

BATTLEGROUND OR MEETING POINT? RESPECT FOR NATIONAL IDENTITIES IN THE EUROPEAN UNION - ARTICLE 4(2) OF THE TREATY ON EUROPEAN UNION

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Summary: The national identity clause has drawn significant attention lately and not without reason. Developments regarding this provision have given rise to concerns about whether Article 4(2) CTEU will have implications for the absolute primacy of EU law and thus its authority. This paper argues that Article 4(2) CTEU will play a valuable role in providing additional ground for further co-operation between national constitutional courts and the ECJ and provides the possibility for national constitutional courts in occasional situations to set aside EU law on constitutional identity grounds. This view is presented through a textual and contextual analysis of the provision, the attitudes of both national constitutional courts and the ECJ towards the issue, and lastly the theoretical framework of constitutional pluralism, particularly constitutionalism beyond the state.

1 Introduction

Sovereignty, supremacy, direct effect and *Kompetenz-Kompetenz* have undoubtedly been buzzwords in European constitutional law and have represented the embodiment of the relationship between European Union and national constitutional law.¹ However, the latest developments in European integration have brought an additional phrase that will perhaps serve as a turning point. Namely, the clause on the respect for the national identities of the Member States in Article 4(2) of the Consolidated Treaty on European Union (CTEU) has drawn significant attention, particularly after the interpretations and reasoning delivered concerning this provision by several constitutional courts,² both in the context of the Constitutional Treaty and also the Lisbon Treaty. That this

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¹ For more on this relationship, see I Pernice, N Walker, M Maduro, P Kirchhof, A von Bogdandy, M Kumm and F Mayer.

² France, Constitutional Council, *Decision 2004-505 DC Treaty Establishing a Constitution for Europe*; Spain, Constitutional Tribunal, *Declaration on Establishing a Constitution for Europe, DTC 001/2004*; Germany, Federal Constitutional Court, *Lisbon Decision, 2 BvE 2/08* of 30 June 2009.

interest is not just a coincidence can be observed in the most recent case law of certain constitutional courts as well as the Court of Justice of the European Union (ECJ).

Be that as it may, and regardless of the expectations raised by the Constitutional Treaty and the aftermath of the Lisbon Treaty, the contentious debate on the relationship and conflicts between European Union law and national constitutional law will certainly continue to play a role in the future. Any expectation that this debate in the European constitutional realm is reaching an end is unfortunately wishful thinking. Nevertheless, a 'harmless' concretisation of a single provision, often neglected in the past, has added a truly 'new flavour'. Through the clause on national identity, national constitutions have received firmer status and recognition in EU law.³ Some authors state that this is obvious evidence of the openness of EU law towards national constitutions.⁴

This 'new flavour' is frequently perceived in recent dilemmas. Is national identity actually the same as constitutional identity in EU law? Who should define national identity? What is this provision's impact on the primacy of EU law and the exercise of conferred powers by EU institutions? These and several other questions have come under discussion and this paper aims to tackle them. In short, it involves a critical analysis of the statement that 'interpretations of Article 4(2) TEU will become [are becoming] the battleground or the meeting point, where the limits of the authority of EU law lie'.⁵ It will be argued that the national identity clause provides an instrument for establishing a meeting point where the conflicts arising out of this relationship could be mitigated, but not solved in each case, by taking into consideration both EU and national constitutional aspects of respect for national identity.

Following this line of reasoning, this article will discuss the background and textual and contextual dimensions of Article 4(2) CTEU as a starting point for the analysis, but also represents a supplementary argument in support of the thesis. It will be shown how even the textual and contextual interpretation of this provision requires a shift from a strictly conceived primacy of EU law. The interpretations of national identity of national constitutional courts and the ECJ will be dealt with, trying to show how constitutional courts have already established a link between national identity and constitutional identity, especially in the

³ B De Witte, 'The Lisbon Treaty and National Constitutions. More or Less Europeanisation?' in C Closa (ed), *The Lisbon Treaty and National Constitutions* (ARENA 2009) 32.

⁴ A von Bogdandy and S Schill, 'Die Achtung der nationale Identität unter dem reformierten Unionsvertrag Zur unionsrechtlichen Rolle nationalen Verfassungsrechts und zur Überwindung des absolute Vorrangs' (2010) *ZaöRV* Heft 4, 715.

⁵ D Chalmers, G Davies and G Monti, *European Union Law: Cases and Materials*, (2nd edn CUP 2010) 202.

EU context, and how the invocation of Article 4(2), or the lack of it, by the ECJ and its practice in the realm of fundamental freedoms and rights creates certain dilemmas over the issue of national identity. Lastly, the question of how the national identity clause impacts on the principle of the primacy of EU law will be considered. It will be argued that a rigid understanding of the absolute primacy of EU law is incompatible with new developments seen through the prism of Article 4(2), which provides an additional argument in support of theories of constitutional pluralism and the claim of a constitutional heterarchy in Europe.

2 Article 4(2) CTEU: ‘harmless’ clarification with the potential for a big impact?

2.1 Respect for national identities ex nihilo?

The national identity clause under Article 4(2) CTEU did not come out of nothing *ex nihilo*. The duty of European institutions to respect the national identities of Member States was introduced for the first time in the Maastricht Treaty (TM) through Article F(1).⁶ The reasons behind the enactment of this provision are often seen in the many substantial innovations that this Treaty brought to the then European Communities. In particular, these innovations were the creation of the European Union and treaty provisions touching upon issues traditionally part of national constitutions and sovereignty, such as Monetary Union, European citizenship and the corpus of rights linked to it, and co-operation on foreign policy, justice and home affairs.⁷ This attempt to balance federalist tendencies at the European level and national sovereignty,⁸ or rather external limits to European integration,⁹ did not really occur as a result of this vaguely formulated provision. As a matter of fact, neither Article F(1) nor Article 6(3), after the renumbering occurred with the adoption of the Treaty of Amsterdam (TA), has been invoked by the ECJ,¹⁰ and the Federal Constitutional Court of Germany has done this on only one oc-

⁶ ‘The Union shall respect the national identities of its Member States, whose systems of government are founded on the principles of democracy’. Treaty on the European Union (Maastricht), OJ C191, 29.07.2011 <<http://eur-lex.europa.eu/en/treaties/dat/11992M/hm/11992M.html#0001000001>> accessed 15 August 2012.

⁷ De Witte (n 3) 33.

⁸ J-H Reestman, ‘The Franco-German Constitutional Divide: Reflections in National and Constitutional Identity’ (2009) 5 European Constitutional Law Review 374, 376.

⁹ T Oppermann, *Europarecht*, (2nd edn CH Beck 1999) §11, para 885; T Oppermann, CD Classen and M Nettesheim, *Europarecht*, (4th edn CH Beck 2009) §5 para 8. Compare A von Bogdandy and S Schill, ‘Article 4 EUV’ in E Grabitz, M Hilf and M Ruffert (eds), *Das Recht der Europäischen Union, Kommentar I* (CH Beck 2011) para 38.

¹⁰ LFM Besselink, ‘National and Constitutional Identity before and after Lisbon’ (2010) 6(3) Utrecht Law Review 41.

casation.¹¹ However, the need to counterweight federalist tendencies has not diminished among Member States.

During the deliberations on and drafting of the Treaty Establishing a Constitution for Europe (CT) during the Constitutional Convention, the question of concretisation of the national identity clause was put on the table.¹² It was affirmed that this provision should be made more transparent, clarifying the notion of national identity, although there was disagreement on how it should be done. The so-called 'Christophersen Clause', which was an alternative to the firmly rejected proposal of listing all the competences of Member States or creating a charter of Member States' rights,¹³ served as the basis for the new Article I-5 of the CT. It regulated the relations between the Union and Member States, and in its first paragraph *inter alia* stipulated the duty to respect the national identities of Member States. A compromise was finally reached by clarifying national identities in the provision through the fundamental structures inherent in their political and constitutional structures, including regional and local self-government, hence leaving out certain other proposed elements¹⁴ such as language, national citizenship, and church-state relations, which would be regulated by other provisions in the reformed TEU and TFEU after Lisbon.¹⁵

The same provision was taken over by the Lisbon Treaty and an additional sentence emphasising national security as an essential state function was added. In the reform of the TEU, it was inserted as the second paragraph of Article 4, which also regulates relations between the Union and Member States, even though, due to the approach taken in the EU treaties, it does not bear this title as in the CT. However, some authors use a more EU-friendly title for this article in their contributions such as 'principles of fundamental federal structure' (*Prinzipien der föderativen Grundstruktur*),¹⁶ while others treat it as 'a strong reaffirmation of the non-federal nature of the European Union'.¹⁷

¹¹ Federal Constitutional Court of Germany, Maastricht Treaty 1992 Constitutionality Case, 2 BvR 2134 and 2159/92 in A Oppenheimer, *The Relationship Between European Community Law and National Law* Vol 1 (CUP 1994) 556, 574.

¹² For other aspects of the process, see A Puttler, 'Article 4 EUV' in C Calliess and M Ruffert (eds), *EUV/AEUV Kommentar* (4th edn CH Beck 2011) paras 5-7.

¹³ CONV 251/02, 3. One should be careful with this type of argument when claiming a certain type of meaning and scope of a relevant provision, as the context changes, especially in this case with the leaving out of the primacy clause in the Lisbon Treaty.

¹⁴ For more on the debate over these proposals, see CONV 357/02, 10-12 and CONV 400/02, 13.

¹⁵ Article 3(3) CTEU on language; Article 20 TFEU on national citizenship. See Reestman (n 8) 381.

¹⁶ Von Bogdandy and Schill (n 9).

¹⁷ De Witte (n 3) 35.

2.2 Textual and contextual analysis of the national identity clause (Article 4(2))

Like many other provisions in the treaties, Article 4 is a multifaceted article that regulates relations between the Union and Member States. Consequently, besides the reaffirmation of the principle of the conferral of powers or the limited powers of the EU in the first paragraph¹⁸ and the loyalty or fidelity principle with regard to the accomplishment and achievement of Treaty tasks, obligations and objectives in the third, Article 4 reserves the second paragraph for the three duties prescribed for Union institutions. The latter are often seen as central to the interpretation of Article 4, particularly as far as the relationship between Union law and national constitutions is concerned. The three basic duties of Union institutions set out by Article 4(2) are respect for the equality of Member States before the Treaties,¹⁹ and respect for national identities and essential state functions.²⁰

Focusing on the national identity clause, without underestimating the importance of the other principles set forth in this article, one has to see how the wording of this provision should be interpreted in the light of textual and contextual analysis. It is only after reflections on how this provision could and should be interpreted that one can turn to the recent case law of both constitutional courts and the ECJ.

2.2.1 The meaning and scope of the national identity clause: a textual analysis

The need for concretisation of the national identity clause proved to be necessary because of the vagueness and ambiguity of national identity as a notion in terms of its understanding under Article F(1) TM and later Article 6(3) TA.²¹ Just as the components of this notion, namely 'nation' and 'identity', elude attempts to delimit them from other notions

¹⁸ Article 4(1) refers to Article 5, where the conferral of power principle is basically regulated, and restates the last sentence of Paragraph two. See J-C Piris, *The Lisbon Treaty: A Legal and Political Analysis* (CUP 2010) 84. See also CONV 375/02 in the context of the CT referring to the objective of Article I-5: 'The article would therefore not constitute a definition of Member State competence, thereby wrongly conveying the message that it is the Union that grants competence to the Member States, or that Union action may never impact on these fields'.

¹⁹ G Amato and J Ziller, *The European Constitution* (Edward Elgar 2007) 108: 'This reference did not add anything new to the Union's institutional arrangements, though it did underscore the need to avoid an asymmetrical federalism. The definitive version of Article I-5 loses in elegance that which it gains in precision'. Compare Federal Constitutional Court of Germany, *Lisbon decision*, 2 BvE 2/08 of 30 June 2009 para 292, and also Piris (n 18) 85-86.

²⁰ Von Bogdandy and Schill (n 4).709.

²¹ CONV 375/1/02 REV 1, 10.

and precisely define them,²² the same is true with the amorphous notion of national identity, which has practically made this provision obsolete. According to Reestman, '[under the] most common reading of national identity it is very hard, if not impossible to define with any measure of objectivity what the Union's duty to respect the national identity of its Member States entails.'²³ It 'fans out in all directions' but least of all towards any relation to constitutional structures.²⁴ This common reading he refers to is more often associated with the social, cultural, political and even psychological aspects of national identity than with the legal comprehension of this notion.²⁵ Due to its broadness and generality, it has served more as a political declaration than as a legal provision producing legal effect.

An additional problem with the wording of Article 6(3) was the use of the plural form of national identities in the English version,²⁶ which might be equated more easily with the existence of multinational identities in countries rich in ethnic, religious or linguistic diversity. Thus, under such a construction, it was possible without further clarification of the notion of national identity, for cultural,²⁷ historical, political and other identities to be subsumed²⁸ within the provision. This would have opened the door to a situation where every national particularity and characteristic could have served as a reason for limitation on the exercise of Union powers.²⁹

Therefore, the new Article 4(2) CTEU states that the national identities of Member States are inherent in their fundamental constitutional

²² For more on the problem of defining identity and nation by providing explanations of the synchronic and diachronic aspects of identity as well as the objective, both pre-state and state, and subjective elements of 'nation', see Reestman (n 8) 374-379 and von Bogdandy and Schill (n 4) 711-13.

²³ Reestman (n 8) 380.

²⁴ Reestman (n 8) 379, 376.

²⁵ H von der Groeben and J Schwarze (eds), *Vertrag über die Europäische Union und Vertrag zur Gründung der Europäischen Gemeinschaft, Band 1 Art 1-53 EUV* (6th edn Nomos 2003). Para 201 states 'Nationale Identität bedeutet aber auch mehr als Verfassungsidentität. Über diese Mehr entscheidet der Mitgliedstaat selbst. Als Beispiel werden in diesen Zusammenhang Sport, Kultur und Bildung aber auch die interne Staatsorganisation, die Familienstrukturen und die sozialen Sicherungssysteme'. Von Bogdandy and Schill (n 4) 712, citing *Flaggenbeschimpfungs-Beschluss*, 'Nationale Identität meint dann gleichgerichtete psychische Vorgänge der Staatsbürger'.

²⁶ The German version uses 'nationale Identität' in the singular form.

²⁷ See C Strumpf 'Article 6' in J Schwarze (ed), *EU-Kommentar* (Nomos 2nd edn 2008) para 39. In the context of the working languages of EU Institutions, see Oppermann, Classen and Nettesheim (n 9) § 6 para 18.

²⁸ A Puttler 'Article 6' in C Callies and M Ruffert (eds), *Kommentar zu EU-Vertrag und EG-Vertrag* (2nd edn CH Beck 2002) para 213; Oppermann (n 9) § 11 para 885.

²⁹ Besselink (n 10) 42-43.

and political structures, inclusive of regional and local self-government.³⁰ In this sense, Article 4(2) CTEU has its basis in Article 6(3) TA and represents the clarification and concretisation and not the alteration of this provision. The emphasis on fundamental constitutional structures basically ties national identity firmly to constitutional identity and excludes cultural and other types of identity from the scope of this provision.³¹ The English version makes the case for this conclusion more strongly by using *inherent* instead of *finds its expression through* (*zum Ausdruck kommt*) in establishing the link between national identity and constitutional structures.³² It is only the fundamental values, the core of the constitutional identity, that are to be respected, and in this way a pre-constitutional context and argument is avoided, something that might be implied by the latter expression. If the opposite was the case, every single issue could be connected to national identity. Such an understanding is also supported by the existence of a separate provision, Article 3(3) CTEU, which regulates respect for cultural and linguistic diversity³³ and creates a duty for the Union itself, unlike Article 149(1) TEC, where such a duty of respect did not exist.³⁴

Additionally, it is very important to determine the extent of the duty that is placed on EU institutions. Therefore, the notion of ‘respect’ should be examined. It is quite certain that this respect represents a legal obligation for the Union.³⁵ According to von Bogdandy, the duty to respect national identity in Article 4(2) does not in any way imply an absolute protection or preservation of national identity,³⁶ and accordingly does not imply the primacy of constitutional provisions regulating specific values

³⁰ ‘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.’ CTEU <<http://register.consilium.europa.eu/pdf/en/08/st06/st06655.en08.pdf>> accessed 10 August 2012.

³¹ Puttler (n 28) para 14; von Bogdandy and Schill (n 16) para 14; Besselink (n 10) 44. Compare R Geiger, ‘Article 4 EUV’ para 3 in R Geiger, D-E Khan and M Kotzur (eds), *EUV/AEUV* (5th edn CH Beck 2010).

³² A von Bogdandy and S Schill, ‘Overcoming Absolute Primacy: Respect for National Identity under the Lisbon Treaty’ (2011) 48 *CLM Rev.* 1427-1428; von Bogdandy and Schill (n 16) para 14.

³³ For the secondary role of cultural identity under Article 4(2) CTEU, see Besselink (n 10) 44.

³⁴ ‘[R]especting the responsibility of the Member States for the content of teaching and the organization of education systems and their cultural and linguistic diversity’, Art 149 TEC. See also Case C-160/03 *Kingdom of Spain v Eurojust* [2005] ECR I-2077, Opinion of AG Maduro, para 24. He refers to both Article 6 TEU and 149 TEC, thus showing that both of these articles regulate linguistic identity, ie diversity.

³⁵ Opinion of AG Maduro (n 34) para 33; Puttler (n 12) para 22.

³⁶ Compare Beutler ‘Article 6’ in von der Groeben and Schwarze (eds) (n 25) para 201: ‘Sie [Die Achtung] nicht nur Respektierung, sondern vor allem auch Förderung der jeweiligen nationalen Identität’.

over EU law as a matter of principle.³⁷ Nevertheless, he states that it certainly represents a legal obligation for the Union. It envisages the need for balance under circumstances of conflict between the fundamental principles and values of the two legal orders and co-operation between the institutions of these orders.³⁸ The way this balance is to be reached and co-operation achieved is, on the other hand, a matter of contention. Whether this is to be achieved through judicial means where either the ECJ or national constitutional courts will have the last word, each in its own realm, or whether it should be left to the political institutions, mainly at the national level, to decide upon is open for discussion. In contrast, Puttler argues that in the case of conflict between the national identity of Member States and the exercise of Union competences, the latter should yield. She thus argues that there is no room for any balancing and that the national identity clause can be invoked only in extreme situations.³⁹ As this relationship is one of the core issues raised with regard to the relationship between EU law and national law, it will be dealt with in more detail in the last part of this paper.

At the end of this section, two other points should be addressed as far as the wording of Article 4(2) is concerned. The first point worth making is the referral to 'fundamental constitutional structures' instead of constitutional values in the national identity clause. Here, a narrow reading⁴⁰ of this provision might be possible due to the common understanding of the term structures, which is often related to the organisation and institutional design of the respective state whilst not including constitutional and political values.⁴¹ Even though it is true that these notions are not synonymous, which might lead to debate over the scope of the provision, there is almost a tacit consensus among scholars that constitutional values come within the meaning of the national identity clause.⁴² The same understanding is present in the decisions of both national constitutional courts and the ECJ.

In addition, as far as Article 4(2) is concerned, emphasis is most frequently put on fundamental constitutional structures, assuming a national dimension while somehow forgetting the second part concerning the clarification of national identity. Namely, regional and local self-government in the Member States, which were not covered under Article

³⁷ Von Bogdandy and Schill (n 16) para 33.

³⁸ Von Bogdandy and Schill (n 4) 726, 731.

³⁹ Puttler (n 12) para 22.

⁴⁰ Compare Joined Cases C-428/06 to C-434/06 *Unión General de Trabajadores de La Rioja (UGT-Rioja) v Juntas Generales del Territorio Histórico de Vizcaya and Others* [2008] ECR I-6747, Opinion of AG Kokott, para 54.

⁴¹ De Witte (n 3) 34.

⁴² Von Bogdandy and Schill (n 16) para 28; Puttler (n 12) para 16.

6(3) TA,⁴³ are recognised and included as part of the fundamental constitutional structures which they are normally part of as clarification of the national identity of Member States.⁴⁴ Now, they not only fall within the scope of Article 4(2) but they, or to be more precise the Committee of the Regions, have been given the right to file actions for infringements of the subsidiarity principle by legislative acts of the Union before the ECJ under Article 263(3). Thus, the duty to respect regional and local structures is even more concrete on the side of the Union, bearing in mind that it has been reinforced by the inclusion of these structures within the subsidiarity principle.⁴⁵ This does not alter the fact that regional and local authorities are only indirectly tied to national identity, that is, through the Member States and their constitutions in the light of EU law.⁴⁶ This implies that certain specificities at regional and local level might not be incorporated within the scope of the provision.

2.2.2 Article 4(2) and other Treaty provisions

It is firmly established within the methods of legal interpretation that a provision cannot be analysed in isolation without any relation to other relevant provisions. This is even more so when complex legal texts are concerned, such as the EU Treaties. Therefore, Article 4(2) must be read, first of all, in the context of Article 4 as a whole, and then in relation to other relevant articles such as Articles 2, 5, 7 and 3(3) TEU.

The national identity clause, when viewed in the light of the conferral of powers principle (Article 4(1) and Article 5(1) and (2) CTEU) in conjunction with the principles of subsidiarity⁴⁷ and proportionality⁴⁸ (Article 5(3) and (4)) and the fidelity clause (Article 4(3)), should be understood as representing the limits on the exercise of the EU's powers conferred on it by the Member States. As a matter of fact, even Article 6(3) TA has been understood by some authors in the same way, regardless of the positioning and usage of this provision prior to the Lisbon Treaty.⁴⁹ Union institutions have a duty to respect the national identity inferred in the phrase

⁴³ Puttler (n 28) para 216. See also Beutler (n 36) para 204, focusing on regional self-government.

⁴⁴ Amato and Ziller (n 19) 81; Case C-324/07 *Coditel Brabant SPRL v Commune d'Uccle and Région de Bruxelles-Capital* [2008] ECR I- 8457, Opinion of AG Trstenjak, para 85.

⁴⁵ Amato and Ziller (n 19) 190.

⁴⁶ This is best illustrated by the fact that local self-government is not part of the German constitutional identity embodied in Article 79(3), while regional self-government is. See Puttler (n 12) para 19.

⁴⁷ See Beutler (n 25) para.205 and Strumpf (n 27) para 38 in the context of Article 6(3) TA.

⁴⁸ Von Bogdandy and Schill, (n 16) para 33, put the emphasis on proportionality and do not refer to subsidiarity, while Puttler refers to both (n 12) para 10.

⁴⁹ Beutler (n 25) para 206.

'full mutual respect' and should not take actions that could jeopardise the fundamental political and constitutional structures of the Member States, which is implied by Article 4(3) CTEU subparagraph 1.⁵⁰ Such a reading is also justified by the positioning of the national identity clause in Paragraph 2 before the fidelity principle, which is regulated in Paragraph 3 of Article 4. A different reading of this relationship would make the national identity clause redundant. Thus, it can be inferred that the Treaty in this way qualifies the fidelity principle through the protection of the national identities of the Member States.⁵¹

In addition, the reason for the first paragraph being inserted in Article 4, which emphasises the residual powers of the Member States, and also the ordering of the paragraphs in this article could be interpreted as having the intention of showing that the external limit on the exercise of the Union's conferred powers are the fundamental constitutional structures of the Member States. This is also why the delimitation of powers between the Union and the Member States was discussed together with Article I-5 during the Constitutional Convention.⁵²

On the other hand, limitation on the exercise of the conferred powers of the Union cannot run counter to the values of the EU listed in Article 2 TEU, which are basically common to the Member States and serve as the main condition under Article 49 for membership of the EU.⁵³ If the interpretation of national identity runs counter to the basic values of the EU, then action on the suspension of voting rights under Article 7 TEU could be taken.⁵⁴ This position opens the door for the ECJ to assess national identity in the light of EU law, ie the values set out in the TEU, which has not been enthusiastically welcomed by national constitutional courts. However, the interpretation suggested here is one that envisions control over the outer limit of EU law, ie Article 2 CTEU, as in the opposite case the ECJ would be projecting EU values, interpreted by the Court itself, on national identity and in essence asserting the absolute primacy of EU law as declared in established case law.

The abstract textual and contextual argumentation connected to the interpretation and understanding of the national identity clause is made more tangible with an examination of the case law of national constitutional courts and the ECJ in the next section. Despite being tan-

⁵⁰ 'Pursuant to the principle of sincere cooperation, the Union and the Member States shall, in *full mutual respect*, assist each other in carrying out tasks which flow from the Treaties' (emphasis added).

⁵¹ Puttler (n 12) para 10.

⁵² Puttler (n 12) para 14.

⁵³ In the context of Article 6(1) and (3) TA, see Beutler (n 25) para 205.

⁵⁴ Von Bogdandy and Schill (n 4) 715. See also Puttler (n 28) para 218.

gible, they nevertheless remain complex and without a firm conclusion concerning their future impact.

3 The national identity clause in the case law of national constitutional courts and the ECJ

In the previous section, Article 4(2) was discussed through a textual and contextual analysis which sheds some light on the whole issue, thus making such arguments only supplementary, but which does not answer certain very important questions. Namely, who is to decide upon the content of national identity, and who is to monitor the conformity of EU legislative acts and actions with national identity? The answers to these questions show that in essence there is an inherent need placed within the framework of this provision for co-operation between the two legal orders, represented by the highest judicial instances, in order for this provision to play a constructive role. However, there seem to be certain limits on the achievement of this co-operation.

3.1 The definition of national identity in national constitutional court case law⁵⁵

3.1.1 National identity as constitutional identity

It has been firmly established that constitutional courts are best placed to define the content of national identity as referred to in Article 4(2) CTEU.⁵⁶ Only these institutions can authoritatively determine the true meaning and scope of the relevant constitutional provisions regulating the fundamental values and principles of constitutional identity. Accordingly, as the establishment of the meaning and scope of national identity would involve the interpretation of national law, the ECJ under Article 19 CTEU lacks the jurisdiction to rule upon such cases. It is certain, though, that the latter cannot be perceived in absolute terms, as the application of the national identity clause has its own limits within EU law as seen in Article 2 TEU.

Even though almost every European constitution contains a provision that declares, regulates or at least alludes to the core elements of constitutional identity, the association of national identity in the sense of

⁵⁵ The focus here is on constitutional courts due to concern for the length of the paper. There is also the respective case law of high courts with constitutional jurisdiction in other Member States, which should not be underestimated and which should be taken into consideration, eg Belgium, Denmark, Estonia, Ireland, etc.

⁵⁶ Case C-213/07, *Michaniki AE v Ethniko Simvoulío Radiotileorasis* [2008] ECR I-9999 Opinion of AG Maduro, para 30; Case C-53/04, *Cristiano Marrosu and Gianluca Sardino v Azienda Ospedaliera Ospedale* [2006] ECR I-7213, Opinion of AG Maduro, para 40. See also von Bogdandy and Schill (n 4).

Article 4(2) CTEU with these provisions has been a recent development. As a matter of fact, it has only been the Federal Constitutional Court of Germany (FCC) that has so far directly established a link between the national identity clause and constitutional identity as envisaged in Article 79(3) of the German Basic Law (GG). Other constitutional courts either have not had the opportunity to establish this link or have missed the first opportunity to do so.

Be that as it may, one should not draw the wrong conclusion that constitutional identity has not played a substantial role in cases involving both primary and secondary EU law. The notion of national or constitutional identity is not alien to national constitutional courts in cases dealing with EU law. In the past, they invoked constitutional provisions that expressed the core values of constitutional identity in order to resist, in a more abstract and preventive manner, the excessive exercise of Union competences and the absolute primacy of EC/EU law.

Like every other discussion on the relationship between national constitutions and EU law, one has to begin with the already well-known case law of the constitutional courts of Germany and Italy, which some authors claim have shaped the national identity clause.⁵⁷

In the early 1970s, the FCC started writing the first concrete chapter on the relationship between national constitutional and EU law, which significantly influenced the future development of this never-ending story. In *Solnage I*, the Court reasoned that 'it [Article 24 GG] does not open the way to amending the basic structure of the Basic Law, which forms the basis of its identity, without a formal amendment to the Basic Law, that is, it does not open any such way through legislation of the inter-state institution.'⁵⁸

This view has been affirmed and furthered along the line in the subsequent case law, in the first place by *Solange II*⁵⁹ and the Maastricht Decision, which referred to Article F(1) of the Treaty of Maastricht in the context of subsidiarity, proportionality and the conferral of powers.⁶⁰ Most significantly, the value of constitutional identity in the light of Ar-

⁵⁷ Reestman (n 8) 380.

⁵⁸ Federal Constitutional Court of Germany, *Solange I*, 2 BvL 52/71 of 29 May 1974, *Decisions of the Bundesverfassungsgericht, Federal Republic of Germany: International Law and Law of the European Communities 1952-1989*, 275.

⁵⁹ Federal Constitutional Court of Germany, *Solange II*, 2 BvR 197/83 of 22 October 1986, *Decisions of the Bundesverfassungsgericht, Federal Republic of Germany: International Law and Law of the European Communities 1952-1989*, 625.

⁶⁰ Federal Constitutional Court of Germany, *Maastricht Treaty 1992 Constitutionality Case*, 2 BvR 2134 and 2159/92, in Oppenheimer (n 11) 556, 574. For more on these three cases, see FC Mayer, 'The European Constitution and the Courts', in A Von Bogdandy and J Bast (eds), *Principles of European Constitutional Law* (Hart 2006) 295-300.

ticle 4(2) TEU has been emphasised and contextualised in the Lisbon decision.

The Italian Constitutional Court (ICC), at almost the same time, formed its counter-limits (*controlimiti*) doctrine, which puts limits on the primacy of EU law by implying constitutional identity. In the *Frontini* case,⁶¹ the ICC made clear that EC powers or the exercise thereof could not in any case 'violate [the] fundamental principles of our [Italian] constitutional order or the inalienable rights of man'. In the case of violation, which according to this court is quite unlikely to occur, the ICC has the competence to review the acts or actions of EU institutions. The ICC has affirmed this standard in two other landmark cases, *Granital*⁶² and *Fragd*,⁶³ but to date has neither precisely defined what this abstract formulation stands for nor which principles and values it entails, and neither has it applied it to EU law.

The French Constitutional Council (CC) has also been busy in recent years on this issue. Its initial wording of 'an express contrary provision of the Constitution' that would justify disobedience towards a secondary EC law,⁶⁴ was changed to a 'rule or principle inherent to the constitutional identity of France, except when the constituting power consents thereto [to the application of the EU act]'⁶⁵ as a limit on the application of the same source of law. However, the idea behind it remains the same, embodied in the doctrine of *réserve de constitutionnalité*, ie the acceptance of the primacy of EU law within certain constitutional limits.⁶⁶

Nevertheless, the decisions of the CC and the Spanish Constitutional Tribunal (SCT), where views were shared between the two institutions on the meaning of the then Article I-5 CT with regard to Article

⁶¹ ICC, *Frontini v Ministero delle Finanze* of 27 December 1973, in Oppenheimer (n 11) 640.

⁶² ICC, *Spa Granital v Amministrazione delle Finanze dello Stato* of 8 June 1984, in Oppenheimer (n 11) 651.

⁶³ ICC, *Fragd v Amministrazione delle Finanze* of 21 April 1989, in Oppenheimer (n 11) 657.

⁶⁴ When the constitutionality of primary law is at stake, then the phrase used by the Council that represents its standard of control in the process of ratification, is for the commitments taken by the treaties not to 'call into question constitutionally guaranteed rights and freedoms or adversely affect the fundamental conditions of the exercising of national sovereignty'. See French Constitutional Council *Decision No 2004-505 DC* of 19 November 2004, para 7 and also *Decision No 2007-560 DC* of 20 December 2007, para 9.

⁶⁵ For more on the provisions which are specific to France and thus part of its constitutional identity, see Reestman (n 8), 388. Here, a note should be made on a possible area of conflict regarding the policy, or better said lack of any, on respect and recognition of racial and ethnic minorities in France and the values of the Union envisaged in Article 2 CTEU, which also includes respect for the rights of persons belonging to minorities.

⁶⁶ X Groussot, 'Supr[imacy] à la Française: Another French Exception?' (2008) 27 Yearbook on European Law, 89, 105-107.

I-6 CT, the primacy clause, are crucial for the greater awareness and significance of the national identity clause not only in France and Spain but also beyond. It was stated that the relation and positioning of the two provisions is a clear sign that national identity represents the limit to the primacy of EU law over national constitutions, and this is why they did not find the primacy clause to be in conflict with the constitution, since it did not alter the scope of the already existing doctrine.⁶⁷

Since 2004, on the other hand, the pattern created by the FCC and ICC, and now cautiously applied by the CC, has been followed by the other constitutional courts of the new Member States, which has led Sadurski to name this trend 'Solange Chapter 3'.⁶⁸ However, this trend has been characterised by an interesting and noteworthy paradox. While in the period prior to accession to the EU these states put a lot of effort into promoting the integration process as the only path for their further democratisation, after accession they have set limits on EU law rooted in constitutional provisions declaring the democratic character of the state based on the rule of law.⁶⁹

The Czech Constitutional Court (CCC) is an interesting example when it comes to discussing the national identity clause. Following an already settled case law, beginning with the Sugar Quota case,⁷⁰ the CCC's first decision dealing with EU matters in which the threshold was set, the CCC in its *Lisbon I* decision stated that the application of Union law in the Czech Republic has its limits in the 'untouchable' material core of the constitution. The material core stems from the principles of the 'democratic state governed by the rule of law' of Articles 9(2) and 1(1) of the Constitution.⁷¹ In the follow-up to this decision, *Lisbon II*, it resisted pressure from applicants and firmly declined to list the non-transferable competences⁷² or declare the elements of the material core of the constitution,⁷³ which belies the idea of a fundamental resemblance

⁶⁷ French Constitutional Council, *Decision 2004-505 DC* Treaty Establishing a Constitution for Europe, paras 12-13; Spanish Constitutional Tribunal, Declaration on Establishing a Constitution for Europe, *DTC 001/2004*, para 4.

⁶⁸ W Sadurski, 'Solange, Chapter 3: Constitutional Courts in Central Europe - Democracy - European Union' 14(1) *European Law Journal* 1.

⁶⁹ Sadurski (n 68) 4; Polish Constitutional Tribunal, *Judgment K 18/04* of 11 May 2005; Hungarian Constitutional Court, Decision 17/2004 (V 25); Latvian Constitutional Court, *Case no 2008-35-01* of 7 April 2009.

⁷⁰ CCC, *Decision PL US 50/04* of 8 March 2006.

⁷¹ CCC, Treaty of Lisbon I, *Decision PL US 19/08* of 26 November 2008, paras 85, 89, 94, 91, 93, 114.

⁷² CCC, Treaty of Lisbon II, *Decision PL US 29/09*, para 111.

⁷³ CCC (n 72) para 112.

to the FCC's case law.⁷⁴ The logic behind the reasoning appears to be very sound and legitimate. The approach taken was to avoid the severe criticism that the FCC has received for its judicial activism in the Lisbon decision and *inter alia* for going too far with the definition and scope of constitutional identity and essential state functions. Therefore, the CCC justified this move by stating that if it had decided differently, it would have crossed the line of its competences and in that way encroached upon the decision-making powers of political bodies, because of which it would have unavoidably been labelled an activist court.⁷⁵

The general overview of national constitutional court case law shows a relatively high level of convergence as far as Article 4(2) CTEU is concerned. However, a common understanding of the notion of constitutional identity is not very likely, regardless of the values and principles shared by these states and which are also inherent to the EU. Notwithstanding the absence in most cases of a direct referral and invocation of the national identity clause, the wording used by courts still seems to be in line with the national identity clause. Nevertheless, these institutions have left open the precise determination of the content of national or constitutional identity by using general and abstract formulations, frequently citing only the relevant constitutional provisions and in this sense providing themselves with a certain leeway in future cases.

3.1.2 *The Lisbon decision of the Federal Constitutional Court of Germany*

There are two main reasons why the Lisbon decision of the FCC is discussed separately from the case law of other national constitutional courts. First, the importance of this decision is undoubted as far as Article 4(2) CTEU is concerned. Second, there is the overall influence and importance of this institution in shaping the relationship between national constitutional and EU law.

Adhering and further developing the principles introduced in its previous decisions, the FCC in its Lisbon decision⁷⁶ clarified and contextualised the constitutional identity of Germany at both the constitutional and European level. Respecting the aforementioned continuity, the Court identified constitutional identity through Article 23(1) GG⁷⁷ in

⁷⁴ See The Editors and J Komarek, 'The Czech Constitutional Court's Second Decision on the Lisbon Treaty of 3 November 2009', (2009) 5 European Constitutional Law Review 345.

⁷⁵ CCC (n 72). para. 113.

⁷⁶ Federal Constitutional Court, Lisbon Decision, 2 BvE 2/08 of 30 June 2009.

⁷⁷ 'With a view to establishing a united Europe, the Federal Republic of Germany shall participate in the development of [a] European Union that is committed to democratic, social, and federal principles, to the rule of law, and to the principle of subsidiarity, and that guarantees a level of protection of basic rights essentially comparable to that afforded by this Basic Law'.

conjunction with Article 79(3) GG,⁷⁸ the so-called 'eternity clause', and accordingly its duty to protect and guarantee this identity, the 'identity review', hence adding a new avenue for a review of EU law. For this supplementation of the previous *Solange* and *ultra vires* review doctrines,⁷⁹ it finds support not only in the GG but also in the CTEU, or more precisely Article 4(2), therefore concluding the mutuality of the obligation under both legal orders, which at the same time is in conformity with the principle of the openness of German law towards EU law and the loyalty clause.⁸⁰ Through this reasoning, the FCC established a direct link between the constitutional identity of Germany and the national identity clause in the CTEU.

However, it did not stop here but went further, discussing which competences and powers of the German state cannot be transferred to the Union under existing constitutional provisions, a point which led some scholars⁸¹ to conclude that the notion of constitutional identity also includes certain other competences of the state enumerated in the Lisbon decision.⁸² On the other hand, the authors that noticed this issue criticised the Court's stance as being too far-reaching.⁸³ Indeed, it is undeniably true that it is far-reaching, but only if it is read in such a way that directly relates the list of competences to constitutional identity as regulated in the Treaty. An alternative reading of the decision in

⁷⁸ Compare C Tomuschat, 'Lisbon - Terminal of the European Integration Process? The Judgment of the German Constitutional Court of 30 June 2009' (2010) *ZaöRV* Heft 2, 278, in which it is claimed that this provision has the aim of preventing anti-democratic forces taking power.

⁷⁹ See J Ziller, 'The German Constitutional Court's Friendliness towards European Law: On the Judgment of *Bundesverfassungsgericht* over the Ratification of the Treaty of Lisbon' (2010) 16(1) *European Public Law* 66-67.

⁸⁰ FCC (n 76) para 240 'In this respect, the guarantee of national constitutional identity under constitutional and under Union law go hand in hand in the European legal area' and para 235 'The obligation under European law to respect the constituent power of the Member States as the masters of the Treaties corresponds to the non-transferable identity of the constitution (Article 79.3 of the Basic Law), which is not open to integration in this respect. Within the boundaries of its competences, the Federal Constitutional Court must review, where necessary, whether these principles are adhered to'.

⁸¹ Geiger (n 31) links constitutional identity with the powers enumerated in FCC (n 76) para 260. Also see Puttler (n 12) para 17.

⁸² FCC (n 76) para 252 'Particularly sensitive for the ability of a constitutional state to democratically shape itself are decisions on substantive and formal criminal law (1), on the disposition of the monopoly on the use of force by the police within the state and by the military towards the exterior (2), fundamental fiscal decisions on public revenue and public expenditure, the latter being particularly motivated, *inter alia*, by social policy considerations (3), decisions on the shaping of living conditions in a social state (4) and decisions of particular cultural importance, for example on family law, the school and education system and on dealing with religious communities (5).' See paras 253-260 where the court separately explains these five groups of decisions.

⁸³ Von Bogdandy and Schill (n 4) 724.

this part seems to be more reasonable. Challenging the aforementioned interpretation of the FCC's reasoning, Reestman writes that the five domains of state power 'are, moreover, domains in which the chances of an encroachment of other principles belonging to the German constitutional identity seem particularly great' and 'they are closely connected to it [constitutional identity] via the principle of democracy'.⁸⁴ It is also affirmed by Grimm that 'the list fulfils the function of [a] warning sign: touching these matters *implies* a danger to the identity of the Member States' (emphasis added).⁸⁵ This view corresponds to the one expressed by the CCC in the Lisbon II decision, where it demarcated non-transferable competences from the elements of the material core,⁸⁶ and can also be traced in the wording of the FCC. Even though these competences are related to the democratic principle, by using the wording 'particularly sensitive for the ability of a constitutional state to democratically shape itself', it does not firmly establish them as an inherent part of the constitutional identity and in the light of Article 4(2) CTEU, they cannot be seen in every case as fundamental constitutional structures. It is in this sense that one also has to bear in mind the third duty regulated by Article 4(2), ie the duty to respect essential state functions in support of this interpretation.⁸⁷ A relationship to the national identity clause is present. However, it does not mean that these two duties of the Union are identical. Essential state functions do not have to be in every case part of the fundamental constitutional structures of the Member States. This is even more so when one notices that the Court states that 'principle of democracy ... does not mean that a pre-determined number or certain types of sovereign rights should remain in the hands of the state'.⁸⁸ That such a reading of the Lisbon decision is not just an isolated case is shown by two other cases dealing with EU matters that followed this decision. *Honeywell* and *Data Retention* showed the FCC's restraint and narrow application of the principles introduced or restated in the Lisbon decision.⁸⁹

⁸⁴ Reestman (n 8) 386.

⁸⁵ D Grimm, 'Defending Sovereign Statehood against Transforming the European Union into a State' (2009) 5 *European Constitutional Law Review* 368.

⁸⁶ See *Lisbon II* paras 111 and 112. The second paragraph begins with the words '[f]or the same reason'.

⁸⁷ Geiger (n 31) Art 4 EUV, para 4 referring to FCC, Lisbon (n 76) para 351 and the way the new EU powers should be exercised in future.

⁸⁸ FCC, *Lisbon* (n 76) para 248. See also Grimm (n 85) 368.

⁸⁹ FCC, *Honeywell* decision, 2 BvR 2661/06 of 6 July 2010 para 65. See M Mahlmann, 'The Politics of Constitutional Identity and its Legal Frame - the Ultra Vires Decision of the German Federal Constitutional Court' (2010) 11 *German Law Journal* 1407, 1410. *Data Retention* decision 1BvR 256/08, 1BvR 263/08, 1 BvR 586/08 of 2 March 2010. See A-B Kaiser, Case Note: 'German Data Retention Provisions Unconstitutional in their Present Form; Decision of 2 March 2010, NJW 2010' (2010) 6 *European Constitutional Law Review*

Therefore, the FCC's case law, especially the Lisbon decision, under this interpretation might also be seen as part of a general tendency of national constitutional courts. The question that remains open is how far the FCC and other courts are willing and able to go, both in the light of their international obligations assumed through the EU treaties, which will also be reviewed by the ECJ, and their respective constitutional provisions. It appears to be evident from the number of cases that involve direct confrontation with EU law and the ECJ, and by the reasoning in the cases that a certain level of self-restraint is surely being applied.

3.2 The ECJ and the national identity clause

Perhaps Article 19 CTEU does not provide jurisdiction for the ECJ to determine the content of a specific national identity that is based primarily on the constitutional provisions of the Member States, but a total exclusion of any type of jurisdiction over issues connected with the national identity clause would be implausible.⁹⁰ In exercising its powers, the Court has to confirm that the respective structures of national identity do not infringe upon the values of the Union set forth in Article 2 CTEU. Accordingly, the relationship between the highest court instances of the two legal orders stemming from Article 4(2) CTEU is often characterised as a 'relationship of co-operation'.⁹¹ However, there is a dilemma about how this co-operation is to be realised under the present circumstances of friction and contradictory positions between the respective institutions.

3.2.1 The case law in the pre-Lisbon period

The ECJ's case law does not have an impressive direct invocation of the national identity clause prior to the enactment of the Lisbon Treaty. National identity played only a secondary role. There is not a single judgment of the ECJ where the Court drew attention to the duty of Union organs to respect national identity as articulated first in Article 6(3) TEU. In cases where Advocate Generals had previously invoked these provisions, the Court did not find it necessary to do the same.⁹² However, the

503. In *Honeywell*, the FCC substantially qualified the scope of the *ultra vires* review, thus avoiding identity control. In *Data Retention*, it did not go too far on constitutional identity and identity control even though one might argue that there were strong grounds to do so or use an *ultra vires* review.

⁹⁰ Besselink (n 10) 45; von Bogdandy and Schill (n 4).707.

⁹¹ Besselink (n 10) 45, borrowing the wording of the FCC from the Maastricht decision (n 59). See more on this point in P Kirchhof, 'The Balance of Powers between National and European Institutions' (1999) 5(3) *European Law Journal* 225.

⁹² *Michaniki* (n 56) Opinion of AG Maduro, para 30; *Marrosu*, Opinion of AG Maduro (n 56) para 40; *UGT-Rioja* (n 40) Opinion of AG Kokott, para 54; *Kingdom of Spain v Eurojust* (n 34) Opinion of AG Maduro, para 24.

Court, before the enactment of the Lisbon Treaty, implicitly, though only partly, recognised the Union's duty to respect the national identity of the Member States, this being different from recognising national identity as a legitimate aim, in *Commission v Luxembourg*.⁹³ Basically, it was only in cases involving deviations from the fundamental freedoms of the Member States justified by fundamental rights that the Court took into consideration specific constitutional provisions as interpreted by the national courts.

The first important case in this group is the *Omega* case. There are three main points from this case important for the issues at hand. In this case, dealing with derogation from the freedom to provide services based on the public policy of the protection of human dignity as regulated in the German Basic Law, (1) the ECJ held that the protection of fundamental rights constitutes a legitimate interest within the public policy of the Member States and justifies derogation from the fundamental freedoms of the EC. Restating on this point what had already been held by the ICC in *Fragd*,⁹⁴ the ECJ declared that the legitimate interest pursued does not have to correspond to a conception shared by all Member States. (2) The protection of fundamental rights as a public policy has to be interpreted strictly so that its scope cannot be determined unilaterally by each Member State without any control by Community institutions.⁹⁵ (3) Lastly, adding to the previous points, the ECJ held that such derogation from fundamental freedoms can be justified only if it passed the proportionality test. It is precisely in this last point that it relied heavily on the assessment of the Federal Administrative Court of Germany, which can be interpreted as recognition of the exclusive jurisdiction of national courts to decide the content of constitutional identity, in this case fundamental rights, and for it to review this interpretation in the light of EC/EU law. The same logic was followed in later case law. The *Laval*⁹⁶ and *Viking Line*⁹⁷ cases are very illustrative in this regard.

⁹³ Case 473/93 *Commission v Luxembourg* [1996] ECR I-3207.

⁹⁴ *Fragd* (n 63) 657.

⁹⁵ Case C-36/02 *Omega Spielhallen- und Automatenaufstellungs-GmbH v Oberbürgermeisterin der Bundestadt Bonn* [2004] ECR I-9609 para 30. This strict interpretation according to the court entails that 'public policy may be relied on only if there is a genuine and sufficiently serious threat to a fundamental interest of society'. See also para 31.

⁹⁶ Case C-341/05 *Laval un Partneri Ltd v Svenska Byggnadsarbetareförbundet* [2007] ECR I-11767 paras 91-92.

⁹⁷ Case C-438/05 *International Transport Workers' Federation, Finnish Seamen's Union v Viking Line ABP, OÜ Viking Line Eesti* [2007] ECR I-10779 paras 85-90. Paragraph 85 reads 'it must be pointed out that, even if it is ultimately for the national court, which has sole jurisdiction to assess the facts and interpret the national legislation, to determine whether and to what extent such collective action meets those requirements, the Court of Justice, which is called on to provide answers of use to the national court, may provide guidance, based on the file in the main proceedings and on the written and oral observations which

In the latter, the ECJ clearly set out the roles of both the national courts and ECJ. Thus, it can be concluded that basically the ECJ leaves it to national courts to determine the proportionality of national acts, while providing guidance for this discretion.⁹⁸

The common denominator in this group of cases is that they all balance between the fundamental freedoms of the EU and fundamental rights as regulated in national constitutions. Due to this fact, one cannot be too enthusiastic, as the ECJ has been following well-established practice, basically since the FCC *Solange I* decision, of respect for fundamental rights that are now also partly incorporated into the Treaties by the Charter on Fundamental Rights. Nevertheless, the degree of protection might turn out to be an issue, and at this point the national identity clause could play a role.

The crucial point of these cases is that the legal basis for allowing Member States to derogate from the application of EU law was found in provisions other than the national identity clause, namely Articles 39 and 46 TEC, or better said the latter were not read in conjunction with Article 6(3) TA. Maybe it seems that it does not really matter which of these provisions are invoked, as the legal consequences are the same and EU law is not applied to the situation at hand. However, the difference between them is that whereas provisions regulating exceptions in the application of fundamental freedoms is totally within the jurisdiction of the ECJ, Article 4(2), as clarified before, is not. Crucially, the latter provision 'clearly refers back to the Member States'.⁹⁹ It is not to be inferred from this view that the ECJ should invoke only the national identity clause. This would not be sound, as Article 6(3) was not to be applied and interpreted by the ECJ under Article 46 TEU but rather affirmed the duty that it has under treaty provisions to respect the fundamental constitutional structures of the Member States as declared in their constitutions and interpreted by their national constitutional courts. Since the new national identity clause has entered into force only recently, it might be true that the ECJ will adapt to the new meaning of this clause, even though certain recent developments do not give rise to an unreserved optimism.

In contrast to previous cases, in *Michaniki*,¹⁰⁰ which involved the question of the (in)compatibility of a constitutional provision and an internal market directive, the ECJ did not follow the same approach, as the constitutional provision at stake was not of the same importance as the

have been submitted to it, in order to enable the national court to give judgment in the particular case before it.'

⁹⁸ See Groussot (n 66) 117.

⁹⁹ FC Mayer, 'Supremacy - Lost?', Walter Hallstein-Institut, Paper 2/06, 8 <<http://www.whi-berlin.eu/documents/whi-paper0206.pdf>> accessed 15 August 2012.

¹⁰⁰ *Michaniki* (n 56).

ones regulating fundamental rights.¹⁰¹ As a matter of fact, the Court did not pay any attention to the constitutional dimension of the case, and basically trivialised the meaning of the respective constitutional provision.¹⁰² However, is it up to this court to decide which constitutional provisions are trivial for EU law? This question implies that ‘a risky enterprise to project an EU ranking of values onto national constitutional law’¹⁰³ which was not quite in line with Article 4(2) CTEU took place in this case.

AG Maduro was cautious¹⁰⁴ in his opinion, which basically followed the reasoning of the Court in some of the previously mentioned cases. He drew attention to respect for national identity¹⁰⁵ and the fact that this case involved a provision that had been subject to a prior national constitutional assessment.¹⁰⁶ He affirmed the national courts’ discretion to rule upon the meaning and scope of such provisions, subject to judicial review with regard to assessment of the proportionality of the specific national provision.¹⁰⁷ By taking this view, Maduro alluded to the sensitivity of the issue and considerations that needed to be taken into account in the application of the proportionality test, even though, just like the ECJ itself, he did not really go into the Greek context, which raises concern for the appropriateness of the finding.¹⁰⁸

The ECJ, on the other hand, ignored most of these crucial points in its decision and applied the principle of the primacy of EU law, as articulated in *Internationale Handelsgesellschaft*, by which it suggested the inconformity of the national constitutional provision with the specific directive. The decision was not warmly welcomed and also received criticism because it was made at a particularly sensitive moment which could have arguably increased the gap between the ECJ and national constitutional courts in the context of the Lisbon decision of the FCC.¹⁰⁹

Comparing *Michaniki* with *Omega* and other related cases, one can notice certain illuminating patterns. Namely, as far as fundamental rights are concerned, the ECJ seems to be rather ‘co-operative’ and

¹⁰¹ Besselink (n 10) 48.

¹⁰² V Kosta, Case Note ‘Case C-213/07, *Michaniki AE v Ethniko Simvoulío Radiotileorasis, Ipourgos Epikratias*’ (2009) 5 European Constitutional Law Review 510.

¹⁰³ Besselink (n 10) 49.

¹⁰⁴ *Michaniki* (n 56) Opinion of AG Maduro, opening remarks point 1: ‘What makes the present case unusual, however, is the fact that the national legislative measure in question is a constitutional provision. Should this fact affect the response to be given?’

¹⁰⁵ *Michaniki* (n 56) Opinion of AG Maduro, para 31.

¹⁰⁶ *Michaniki* (n 56) Opinion of AG Maduro, para 30.

¹⁰⁷ *Michaniki* (n 56) Opinion of AG Maduro, paras 34-35.

¹⁰⁸ Kosta (n 102) 512.

¹⁰⁹ Kosta (n 102) 507.

accepts and adheres to the discretion of national courts to determine the meaning, scope and importance of the specific legitimate interest that is the fundamental constitutional right. However, as far as other constitutional provisions are concerned, the ECJ is not willing to be so resilient. Bearing in mind that constitutional identity not only includes fundamental rights but also certain other elements, it will be difficult for national constitutional courts and the ECJ to resolve issues related to respect for national identity.

3.2.2 *The case law in the post-Lisbon period*

In the first years following the justiciability of the national identity clause, the ECJ has invoked this provision in only two cases. In the *Sayn-Wittgenstein* decision,¹¹⁰ the ECJ invoked Article 4(2) CTEU for the first time.¹¹¹ This case involved a ban on the registration and use of noble titles, Austrian or foreign, in Austria as part of a person's name, which was provided for by a statute (Abolition of the Nobility Act) of constitutional rank implementing a constitutional principle of equal treatment, and the compatibility of this ban with the freedom of movement in the EU as regulated in Article 21 TFEU. Similar to some of the cases mentioned before, the ECJ decided that an encroachment on the freedom of movement under Article 21 through such a ban in a Member State can be justified and is proportional. The latter was determined by the ECJ itself, even though AG Sharpston stated that the national court should assess proportionality¹¹² on public policy grounds while invoking the duty for respect of the national identity of Member States only as a secondary argument.¹¹³ Here there are two points that need to be emphasised for the purpose of the position presented in this article.

First, the ECJ stated quite clearly that 'national identity, *may be taken into consideration* when a balance is struck between legitimate interest and the right of free movement of persons recognized under European Union law' (emphasis added),¹¹⁴ by means of which it inserted national identity within the framework of public policy justification and made this a free movement case.

Secondly, Article 4(2) CTEU was invoked in the context of the status of Austria as a republic¹¹⁵ in applying the proportionality test, which

¹¹⁰ Case C 208/09 *Ilonka Sayn-Wittgenstein v Landeshauptmann* [2010] ECR I-13693.

¹¹¹ For more on this case, see LFM Besselink, 'Case C-208/09, Ilonka Sayn-Wittgenstein v Landeshauptmann von Wien, Judgment of the Court (Second Chamber) of 22 December 2010' (2012) 49(2) CML Rev 671-93.

¹¹² *Sayn-Wittgenstein* (n 110) Opinion of AG Sharpston, para 68.

¹¹³ Von Bogdandy and Schill, (n 32) 1424.

¹¹⁴ *Sayn-Wittgenstein*, (n 110) para 83.

¹¹⁵ *Sayn-Wittgenstein*, (n 110) para 92 'It must also be noted ...' (emphasis added).

raises certain questions. Namely, while the whole case dealt with the equal treatment of citizens and its implementation through the ban on noble titles, the Republic's status was not really at stake and could not be interpreted as an 'obvious reason' for the outcome of the case.¹¹⁶ The fact that a certain state is a republic does not necessarily mean that it must ban noble titles and interpret equal treatment in such a manner as Austria does. Thus, in this case a republican status is not really an argument for declaring the ban proportional. Additionally, the reason for such an outcome in this case can also be explained through the clear and explicit decision of the Constitutional Court of Austria upon the matter, declaring an act by the Austrian authorities different from the aforementioned ban as unconstitutional. Under such circumstances, any other outcome in this case would have put the ECJ on a line of direct confrontation with the Constitutional Court, something that it obviously tried to avoid by also invoking Article 4(2) CTEU.

Bearing all this in mind, it could be easily claimed that the proportionality test in essence was not applied in this case, similar to *Omega*,¹¹⁷ which was referred to by the ECJ in this case. This leaves the national identity clause without particular meaning and purpose, thus making Article 4(2) CTEU very much redundant.¹¹⁸

In *Runevič-Vardyn*,¹¹⁹ the ECJ dealt with an issue that involved the Lithuanian rules on the spelling of names on the birth and marriage certificate of a couple: Mrs Runevič-Vardyn, a Lithuanian citizen of Polish origin, and a Polish citizen, Mr Wardyn, who had got married in Lithuania, and the compliance of these rules with Article 21 TFEU. Of the three separate aspects¹²⁰ that were recognised by the Court, only in the one that had to do with the discrepancy in the spelling of the surname of the husband on the marriage certificates, Vardyn instead of Wardyn, was it declared that this could represent a restriction on the freedom of movement. Such a restriction could be justified by a national identity

¹¹⁶ For a different view, see S Rodin, *Croatian Yearbook of European Law and Policy* (2011) 30-31.

¹¹⁷ *Sayn-Wittgenstein* (n 110) para 86 'The Court has repeatedly noted that the concept of public policy as justification for a derogation from a fundamental freedom must be interpreted strictly, so that its scope cannot be determined unilaterally by each Member State without any control by the European Union institutions ... Thus, policy may be relied on only if there is a genuine and sufficiently serious threat to a fundamental interest of society'.

¹¹⁸ For an opposing view, see Besselink (n 111) 684-686.

¹¹⁹ Case-C 391/09 *Malgożata Runevič-Vardyn and Łukasz Paweł Wardyn v Vilniaus miesto savivaldybės administracija and Others* [2011] OJ C 194 nyp. For more on this case, see H van Eijken, 'Case-C 391/09, Malgożata Runevič-Vardyn and Łukasz Paweł Wardyn v Vilniaus miesto savivaldybės administracija and Others Judgment of the Court (Second Chamber) of 12 May 2011' (2012) 49(2) CML Rev 809-826.

¹²⁰ *Runevič-Vardyn* (n 119) para 51.

concern, such as the protection of the Lithuanian language, which has a constitutional status confirmed by a decision of the Lithuanian constitutional court, as pointed out by the ECJ.

The second case discussed in this part is important with respect to the issue at hand for two reasons. First, it is the second case in which the ECJ invoked the national identity clause. It was made clear in this case that national identity can be an independent justification for the derogation of a Member State from freedom of movement. However, the evocation of national identity grounds for justification for the first time within the framework of Article 4(2) CTEU is not related to fundamental rights but rather to the constitutional status of the Lithuanian language.¹²¹ This might be a hint for a new development along the lines that were presented in the previous section related to fundamental rights as grounds for derogation from fundamental freedoms in the pre-Lisbon period. Additionally, Article 4(2) CTEU has been correlated with Article 3(3) CTEU, which is an interesting aspect of the decision but which will not be dealt with further here.

Second, the Court in this context left it up to the national court to decide whether the spelling rules cause a serious inconvenience for the applicants and also on the proportionality between free movement and the right to private life under both Article 7 of the Charter and Article 8 of the ECHR on the one hand, and national identity on the other.¹²² This can be seen as a significant shift with regard to *Sayn-Wittgenstein* by providing the necessary leeway for national courts in deciding national identity issues.

These two cases show that there is a positive development in recognising the importance of the national identity clause, but it seems to be too early to draw specific conclusions. Future cases will need to be followed closely in order to see if *Runevič-Vardyn* will turn out to set a new standard or equilibrium in respect for the national identity of the Member States.

4 The national identity clause and the absolute primacy of EU law: having your cake and eating it?

While discussing the questions in the previous section of who is to decide on national identity and determine the limit that it represents for EU law, it is evident that constitutional courts and the ECJ are not completely on the same page. Nothing else can be expected, because the answer to these questions might significantly impact the fundamental doctrine of the primacy of EU law.

¹²¹ *Runevič-Vardyn* (n 119) paras 86-87.

¹²² *Runevič-Vardyn* (n 119) para 91.

Primacy is one of the cornerstones of EU law.¹²³ Although it has no explicit treaty basis, despite several attempts, it was established and justified by the ECJ in its landmark decision *Costa v ENEL* on the basis of the independence, uniformity and efficacy of EC law.¹²⁴ In *Internationale Handelsgesellschaft*, the primacy was clarified to also include the precedence of EC law over national constitutions. This last point has been a bone of contention between national constitutional courts and the ECJ ever since.

While the primacy of EU law over national legislation has been accepted by national constitutional courts from the outset, the primacy of EU law over constitutions, or at least their fundamental provisions, has been continuously and persistently challenged.¹²⁵ The arguments are basically founded on the source of authority of EU law in national legal systems and that is, in the view of these courts, the constitutions themselves. Therefore, they cannot agree to this type of emancipation of EU law, particularly not through a principle that has been developed by the ECJ and without a legal basis in the treaties. On the other hand, they consistently declare the openness of the national legal order and their commitment to EU law, since this is also an obligation stemming from constitutional provisions.

An interesting aspect of this development is the occurrence of what is referred to as the 'duality' of constitutional provisions. Namely, constitutional courts have insisted on and emphasised the 'core provisions' whenever a matter related to EU law is placed before them. It could be implied that it is the red line they are not willing or able to cross even by invoking a European-friendly interpretation of these provisions, which in essence would mean their tacit amendment. Thus, phrases such as the 'material core', 'constitutional identity', and 'fundamental principles' are a common feature of the reasoning of national constitutional courts in determining the limits of the application of EU law, which have now also found their clearer articulation in EU law through Article 4(2) CTEU. One can argue, judging by the attitude of constitutional courts and their interpretation of the national identity clause, pre- and post-Lisbon, that they see the national identity clause as the 'weak spot' of the primacy

¹²³ For more on primacy, see I Pernice, 'Costa v ENEL and Simmenthal: Primacy of European Law' in MP Maduro and L Azoulay (eds), *The Past and Future of EU Law: The Classics of EU Law Revisited on the 50th Anniversary of the Rome Treaty* (Hart 2010) 47; Chalmers, Davies and Monti (n 5) 203-210. On the difference between supremacy and primacy, see Mayer (n 99) 3-5.

¹²⁴ Compare C Harlow, 'Voices of Difference in a Plural Community' (2002) 50 *American Journal of Comparative Law* 339, 358: 'Supremacy is buttressed by the ingenious use made by the ECJ Judgment of the simple obligation imposed on Member States by EC Art 10 (ex 5) "to take all appropriate measures" to fulfil their Treaty obligations'.

¹²⁵ The interpretation and consequences of Declaration No 17 are not discussed here.

of EU law.¹²⁶ Perhaps a clear signal was sent by the FCC in the Lisbon decision by reserving, within the national legal order, the duty to define and protect constitutional identity and by avoiding the possibility of being circumvented by lower courts through preliminary references to the ECJ.¹²⁷

The ECJ is not lagging behind and mirrors this position, particularly through the insistence on the uniform and effective application of EU law. Not only are the instances in which it has invoked the national identity clause quite rare, but also the ECJ recently in September 2010 affirmed its positions on the absolute primacy of EU law by referring to *Internationale Handelsgesellschaft*.¹²⁸ Additionally, the *Kadi*¹²⁹ decision could prove to be a good argument for constitutional courts to argue the double standards applied by the ECJ with respect to the fundamental principles of EU law *vis-a-vis* the fundamental principles of national constitutions, and to challenge the understanding of the primacy of EU law,¹³⁰ something that the FCC did not fail to notice and mention in its Lisbon decision.¹³¹

Nonetheless, although the ECJ has started invoking Article 4(2) CTEU and to some extent abide by its duty, it is not certain that there will be no reaction from constitutional courts, especially if the interpretation provided by the ECJ is not totally in line with the defined meaning and scope of constitutional identity. In this sense, the reserved mandate of constitutional courts to defend constitutional identity might lead these institutions to review the decisions of the ECJ, as it is also under the duty to respect national identity. True, it is not totally in line with the spirit and logic of EU law, according to which the ECJ should make the ultimate decision on the limits of EU law,¹³² but one cannot expect constitutional courts to rule contrary to their constitution when an interpretation accommodating both EU and national law interests is not feasible.¹³³

¹²⁶ Chalmers, Davies and Monti (n 5) 201.

¹²⁷ FCC, *Lisbon*, (n 76) para 241; Ziller (n 79) 71.

¹²⁸ Case C-409/06 *Winner Wetten GmbH v Bürgermeisterin der Stadt Bergheim* [2010] ECR I-8015 para 61. For more on the meaning of *Winner Wetten* in the context of *Sayn-Wittgenstein*, see Besselink (n 111) 689-691.

¹²⁹ Joined Cases C-402/05P and C-415/05 P *Kadi and Al Barakaat v Council* [2008] ECR I-6351.

¹³⁰ For more on this point, see B De Witte, 'European Union Law: How Autonomous is its Legal Order?' (2010) 65 *ZÖR* 153.

¹³¹ FCC, *Lisbon* (n 76) para 340.

¹³² Mayer (n 99) 8.

¹³³ Tomuschat (n 78) 279.

The counter argument that it is practically a self-limitation of the primacy that is declared in the Treaty, and thus EU primary law, because of which absolute primacy is not affected, is not totally convincing.¹³⁴ As stated above, constitutional courts will claim the last call on limits to the application of EU law on constitutional identity grounds. The claim will not be based, at least not solely, on Article 4(2) CTEU but rather on the respective constitutions that often declare that the principles, the parts relating to constitutional identity, are not to be amended by a regular constitutional procedure. By this very fact, it cannot be claimed that absolute primacy has not been impacted and that the ECJ should not adapt to it by paying due respect to national identities.

It should also be noted that constitutional courts have shown a certain level of self-restraint by declaring that this type of review of EU acts and actions will occur only under exceptional circumstances.¹³⁵ Nevertheless, even if the chances of a conflict that could turn out to be unresolvable are very slim, such a possibility still exists and it could be just a matter of time before it occurs.¹³⁶ The developments concerning the Data Retention Directive might prove to have such potential. Three constitutional courts have declared that the domestic implementing acts are encroaching on constitutional rights and are thus unconstitutional. The FCC decision is particularly important as the first case in which 'identity control' was applied.¹³⁷

Similar to the EAW case,¹³⁸ the FCC chose an elegant solution to the issue, as it did not question the validity or applicability of the Directive but rather the German implementing legislation, and thus avoided preliminary reference to the ECJ. The conditions that were set by this court in order for an implementing act to be constitutional are very strict and for the most part hard to meet. As result, an infringement procedure against Germany has been initiated by the European Commission. Now it is up to the ECJ to decide whether this state has infringed its obliga-

¹³⁴ M Kumm and VF Comella, 'The Primacy Clause of the Constitutional Treaty and the Future of Constitutional Conflict in the European Union' (2005) 3 *International Journal of Constitutional Law*, 473, 479, 491-492.

¹³⁵ *Fragd* (n 63) 657 'highly unlikely'; FCC, *Lisbon* (n 76) para 340 'exceptionally'; CCC (n 71) paras 84, 110 and 139 'exceptional cases'.

¹³⁶ Interestingly, this was also noticed by the ICC as far back as 1989 in the *Fragd* case when it stated: 'Such a conflict, whilst being highly unlikely, could still happen'. *Fragd* (n 63) 657.

¹³⁷ Federal Constitutional Court of Germany, *1 BvR 256/08*, *1 BvR 263/08*, *1 BvR 586/08* of 2 March 2010 para 218, referring directly to the Lisbon decision: 'It is *part of the constitutional identity* of the Federal Republic of Germany that the citizens' enjoyment of freedom may not be totally recorded and registered, and the Federal Republic must endeavour to preserve this in European and international connections' (emphasis added). Translation taken from FCC Press release no 11/2010 of 2 March 2010.

¹³⁸ FCC, European Arrest Warrant Act case, *2 BvR 2236/04* of 18 July 2005.

tions in protecting its constitutional identity. If it decides against the Member State, which seems likely to happen, then it will be very interesting to see the reaction of the FCC, if there is any of course.¹³⁹

4.1 Constitutionalism beyond the state revisited

The occurrence of such conflicts, however, should not always be seen as something catastrophic. As matter of fact, many scholars who are proponents of the concept of constitutional pluralism take this as an acceptable, if not desirable, 'risk'. Among the different views on constitutional pluralism in the European Union, Mattias Kumm has directly included considerations of the national identity clause under the CT and its impact on the relationship between national and EU law, especially in the context of primacy, in developing his vision of constitutional pluralism.¹⁴⁰ Within the framework of Constitutionalism Beyond the State (CBS) as a normative jurisprudential account of constitutional conflicts developed by Kumm, it is claimed that the national identity clause authorises Member States to set aside EU law on constitutional identity grounds, and that it is something that under certain limited conditions,¹⁴¹ such as a clear and specific constitutional rule,¹⁴² should be accepted by the ECJ. In arguing his position, Kumm further explains certain conditions for both national courts, ie constitutional ones, and the ECJ in making this type of constitutional conflict a moment of constructive deliberative engagement¹⁴³ and transforming the role of constitutional courts into one of 'a constructive corrective force'¹⁴⁴ in the European Union. The underlying principle of best fit as opposed to the ultimate legal rule premise is aimed at leading national courts to rely on both national and European Union law.¹⁴⁵ Thus, in the case of conflict, claims should not be made as to which legal order will have primacy, but it should be an act of balancing between competing principles in a way that will best suit the common values underlying both legal orders and practices.

¹³⁹ To make the issue even more interesting, the Commission in its evaluation report on the Directive wrote: 'the Commission intends to propose amendments to the Directive, based on an impact assessment.' Commission, Evaluation report on the Data Retention Directive (Directive 2006/24/EC) COM (2011) 225 final 1. The question is thus if the Commission will consider the requirements of the FCC and if it will be willing to meet them.

¹⁴⁰ For more on this, see M Kumm, 'The Jurisprudence of Constitutional Conflict: Constitutional Supremacy in Europe before and after the Constitutional Treaty' (2005) 11(3) *European Law Journal* 262-307.

¹⁴¹ Kumm (n 140) 302-304.

¹⁴² Kumm (n 140) 297-298; Kumm and Comella (n 134) 488-489.

¹⁴³ Kumm (n 140) 269.

¹⁴⁴ Kumm (n 140) 292.

¹⁴⁵ Kumm (n 140) 282-288.

Under these circumstances, not only will Pandora's Box¹⁴⁶ remain closed, but also through the engagement of national constitutional courts a relationship of complementarity between the courts in achieving a common constitutional tradition in Europe and furthering European integration will be fostered. Chaos has neither come about and nor is it on the verge of happening; on the contrary.¹⁴⁷

As has been shown, the national constitutional courts have themselves declared quite openly that a constitutional conflict might occur in only very exceptional circumstances, as has been the case so far. In this sense, even the recent case law, especially the cases analysed above where the courts referred to EU law and Article 4(2) CTEU in their reasoning, confirms the positions of CBS and makes the case for this pluralistic vision even stronger after the adoption of the Lisbon Treaty. On the other hand, also following the line of argumentation in CBS, it is for the ECJ to take further steps in a direction that would provide more leeway for national courts to assess whether national, ie constitutional, identity has been touched upon. Such an involvement and engagement of the constitutional courts will only further pacify relations through the perception of the constitutional courts as equal partners and contributors to the creation of a common constitutional area in Europe.

Recent developments in the case law of the ECJ provide evidence that the Court is starting to take this issue more seriously, even though one should not jump to conclusions, as this has happened only recently in *Runevič-Vardyn*. In any case, the last line of defence for the ECJ against compromising the uniform and effective application of EU law will be Article 2 CTEU. As an addition to CBS, this interpretation is also in line with the legislative history and original meaning of this provision within the framework of the CT.¹⁴⁸ At the same time, this leading value of EU law does not need to be taken to the extreme, as it might be stated that it could be overridden by other values and principles as well as the fact that now throughout the Union EU law is not applied in this strict sense bearing in mind all the exceptions, opt-outs or protocols excluding certain Member States from respect for this principle.

4.2 Content v normative relevance

Authors writing on this topic have put forward the argument that the national identity clause as a matter of EU law is to be applied and interpreted solely by the ECJ, as this is the court that provides the au-

¹⁴⁶ M Wendel, 'Lisbon before the Courts: Comparative Perspectives' (2011) 7 European Constitutional Law, 96, 135.

¹⁴⁷ See the part on the *Cassandra* and *Pangloss* scenarios in Kumm (n 140) 291-292.

¹⁴⁸ CONV 375/1/02 REV 1, 11.

thoritative interpretation of EU law. In claiming this, however, the argument goes on to explain that basically Article 4(2) CTEU incorporates two dimensions. The first one is the content and scope of the constitutional identity that needs to be determined by the respective national courts, above all constitutional courts, because it is a matter of national law. The second is the normative relevance of this provision with regard to the limits that it sets on the application of EU law, which must be determined by the ECJ.¹⁴⁹

Even though at first glance this argument is well founded, it manifests a certain weakness and shortcoming in its elaboration. Namely, the differentiation between the content and scope of the respective constitutional identity and its normative relevance in EU law is not always an easy and simple task. This is particularly the case when there is no clear declaration by a respective national authority or constitutional court on this point, which some authors overlook.¹⁵⁰ As noted before, constitutional courts have not been so keen on listing the values and principles of constitutional identity and thus retained their right to decide upon it only in specific cases. Under such circumstances and in the absence of procedural instruments such as a preliminary reference to constitutional courts, the ECJ in deciding a case involving a claim of respect for national identity employing the proportionality test will enter into a forbidden zone of determining the content and scope of the constitutional identity of a Member State.¹⁵¹ This is in essence contrary to Article 19 CTEU and also contrary to its duty to respect Article 4(2) CTEU.

If a government or national court makes a claim for respect for national identity in a case before the ECJ, then the ECJ needs to leave the determination of constitutional identity and the proportionality test to the national courts by providing certain guidelines, even in cases where the constitutional court has not voiced itself on the issue. In this way, the ECJ will avoid deciding on essential and non-essential elements of national constitutions¹⁵² or adapting the reasoning on constitutional identity based on primary or secondary EU law.¹⁵³

¹⁴⁹ Wendel (n 146) 134-135; von Bogdandy and Schill (n 32) 1448.

¹⁵⁰ Von Bogdandy and Schill (n 32) 1449.

¹⁵¹ Case C 51/08 *European Commission v Grand Duchy of Luxembourg* [2011] OJ C 204 nyp, para 124. See Besselink (n 111) 687.

¹⁵² Rodin (n 116) 26.

¹⁵³ Von Bogdandy and Schill (n 32), 1441-1445; Besselink (n 111) 688. Besselink is not that convincing when making the argument that secondary EU law can rarely imply a constitutional identity issue. The counter-argument would be the Data-Retention Directive, which has drawn significant attention especially with the interpretations of the right to privacy and other related fundamental rights.

In the two post-Lisbon decisions of the ECJ, however, constitutional courts have had their say on the specific aspect of constitutional identity, but the ECJ, although deferential to national courts, was not consistent in its approach. Unlike in *Runevič-Vardyn*, where it left the proportionality test to national courts, in *Sayn-Wittgenstein* the ECJ tried to translate the case into an exclusively freedom of movement case. Nevertheless, in the application of the proportionality test it relied only on national law arguments, such as the constitutional nature of the provision of equality of treatment and the abolition of noble titles, the ruling of the Austrian Constitutional Court and Austria's status as a republic as part of its constitutional identity, which could easily lead to a claim that effectively no proportionality test was applied or that it was just a 'thin' proportionality test.¹⁵⁴ It is important to closely follow future decisions of the ECJ involving respect for constitutional identity, particularly bearing in mind another string of case law in which the latest episode was *Winner-Wetten*, which might put under suspicion the readiness of the ECJ to adapt the absolute primacy of EU law.¹⁵⁵

All things considered, there are no strict guarantees that courts will abide by their duties under EU law or national constitutional law, especially with respect to constitutional identity. This situation shows that Article 4(2) CTEU will probably not be able to solve the riddle of absolute primacy. The complexity of the whole issue is such that the national identity clause does not suffice and cannot be a panacea.¹⁵⁶ As a matter of fact, there is also doubt whether the highest courts of the two legal orders have the instruments required to bring this conundrum to an end.¹⁵⁷ There are inherent limitations, both procedural and material, in these instances. If the two positions, the one of the ECJ and that of the national constitutional courts, cannot be reconciled under such circumstances, then perhaps the solution should be sought in political institutions and political decisions.¹⁵⁸ The available options¹⁵⁹ might include changes to the law, treaties or constitutions, or opting for an Irish solution, ie enacting a protocol declaring the limit of EU law application on matters of high constitutional importance.¹⁶⁰ Even though these al-

¹⁵⁴ Besselink (n 111) 689.

¹⁵⁵ Besselink (n 111).

¹⁵⁶ On the shortcomings of pluralist theories, see Chalmers, Davies and Monti (n 5) 199. See also Mayer (n 60) 311.

¹⁵⁷ See *Fragd* (n 63) 659, 'balancing between uniform application or certainty of law and the fundamental principles of national constitutions will represent an extremely difficult evaluation'.

¹⁵⁸ Kumm (n 140) 274; Kumm and Comella (n 134) 490.

¹⁵⁹ Mayer (n 60) 311; Compare Mayer (n 99) 8.

¹⁶⁰ Compare Mayer (n 99) 7.

ternatives are difficult to achieve, it is to be seen whether they are more viable than withdrawal from the Union.¹⁶¹

5 Conclusion

Slowly but surely, respect for national identity is becoming a catchphrase of both EU and national constitutional law. Article 4(2) CTEU has drawn significant attention in judicial but also academic discourse. National constitutional courts perceive it as a confirmation at the EU level of their consistent views on the relationship between national constitutional law and EU law and as the soft spot of the primacy of EU law. The ECJ interprets this provision as just another justification that may be taken into consideration when balancing national measures with fundamental freedoms, avoiding truly adapting the rigid interpretation of the absolute primacy of EU law.

The view taken here is that Article 4(2) CTEU creates a basis at the EU level for the recognition of the right of national constitutional courts to set aside EU law under exceptional circumstances when a value or principle of their constitutional identity is encroached upon. This right is not an absolute one, however, and it will be up to the ECJ to defend the outer limits of EU law through Article 2 CTEU.

Such a view is based on the concept of constitutional pluralism, particularly the constitutionalism beyond the state account of Mattias Kumm. It seems that the case for CBS is even stronger in the aftermath of the Lisbon Treaty, which can vividly be seen through the attitude of national constitutional courts, but which is also supported by textual and contextual analysis of this provision. The ECJ has hinted lately in its *Runevič-Vardyn* decision that there might be a shift in its practice, but it is still too early to say.

In this way, the significance of Article 4(2) CTEU should not be overstated. The national identity clause will not be able to solve the core problem of the relationship between the two legal orders that are the source of the authority of EU law, and based on this the primacy of EU law. Nevertheless, it should not be underestimated, as it surely provides the conditions for increased co-operation among the highest judicial instances in Europe. Thus, it will not be a battleground but will mitigate any future conflict by providing a framework for damage control. Neither will it be a total meeting point, as the circumstances in the relationship are a bit too complex for one provision to be able to abolish any type of friction.

¹⁶¹ Mayer (n 99) 8.