome”, *VerfBlog*, 2017/12/05, available at DOI: [10.17176/20171206-095420](https://doi.org/10.17176/20171206-095420).

that allow for the inclusion of national concerns and interests within the European legal framework, such as Article 6(3) TEU and the Common Constitutional Traditions.

Finally, admitting that Article 4(2) TEU could act as a normative basis for the invalidation and the discretionary interpretation by the CJEU of EU statutory law seems to not fully take into account that, in general and except for specific cases⁴⁴⁴, Member States contribute to the definition of EU secondary law in the context of the EU legislative procedures. As recognised by Schnettger⁴⁴⁵, it is their duty to raise any incompatibility between the draft law and their national identity before the piece of EU law is enacted: in this way, flexibility and margins of discretions can be ensured to the Member States concerned by the potential conflict. If this is not the case, an arbitrary intervention of the Court of Justice risks infringing the separation of powers⁴⁴⁶.

Taken all this into account, it is worth raising some final thoughts as to what role the Court of Justice and, in general, law-enforcer should play in balancing the two opposing directives of national identity and European integration.

For instance, as highlighted in the introduction, Article 4(2) TEU has been regarded to as a platform to mediate constitutional conflicts over the protection of national identity and individuality⁴⁴⁷. Thus, as recognised by Fromage and De Witte⁴⁴⁸, the discourse on this subject has been in a significant part deferred to judicial dialogue. Accordingly, it is in this context that the boundaries of the concept of national identity and of the effects of Article 4(2) TEU have been drawn. Yet, as affirmed by the same authors, in the light of the wider implications the questions of if, when and how to protect national identity have in the relationship between the European Union and its Member States, as well as for the functioning of the European Union in general, this responsibility cannot, and should not, fall exclusively on courts. Rather, the jurisprudence of the Court of Justice of the European Union and the Member States' pleadings before this court may contribute to a broader discussion on what are the limits of European integration.

⁴⁴⁴ E.g. when the Member State concerned has voted against the draft law.

⁴⁴⁵ A. SCHNETTGER, 2019.

⁴⁴⁶ See on a similar note E. CLOOTS, 2021.

⁴⁴⁷ S. GARBEN, "Collective Identity as a Legal Limit to European Integration in Areas of Core State Powers", *JCMS: Journal of Common Market Studies*, Vol. 58, 2020, available at <https://doi.org/10.1111/jcms.12975>.

⁴⁴⁸ D. FROMAGE, B. DE WITTE, 'National Constitutional Identity Ten Years on: State of Play and Future Perspectives', (2021), 27, *European Public Law*, Issue 3 *European Public Law*, Vol. 27 Issue No. 3, 2021, pp. 411-426, available at <https://kluwerlawonline.com/journalarticle/European+Public+Law/27.3/EURO2021019>.

Sources

Normative Sources

EU Sources

EU Treaties

- Treaty on European Union (Consolidated version 2016).
- Treaty on the Functioning of the European Union (Consolidated version 2016).

EU Charter of the Fundamental Rights

Directives:

- Directive 2000/43/EC of 29 June 2000.
- Directive 2000/78/EC of 27 November 2000.

Regulations:

- Regulation (EU, Euratom) 2020/2092 of the European Parliament and of the Council of 16 December 2020.

Decisions:

- Commission's Decision 2006/928/EC 13 December 2006.
- Council Decision (EU) 2015/1523, 2015 OJ (L239/146).
- Council Decision (EU) 2015/1601, 2015 OJ (L248/80).

European Convention for the Protection of Human Rights and Fundamental Freedoms

- Article 7(1) ECHR.
- Article 8 ECHR.

National law

- Belgian Constitution, Article 4 (English translation available at https://www.dekamer.be/kvvcr/pdf_sections/publications/constitution/GrondwetUK.pdf).
- French Constitution, Article 2 (English translation available at https://www.conseil-constitutionnel.fr/sites/default/files/as/root/bank_mm/anglais/constiution_anglais_oct2009.pdf).
- Irish Constitution, Article 8.

- Lithuanian Constitution, Article 14 (English translation available at https://ec.europa.eu/migrant-integration/library-document/constitution-republic-lithuania_en).
- Slovenian Constitution, Article 11 (English translation available at <https://www.us-rs.si/media/constitution.pdf>).
- Spanish Constitution, Article 3 (English translation available at <https://www.boe.es/legislacion/documentos/ConstitucionINGLES.pdf>).
- German Basic Law, Paragraph 1(1) (English translation available at <https://www.btg-bestellservice.de/pdf/80201000.pdf>).
- Italian Constitution: Article 11, Article 117 (English translation available at https://www.senato.it/documenti/repository/istituzione/costituzione_inglese.pdf).
- White Paper on the Reform of the Polish Judiciary, Warsaw, 7 March 2018 (English translation available at <https://www.statewatch.org/media/documents/news/2018/mar/pl-judiciary-reform-chancellor-white-paper-3-18.pdf>).
- Seventh amendment of the Basic Law of Hungary, T/332 (English translation available at <https://helsinki.hu/wp-content/uploads/T332-Constitution-Amendment-29-May-2018-ENG.pdf>).

Jurisprudence

Rulings of the ECJ

Case Case C–3/10 *Affatato* ECLI:EU:C:2012:110.

Case C-6/64 *Flaminio Costa v E.N.E.L.* ECLI:EU:C:1964:66.

Joined Cases C-11/06 and C-12/06 *Morgan and Bucher* ECLI:EU:C:2007:626.

Case C-11/70 *Internationale Handelsgesellschaft mbH v Einfuhr- und Vorratsstelle für Getreide und Futtermittel* ECLI:EU:C:1970:114.

Case C-26/62 *Van Gend & Loos* ECLI:EU:C:1963:1.

Case C–36/02 *Omega Spielhallen- und Automatenaufstellungs-GmbH v Oberbürgermeisterin der Bundesstadt Bonn* ECLI:EU:C:2004:614.

Case C-42/17 *M.A.S. & M.B* ECLI:EU:C:2017:936.

Case C-46/16, *Associação Sindical dos Juizes Portugueses*, ECLI:EU:C:2018:117.

Case C-51/08 *Commission v. Luxembourg*, EU:C:2011:336.

Case C-51/15, *Remondis GmbH & Co. KG Region Nord contro Region Hannover* ECLI:EU:C:2016:985.

Case C-55/94 *Gebhard v Consiglio dell’Ordine degli Avvocati e Procuratori di Milano*, EU:C:1995:411.

Joined cases C-58/13, *Angelo Alberto Torresi* and C-59/13 *Pierfrancesco Torresi v Consiglio dell’Ordine degli Avvocati di Macerata* ECLI:EU:C:2014:2088.

Case C-60/00 *Carpenter* [2002] ECLI:EU:C:2002:434.

Case C-73/08 *Bressol*, ECLI:EU:C:2010:181.

Case C-76/05 *Schwarz and Gootjes-Schwarz* ECLI:EU:C:2007:492.

Joined Cases C-83/19, C-127/19, C-195/19, C-291/19, C-355/19 and C-397/19, *Asociația ‘Forumul Judecătorilor din România’*, 18 May 2021, ECLI:EU:C:2021:393.

Joined cases 90/63 and 91/63, *Commission v Luxembourg and Belgium* ECLI:EU:C:1964:80.

Case C-105/14, *Ivo Taricco and others*, ECLI:EU:C:2015:555.

Case C-106/77 *Amministrazione delle Finanze dello Stato v Simmenthal SpA* ECLI:EU:C:1978:49.

Case C-112/00 *Schmidberger, Internationale Transporte und Planzüge v Republik Österreich*, ECLI:EU:C:2003:333.

Case C-129/96 *Inter-Environnement Wallonie ASBL v. Région wallonne* ECLI:EU:C:1997:628.

Case C-148/02 *Garcia Avello* ECLI:EU:C:2003:539.

Case C-153/02 *Neri* ECLI:EU:C:2003:614.

Case C-156/13, *Digibet Ltd, Gert Albers v. Westdeutsche Lotterie GmbH & Co. OHG*, ECLI:EU:C:2014:1756.

Case C-156/21, *Hungary v. European Parliament and Council of the European Union* ECLI:EU:C:2022:97.

Case C-157/21, *Poland v. European Parliament and Council of the European Union*, ECLI:EU:C:2022:98.

Case C-169/91 *Council of the City of Stoke-on-Trent and Norwich City Council v B&Q plc* EU:C:1992:519.

Case C-192/18, *European Commission v Republic of Poland*, ECLI:EU:C:2019:924.

Case C-193/16, *E* EU:C:2017:542.

Case C-198/89 *Commission v Greece* ECLI:EU:C:1991:79.

Case C-202/11, *Anton Las v PSA Antwerp NV* ECLI:EU:C:2013:239.

Case C-208/09, *Ilonka Sayn-Wittgenstein v. Landeshauptmann von Wien* ECLI:EU:C:2010:806.

Case C-212/04 *Konstantinos Adeneler and others v. Ellinikos Organismos Galaktos (ELOG)* ECLI:EU:C:2006:443.

Joined Cases C-231/06 and C-233/06, *Office national des pensions v Emilienne Jonkman and Hélène Vercheval and Noëlle Permesaen v Office national des pensions* ECLI:EU:C:2007:373.

Case C-260/89 *Elliniki Radiophonia Tileorassi AE (ERT) v. Dimotiki Etairia Pliroforissis and Sotirios Kouvelas* ECLI:EU:C:1991:254.

Case C-279/93 *Schumacker*, ECLI:EU:C:1995:31.

Case C-314/85 *Foto Frost* ECLI:EU:C:1987:452.

Case C-333/14, *Scotch Whisky Association, spiritsEUROPE, Comité de la Communauté économique européenne des Industries et du Commerce des Vins, Vins aromatisés, Vins mousseux, Vins de liqueur et autres Produits de la Vigne (CEEV) v. Lord Advocate General for Scotland* ECLI:EU:C:2015:845.

Case C-344/01 *Germany v Commission* ECLI:EU:C:2004:121.

Joined Cases C-357/19, C-379/19, C-547/19, C-811/19 and C-840/19, *SC Euro Box Promotion SRL*, ECLI:EU:C:2021:1034.

Case C-368/95 *Familiapress* [1997] ECLI:EU:C:1997:325.

Case C-379/87, *Anita Groener v Minister for Education and the City of Dublin Vocational Educational Committee*, ECLI:EU:C:1989:599.

Case C-391/09, *Malgożata Runevič-Vardyn and Łukasz Paweł Wardyn v Vilniaus miesto savivaldybės administracija and Others* ECLI:EU:C:2011:291.

Case C-393/10 *Dermod Patrick O'Brien v. Ministry of Justice* ECLI:EU:C:2012:110.

Case C-399/11 *Stefano Melloni v Ministerio Fiscal* ECLI:EU:C:2013:107.

Case C-438/14 *Bogendorff von Wolffersdorff* EU:C:2016:401.

Case C-476/17 *Pelham and Others* EU:C:2019:624, para. 78.

Case C-531/07 *Fachverband der Buch—und Medienwirtschaft v LIBRO Handelsgesellschaft mbH* EU:C:2009:276.

Joined cases C-585/18, C-624/18 e C-625/18, *A. K. v. Krajowa Rada Sądownictwa and CP and DO v. Sąd Najwyższy*, ECLI:EU:C:2019:982.

Case C-600/14, *Federal Republic of Germany v Council of the European Union*, ECLI:EU:C:2017:935.

Case C-617/10 *Åklagaren v Hans Åkerberg Fransson* EU:C:2013:105.

Case C-621/18 *Andy Wightman and a. v Secretary of State for Exiting the European Union* ECLI:EU:C:2018:999.

Case C-673/16, *Relu Adrian Coman e a. v. Inspectoratul General pentru Imigrări and Ministerul Afacerilor Interne* ECLI:EU:C:2018:385.

Case C-791/19, *Commission v. Poland*, 15 July 2021, ECLI:EU:C:2021:596.

Case C-808/18, *Commission v Hungary*, ECLI:EU:C:2020:1029.

Case C-824/18, *AB v Krajowa Rada Sadownictwa*, EU:C:2021:153.

Opinion 1/09, EU:C:2011:123.

Opinion 2/13 ECLI:EU:C:2014:2454.

Advocate General Opinions

Case C-180/04 *Cristiano Marrosu and Gianluca Sardino v Azienda Ospedaliera Ospedale San Martino di Genova e Cliniche Universitarie Convenzionate*, Opinion of Advocate General Maduro in [ECLI:EU:C:2005:569]

Case C-399/11 *Stefano Melloni*, Opinion of Advocate General Bot, ECLI:EU:C:2012:600.

Case C-222/07 *UTECA*, Opinion of Advocate General Kokott in ECLI:EU:C:2009:190

Case C-51/15, *Remondis GmbH & Co. KG Region Nord contro Region Hannover*, Opinion of Advocate General Mengozzi, ECLI:EU:C:2016:504.

Case C-203/07, *Greece v Commission*, Opinion of Advocate General Mazák, EU:C:2008:606.

Case C-673/16, *Relu Adrian Coman*, Opinion of Advocate General Wathelet, ECLI:EU:C:2018:2.

Case C-157/15 *Achbita*, Opinion of Advocate General Kokott, ECLI:EU:C:2016:382.

Case C-414/16 *Egenberger*, Opinion of Advocate General Tanchev, ECLI:EU:C:2017:851.

Case C-213/07, *Michaniki AE v Ethniko Symvoulío Radiotileorasis and Ypourgos Epikrateias*, Opinion of Advocate General Poiares Maduro, ECLI:EU:C:2008:544.

Case C-883/19 *HSBC Holdings and Others v Commission* Opinion of Advocate General Emiliou, ECLI:EU:C:2022:384.

Case C-391/20 *Boriss Cilevičs and Others* Opinion Of Advocate General Emiliou, ECLI:EU:C:2022:384.

National constitutional Courts (in English translation)

German Federal Court:

- BVerfGE judgement of 29/05/1974 37, 271 (*Solange I*) CMLR 540;
- BVerfGE judgement of 22/11/1986 73, 339 (*Solange II*) 3 CMLR 225;

- BVerfGE judgement of 12/10/1993 2 BvR 2134/92 and 2 BvR 2159/92
ECLI:DE:BVerfG:1998:rs19980331.2bvr187797 (*Maastricht*);
- BVerfG, Judgment of 30/06/2009 2 BvE 2/08
ECLI:DE:BVerfG:2009:es20090630.2bve000208 (*Lisbon*);
- BVerfGE judgement of 06/07/2010 2 BvR 2661/06
ECLI:DE:BVerfG:2010:rs20100706.2bvr266106 (*Honeywell*);
- BVerfG judgement of 21/06/2016 2 BvR 2728/13
ECLI:DE:BVerfG:2016:rs20160621.2bvr272813 (*Gauweiler*);
- BVerfG judgment of 05/05/2020 2 BvR 859/15
ECLI:DE:BVerfG:2020:rs20200505.2bvr085915 (*Weiss*).

Italian Constitutional Court:

- Judgement 14/1964;
- Decision No. 183/1973;
- Decision No. 170/1984;
- Judgment 232/1989;
- Decision No. 143/2014;
- Order No. 24/2017;
- Decision no. 115/2018.

French Constitutional Council:

- Decision no. 2006-540 DC, 03/08/2006, ECLI:FR:CC:2006:540.

Spanish Constitutional Tribunal:

- Tribunal Declaration 1/2004, ECLI:ES:TS:2004:1.

Constitutional Court of the Czech Republic:

- Decision 08/03/2006 ÚS 50/04 ECLI:CZ:US:2006:50.04;
- Decision 26/11/2008 ÚS 19/08 (*Lisbon I*) ECLI:CZ:US:2008:19.08;
- Decision 03/11/2009 ÚS 29/09 (*Lisbon II*) ECLI:CZ:US:2009:29.09;
- Decision 31/01/2012, US 5/12 (*Holubec*) ECLI:CZ:US:2012:5.12.

Hungarian Constitutional Court:

- Decision 22/2016 (*XII.5.*) *AB* on the Interpretation of Article E) (2) of the Fundamental Law (Nov. 30, 2016);
- Decision no. X/477/2021 on the interpretation of the provisions of the fundamental law allowing the joint exercise of powers.

Constitutional Tribunal of Poland:

- Ref. No. K 3/21;
- Ref. No. K 32/09;
- Ref. No. SK 45/09.

Romanian Constitutional Court:

- Decisions No. 33/2018 of 15 February 2018;
- Decision No. 104/2018 of 29 May 2018;
- Decision No. 1519/2011 of 15 November 2011;
- Decision No. 2/2012 of 11 January 2012; Decision No. 390 of 8 June 2021.

Other sources

IDEA (Institute for Democracy and Electoral Assistance), “*The State Of Democracy In Europe 2021, Overcoming the Impact of the Pandemic*”, available at <https://www.idea.int/gsod/sites/default/files/2021-11/state-of-democracy-in-europe-2021.pdf>.

Statement of Retired Judges of the Polish Constitutional Tribunal, 10 October 2021.

Bibliography

ALBORS-LLORENS, A., “Judicial protection before the Court of Justice of the European Union” in C. BARNARD AND S. PEERS (eds), *European Union Law*, Second Edition, Oxford University Press, Oxford, 2017, p. 288.

ALTOMONTE C., VILAFRANCA A. (eds.) “*Europe in Identity Crisis. The Future of the EU in the Age of Nationalism*”, Milano: Ledizioni LediPublishing, 2019, available at <https://www.ispionline.it/it/publicazione/europe-identity-crisis-future-eu-age-nationalism-24606>.

AMALFITANO C., POLLICINO O., “Two Courts, two Languages? The Taricco Saga Ends on a Worrying Note”, *VerfBlog*, 2018/6/05, available at [10.17176/20180605-204156-0](https://doi.org/10.17176/20180605-204156-0).

AMALFITANO C., POLLICINO O., “Jusqu’ici tout va bien... ma non sino alla fine della storia. Luci, ombre ed atterraggio della sentenza n. 115/2018 della Corte costituzionale che chiude (?) la saga Taricco”, in *Diritti Comparati*, 2018, available at <https://www.diritticomparati.it/jusquici-tout-va-bien-ma-non-sino-alla-fine-della-storia-luci-ombre-ed-atterraggio-della-sentenza-n-115-2018-della-corte-costituzionale-che-chiude-la-saga-taricco/>.

BAYER L., “In major first, EU triggers power to cut Hungary’s funds over rule-of-law breaches”, *Politico*, 27/04/2022 available at <https://www.politico.eu/article/eu-european-commission-rule-law-mechanism-hungary-funds/>.

BARAK A., “Human Dignity in German Constitutional Law,” *Human Dignity: The Constitutional Value and the Constitutional Right* (Cambridge University Press 2015).

BASSINI M., POLLICINO O.: “The Taricco Decision: A Last Attempt to Avoid a Clash between EU Law and the Italian Constitution”, *VerfBlog*, 2017/1/28, available at DOI: 10.17176/20170130-094500.

BASSINI M., POLLICINO O.: “Defusing the Taricco Bomb through Fostering Constitutional Tolerance: All Roads Lead to Rome”, *VerfBlog*, 2017/12/05, available at DOI: [10.17176/20171206-095420](https://doi.org/10.17176/20171206-095420).

BERNARDI A., “*I Controlimiti: Primato Delle Norme Europee E Difesa Dei Principi Costituzionali*”, Naples: Jovene Editore, 2017.

BESSELINK L.F.M., 'The Persistence of a Contested Concept: Reflections on Ten Years Constitutional Identity in EU Law', *European Public Law*, Vol. 27 Issue No. 3, 2021, pp. 597-612, available at <https://kluwerlawonline.com/journalarticle/European+Public+Law/27.3/EURO2021028>.

BIEBER F., BIEBER R., “*Negotiating Unity and Diversity in the European Union*”, Springer Nature Switzerland, 2021.

BOBEK M., “The effects of EU law in the national legal systems”. In: C. BARNARD and S. PEERS, eds., *European Union Law*, 3rd edn. Oxford: Oxford University Press, 2020, pp. 154-190.

BONELLI M., 'The Taricco Saga and the consolidation of judicial dialogue in the European Union', *Maastricht Journal of European and Comparative Law*, 2018, vol. 25, no. 3, pp. 357-373. <https://doi.org/10.1177/1023263X18773046>.

BONELLI M., ‘National Identity and European Integration Beyond ‘Limited Fields’ in *European Public Law*, Vol. 27, No. 3 (2021), pp. 537-538, available at <https://doi.org/10.54648/euro2021025>.

BRUGGEMAN R., LARIK J., “The Elusive Contours of Constitutional Identity: Taricco as a Missed Opportunity” in *Utrecht Journal for International and European Law*, Vol. 35 Issue no. 1, 2020, available at doi:10.5334/ujiel.489.

E. BULMER, “*What is a Constitution? Principles and Concepts*”, Stockholm, International Institute for Democracy and Electoral Assistance, 2017 Second edition, available at <https://www.idea.int/sites/default/files/publications/what-is-a-constitution-primer.pdf>.

BURCHARDT D., “Belittling the Primacy of EU Law in Taricco II”, *VerfBlog*, 2017/12/07, available at DOI: 10.17176/20180907-161259-0.

CHALMERS D., DAVIES G., MONTI G., *European Union Law*, 2nd edn (Cambridge: Cambridge University Press, 2010), p.201.

CHRONOWSKI N., VINCZE A.: “Full Steam Back: The Hungarian Constitutional Court Avoids Further Conflict with the ECJ”, *VerfBlog*, 2021/12/15, <https://verfassungsblog.de/full-steam-back/>.

CLAES M., “National Identity: Trump Card or Up for Negotiation?”, in ARNAIZ A. S., LLIVINA C. A. eds. *National Constitutional Identity And European Integration*, Cambridge: Intersentia (2013).

CLAES M., REESTMAN J.-H., “The Protection of National Constitutional Identity and the Limits of European Integration at the Occasion of the Gauweiler Case,” *German Law Journal*. Cambridge University Press, 16(4), 2019, pp. 917–970. doi: 10.1017/S2071832200019957.

CLAES M., 'National Identity and the Protection of Fundamental Rights', *European Public Law*, Vol. 27 Issue No. 3, 2021, pp. 517-535, <https://kluwerlawonline.com/journalarticle/European+Public+Law/27.3/EURO2021024>.

CLOOTS E., *National Identity in EU Law*, Oxford Studies in European Law, Oxford online edn, 19 Mar. 2015.

DE WITTE B., "Article 53 - Level of Protection" in PEERS S., HERVEY T., KENNER J., WARD A (eds.) *European Charter of Fundamental Rights*, 2021, pp. 1531-1532.

DE WITTE B., 'Article 4(2) TEU as a Protection of the Institutional Diversity of the Member States', *European Public Law*, Vol. 27 Issue 3, 2021, pp. 559-570, <https://kluwerlawonline.com/journalarticle/European+Public+Law/27.3/EURO2021026>.

DI FEDERICO G., 'The Potential of Article 4(2) TEU in the Solution of Constitutional Clashes Based on Alleged Violations of National Identity and the Quest for Adequate (Judicial) Standards', *European Public Law*, Vol. 25 Issue no. 3, 2019, pp. 347-380, <https://kluwerlawonline.com/journalarticle/European+Public+Law/25.3/EURO2019021>.

DOBBS M., "Sovereignty, Article 4(2) TEU and the Respect of National Identities: Swinging the Balance of Power in Favour of the Member States?" in *Yearbook of European Law*, Vol. 33, No. 1, 2014, pp. 298–334.

ELEFThERIADIS P., "Germany's Failing Court", *VerfBlog*, 2020/5/18, available at DOI: [10.17176/20200519-013420-0](https://doi.org/10.17176/20200519-013420-0).

FABBRINI F., SAJO A., "The Dangers of Constitutional Identity", *European Law Journal*, 2019.

FABBRINI F., 'After the OMT Case: The Supremacy of EU Law as the Guarantee of the Equality of the Member States', in *German Law Journal*, Vol. 16, 2019.

FARAGUNA P., "The Italian Constitutional Court in re Taricco: "Gauweiler in the Roman Campagna""", *VerfBlog*, 2017/1/31, available at DOI: [10.17176/20170131-132708](https://doi.org/10.17176/20170131-132708).

FARAGUNA P. and DRINÓCZI T.: "Constitutional Identity in and on EU Terms", *VerfBlog*, 2022/2/21, <https://verfassungsblog.de/constitutional-identity-in-and-on-eu-terms/>.

FERRANTE M. L., "La sentenza n. 115/2018 con la quale la Corte costituzionale ha posto fine all'affaire Taricco: una decisione ferma ma diplomatica." In *Dirittifondamentali.it*, Vol. no. 2, 2018, available at <http://dirittifondamentali.it/wp-content/uploads/2019/06/Ferrante-La-sentenza-n.-115-2018-con-la-qual-e-la-Corte-costituzionale-ha-posto-fine-all%E2%80%99affaire-Taricco.pdf>.

FICHERA M., POLLICINO O., "The Dialects between Constitutional Identity and Common Constitutional Traditions: Which Language for Cooperative Constitutionalism in Europe," in *German Law Journal*, Vol. 20, no. 8 (2019), pp. 1097-1118, available at <https://heinonline.org/HOL/P?h=hein.journals/germlajo20&i=1093>.

FROMAGE D., DE WITTE B., 'National Constitutional Identity Ten Years on: State of Play and Future Perspectives', (2021), 27, *European Public Law*, Issue 3 *European Public Law*, Vol. 27 Issue No. 3, 2021, pp. 411-426, available at <https://kluwerlawonline.com/journalarticle/European+Public+Law/27.3/EURO2021019>.

FROMAGE D., 'National Constitutional Identity and Its Regional Dimension Post-Lisbon as Part of a General Trend Towards Multilevel Governance Within the EU', *European Public Law*, Vol. 27 Issue No. 3, 2021 pp. 497-516, available at <https://kluwerlawonline.com/journalarticle/European+Public+Law/27.3/EURO2021023>

GALEOTTI S., *Il Presidente della Repubblica garante della Costituzione. La concezione garantistica del Capo dello Stato negli scritti dell'Autore dal 1949 ad oggi* (Milan: Giuffrè, 1992).

GALLO D., "Controlimiti, identità nazionale e i rapporti di forza tra primato ed effetto diretto nella saga Taricco" in *Diritto dell'Unione Europea*, Vol.2, 2017, available at <http://www.dirittounioneuropea.eu/identita-nazionale-forza-primato-effetto-diretto-taricco>.

GARBEN S., "Collective Identity as a Legal Limit to European Integration in Areas of Core State Powers", *JCMS: Journal of Common Market Studies*, Vol. 58, 2020, available at <https://doi.org/10.1111/jcms.12975>.

GUASTAFERRO B., "Beyond the Exceptionalism of Constitutional Conflicts: The ordinary functions of the Identity Clause", *Yearbook of European Law*, 2012, pp. 263-289, available at <https://jeanmonnetprogram.org/wp-content/uploads/2014/12/JMWP01Guastaferro.pdf>.

HALMAI G., "The Hungarian Constitutional Court and Constitutional Identity", *VerfBlog*, 2017/1/10, available at 10.17176/20170111-091119.

KELEMEN R. D., PECH L., "*Why autocrats love constitutional identity and constitutional pluralism Lessons from Hungary and Poland*", *Reconnect*, September 2018, available at <https://reconnect-europe.eu/wp-content/uploads/2018/10/RECONNECT-WorkingPaper2-Kelemen-Pech-LP-KO.pdf>.

KONCEWICZ T. T., “Constitutional Capture in Poland 2016 and Beyond: What is Next?”, *VerfBlog*, 2016/12/19, available at <https://verfassungsblog.de/constitutional-capture-in-poland-2016-and-beyond-what-is-next/>.

KUMM M., FERRERES COMELLA V., “The Primacy Clause of the Constitutional Treaty and the Future of Constitutional Conflict in the European Union”, *International Journal of Constitutional Law*, Vol. 3 Issue no. 2-3, 2005.

IMAMOVIĆ Š., CLAES M., BESSELINK L.F.M., REESTMAN J.H., “*National constitutional avenues for further EU integration*”, European Parliament Report, 02/2014, available at <https://op.europa.eu/s/w7qn>.

ISKRA K. A., “*Fact Sheets on the European Union*”, European Parliament Report,, 04/2022, available at www.europarl.europa.eu/factsheets/en.

LASEK-MARKEY M., “*Poland’s Constitutional Tribunal on the status of EU law: The Polish government got all the answers it needed from a court it controls*”, *European Law Blog*, 21/10/2021, available at <https://europeanlawblog.eu/2021/10/21/polands-constitutional-tribunal-on-the-status-of-eu-law-the-polish-government-got-all-the-answers-it-needed-from-a-court-it-controls/>.

MANACORDA S., “Le garanzie penalistiche nei rapporti con il diritto dell’Unione” in A. BERNARDI eds., *I Controlimiti. Primato Delle Norme Europee E Difesa Dei Principi Costituzionali*, Naples: Jovene editore, 2017.

MARTINICO G., “Taming National Identity: A Systematic Understanding of Article 4.2 TEU” in *European Public Law*, no. 3, 2021.

MILLET F. X., “The Respect for National Constitutional Identity in the European Legal Space: An Approach to Federalism as Constitutionalism”, in L. AZOULAI (ed.), *The Question of Competence in the European Union* (Oxford, 2014; online edn, Oxford Academic, 16 Apr. 2014), available at <https://doi.org/10.1093/acprof:oso/9780198705222.003.0013>.

MILLET F. X., “Successfully Articulating National Constitutional Identity Claims: Strait Is the Gate and Narrow Is the Way”, in *European Public Law*, 2021, Vol. 27, Issue 3, pp. 571-596, <https://kluwerlawonline.com/journalarticle/European+Public+Law/27.3/EURO2021027>.

MORARU M., BERCEA R., “The First Episode in the Romanian Rule of Law Saga: Joined Cases C-83/19, C-127/19, C-195/19, C-291/19, C-355/19 and C-397/19, Asociația ‘Forumul Judecătorilor Din România, and Their Follow-up at the National Level”, *European Constitutional Law Review*, 26 April 2022, pp. 82 – 113, DOI: <https://doi.org/10.1017/S1574019622000074>.

PASCUAL M. G., “Criminal Law as an Essential Function of the State: Last Line of Resistance?”, in A. SAIZ ARNAIZ & C. ALCOBERRO *National Constitutional Identity and European Integration* (Llivina eds, Intersentia 2013) p. 161-163.

PECH L., “No More Excuses: The Court of Justice greenlights the rule of law conditionality mechanism”, *VerfBlog*, 2022/2/16, <https://verfassungsblog.de/no-more-excuses/>.

PÉREZ A. T., “Melloni in Three Acts: From Dialogue to Monologue,” *European Constitutional Law Review* Vol. 10 Issue no. 2, 2014, available at doi: 10.1017/S1574019614001199.

PITRUZZELLA G., BIN R., “*Diritto Costituzionale*”, Giappicchelli eds, 2022.

POIARES MADURO M., ‘Contrapunctual Law: Europe’s Constitutional Pluralism in Action’ in N. WALKER (ed.), *Sovereignty in Transition*, London: Hart Publishing.

POLANSKI O., “Poland - Constitutional Tribunal judgment K 3/21 - a continued assault on the integrity of the EU legal order”, *Public Law*, 2022, pp. 344-347 available at <https://uk.westlaw.com/Document/IF6A7A9D09E7811EC8C32C2E4AD87A234/View/FullText.html>.

RODIN S., “National Identity And Market Freedoms After The Treaty Of Lisbon”, *Review of European Law*, Vol. 13, Issue 2-3 (2011), pp. 5-40.

SARMIENTO D., 'Who's afraid of the Charter? The Court of Justice, national courts and the new framework of fundamental rights protection in Europe', *Common Market Law Review*, Vol. 50 Issue No. 5, 2013 pp. 1267-1304, available at <https://kluwerlawonline.com/journalarticle/Common+Market+Law+Review/50.5/COLA2013132>.

SARMIENTO D., “To bow at the rhythm of an Italian tune”, in *Despite our differences*, 2017, available at <https://despiteourdifferencesblog.wordpress.com/2017/12/05/to-bow-at-the-rhythm-of-an-italian-tune/>.

SCHMAHL S., “The National Identity Criterion in the Crossfire Between European Integration and the Preservation of National Sovereignty”. In: M. BREUER, (eds) *Principled Resistance to ECtHR Judgments - A New Paradigm?*, Beiträge zum ausländischen öffentlichen Recht und Völkerrecht, vol 285, 2019. Springer, Berlin, Heidelberg.

SCHNETTGER A., “Article 4(2) TEU as a Vehicle for National Constitutional Identity in the Shared European Legal System” in C. CALLIESS AND G. VAN DER SCHYFF (eds), *Constitutional Identity in a Europe of Multilevel Constitutionalism* (Cambridge: Cambridge University Press 2019).

SELEJAN-GUTAN B., “A Tale of Primacy, part III: Game of Courts”, *VerfBlog*, 2021/11/17, available at <https://verfassungsblog.de/a-tale-of-primacy-part-iii/>.

SELEJAN-GUTAN B., “New Challenges against the Judiciary in Romania”, *VerfBlog*, 2019/2/22, <https://verfassungsblog.de/new-challenges-against-the-judiciary-in-romania/>.

SELEJAN-GUTAN B., “Who’s Afraid of the „Big Bad Court”?”, *VerfBlog*, 2022/1/10, <https://verfassungsblog.de/whos-afraid-of-the-big-bad-court/>.

SHUIBHNE N. N., “Exceptions to the free movement rules” in BARNARD C., PEERS S., *European Union Law*, Second Edition, Oxford University Press, Oxford, 2017, p. 477.

SPAVENTA E., “Fundamental rights in the European Union”, in BARNARD C., PEERS S., *European Union Law*, Second Edition, Oxford University Press, Oxford, 2017, pp.233-234.

SPAVENTA E., 'Should we “harmonize” fundamental rights in the EU? Some reflections about minimum standards and fundamental rights protection in the EU composite constitutional system', *Common Market Law Review*, Vol. 55 Issue No. 4, 2018, pp. 997-1023, available at <https://kluwerlawonline.com/journalarticle/Common+Market+Law+Review/55.4/COLA2018091>.

SPAVENTA E., “Drinking Away Our Sorrows?: Regulatory Conundrums after Scotch Whisky” in AMTENBRINK F., DAVIES G., KOCHENOV D., LINDEBOOM J., *The Internal Market and the Future of European Integration: Essays in Honour of Laurence W. Gormley* (Cambridge: Cambridge University Press 2019).

STONE SWEET A., “Constitutional Courts”, in ROSENFELD M., SAJÓ A. (eds), *The Oxford Handbook of Comparative Constitutional Law* (2012; online edn, Oxford Academic, 21 Nov. 2012).

TĂNĂSESCU E.S., SELEJAN-GUTAN B., “A Tale of Primacy: The ECJ Ruling on Judicial Independence in Romania”, *VerfBlog*, 2021/6/02, available at <https://verfassungsblog.de/a-tale-of-primacy/>.

TIMMERMANS C., “ECJ Doctrines on Competences”, in AZOULAI L., “The ‘Retained Powers’ Formula in the Case Law of the European Court of Justice: EU Law as Total Law?”, 4(2) *European Journal of Legal Studies*, 2011, available at <http://hdl.handle.net/1814/31371>.

TONIATTI R., “Sovereignty Lost, Constitutional Identity Regained”, in SAIZ ARNAIZ A., ALCOBERRO C., *National Constitutional Identity and European Integration* (Llivia eds, Intersentia 2013) p. 161-163.

UITZ R., “National Constitutional Identity in the European Constitutional Project: A Recipe for Exposing Cover Ups and Masquerades”, *VerfBlog*, 2016/11/11, available at [10.17176/20161111-103427](https://doi.org/10.17176/20161111-103427).

VAN DER SCHYFF G., “The constitutional relationship between the European Union and its Member States: the role of national identity in article 4(2) TEU” *European Law Review*, October 2012, available at <https://uk.westlaw.com/Document/I90DC21B1136011E2886FA474C1AE060E/View/FullText.html>.

VILLOTTI J., ‘National constitutional identities and the legitimacy of the European Union – two sides of the European coin’, *Zeitschrift für europarechtliche Studien*, January 2015, available at https://www.nomos-elibrary.de/10.5771/1435-439X-2015-4-475.pdf?download_full_pdf=1.

VON BOGDANDY A., SCHILL S., “Overcoming Absolute Primacy: Respect for National Identity Under the Lisbon Treaty”, *Common Mkt. L. Rev.* 1417, 1440 (2011).

VYHNANEK L., "The Eternity Clause in the Czech Constitution as Limit to European Integration," *Vienna Journal on International Constitutional Law*, Vol. 9, no. 2, 2015, available at <https://heinonline.org/HOL/P?h=hein.journals/vioincl9&i=243>.