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The notion of constitutional identity and its role in European integration

Policy Department for Citizens' Rights and Constitutional Affairs
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The notion of constitutional identity and its role in European integration

Abstract

Since the introduction of Article 4(2) of the Treaty on European Union, the meaning and function of the notion of constitutional identity have become an important point of contention. This study, commissioned by the European Parliament's Policy Department for Citizens' Rights and Constitutional Affairs at the request of the AFCO Committee, examines what the concept of constitutional identity means and how it has been understood in various EU Member States. It assesses the impact of this concept on the relations between the EU and its Member States. Finally, the study evaluates how the notion of constitutional identity can play a role in future EU integration.

This document was requested by the European Parliament's Committee on Constitutional Affairs.

AUTHOR
Dr. Christophe MAES, Research associate KU Leuven & UCLouvain Saint-Louis – Bruxelles

ADMINISTRATOR RESPONSIBLE
Eeva PAVY

EDITORIAL ASSISTANT
Fabienne VAN DER ELST

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To contact the Policy Department or to subscribe for updates, please write to:
Policy Department for Citizens' Rights and Constitutional Affairs
European Parliament
B-1047 Brussels
Email: poldep-citizens@europarl.europa.eu

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LIST OF ABBREVIATIONS

ECB	European Central Bank
CFR	Charter of Fundamental Rights of the European Union
CVM	Cooperation and Verification Mechanism
EAW	European Arrest Warrant Framework Decision
ECHR	European Convention on Human Rights
CJEU	Court of Justice of the European Union
ECtHR	European Court of Human Rights
EU	European Union
GFCC	Germany's Federal Constitutional Court
ICC	Italy's Constitutional Court
OMT	Outright Monetary Transactions mechanism
PSPP	Public Sector Purchase Programme
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union

EXECUTIVE SUMMARY

Since the introduction of the so-called 'identity clause' in the Treaty on European Union (TEU; Maastricht Treaty) (1992) and its reformulation in the Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community (2009), the meaning and function of constitutional identity have become an important point of contention in the political and constitutional spheres of the EU.[1] Constitutional identity has increasingly been used to affirm the domestic courts' internal adjudicative authority and to resist further European integration. This study aims to take stock of this notion.

First, the study analyses 'constitutional identity' as a concept. It presents constitutional identity both as an analytical and descriptive concept and as a legal doctrinal notion. As an analytical concept, constitutional identity is used to explain how a collectivity understands itself through a constitutional document or order. As a normative concept, constitutional identity focuses on the core norms and principles of a constitutional system that bind constitutional actors in a particular way, making these rules and values unamendable. The study also explains what the sources of constitutional identity could be and which elements can belong to its content.

Second, the study explores the understanding and use of constitutional identity as referred to in Article 4(2) TEU in various EU Member States. It provides an overview that ranges from the emergence of constitutional identity in the jurisprudence of German and Italian constitutional courts and the insertion of this concept in the EU Treaties, to the various uses of constitutional identity as a means of limiting the primacy of EU law. The study concludes this overview by analysing the gradual establishment of the EU's constitutional identity.

Third, the study examines the influence of constitutional identity on shaping the relations between the Member States and the EU institutions. It shows that constitutional identity functions as a legal instrument that channels constitutional conflicts and promotes constitutional dialogue, turning it into an important reference point for a shared normativity between European and national legal orders. It analyses the different national and EU actors involved in interpreting constitutional identity and assesses the various possibilities for enforcing and accommodating constitutional identity in the EU.

Fourth, the study inquires into the relationship between national law and EU law, focusing on the three types of review that allow courts to evaluate EU law: fundamental rights review, ultra vires review, and identity review. The analysis of these forms of review shows their interconnection and how the Court of Justice of the European Union (CJEU) has responded to the Member States' courts' use of these review types.

The study concludes with an assessment of how the notion of constitutional identity can affect the future of EU integration, especially considering future enlargement of the EU. It first points to the fact

[1] Article 4(2) TEU states: "*The Union shall respect the equality of Member States before the Treaties as well as their national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government. It shall respect their essential State functions, including ensuring the territorial integrity of the State, maintaining law and order and safeguarding national security. In particular, national security remains the sole responsibility of each Member State*".

that the notion of constitutional identity will inevitably continue to play a role in the time to come. The identity clause of Article 4(2) TEU must be understood as a norm of reference in the EU's constitutional pluralist setting. In this respect, both domestic and European accounts of constitutional identity are equally relevant. This leads to the observation that in such a system, no single constitutional authority can claim exclusive and absolute ownership in the application of the identity clause of Article 4(2) TEU, leaving final interpretative authority to remain open. Yet, this cannot give way to an abuse of constitutional identity: the accommodation of identity-based claims can only be acknowledged and accommodated in so far as they do not undermine the uniformity reached in certain areas through legislative harmonisation and if they respect the shared values referred to in Article 2 TEU[2]. Should Member States steer towards destructive conflicts, characterised by a lack of sincere cooperation and mutual trust between the former and EU institutions, these conflicts can be responded to with the appropriate judicial, legal, and political actions at the national and EU levels. Finally, the study proposes some recommendations to appease future constructive conflicts between the Member States and the EU, and enhance the cooperative dialogue.

[2] Article 2 TEU stipulates: "*The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail*".

1. INTRODUCTION*

Article 4(2) TEU stipulates that the EU must 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. The EU must also respect the Member States' **essential State functions**, including ensuring the territorial integrity of the State, maintaining law and order, and safeguarding national security. As such, Article 4(2) TEU forms the legal basis for the EU's acknowledgment and respect of the Member States' constitutional identities when interpreting and enforcing EU law.

Since the introduction of the identity clause in the Treaty on European Union (TEU; Maastricht Treaty) (1992) and its reformulation in the Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community (2009), the meaning and function of the notion of constitutional identity have become an important point of contention. This notion has increasingly been used to affirm the domestic courts' internal adjudicative authority and to resist further European integration. This study aims to investigate this notion.

In the first section, this study will show that constitutional identity can be understood both as **an analytical and a normative concept**:[1] first, this concept tries to grasp how a collective body can understand itself through constitutional documents and a constitutional order, and second, it explains the binding nature of fundamental constitutional norms and values for constitutional actors.

The study then explores what could possibly fall under the notion of constitutional identity as referred to in Article 4(2) TEU.[2] The content of the Member States' constitutional identities can be found in **various sources** (e.g. preambles, eternity clauses, constitutional and semi-constitutional norms.). Constitutional identity can also **relate to various elements** (e.g. systems and modes of government, fundamental rights, and language dispositions) and the specific interpretation thereof. The study furthermore presents the **role and function** of constitutional identity as stipulated in the identity clause. This section concludes with an overview of the use and interpretation of the notion of constitutional identity in various EU Member States, showing that constitutional identity emerged in the EU sphere as a legal concept meant to secure the domestic **protection of fundamental rights**, but domestic courts gradually reframed this concept as a **marker of national autonomy and constitutional authority**.[3]

Third, the study addresses the influence of constitutional identity on shaping the relations between the Member States and the EU institutions.[4] It analyses the different national and EU **actors involved in interpreting** constitutional identity and assesses the various possibilities for enforcing and accommodating constitutional identity in the EU. It shows that constitutional identity functions as a

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1 See point 2.1.

2 See points 2.2 and 2.3.

3 See point 2.4

4 See point 3.

legal instrument that channels constitutional conflicts and promotes **constitutional dialogue**, turning it into an important reference point for a shared normativity between European and national legal orders. The study further observes that, although the notion of constitutional identity is meant to be used **constructively**, at the same time it can also be **misused** or **abused**. In the latter case, any form of genuine dialogue between national and EU institutions is absent and the links between the different sites of constitutional authority in the EU are intentionally or strategically severed. The study makes clear, however, that Member States must act loyally and cooperatively (Article 4(3) TEU), and with respect for the shared values of the EU, referred to in Article 2 TEU – namely the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities – and the EU rights, freedoms, and principles set out in the Charter of Fundamental Rights of the European Union (Article 6 TEU). Should they fail to do so, situations can best be resolved by **combined actions** at the national and EU levels (legal, judicial, and political). Depending on the context, the resolution of conflicts can, in particular, consist of remediations and sanctions imposed by the EU institutions and bottom-up actions from within the Member States.

In the next part, the study inquires into the relationship between national law and EU law, focusing on the three types of review that allow courts to evaluate EU law:[5] next to **fundamental rights review** and ***ultra vires* review**, national courts dispose of the possibility of **identity review**. Whereas fundamental rights review concerns the protection of fundamental rights against possible infringements of EU acts and *ultra vires* review constitutes a control mechanism to safeguard the principle of conferral of powers, identity review serves as a mechanism to test the compatibility of EU law against fundamental constitutional principles, regardless of whether EU competences are transgressed. The analysis of these forms of review will also show how the Court of Justice of the European Union (CJEU) has responded to the Member States' courts' use of these review types: the **acceptance of identity-based claims seems to depend on the level of EU harmonisation** in a certain area. Cases that fall outside areas that have been fully harmonised and that revolve around substantive EU rules (market freedoms and EU fundamental rights) seem to have left more room for derogations to EU law. In these cases, the CJEU granted exceptions to market freedoms based on the principle of **proportionality**: depending on the relevant right, the element of constitutional identity, and the systemic significance of the case, the CJEU either struck a balance between the fundamental right at stake and the element of constitutional identity or deferred the proportionality test to the domestic courts. Thus, it seems that the accommodation of identity-based claims will only be acknowledged and accommodated in so far as they do not undermine the uniformity reached in certain areas through legislative harmonisation and if they respect the shared values referred to in Article 2 TEU.

The study concludes by asserting that constitutional identity will **continue to play a role in the future of EU integration**:[6] the identity clause of Article 4(2) TEU must be understood as a norm of reference in the EU's constitutional pluralist setting. In such a system, no single constitutional authority can claim absolute and exclusive ownership in the application of the identity clause of Article 4(2) TEU. Consequently, both domestic and European interpretations of constitutional identity are equally

[5] See point 4.

[6] See point 5.

relevant, leaving final interpretative authority to remain open and making contention and conflict inevitable. Therefore, this section provides a few recommendations to appease future conflicts between the Member States and the EU and enhance the cooperative dialogue.

2. THE NOTION OF CONSTITUTIONAL IDENTITY

Although the notion of constitutional identity has received increasing attention during the past decade, it remains an enigmatic notion in legal theory and European and national constitutional law. There is no generally accepted definition, nor a demarcated scope of application of constitutional identity.[7]

The ambiguity over the notion of constitutional identity has however not prevented this notion from gaining increasing importance in the past decades. The emergence of constitutional identity in the EU Treaties, the use of the concept in domestic and European courts, and its increasing instrumentalisation in political language have shown that this concept highly influences how Member States comply with or derogate from EU law. Constitutional identity has transformed the legal arguments and reasoning of the Member States' courts as well as the Court of Justice of the European Union (CJEU). At the same time, it affects the balancing exercise carried out by the EU legislator.

2.1. The concept of constitutional identity

It is generally accepted that the concept of constitutional identity is intimately connected with the constitution of a given state.[8] The concept is often linked to the identity of the constitution itself or the relation between the constitution and the constructed identity of the collective 'self'.[9] From this, constitutional identity can be understood both as an analytical and descriptive concept and as a legal doctrinal notion.[10]

2.1.1. Constitutional identity as an analytical concept

As an analytical concept, constitutional identity questions what gives specificity to a constitution – understood as a socio-political and cultural document. In this meaning, constitutional identity explains the foundational basis for a polity's self-understanding.[11] Here, constitutional identity focuses on the relationship between a national culture and its constitution.

Scholars who have studied this avenue to the notion of constitutional identity have pointed at practices of jurists, politicians, and the general public, which cultivate a community's affection for the principles

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7 Michel Rosenfeld describes the notion of constitutional identity as an essentially contested concept – *i.e.* a concept that expresses a normative standard, but whose conceptions differ from one person to the other, while its correct application is to create disagreement over what the concept is itself. M. Rosenfeld, "Constitutional Identity", in M. Rosenfeld and A. Sajó (eds.), *The Oxford Handbook of Comparative Constitutional Law*, Oxford University Press, 2012, 756 (756-776).

8 M. Polzin, "Constitutional Identity as a Constructed Reality and a Restless Soul", *German Law Journal* 18/7 (2017), 1595-1616.

9 J.L. Martí, "Two Different Ideas of Constitutional Identity: Identity of the Constitution v. Identity of the People", in A. Saiz Arnaiz and C. Alcoberro Llivina (eds.), *National Constitutional Identity and European Integration*, Cambridge, Intersentia, 2013, 17 (17-36).

10 J. Scholtes, *The Abuse of Constitutional Identity in the European Union*, Oxford, Oxford University Press, 2023, 2.

11 M. Tushnet, "Some Reflections on Method in Comparative Constitutional Law," in S. Choudhry (ed.), *The Migration of Constitutional Ideas*, Cambridge University Press, 2006, 82 (67-83).

that are articulated by and institutionalised in a constitutional system.[12] The seminal works of Gary Jacobsohn and Michel Rosenfeld that have delved into the analytic understanding of constitutional identity emphasise the dynamic and dialogical nature of this concept: due to different political aspirations in society, Jacobsohn argues, there will always be multiple incompatible interpretations of constitutional principles and commitments. What then identifies a constitutional system is how actors within and outside the legal system deal with such divergences through time, resulting in an ongoing historical and social evolution.[13] Rosenfeld, from his side, considers that constitutional identity emerges from the interplay between the constitutional features that endure over time (sameness) and those that evolve while remaining the same entity (selfhood).[14] In this view, constitutional identity will always be subject to contestation, dialogue, and compromise.

2.1.2. Constitutional identity as a normative concept

Next to an analytical concept, constitutional identity can also be understood as a normative concept that is capable of either binding or motivating constitutional actors and interpreters such as (constitutional) legislators, governments, and courts.[15] In this respect, constitutional identity ties up with constitutionalism.[16] Although constitutionalism has received different meanings, it is most commonly conceived as a theory about controlling, restraining, and limiting state power in a substantive way to safeguard individual liberty and protect it from abuse of power.[17] In this view, constitutionalism stands for individual rights protection. This avenue to constitutionalism correlates with an important legal dimension of constitutional identity, namely that of limitations to the constituted powers. Constitutional identity namely presupposes the existence of a normative core that must be protected at all times from the political process.

Accordingly, legal scholarship has argued that the imposition of substantive limitations on the constituted powers constitutes one of the most important normative applications of the notion of constitutional identity.[18] Indeed, a constitution's immutable elements reflect the *raison d'être* or the 'general spirit' of the constitution.[19] Such core elements can be considered part of the substantive constitution that precedes any constitutional revision. Accordingly, a constitutional revision must always be consistent with the substantive constitution.[20] If not, constitutional amendments would be

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12 K. Eder, "A Theory of Collective Identity Making Sense of the Debate on a 'European Identity'", *European Journal of Social Theory* 12/4 (2009), 427–447; J. Mazzone, "The Creation of a Constitutional Culture," *Tulsa Law Review* 40/4 (2004), 671-698; A. Siegel, "Constitutional Theory, Constitutional Culture", *Journal of Constitutional Law* 18(4) (2016), 1067-1128.

13 G. Jacobsohn, *Constitutional Identity*, Cambridge, Harvard University Press, 2010.

14 M. Rosenfeld, The Identity of the Constitutional Subject: Selfhood, Citizenship, Culture, and Community, London, Routledge, 2010.

15 J. Scholtes, *The Abuse of Constitutional Identity in the European Union*, Oxford, Oxford University Press, 2023, 3.

16 L. Allezard, "Constitutional identity, identities and constitutionalism in Europe", *Hungarian Journal of Legal Studies* 63 (2022), 58-77.

17 A. Sajó, Limiting Government: An Introduction to Constitutionalism, New York, Central European Press, 1999.

18 This is especially true for domestic constitutional law. See M. Polzin, "Constitutional Identity as a Constructed Reality and a Restless Soul", *German Law Journal* 18/7 (2017), 1597-1598 (1595-1616); Y. Roznai, *Unconstitutional Constitutional Amendments*, Oxford, Oxford University Press, 2017, 148 a.f.; J. Scholtes, "Abusing Constitutional Identity", *German Law Journal* 22 (2021), 541-542 (534-556).

19 Y. Roznai, Unconstitutional Constitutional Amendments. The Limits of Amendment Power, Oxford, Oxford University Press, 2017, 131.

20 R. Albert, Constitutional Amendments. Making, Breaking, and Changing Constitutions, Oxford, Oxford University Press, 2019, 82.

substantially inconsistent with the constitutional whole. Constitutional amendment would then amount to the adoption of a new constitution.[21] This would be to step outside the constitutional realm, so to speak. For this reason, these values could not be amended through the normal constitutional revision procedure. Constitutional identity here forms the fault line between a valid constitutional amendment on the one hand and violating or abrogating the constitution on the other.[22]

Restrictions on constitutional power can be explicit or implicit. Explicit limitations may be found in specific constitutional provisions. A well-known example is the German eternity clause.[23] This provision protects the inviolability of human dignity and the character of the Federal Republic as a federal, social, and democratic state. According to the German Federal Constitutional Court (GFCC), Article 79(3) of the Basic Law constitutes an absolute limit for the protection of the constitutional identity.[24] The Norwegian Constitution provides that amendments shall be done using "*particular provisions which do not alter the spirit of the Constitution*".[25] The French and Italian constitutions also contain constitutional provisions that explicitly limit the constitutional legislator.[26]

Implicit limitations, on the other hand, cannot be traced to a positive-law constitutional provision. Within the implicitly unamendable provisions, one can make a further distinction between unamendable provisions because they are either practically difficult to amend (e.g. because of a provision's strict revision requirements and the political sensitivity of its revision) or because they are structurally unamendable.[27] This structural unamendability, in turn, may relate to four aspects. First, certain values and principles may enjoy special constitutional status and imply that changing these 'fundamental' elements may violate the structure, constitutional core, or spirit of the constitution. One might consider e.g. the democratic form (direct, representative, semi-direct, etc.), the form of government (monarchy, republic, etc.), or the form of state (a unitary state as a safeguard against fragmentation, a federal state guaranteeing certain minority rights, etc.). A notable example of implicit limitations is India's 'basic structure doctrine': in 1793 India's Supreme Court proclaimed certain features and elements of the Indian Constitution to be unamendable to the extent that the Court considered these elements to be fundamental for the basic structure and integrity of the constitutional edifice.[28] With this ruling, the Court affirmed the constitutional review of constitutional amendments and substantial limits to the democratic powers of the Indian Parliament.[29] Second, there are general principles of law with constitutional value that are so self-evident that they are assumed to be implicit

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21 Y. Roznai, Unconstitutional Constitutional Amendments. The Limits of Amendment Power, Oxford, Oxford University Press, 2017, 141.

22 P. Kirchhof, "Die Identität der Verfassung", in P. Kirchhof and J. Isensee (eds.), *Handbuch des Staatsrechts der Bundesrepublik Deutschland*, vol. 2, 2005, 261 and 284 (261-316).

23 Article 79 (3) German Basic Law.

24 Judgment of the Bundesverfassungsgericht of 30 July 2019, BVerfGE 2 BvR 1685/14, para. 119.

25 Article 121 Constitution of the Kingdom of Norway.

26 Respectively Article 139 Italian Constitution and Article 89 French Constitution stipulate that the republican governmental form cannot be changed. For a list of explicitly limiting provisions, consult Y. ROZNAI, *Unconstitutional Constitutional Amendments. The Limits of Amendment Power*, Oxford, Oxford University Press, 2017, note 10, Appendix.

27 For a typology, see A. Ferrara, *Sovereignty Across Generations. Constituent Power and Political Liberalism*, Oxford, Oxford University Press, 2023, 262 a.f.

28 Supreme Court of India, judgement of 24 April 1973, *Kesavananda Bharati Sripadagalvaru and Ors. V. State of Kerala and Anr*, (1973) 4 SCC 225. For an application of this doctrine in the United States, see M. Mate, "State Constitutions and the Basic Structure Doctrine", *Columbia Human Rights Law Review*, 45/2 (2014), 441-498.

29 The same year, the Italian Constitutional Court issued a ground-breaking judgment that vested the *controlimiti* doctrine that limited the application of EU law within its domestic legal order. Henceforth, supranational norms violating the core principles of the Italian Constitution would not find application. Judgment of the Corte Costituzionale of 18 December 1973, *Frontini*, n° 183/1973, ECLI:IT:COST:1973:183.

in the Constitution. These are rules of conduct that are essential to the existence, functioning, and maintenance of the legal order.[30] Think here, for example, of the separation of powers, the principle of the rule of law, and the principles of monism or dualism in international law. A third category consists of implicit democratic principles that are indispensable for the maintenance of liberal democratic regimes.[31] Classic examples are the diversity of political parties or the organization of periodic elections. A fourth set of structurally immutable provisions concerns those that find limitation in binding international and European treaties.[32] In sum, constitutional identity is a concept concerned with protecting the constancy of the normative core of a constitution in a changing context. In this respect, it can be understood as a counter-majoritarian tool that allows courts to put a check on constitutional change.[33]

While this understanding and use of constitutional identity mostly plays out on the domestic level, constitutional identity can have a similar function in the relation between legal orders. Within this paradigm, constitutional identity has been linked to the question of the limit of EU competences:[34] important national constitutional norms and values are used as justification for dismissing the application of public international law.[35] In this view, constitutional identity aims at protecting the choices of national constituent power against encroachments by supranational institutions.[36] It is here that the other side of constitutionalism's coin plays out: as an ideology that empowers ordinary people in a democracy.[37] Constitutionalism theorises the democratic self-government of a political community in terms of sovereignty and constituent power. Sovereignty lies with the people, and through the constitutional moment, the constitutional order, and constitutional processes the people can find agency in its self-determination.[38] In this context, the notion of constitutional identity is not aimed at curbing an expansive constitutional legislator attempting to amend the constitutional framework. Instead, it is directed against the supranational level. The main idea is that only the constituent power, as the representative of the political community, has the power to determine the general form and structure of political unity by drafting a constitution. When the constituted powers go beyond the scope of a particular revision procedure, they act *ultra vires* the constituent subject.[39] In this case, the derived constituent power modifies the fundamental structure or spirit of the constitution, which

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30 A. Ferrara, Sovereignty Across Generations. Constituent Power and Political Liberalism, Oxford, Oxford University Press, 2023, 261-264.

31 Ibid., 261-264.

32 Alessandro Ferrara points to a possible fifth category to be found in silent universal expectations that everyone would assume to be true. E.g. the prohibition for the constituent to abolish the tax system or to extend indefinitely the mandate of a representative assembly. A. Ferrara, *Sovereignty Across Generations. Constituent Power and Political Liberalism*, Oxford, Oxford University Press, 2023, 263.

33 Note that, although there are many potential legitimate uses of constitutional identity, even within the national context constitutional identity can be misused or abused.

34 M. Claes, 'Negotiating Constitutional Identity or whose Identity Is it Anyway?' in M. Claes, M. de Visser, P. Popelier, and C. Van de Heyning (eds.), *Constitutional Conversations in Europe*, Cambridge, Intersentia, 2012, 219 (205-234).

35 A. Peters, "Rechtsordnungen und Konstitutionalisierung: Zur Neubestimmung der Verhältnisse", *Zeitschrift für Öffentliches Recht* 65/1 (2010), 54-55 (3-64).

36 M. Kumm, "Un-European Identity Claims: On the Relationship between Constituent Power, Constitutional Identity and its Implications for Interpreting Article 4(2) TEU", in K. Kovács (ed.), *The Jurisprudence of Particularism: National Identity Claims in Central Europe*, Oxford, Hart Publishing, 2023, 175-176 (173–186).

37 J. Waldron, *Political Political Theory: Essays on Institutions*, Cambridge, Harvard University Press, 2016, 34.

38 Ibid., 39-40.

39 J. Colón-Rios, "Introduction: The Forms and Limits of Constitutional Amendments," *International Journal of Constitutional Law* 13/3 (2015), 571 a.f. (567-574). On the *ultra vires* review of national courts: *infra*, point 4.2.

constitutes a substantial replacement of the constitution.[40] Constitutional identity in the European context can give rise to two forms of limitations: first, a domestic legislator that intends to transfer powers to a supranational institution is limited by the national constitutional identity. Second, the exercise of transferred powers must be interpreted and exercised by the supranational institutions with respect to the national constitutional identity at the risk of being considered non-binding by the Member State.

2.2. The content of constitutional identity

2.2.1. Sources

For the determination of a Member States' constitutional identity, the national constitution serves as the main source: constitutional identity will be easier to determine when a Member State's constitution explicitly designates the highest values of the constitutional order.[41] Aspects that are part of a preamble or the introductory title of the constitutional text[42] can also serve as an indication that these elements belong to the constitutional identity.[43] Preambles often comprise national aspirations, but also expressions of a nation's historical, social, political, and religious accomplishments.[44] However, national constitutions often do not explicitly state which values are part of the 'constitutional core' or abstain from distinguishing between higher, foundational values and lower values. In these cases, the fact that certain constitutional provisions are difficult or impossible to amend can be indicative. Especially eternity clauses that entrench certain values or state attributions[45] should be considered here.[46]

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[40] M. Kumm, "Un-European Identity Claims: On the Relationship between Constituent Power, Constitutional Identity and its Implications for Interpreting Article 4(2) TEU", in K. Kovács (ed.), *The Jurisprudence of Particularism: National Identity Claims in Central Europe*, Oxford, Hart Publishing, 2023, 175-176 (173–186); Y. Roznai, *Unconstitutional Constitutional Amendments. The Limits of Amendment Power*, Oxford, Oxford University Press, 2017, 65-66.

[41] E.g. art. 3 of the Croatian Constitution, which enumerates "the highest values of the constitutional order of the Republic of Croatia".

[42] See the Opinion of Advocate General Wathelet of 11 January 2018 in case *Coman*, C-673/16, ECLI:EU:C:2018:2, para. 40. See more generally on preambles and the connection with national identity: L. Orgad, "The Preamble in Constitutional Interpretation", *International Journal of Constitutional Law*, 8 (2010), 714–738.

[43] An example of this can be found in the Irish Supreme Court's judgment *McGee v. The Attorney General*, which established the primacy of religious identity contained in the Preamble over other constitutional norms. Judgement of the Irish Supreme Court of 19 December 1974, *McGee v. The Attorney General*, n° 1971 2314 P. However, as some observers have pointed out, the Irish constitutional identity is primarily vested in the sovereignty of the Irish people, understood in procedural terms of constitutional amendment. Arguably, the Irish constitutional identity has limited substantive content. E. Daly, "Constitutional Identity in Ireland. National and Popular Sovereignty as Checks on European Integration", in C. Calliess and G. van der Schyff (eds.), *Constitutional Identity in a Europe of Multilevel Constitutionalism*, Cambridge, Cambridge University Press, 2020, 182-200.

[44] W. Voermans, M. Stremler, and P. Cliteur, *Constitutional Preambles: A Comparative Analysis*, Cheltenham, Edward Elgar Publishing, 2017, 92. See also L. Orgad, "The Preamble in Constitutional Interpretation", *International Journal of Constitutional Law*, 8 (2010), 716 (714–738).

[45] E.g. the eternity clause of Article 79(3) of the German Constitution, which states that "Amendments to this Basic Law affecting the division of the Federation into Länder, their participation on principle in the legislative process, or the principles laid down in Articles 1 and 20 shall be inadmissible" and the eternity clause in Article 9(2) of the Czech Constitution, stipulating that "Any change of fundamental attributes of the democratic state governed by the rule of law is inadmissible". For a more elaborate discussion of the German Constitutional Court's interpretation of the eternity clause, especially as an element of the German constitutional identity, see supra, point 2.1.2.

[46] A. Von Bogdandy and S. Schill, "Overcoming Absolute Primacy: Respect for National Identity under the Lisbon Treaty", *Common Market Law Review* 48 (2011), 1432 (1417-1454).

Constitutional identity can further be derived from constitutional principles or provisions that belong to the 'spirit of the constitution'[47] or that establish the 'basic structure' of the constitution.[48] Furthermore, one can consider any aspect unique to the Member State's constitutional order that has had an impact on the creation and application of the constitutional text.[49] These are elements that were inscribed at (original or derivative) constituent moments and arise from a historical, "inherited" identity or aspirations arising from a projected identity.[50]

The content of a constitutional identity is not necessarily found in constitutional texts. For constitutional orders that do not possess a formal, written constitution, the elements of the constitutional identity must be deduced from other sources. The United Kingdom and Austria are cases in point. As the United Kingdom lacks a written constitution, it has been argued that 'constitutional statutes' – *i.e.* norms that are less susceptible to implicit amendment or repeal and require explication – are part of the UK's constitutional identity.[51] In contrast with the United Kingdom, the Austrian Federal Constitution has a textual basis, although it is not found in a single document, but dispersed over various sources.[52] The content of Austrian constitutional identity can be found in the 'Basic Principles' – *i.e.* norms that rank highest in the hierarchy and are more difficult to amend. Consequently, they are considered to be part of Austria's constitutional core that cannot be limited by EU law.[53] Some countries also rely on fundamental norms or statutes that are not part of the constitution, but complement constitutional arrangements. Belgium is a well-known example, where (qualified majority) laws determine linguistic regulations and the division of competences between the Federal state, the communities, and the regions.[54] As such, these 'semi-constitutional' norms characterise Belgian federalism and could be considered to form a part of its constitutional identity.[55] Finally, elements of a constitutional identity can be found in unwritten customary constitutional law and practices, or general

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47 E.g. Article 121 of the Constitution of the Kingdom of Norway prohibits constitutional amendments that could change the 'spirit of the Constitution'.

48 *Supra*, point 2.1.2

49 P. Gérard and W. Verrijdt, "Belgian Constitutional Court Adopts National Identity Discourse. Belgian Constitutional Court No. 62/2016, 28 April 2016", *European Constitutional Law Review* 13 (2017), 201-202 (182-205).

50 L. Allezard, "Constitutional Identity, Identities and Constitutionalism in Europe", *Hungarian Journal of Legal Studies* 63 (2022), 62 (58-77).

51 Other elements of the UK's constitutional identity are parliamentary sovereignty, the principle of legality, the rule of law, and power devolution to Scotland, Wales, and Northern Ireland. See on the UK's constitutional identity P. Craig, "Constitutional Identity in the United Kingdom. An Evolving Concept", in C. Calliess and G. van der Schyff (eds.), *Constitutional Identity in a Europe of Multilevel Constitutionalism*, Cambridge, Cambridge University Press, 2020, 288 a.f. (284-302).

52 The Austrian Constitution is also 'flexible', as it does not require constitutional amendments to be incorporated into the federal constitutional law. G. Lienbacher and M. Lukan, "Constitutional Identity in Austria. Basic Principles and Identity beyond the Abolition of the Nobility", in C. Calliess and G. van der Schyff (eds.), *Constitutional identity in a Europe of multilevel constitutionalism*, Cambridge, Cambridge University Press, 2020, 42-43 (41-58).

53 G. Lienbacher and M. Lukan, "Constitutional Identity in Austria. Basic Principles and Identity beyond the Abolition of the Nobility", in C. Calliess and G. van der Schyff (eds.), *Constitutional Identity in a Europe of Multilevel Constitutionalism*, Cambridge, Cambridge University Press, 2020, 44 a.f. (41-58); T. Kröll and G. Lienbacher, "Country report Austria" in European Parliament (ed.), *National Constitutional Law and European Integration,* Brussels, 2011, 150 a.f. (141–168).

54 The CJEU has acknowledged that the protection of the official language of a federated entity is part of Belgium's national identity, but it has nevertheless stated that a Flemish Community Act requiring the contracts between employers and employees to be in Dutch, regardless of their own language, went too far, see judgement of the Court of Justice of 16 April 2013, *Las*, C-202/11, ECLI:EU:C:2013:239, para. 26.

55 E. Cloots, "Het mysterie van de Belgische nationale en constitutionele identiteit", *Tijdschrift voor Bestuurswetenschappen en Publiekrecht* 6 (2017), 313-315 (310-321). See also P. Gérard and W. Verrijdt, "Belgian Constitutional Court Adopts National Identity Discourse. Belgian Constitutional Court No. 62/2016, 28 April 2016", *European Constitutional Law Review* 13 (2017), 201-202 (182-205).

principles of law with constitutional value. These principles are rules of conduct that are essential for the existence, the functioning, and the conservation of the legal order. Hence, they are presupposed to the constitutional system and are often identified as elements of a constitutional identity. One could think of the rule of law and the separation of powers, or the choice of a monist or dualist system.[56]

2.2.2. Elements of constitutional identity

According to Article 4(2) TEU, the EU must respect the equality of Member States before the Treaties as well as their national identities, inherent in their (political and constitutional) fundamental structures. The EU must also respect the Member States' essential State functions, including ensuring the territorial integrity of the State, maintaining law and order and safeguarding national security. In particular, national security remains the sole responsibility of each Member State.

Because of the vague wording and the reference to the 'national' identities of the Member States, there have been many discussions about what constitutional identity means and to which elements the identity clause can refer. Some authors define constitutional identity rather narrowly as the specificity of the constitutional text with its particular features.[57] Another strand in legal scholarship identifies constitutional identity with the people's common legal and political values as expressed in the text[58] or points at 'the fundamental elements of a particular constitutional order as the expression of its individuality'.[59] Scholars and courts also disagree on the degree to which 'constitutional identity' and 'national identity' coincide or differ from each other. Some argue that these notions should be distinguished, as a country's lived identity (historical or cultural) does not necessarily coincide with its constitutional principles.[60]

As this study will outline, the different conceptions of constitutional identity and the ambiguity over the concept's function can lead to different outcomes and attitudes vis-à-vis EU integration:[61] constitutional identity can prompt interpretations that are meant to affirm the national court's internal

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[56] The choice for a monist system has been considered an element of the Dutch constitutional identity, characterized by openness towards the international legal order. B. Oomen, "Strengthening Constitutional Identity where there is none: the Case of the Netherlands", *Revue interdisciplinaire d'études juridiques* 77/2 (2016), 235-263. On the other hand, the dualist take on the relationship between national and international law – e.g. in Germany and Italy – has been explained as a generative source of national limitations to EU law application, also in terms of constitutional identity. G. van der Schyff, "EU Member State Constitutional Identity: A Comparison of Germany and the Netherlands as Polar Opposites", *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht*, 76 (2016), 177 (167-191).

[57] J.L. Martí, "Two Different Ideas of Constitutional Identity: Identity of the Constitution v. Identity of the People", in A. Saiz Arnaiz and C. Alcoberro Llivina (eds.), *National Constitutional Identity and European Integration*, Cambridge, Intersentia, 2013, 17 (17-36).

[58] T. Pavone, "Constitutional Identity: An Overview and Some Conceptual Concerns, https://static1.squarespace.com/static/5d653034873abb0001dd9df5/t/5d6ee239977d290001c347bf/1567547962244/Jacobsohn-+Constitutional+Identity+%28Critical+Review%29.pdf, accessed on 29 February 2024.

[59] C. Calliess and G. van der Schyff, "Constitutional Identity Introduced", in C. Calliess and G. van der Schyff (eds.), *Constitutional Identity in a Europe of Multilevel Constitutionalism*, Cambridge, Cambridge University Press, 2020, 7 (3-8).

[60] E. Cloots, *National Identity in EU Law*, Oxford, Oxford University Press, 2015. See also judgment of the Bundesverfassungsgericht of 14 January 2014, *Gauweiler*, BVerfGE, 2 BvR 2728/13, para. 29. For a similar distinction in the jurisprudence of the Belgian Constitutional Court: judgment of the Belgian Constitutional Court of 28 April 2016 on the Treaty Establishing the European Stability Mechanism, n° 62/2016 .

[61] *Infra*, point 2.4.

adjudicative authority, to resist further European integration, and justify divergent interpretations of the rule of law and human rights.[62]

In the context of constitutional dialogue between the different constitutional orders of the EU and the use of Article 4(2) TEU, the terms 'national' and 'constitutional identity have nevertheless been used as synonyms by the CJEU, the majority of Member States' courts and legal scholarship.[63] The wording of Article 4(2) TEU is thereby taken as a benchmark: only the elements embedded in the Member States' "*fundamental structures, political and constitutional*" are taken into account. This means that features of national identity can be considered only insofar as they have an 'essential constitutional status' and 'manifest themselves in a constitutional sense'.[64] In other words, elements of a pre-constitutional identity may be part of a Member State's constitutional identity, but this is not necessarily the case. Some therefore distinguish constitutional identity from (pre-constitutional) "national identity," despite the explicit reference in Article 4(2) TEU to the "*national identities*" of Member States.[65]

2.3. The role and function of constitutional identity

The interpretation that has been given to the notion of 'constitutional identity' as a legal concept and its proliferation in the EU constitutional debates can best be understood in light of the process of European integration and, more specifically, in the discussions during the drafting of the Maastricht and Lisbon Treaties on the scope of application of EU law in the constitutional law of European Member States.[66] Since the *Van Gend en Loos* and *Costa* judgments, the CJEU considers the Treaty provisions to have a direct effect and primacy over national law.[67] Gradually, the European legal order has become

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62 L. Corrias, "Populism in a Constitutional Key: Constituent Power, Popular Sovereignty and Constitutional Identity", *European Constitutional Law Review* 12 (2016), 6-26; F. Fabbrini and A. Sájo, "The Dangers of Constitutional Identity", *European Law Journal 25* (2019), 457-473; P. Faraguna, "Identity", in R. Grote, F. Lachenmann and R. Wolfrum (eds.), *Max Planck Encyclopedia of Comparative Constitutional Law*, Oxford, Oxford University Press, 2017, https://oxcon.ouplaw.com/display/10.1093/law-mpeccol/law-mpeccol-e792, accessed on 29 February 2024.

63 Opinion of Advocate General Poiares Maduro of 20 September 2005 in case *Marrosu and Sardino,* C-53/04, ECLI:EU:C:2006:517, para. 40; Opinion of Advocate General Cruz Villalón of 14 January 2015 in case *Gauweiler*, C-62/14, ECLI:EU:C:2015:7, para. 61. See also L. Besselink, "National and Constitutional Identity before and after Lisbon", *Utrecht Law Review* 6/3 (2010), 36-37 (36-49); S. Rodin, "National Identity and Market Freedoms after the Treaty of Lisbon", *Croatian Yearbook of European Law and* Policy 7 (2011), 11-42; A. Von Bogdandy and S. Schill, "Overcoming Absolute Primacy: Respect for National Identity under the Lisbon Treaty", *Common Market Law Review* 48 (2011), 1417 and 1435 (1417-1454); G. van der Schyff, "The Constitutional Relationship between the European Union and its Member States: The Role of National Identity in Article 4(2) TEU", *European Law Review* 37/5 (2012), 563 and 568 (563-584); D. Thym, "In the Name of the Sovereign Statehood: A Critical Introduction to the Lisbon Judgment of the German Constitutional Court", *Common Market Law Review* 46 (2009), 1795 and 1811 (1795-1822).

64 G. van der Schyff, "Member States of the Union, Constitutions, and Identity. A Comparative Perspective", in C. Calliess and G. van der Schyff (eds.), *Constitutional Identity in a Europe of Multilevel Constitutionalism*, Cambridge, Cambridge University Press, 2020, 326 a.f. (305-347).

65 See e.g. E. Cloots, *National Identity in EU Law*, Oxford, Oxford University Press, 2015.

66 P. Faraguna, "Identity", in R. Grote, F. Lachenmann and R. Wolfrum (eds.), *Max Planck Encyclopedia of Comparative Constitutional Law*, Oxford, Oxford University Press, 2017, https://oxcon.ouplaw.com/display/10.1093/law-mpeccol/law-mpeccol-e792, accessed on 29 February 2024; D. Fromage and B. De Witte, "Guest Editors' Introduction. National Constitutional Identity Ten Years on: State of Play and Future Perspectives", *European Public Law* 27/3 (2021), 411-424.

67 Judgment of the Court of Justice of 15 July 1964, *Flaminio Costa v ENEL*, 6/64, ECLI:EU:C:1964:66; judgment of the Court of Justice of 5 February 1963, *Van Gend en Loos*, 26/62, ECLI:EU:C:1963:1. See also judgment of the Court of Justice of 17 December 1970, *Internationale Handelsgesellschaft*, 11/70, ECLI:EU:C:1970:114; judgment of the Court of Justice of 9 March 1978, *Amministrazione delle Finanze dello Stato v Simmenthal SpA*, 106/77, ECLI:EU:C:1978:49.

recognised as an autonomous legal order, endowed with its own framework and founding principles.[68] However, the EU's 'constitutionalisation' and its potential effects on the Member States' national law have eventually triggered reactions from the Member States. As the emergence and 'constitutionalisation' of the EU led to the fragmentation of the Member States' national sovereignty over a complex legal environment, a shift occurred in legal thinking, replacing the notion of sovereignty with the notion of identity.[69] Just like sovereignty became composed of different layers of autonomy, identity could be understood as something non-exclusive. At the same time, the notion of constitutional identity could operate in three types of contexts that are highly relevant in the setting of EU integration:[70] First, constitutional identity could protect the constitutional order from internal changes that pose a threat to its existence. Second, constitutional identity allows for the horizontal regulation of relations with other constitutional orders. Third, it could affect the development of a constitutional identity of the EU, to which Member States adhere, contrast with, or are opposed to.[71]

Hence, in a setting of supranational constitutionalism, constitutional identity can serve as a bridge between domestic constitutionalism and EU constitutionalism, sustaining the EU as a composite constitutional order. This is because constitutional identity has several specific functions: "*a legitimation function, a safeguarding function, a linking function, a differentiating function, an ideological function, and a function of constitutional and political self-understanding*".[72] As a legitimating concept, constitutional identity can produce legitimacy for the transfer of constitutional competences from the domestic level to the EU level. It can justify the connection of these levels (in terms of the transfer of sovereignty, e.g. for reasons of efficiency), as well as the separation of both (in terms of the limitations to the primacy of EU law, e.g. on historical or socio-political grounds).[73] The safeguarding function boils down to protecting some of the Member States' core constitutional values, principles, and institutions (i.e. elements that make the collective constitutional 'self') from encroachments of the supranational order. Conversely, as constitutional identity protects specific elements, those elements that are not part of it are subject to EU law primacy. The primacy of EU law is in other words merely limited in a selective way.[74] The linking and differentiating functions of constitutional identity form two faces of the same functional coin: constitutional identity serves to reveal similarities and convergences between Member States in what they equally do or do not protect against EU primacy ('common constitutional traditions').[75] Against this, constitutional identity can also point to differences between various national constitutional orders, and between these orders and supranational constitutional regimes (both in terms of institutional design and fundamental constitutional axiology).[76] Furthermore, constitutional

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[68] See esp. the Court of Justice's Opinion of 18 December 2014, 2/13, ECLI:EU:C:2014:2454. See also G. De Búrca, "Sovereignty and the Supremacy Doctrine of the European Court of Justice", in N. Walker (ed.), *Sovereignty in Transition*, Hart, 2003, 450-455 (449-460).

[69] R. Toniatti, "Sovereignty lost, Constitutional Identity regained", in A. Saiz Arnaiz and C. Alcoberro Llivina (eds.), *National Constitutional Identity and European Integration*, Cambridge, Intersentia, 2013, 49-73; N. Walker, "The Idea of Constitutional Pluralism", *Modern Law Review* 65/3 (2002), 345 (317-359).

[70] A. Śledzińska-Simon, "Constitutional Identity in 3D: A Model of Individual, Relational and Collective Self and its Application in Poland", *International Journal of Constitutional Law* 13/1 (2015), 124-155.

[71] Ibid., 129 (124-155).

[72] M. Belov, "The Functions of Constitutional Identity Performed in the Context of Constitutionalization of the EU Order and Europeanization of the Legal Orders of EU Member States". *Perspectives on Federalism*, 9/2 (2017), E-75 (E-72-97).

[73] Ibid., E-76-81 (E-72-97).

[74] Ibid., E-81-87 (E-72-97).

[75] On 'common constitutional traditions': *infra*, point 2.4.6.

[76] M. Belov, "The Functions of Constitutional Identity Performed in the Context of Constitutionalization of the EU Order and Europeanization of the Legal Orders of EU Member States". *Perspectives on Federalism*, 9/2 (2017), E-87-88 (E-72-97).

identity has an ideological function that aims at fostering pluralism within the EU. Vertical dialogue between (sub)national and supranational levels helps to identify idiosyncratic elements of the domestic constitutional orders and universally accepted elements of constitutional design, in turn ordering them to explain multipower relations.[77] Finally, constitutional identity has the potential to prompt the political community to self-reflection on the foundations of its constitutional order, culture, and aspirations. This function of constitutional self-understanding is however relative, considering that the interpretative attribution of constitutional identity to the judiciary leads to a democratic legitimacy deficit, possibly averting the population from this notion; an effect that is perhaps also reinforced with the highly legal-technical products of judicial dialogue on the notion of constitutional identity.

2.4. The interpretation of the notion of constitutional identity in a selection of Member States

The EU is characterized by an inherent tension: integration versus the respect of national interests, values, and particularities.[78] It comes then as no surprise that, as the EU's integration process progressed and constitutional conflicts emerged, the identity clause of Article 4(2) TEU played a pivotal role in the interaction of the interests and concerns at stake.[79]

As this study shows, the identity clause can function as a legal instrument that channels constitutional conflicts and promotes **constitutional dialogue**, turning it into an important reference point for a shared normativity between European and national legal orders.[80] Legal scholars nevertheless point at the possible **misuse** or **abuse** of the concept of constitutional identity:[81] the different uses of constitutional identity in EU law are often underpinned by the idea that identity claims are (or try to be) normative arguments against the primacy of EU law. These claims can eventually lead to constitutional conflicts, which are at times explained as being either constructive or destructive.[82] In case of **constructive conflicts**, constitutional reservations to the primacy of EU law can be 'dogmatically recalcitrant', but there is no political pressure on the courts, which are considered

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77 Ibid., E-88-93 (E-72-97).

78 See on this more in-depth: L. Besselink, "Concluding Article: The Persistence of a Contested Concept: Reflections on Ten Years Constitutional Identity in EU Law", *European Public Law* 27/3 (2021), esp. at 598-602 (597-611).

79 D. Fromage and B. De Witte, "Guest Editors' Introduction. National Constitutional Identity Ten Years on: State of Play and Future Perspectives", *European Public Law* 27/3 (2021), 411-424.

80 Further elaborated at points 3.2 and 4.3.

81 P. Bárd, N. Chronowski, and Z. Fleck, "Use, Misuse, and Abuse of Constitutional Identity in Europe", in M. Tushnet and D. Kochenov, *Research Handbook on the Politics of Constitutional Law*, Cheltenham, Edward Elgar Publishing, 2023, 612-634. On the different types of constitutional identity abuse, consult J. Scholtes, *The Abuse of Constitutional Identity in the European Union*, Oxford University Press, Oxford, 2023, esp. at 201 a.f.

82 See more specifically on this terminology: A. Bobić, "Constructive Versus Destructive Conflict: Taking Stock of the Recent Constitutional Jurisprudence in the EU", Cambridge Yearbook of European Legal Studies 22 (2020), 60-84. Others make a similar distinction between two forms of judicial 'identity review' of EU acts by national courts, namely 'soft-conflict identity reviews' that allow for flexibility in jurisdictional conflicts and' hard-conflict identity reviews' that generate conflicts irreconcilable with the tenets of the EU legal order. L.D. Spieker, "Framing and Managing Constitutional Identity Conflicts: How to Stabilize the Modus Vivendi Between the Court of Justice and National Constitutional Courts", *Common Market Law Review* 57 (2020), 365 and 373 a.f. (361-397).

'constitutionally impeccably composed'.[83] More importantly, constructive conflicts "*remain within the confines of constitutional pluralism's normative core*" – *i.e.* the plurality of values agreed upon by all Member States listed in Article 2 TEU.[84] Legal scholarship therefore generally agrees that Member States must act loyally and cooperatively (Article 4(3) TEU), and with respect for the shared values of the EU, referred to in Article 2 TEU – namely the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities – and the EU rights, freedoms, and principles set out in the Charter of Fundamental Rights of the European Union (Article 6 TEU).[85] **Destructive conflicts**, on the other hand, are characterized by the absence of any form of genuine dialogue between national and EU institutions. Here, constitutional identity is used as a tool for justifying encroachments on judicial independence and democratic institutions. National courts go beyond a reasonable interpretation of the values referred to in Article 2 TEU, e.g. by employing a *contra legem* reading of the latter. In these cases, the normative ideals of the EU's integration project themselves are questioned and the links between the different sites of constitutional authority in the EU are intentionally or strategically severed.[86]

The overview provided in this section is based on this typology of constructive and destructive conflicts to categorize the different uses of the notion of constitutional identity in various Member States and the constitutional conflicts that emerged in the legal conversation between the latter and the EU.[87]

2.4.1. The emergence of the notion of constitutional identity: Italy and Germany

Before the Maastricht Treaty (1992) and the Lisbon Treaty (2007), the CJEU's affirmation of EU law primacy initiated a series of constitutional conflicts with national courts.[88] By framing the protection of

[83] F. Weber, "The Identity of Union Law in Primacy: Piercing Through Euro Box Promotion and Others", *European Papers* 7/2 (2022), 767-768 (749-771)

[84] A. Bobić, "Constructive Versus Destructive Conflict: Taking Stock of the Recent Constitutional Jurisprudence in the EU", *Cambridge Yearbook of European Legal Studies* 22 (2020), 60-84. Bosko Tripkovic stresses that only 'deep and authentic evaluative attitudes' upholding general principles of constitutionalism through local constitutional practices can be recognized as properly belonging to constitutional identity. In other words, "[t]*here can be no constitutional identity that does not respect the basic commitment to constitutional form of legitimation and authority*". B. Tripkovic, "Constructing the Constitutional Self: Meaning, Value, and Abuse of Constitutional Identity", *Union University Law Review*, 11/2 (2020), 359-384. In the same vein: A. Kaczorowska-Ireland, "What Is the European Union Required to Respect Under Article 4(2) TEU?: The Uniqueness Approach", *Europan Public Law* 25/1 (2019), 57-82; F.-X. Millet, "Successfully Articulating National Constitutional Identity Claims: Strait is the Gate and Narrow Is the Way", *European Public Law* 27/3 (2021), 586-588 (571-596). Next to the necessity of (genuine) constitutional dialogue, some authors seem to be adding the decisive nature of the constitutional identity argument in the judicial process. However, it remains unclear why and to what extent this criterion can be taken into account to assess the validity of identity claims. For this point of view, consult P. Bárd, N. Chronowski, and Z. Fleck, "Use, Misuse, and Abuse of Constitutional Identity in Europe", in M. Tushnet and D. Kochenov, *Research Handbook on the Politics of Constitutional Law*, Cheltenham, Edward Elgar Publishing, 2023, 612-634.

[85] P. Faraguna, "On the Identity Clause and Its Abuses: 'Back to the Treaty'", *European Public Law* 27/3 (2021), 443-444 (427-446). For a more extensive discussion: *infra*, points 2.4.6 and 4.3.

[86] A. Bobić, *The Jurisprudence of Constitutional Conflict in the European Union*, Oxford, Oxford University Press, 2022, 128 and 263;

[87] It should be noted, however, that it is not ideal to make distinctive categories because it is often not entirely clear what the motives of constitutional actors are (political, doctrinal, institutional, etc.). Moreover, several aspects come into play in the adjudication based on constitutional identity, making a classification at times too rigid (as this section will show, identity-based cases before the CJEU can e.g. be triggered by underlying adjudicative claims between a Member State's domestic courts instead of strongly normative identity-based claims).

[88] Judgment of the Corte Costituzionale of 18 December 1973, *Frontini*, n° 183/1973, ECLI:IT:COST:1973:183. See also the judgment of the Corte Costituzionale of 5 June 1984, *Granital*, n° 170/1984, ECLI:IT:COST:1984:170.

fundamental rights as the core of their constitutions, the German and Italian constitutional courts asserted the existence of constitutional limits to the application of EU law in their respective national law. The reasoning was that the national constitution allows for a transfer of (the exercise of) state powers to the EU, but this transfer does not imply that fundamental constitutional principles can be impaired. The Italian Constitutional Court (ICC) was the first to introduce the idea of constitutional identity with its *controlimiti* doctrine.[89] Although the Court acknowledged that the transfer of state powers to the EU amounted to a limit to Italian state sovereignty, the Court found limitations to this transfer within Article 11 of the Italian Constitution which protects core values, including fundamental rights. The Court asserted that it would retain constitutional review on EU law since such limitations to Italian sovereignty did not allow for violations of the fundamental values of the Italian constitutional order.[90]

The German Constitutional Court used the notion of constitutional identity in this manner to shield its judicial power from European integration. In its famous *Solange I* judgment the GFCC contended that the transfer of powers could not go against the identity and fundamental structure of the German Basic Law, epitomised in the respect for human dignity (Article 79(3) of the Basic Law).[91] Expanding the application of this clause to fundamental rights protection in a broad sense, the GFCC concluded that as long as the Community law does not foresee a catalog of fundamental rights, it is entitled to review the European Community's measures and disapply them if necessary. Although the GFCC mitigated its tone in the *Solange II* judgment, by the same decision it extended the scope of its review possibilities to the 'legal principles underlying the provisions of the Basic Law on fundamental rights'.[92]

In the context of further EU constitutionalisation, the argumentative underpinnings of national limitations to EU integration would gradually come to shift from fundamental rights protection towards democratic constitutionalism as a basis for the Member States' constitutional identity: the drafting of the Maastricht Treaty (1992) increased the Member States' integration and bolstered the Community's autonomy. Whereas the European Community strived for an ever-closer union, the Member States aimed at protecting their national interests.[93] During the drafting process, there was a fear that the traditional role of state governments would be replaced by a supranational entity. Prompted by this political consideration, several efforts were made to reassure the Member States and to clarify the boundaries of Union competences. Along with the principle of subsidiarity, the so-called 'identity clause' was introduced in the Treaty as a limit to the EU's competence creep.[94] The identity clause recognised the diversity between Member States in Article F(1):

> "*The Union shall respect the national identities of its Member States, whose system of government are founded on the principles of democracy.*"

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89 The Court did however not formulate this idea explicitly in terms of constitutional identity.

90 Judgement of the Corte Costituzionale of 18 December 1973, *Frontini*, n° 183/1973, ECLI:IT:COST:1973:183, para. 21.

91 Judgment of the Bundesverfassungsgericht of 29 May 1974, *Solange I*, BVerfGE 37, 271 2 BvL 52/71, para 43 and 44.

92 Judgment of the Bundesverfassungsgericht of 22 November 1986, *Solange II*, BVerfGE, 73, 339, 2 BvR 197/83.

93 F.-X. Millet, L'union Européenne et l'identité constitutionnelle des états membres, Paris, LGDJ, 2013, 10 and 25.

94 P. Faraguna, "Constitutional Identity in the EU. A Shield or a Sword?", *German Law Journal*, 18/7 (2017), 1620 (1617-1640). See also P.D. Marquardt, "Subsidiarity and Sovereignty in the European Union", *Fordham International Law Journal* 18 (1994), 616-618 and 625-626 (616-640); R. Schütze, *From Dual to Cooperative Federalism: The Changing Structure of European Law*, Oxford, Oxford University Press, 2009, 242-243.

Still, the notion of "national identity" in the Maastricht Treaty was vague. Some legal scholars therefore observe that the provision amounted at the time to little more than a mere political statement, designed to gild the pill for the Member States and their respective claims to sovereignty.[95] Consequently, the provision had little to no legal value.[96] With the entry into force of the Lisbon Treaty in 2009, the wording of the identity clause was tightened, and the provision became legally enforceable.[97] Article I-5(1) of the (draft) Constitutional Treaty – which has since become Article 4(2) TEU – stipulated that

> "*The union shall respect the equality of Member States before the constitution as well as their national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government. It shall respect their essential State functions, including ensuring the territorial integrity of the State, maintaining law and order and safeguarding national security.*"[98]

On each of these occasions, the German Constitutional Court delivered high-profile decisions on Germany's access to these Treaties; decisions that would prove to be central to the development of the notion of constitutional identity. With the 1993 *Maastricht* judgment the GFCC created the *ultra vires* review, founding its review jurisdiction on a rigid sovereignty-based interpretation of democratic constitutionalism:[99] according to the GFCC, the principle of democracy, protected by Article 79(3) Basic Law, presupposes that the German Parliament has to retain its substantial democratic State powers and functions when transferring competences to a supranational entity.[100] These powers derive from the German people, who justify in principle this transfer.[101] In other words, it is through the people of the State, acting as a Treaty-endorsing constituent power, that the EU obtains its competences. In consequence, the capacity to confer and reclaim competences – the so-called *Kompetenz-Kompetenz* – remains with the Member States. The GFCC thus accepted a transfer of powers on the condition of "*a sufficiently precise specification of the assigned rights* […] *and of the proposed programme of*

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95 L. Besselink, "National and Constitutional Identity before and after Lisbon", *Utrecht Law Review* 6/3 (2010), 41 (36-49); M. Claes, 'Negotiating Constitutional Identity or whose Identity Is it Anyway?' in M. Claes, M. de Visser, P. Popelier, and C. Van de Heyning (eds.), *Constitutional Conversations in Europe*, Antwerp, Intersentia, 2012, 217 (205-234).

96 D. Simon, "Article F. Commentaire" in V. Constantinesco, R. Kovar, and D. Simon (eds.), *Traité sur l'Union Européenne (signé à Maastricht le 7 février 1992). Commentaire article par article*, Paris, Economica, 1995, 88–89. Elke Cloots points out that it is not entirely clear why the identity clause would have been legally meaningless. She hypothesises that since the CJEU initially lacked jurisdiction to interpret the identity clause, art. F(1) TEU might have been considered unenforceable, hence not legally binding. E. Cloots, *National Identity in EU Law*, Oxford, Oxford University Press, 2015, 36-37.

97 The Member States' diversity has been formally recognised in the Preamble to the Charter of Fundamental Rights of the European Union also: "*The Union contributes to the preservation and to the development of these common values while respecting the diversity of the cultures and traditions of the peoples of Europe as well as the national identities of the Member States and the organisation of their public authorities at national, regional and local levels; it seeks to promote balanced and sustainable development and ensures free movement of persons, goods, services and capital, and the freedom of establishment.*"

98 Some argue that Article I-5 could be read as a limiting configuration of Article I-6, which asserted primacy of Union law over domestic law, since the former might be read "*in conjunction with*" the latter. M. Kumm and V. Ferreres Comella, "The Primacy Clause of the Constitutional Treaty and the Future of Constitutional Conflict in the European Union", *International Journal of Constitutional Law* 3 (2005), 492 (473-492).

99 Judgment of the Bundesverfassungsgericht of 12 October 1993, BVerfGE, 2 BvR 2134/92 and 2 BvR 2159/92.

100 Remark that Article 23 Basic Law explicitly refers to the eternity clause of Article 79(3) Basic Law in stipulating the constitutional conditions for European integration.

101 Judgment of the Bundesverfassungsgericht of 12 October 1993, BVerfGE, 2 BvR 2134/92 and 2 BvR 2159/92, p. 182.

integration".[102] The *Maastricht* judgment thus boiled down to the primacy of State sovereignty. At the same time, it denied the existence of a European people, since the democratic legitimacy of the EU derived exclusively from the Member States.[103] The *Maastricht* judgment meant that the GFCC declared itself competent to review the transfer of competences (limited and sufficiently precise), but also the Union's exercise of these conferred powers. If the national Parliament transferred too many powers (or if they were not sufficiently specified) or the Union transgressed the limits of its competences, the Court could declare inapplicable the legal acts of the German Parliament or the Union respectively.

In the context of Germany's ratification of the Lisbon Treaty, the GFCC issued its *Lisbon* judgment,[104] through which it elaborated on its review competences of EU law: it now added explicitly the identity review, next to the fundamental rights review (*Solange I* judgment) and *ultra vires* review (Maastricht judgment). The Court's judgment affirmed its prior point of view established in the *Maastricht* judgment that the Member States are 'Masters of the Treaties'. Hence, the German people should be considered the original constituent power.[105] Furthermore, the Court based identity review on the eternity clause in Article 79(3) Basic Law, which prevents the German legislator from altering 'core areas' of the Basic Law, such as the democratic and social nature of the German State, the principles of sovereignty, the rule of law, the state welfare, and the governmental form (Article 20 Basic Law), as well as the respect for human dignity (Article 1 Basic Law).[106] The GFCC deemed these core areas to be essential for German statehood. A transfer of these powers or an encroachment thereupon would risk eroding the fundamental democratic right of German citizens to organise themselves democratically through elections - a right that falls within the scope of the perpetuity clause of Article 79(3) Basic Law through Article 1 Basic Law (elections essential to – a German conception of – human dignity) and Article 20 Basic Law (elections as a necessity for the democratic nature of the German state). The GFCC concluded that this right to elections can only be guaranteed if the elected assembly retains substantial powers.[107] Accordingly, the GFCC declared the eternity clause to be an "*absolute limit*" to Germany's possible participation in the development of the European Union.[108] Next to the breach of *ultra vires*, the violation of constitutional identity would lead to the inapplicability of EU law.[109] The judgment furthermore entailed that any German citizen could bring individual complaints to the GFCC to

[102] Ibid., p. 187.

[103] M. Herdegen, "Maastricht and the German Constitutional Court: Constitutional Restraints for an "Ever Closer Union" and Document "Extracts from: Brunner v. The European Union (*Bundesverfassungsgericht)*"", *Common Market Law Review* 31 (1994), 235 and 241-242 (235-262).

[104] Judgment of the Bundesverfassungsgericht of 30 June 2009, *Lissabon*, BVerfGE, 2 BvE 2/08.

[105] Ibid., paras. 228, 248-252 and 286.

[106] Ibid., paras. 216-217.

[107] The German Court considered five fields to be "particularly sensitive to the democratic ability of a constitutional state to shape itself", notably: (1) decisions on substantive and formal criminal law; (2) decisions on the disposition of the monopoly on the use of force by the police within the state and by the military towards the exterior; (3) fundamental fiscal decisions on public revenue and public expenditure; (4) decisions on the shaping of living conditions in a social state; (5) decisions 'of particular cultural importance', for example on family law, the school and education system and on dealing with religious communities. Judgment of the Bundesverfassungsgericht of 30 June 2009, *Lissabon*, BVerfGE, 2 BvE 2/08, para. 210.

[108] Judgment of the Bundesverfassungsgericht of 30 June 2009, *Lissabon*, BVerfGE, 2 BvE 2/08, para. 230.

[109] Ibid., para. 241, 252-260.

evaluate European integration with the German Basic Law.[110] However, the GFCC also emphasised that identity review can only be done in a spirit of sincere cooperation and openness towards EU law.[111]

In a 2014 preliminary reference to the CJEU concerning the Outright Monetary Transactions mechanism (OMT) announced by the European Central Bank (ECB), the GFCC further elaborated on the notion of constitutional identity.[112] Concerned with the possibility that quantitative easing could exceed the unforeseeable risks for national budgets set forth by the German Parliament, the GFCC asked the CJEU whether the ECB's purchase of government bonds issued by the Member States was unlawful: the OMT program might not be covered by the mandate of the ECB, making the ECB acting *ultra vires*. The impact of the program might also affect democratic decision-making on national budgets and undermine budgetary autonomy, possibly impairing German constitutional identity. In its reference, the GFCC made a difference between the values underpinning national 'fundamental structures, political and constitutional' of Article 4(2) TEU on the one hand, and the core constitutional values that represent the national constitutional identity on the other. Departing from its formerly acknowledged principles of cooperation and openness towards EU law, the GFCC stated that the latter values were not subject to the principle of primacy of EU law, entailing exclusive jurisdiction for the GFCC to interpret them.[113] The CJEU eventually refrained from commenting on the interpretation of constitutional identity, focusing solely on the ECB's mandate regarding the OMT mechanism.[114] In view of the reassurance that the OMT mechanism would prevent said risks, the GFCC eventually accepted its validity.[115]

After the GFCC returned in late 2015 to its previous jurisprudence accepting that identity review should be applied according to the principles of sincere cooperation and in a EU-friendly way,[116] the issue of constitutional identity reappeared in the context of the Public Sector Purchase Programme (PSPP) of the ECB. What had begun as a dialogue between the GFCC and the CJEU ended in open conflict. In 2017, the GFCC referred to the CJEU,[117] asking whether the ECB's decision establishing the PSPP was *ultra vires*.[118] The GFCC suspected that the PSPP did not constitute a measure of monetary policy and doubted whether it was conforming with the proportionality principle. In the *Weiss* judgment, the CJEU confirmed the validity of the measure, falling within the competences of the ECB.[119] The CJEU dismissed the GFCC's concern about risk-sharing for the purchase of government bonds as hypothetical and

[110] Ibid., para. 230. See also C. Calliess, "Constitutional Identity in Germany. One for Three or Three in One?", in C. Calliess and G. van der Schyff (eds.), *Constitutional Identity in a Europe of Multilevel Constitutionalism*, Cambridge, Cambridge University Press, 2020, 172 (153-181).

[111] Judgment of the Bundesverfassungsgericht of 30 June 2009, *Lissabon*, BVerfGE, 2 BvE 2/08, para. 240.

[112] Judgment of the Bundesverfassungsgericht of 14 January 2014, *Gauweiler*, BVerfGE, 2 BvR 2728/13.

[113] Ibid., para. 29.

[114] Judgment of the Court of Justice of 16 June 2015, *Gauweiler*, C-62/14, ECLI:EU:C:2015:400, paras. 123-126.

[115] Judgment of the Bundesverfassungsgericht of 21 June 2016, *Gauweiler*, BVerfGE, 2 BvR 2728/13, paras. 218-219.

[116] Judgment of the Bundesverfassungsgericht of 15 December 2015, *Mr R.*, BVerfGE, 2 BvR 2735/14, key considerations 1 and 1.b. This decision relates to the application of identity review in the context of the European Arrest Warrant Framework Decision. Although the GFCC ruled that there was no need for a preliminary ruling by the CJEU, it made clear that there was no conflict between EU law and national law in the case at hand. See esp. Judgment of the Bundesverfassungsgericht of 15 December 2015, *Mr R.*, BVerfGE, 2 BvR 2735/14, paras. 46 and 125. For a more detailed analysis: *infra*, point 4.1.

[117] Judgment of the Bundesverfassungsgericht of 18 July 2017, BVerfGE, 2 BvR 859/15.

[118] The PSPP is a framework program that allows for the central banks of the Eurosystem to purchase assets on the financial markets under specific conditions and from eligible counterparts. Decision 2020/188 of the European Central Bank on a secondary markets public sector asset purchase program, ECB/2020/9 (3 February 2020).

[119] Judgment of the Court of Justice of 11 December 2018, *Weiss*, C-493/17, ECLI:EU:C:2018:1000.

declared the measure to be proportional.[120] In response, the GFCC issued its *PSPP* judgment.[121] In this judgment the GFCC declared the ECB's decision establishing the PSPP and the CJEU's *Weiss* judgment as *ultra vires* acts and in violation of German constitutional identity, protected by Articles 23(1) and 79(3) of the Basic Law.[122] The issue was eventually resolved at the political level: the German Parliament, after having received additional information from the ECB, passed a resolution affirming the conformity of the PSPP with the conditions set forth by the GFCC.[123]

It must be noted that, regardless of the critique in academic scholarship on this decision, some have analysed the PSPP case as a blunt, but constructive attempt of the GFCC to ask for a higher standard of review of the ECB's activities in the monetary field:[124] through the identity review the GFCC emphasised the importance of monetary policies for the Member States, without rejecting the ECB's quantitative easing programs altogether, as it accepted these programs when they comply with the prohibition of monetary financing. The most optimistic analysis of the GFCC's jurisprudence does however not detract from the fact that through this jurisprudence the GFCC clearly (re)affirmed a rigid interpretation of democratic constitutionalism that relies on a constitutional system's strong commitment to its normative core; a core that is strongly tied to the political community and the collective agency of this community through constitutional principles. By expanding the notion of constitutional identity to broad conceptual fields like democracy, sovereignty, and constituent power, the GFCC expedited the dismissal of EU law's primacy, as well as the autonomous nature of the EU.[125]

2.4.2. Further questioning the primacy of EU law: France, Spain and the Czech Republic

Following the German Constitutional Court's jurisprudence, the notion of constitutional identity – including the jurisdictional claim to review Union action against the identity of the Member States – gained traction. Constitutional identity gradually became one of the principal frames for contestation and negotiation of authority between different constitutional orders. This is far from surprising, since the EU, as a heterarchical entity, is characterised by constitutional pluralism that upholds principles such as mutual recognition, sincere cooperation (Article 4(3) TEU), and constitutional dialogue.[126]

The German Constitutional Court's jurisprudence proved instrumental in the introduction of identity review in several Member States. National courts in Denmark,[127] Poland,[128] Cyprus,[129] the Czech

[120] Ibid., paras. 123-126.

[121] Judgment of the Bundesverfassungsgericht of 5 May 2020, BVerfGE, 2 BvR 859/15.

[122] Ibid., paras. 117 and 119.

[123] See on this M. Wendel, "Paradoxes of Ultra-Vires Review: A Critical Review of the PSPP Decision and Its Initial Reception", *German Law Journal* 21 (2020), 979–994.

[124] A. Bobić and M. Dawson, "Making Sense of the "Incomprehensible": The PSPP Judgment of the German Federal Constitutional Court", *Common Market Law Review* 57/6 (2020), 1953, 1956– 1957 (1953-1998).

[125] E. Cloots, *National Identity in EU Law*, Oxford, Oxford University Press, 2015, 51-52; O. Scarcello, *Radical Pluralism in Europe*, London, Routledge, 2023, 39.

[126] D. Fromage and B. De Witte, "Guest Editors' Introduction. National Constitutional Identity Ten Years on: State of Play and Future Perspectives", *European Public Law* 27/3 (2021), 411-424.

[127] Judgment of the Højesteret of 6 April 1998, n° I-361/1997, published in A. Oppenheimer (ed.), *The Relationship Between European Community Law and National Law: The Cases*, vol. 2, Cambridge: Cambridge University Press, 1994, at 174.

[128] Judgment of the Trybunał Konstytucyjny of 27 April 2005, P 1/05; judgment of the Trybunał Konstytucyjny of 11 May 2005, K 18/04.

[129] Judgment of the Cypriot Supreme Court of 7 November 2005, n° 294/2005.

Republic,[130] France,[131] and Spain[132] came to adopt to a more or less extent the notion of constitutional identity as a limit to the absolute primacy of EU law. In 2004 the French *Conseil Constitutionnel* affirmed that Article I-5 of the Constitutional Treaty had no bearing on the place of the French Constitution at the top of the domestic order.[133] Two years later, in 2006, it stated that a national act transposing a directive could not go counter a rule or principle inherent to France's constitutional identity unless with consent of the constituent power.[134] More recently, the *Conseil Constitutionnel* stated that for matters of shared competence between the EU and the Member States, it would review claims of unconstitutionality against the entire body of French constitutional law, whereas, for matters of exclusive EU competence, it would limit its review to the principles inherent to the French constitutional identity.[135]

The Spanish *Tribunal Constitucional* referred explicitly to the identity clause when affirming that the Maastricht Treaty was founded on the values at the base of the Member States' constitutions, prohibiting a transfer of the exercise of competences to supranational institutions that would 'unrecognizably' alter the Member States' basic constitutional structures.[136] This led the Tribunal to declare the existence of material limits resulting implicitly from the Spanish Constitution and including the respect for the sovereignty of the Spanish State, the basic constitutional structures, the system of fundamental principles and values outlined in the Spanish Constitution, including the specific substantive nature of the fundamental rights protection.[137]

The notion of constitutional identity was also picked up in various Central European countries. The Czech Constitutional Court judged in the *Sugar Quotas III* case of 2006 that the (partial) conferral of powers of national state organs is "*naturally a conditional conferral*".[138] The Court also based this position on Czech state sovereignty and constituent power. Consequently, the delegation of a part of the state powers "*may persist only so long as these powers are exercised in a manner that is compatible with the preservation of the foundations of state sovereignty of the Czech Republic, and in a manner which does not threaten the very essence of the substantive law-based state*".[139] That same year the Czech Court

[130] Judgment of the Ústavní soud of 8 March 2006, *Sugar Quotas III*, Pl. US 50/04; judgment of the Ústavní soud of 3 May 2006, *European Arrest Warrant*, Pl. US 66/04.

[131] Decision of the Conseil Constitutionnel (French Constitutional Council) of 10 June 2004, n° 2004-496; decision of the Conseil Constitutionnel of 19 November 2004, n° 2004-505 DC; decision of the Conseil Constitutionnel of 27 July 2006, n° 2006-DC. In this last decision, the French Constitutional Council practically developed for the first time a theory of constitutional identity, independently of the GFCC's conception. The French understanding of constitutional identity remains however obscure. See also, more recently the Conseil Constitutionnel's decision of 15 October 2021, n° 2021-940 QPC.

[132] Declaration of the Tribunal Constitucional of 13 December 2004, n° 1/2004.

[133] Decision of the Conseil Constitutionnel of 19 November 2004, n° 2004-505 DC, para. 10.

[134] Decision of the Conseil Constitutionnel of 27 July 2006, n° 2006-540 DC, para. 19. See also the decision of the Conseil Constitutionnel of 30 November 2006, n° 2006-543 DC, para. 6; decision of the Conseil Constitutionnel of 12 May 2010, n° 2010-605 DC, para. 18.

[135] Decision of the Conseil Constitutionnel of 31 July 2017, n° 2017-749 DC, paras. 13-14. However, the Conseil refrained from specifying the French constitutional identity's content. See J. LARIK, "Prêt-à-ratifier: The CETA Decision of the French Conseil Constitutionnel of 31 July 2017", *European Constitutional Law Review* 13/4 (2017), 764 (759-777).

[136] Declaration of the Tribunal Constitucional of 13 December 2004, n° 1/2004, para. II.3.

[137] Ibid., para. II.2.

[138] Judgment of the Ústavní soud of 8 March 2006, *Sugar Quotas III*, Pl. US 50/04, consideration under 4.B.

[139] Ibid., consideration under 4.B. The Court also stated that it would perform constitutional review in those cases in which the Czech Republic has an area of discretion when implementing EU law. For a more detailed analysis, see J. Komárek, "European Constitutionalism and the European Arrest Warrant: In Search of the Limits of "Contrapunctual Principles"", *Common Market Law Review* 9 (2007), 26-30.

confirmed its ruling when refusing to recognise absolute primacy of EC law. The decision nevertheless held that the European Arrest Warrant Framework Decision[140] was compatible with the Czech Constitution, although the latter enshrines the fundamental right for Czech citizens not to be forced to leave their country.[141] The Czech Court went further in its judgment on the Lisbon Treaty by putting substantive limits to the transfer of powers to the EU and the subsequent application thereof by EU institutions.[142] More than relying on the constitutional specificity of the Czech legal order, the Constitutional Court relied on the German Constitutional Court's jurisprudence – and more precisely the doctrine of unconstitutional constitutional amendments – to judge that the 'material core' of the Czech Constitution prevails over EU law.[143] This core is to be found in the eternity clause in Article 9(2) of the Czech Constitution that prohibits "*any changes in the essential requirements for a democratic state governed by the rule of law*", which the Czech Court considered to be an absolute limit to EU law. The introduction of constitutional identity has however not changed the Czech Court's EU-friendly stance. Although the Court reacted in its *Holubec* judgment[144] to the CJEU's *Landtová* judgment[145] by declaring the latter decision *ultra vires*, the Czech Court does not so much rely on the notion of constitutional identity and generally respects the primacy of EU law over the Czech legal order. The *Holubec* judgment was arguably directed against the Czech Supreme Administrative Court, rather than at the EJC and its vision on the relationship between domestic and EU law.[146] In addition, the issue was without further European consequences: the Court refrained from setting concrete 'identity-based' limits to EU law, stating already in 2008 that it is up to the national legislator to specify the competences that must be retained at the domestic level "*because this is a priori a political question, which provides the legislature*

[140] Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States, OJ L190/1 (amended by Council Framework Decision 2009/299/JHA of 26 February 2009 amending Framework Decisions 2002/584/JHA, 2005/214/JHA, 2006/783/JHA, 2008/909/JHA and 2008/947/JHA, thereby enhancing the procedural rights of persons and fostering the application of the principle of mutual recognition to decisions rendered in the absence of the person concerned at the trial, OJ L81/24).

[141] Judgment of the Ústavní soud of 3 May 2006, *European Arrest Warrant*, Pl. US 66/04, consideration under 4.B.

[142] Judgment of the Ústavní soud of 26 November 2008, *Lisbon I*, Pl ÚS 19/08, para. 85. See also the judgment of the Ústavní soud of 3 November 2009, *Lisbon II*, Pl ÚS 29/09.

[143] See also Pavel Molek, who argues that changing this substantive core would mean replacing the constitution with a new one. P. Molek, *Materiální ohnisko jako věčný limit evropské integrace?*, MUNI Press, 2014, 138. On the doctrine of unconstitutional constitutional amendability: *supra*, point 2.1.2.

[144] Judgment of the Ústavní soud of 31 January 2012, *Holubec*, Pl. ÚS 5/12.

[145] Judgment of the Court of Justice of 22 June 2011, *Landtová*, C-399/09, ECLI:EU:C:2011:415

[146] The *Landtová* judgment disaffirmed the Czech Constitutional Court's *Slovak Pensions* ruling concerning the pension benefits of persons affected by Czechoslovakia's dissolution in 1993. In the light of devaluations of Slovak pensions after the dissolution, the Czech Constitutional Court judged that Czech nationals receiving Slovak pensions were entitled to have these supplemented by the Czech social security administration. This decision triggered a dispute between the Constitutional Court and the Supreme Administrative Court, as the latter refused to accept this arrangement. It was only when the Czech Republic joined the European Union that this decision became problematic in light of the EU's anti-discrimination law. The refusal of the Czech Constitutional Court to revise its jurisprudence eventually prompted the Supreme Administrative Court to bring the case before the CJEU. When the latter issued its judgment, considering it a violation of EU discrimination law, the Czech Constitutional Court responded by declaring the EJC's ruling *ultra vires*, as it ignored the European history and the constitutional identity of the Czech Republic, "*which draws from the common constitutional tradition with the Slovak Republic*". For more in-depth analyses: M. Bobek, "Landtová, Holubec, and the Problem of an Uncooperative Court: Implications for the Preliminary Rulings Procedure", *European Constitutional Law Review*, 10 (2014), 54-89; J. Komárek, "Playing with Matches: the Czech Constitutional Court Declares a Judgment of the Court of Justice of the EU Ultra Vires", *European Constitutional Law Review* 8 (2012), 323-337; D. Kosař and L. Vyhnánek,"Constitutional Identity in the Czech Republic: A New Twist on an Old- Fashioned Idea?", in C. Calliess and G. van der Schyff (eds.), *Constitutional Identity in a Europe of Multilevel Constitutionalism*, Cambridge, Cambridge University Press, 2020, 85-113; R. Zbíral, "Czech Constitutional Court, Judgment of 31 January 2012, Pl. ÚS 5/12. A Legal Revolution or Negligible Episode? Court of Justice Decision Proclaimed Ultra Vires", *Common Market Law Review* 49 (2012), 1-18.

wide discretion; interference by the Constitutional Court should come into consideration as ultima ratio, i.e., in a situation where the scope of discretion was clearly exceeded".[147]

2.4.3. The 'misuse' of the notion of constitutional identity: Bulgaria and Romania

There have also been cases of so-called 'misuse' of constitutional identity, notably by the Bulgarian and Romanian courts.[148] In Bulgaria, authorities refused to accept a Spanish birth certificate of a baby with two mothers. The child was born in Spain, but both mothers held different nationalities. One mother was a UK citizen, who according to UK law was not able to pass citizenship to her child. The other mother was a Bulgarian citizen. Both mothers were named on the Spanish birth certificate, but the municipality denied the possibility for the child to have two mothers (based on the *ius sanguinis* principle). The Bulgarian municipal authorities refused to issue a birth certificate – which was required for the issue of a Bulgarian identity document – on the grounds that no information was provided concerning the child's biological mother. Consequently, the baby was denied (EU) citizenship and put at risk of becoming stateless. The Bulgarian mother of the baby challenged this decision before the Administrative Court of the City of Sofia, which made a preliminary reference to the CJEU asking whether the issuing of a birth certificate would in these circumstances not undermine the Member State's constitutional identity or pose a threat to its public policy.[149]

Referring to the *Coman* case in which the CJEU applied the notion of constitutional identity in a balancing exercise between fundamental rights and policy measures,[150] the CJEU stated that the concept of public policy as justification for a derogation from a fundamental freedom must be interpreted strictly. This means that a Member State cannot unilaterally determine the scope of public policy without control by the EU institutions. Furthermore, public policy may be relied on only if there is a genuine and sufficiently serious threat to a fundamental interest of society.[151] The CJEU thus concluded that in view of the respect of fundamental rights, issuing the child with an identity card or passport without requiring a birth certificate does not undermine the national identity, nor pose a threat to the public policy of that Member State.[152] The Bulgarian Supreme Administrative Court nevertheless dismissed the child's right to a Bulgarian birth certificate and citizenship,[153] thus violating its obligations under EU law.[154] Several months later, the Bulgarian Constitutional Court seemingly confirmed the Supreme Administrative Court's view with a binding interpretative decision that found

[147] Judgment of the Ústavní soud of 26 November 2008, *Lisbon I*, Pl ÚS 19/08, para 109.

[148] P. Bárd, N. Chronowski, and Z. Fleck, "Use, Misuse, and Abuse of Constitutional Identity in Europe", in M. Tushnet and D. Kochenov, *Research Handbook on the Politics of Constitutional Law*, Cheltenham, Edward Elgar Publishing, 2023, 612-634.

[149] Judgment of the Court of Justice of 14 December 2021, *V.M.A. v Stolichna obshtina, rayon „Pancharevo"*, C-490/20, ECLI:EU:C:2021:1008, paras. 28-32, 53-56.

[150] Judgment of the Court of Justice of 5 June 2018, *Coman*, C-673/16, ECLI:EU:C:2018:385. For a more detailed discussion of this balancing exercise: *infra*, point 4.3.

[151] Judgment of the Court of Justice of 14 December 2021, *V.M.A. v Stolichna obshtina, rayon „Pancharevo"*, C-490/20, ECLI:EU:C:2021:1008, para, 54-55 and 69.

[152] Ibid., para, 56.

[153] Judgement of the Bulgarian Supreme Administrative Court of 1 March 2023, appeal nº 2185.

[154] D. De Groot, "Briefing for the European Parliament on 'Free Movement Rights of Rainbow Families'", https://www.europarl.europa.eu/RegData/etudes/BRIE/2023/749768/EPRS_BRI(2023)749768_EN.pdf, accessed on 29 February 2024, 11-12.

the Bulgarian Constitution to recognise a biological meaning to the concept of 'sex' (female/male).[155] The Court based this binary understanding on 'Bulgarian tradition', stating that the embedding of marriage in Article 46(1) of the Bulgarian Constitution is an expression of the Bulgarian nation that has continuously understood marriage in terms of a union between a man and a woman. According to the Court this understanding of marriage developed through Bulgarian history, next to other traditional values and making it part of the 'political and national identity' of Bulgaria. With this decision, the Bulgarian Court went against the CJEU's *Coman* decision and the CJEU's broad interpretation of parent-child relationships.[156]

In Romania, the Constitutional Court openly clashed with the CJEU in 2021 by establishing limitations to EU law on grounds of Romania's constitutional identity. This conflict goes back to 2007 when Romania joined the EU. To assess Romania's post-accession remedial of issues concerning judicial reforms and corruption, the Commission set in place the Cooperation and Verification Mechanism (CVM).[157] Following the introduction of disciplinary proceedings for magistrates and their personal responsibility in cases of judicial errors, the CVM formulated corrective recommendations. When the Romanian Constitutional Court judged that these recommendations had no legal value, given that they are part of EU law and the CJEU had not (yet) ruled on this matter, several ordinary courts submitted preliminary references to the CJEU asking for an interpretation of the CVM's recommendations.[158]

Connecting this issue of judicial independence to the common values of the EU in Article 2 TEU, the CJEU judged that the CVM's recommendations (as well as the Decision establishing the CVM) form part of EU law and have a direct effect.[159] In response, the Romanian Constitutional Court found that EU law does not prevail over the Romanian Constitution and that according to Article 148 of the Constitution national courts do not have the power to examine the conformity of a provision of domestic law with EU law.[160] The Romanian Constitutional Court based the limitation to the primacy of EU law on the notion of constitutional identity but refrained from specifying how this notion must be understood. It furthermore considered that only political authorities are obliged to respect and apply this (CJEU) judgment, but that national courts are not in the position to assess its prevalence over a law declared constitutional by the Constitutional Court.[161]

Although these Bulgarian and Romanian cases could be considered destructive conflicts, some commentators observe that the said courts 'misused' the notion of constitutional identity instead of abusing it: first, because they did not expand on the notion and used in a very confusing manner. Secondly, because there are no signs that these courts have been influenced or pushed by national

[155] Decision of the Bulgarian Constitutional Court of 15 and 26 October 2021, n° 6/2021. For an analysis, see T. Petrova, "Value Judgments. The Dangers of the "Traditionalist" Rhetoric of the Bulgarian Constitutional Court", Verfassungsblog, https://verfassungsblog.de/value-judgments/, accessed on 29 February 2024.

[156] On this broad interpretation, see e.g. Judgment of the Court of Justice of 26 March 2019, *SM v Entry Clearance Officer*, C-129/18, ECLI:EU:C:2019:248.

[157] Commission Decision 2006/928/EC of 13 December 2006 establishing a mechanism for cooperation and verification progress in Romania to address specific benchmarks in the areas of judicial reform and the fight against corruption OJ L354/56.

[158] Judgment of the Court of Justice of 18 May 2021, *Asociația "Forumul Judecătorilor din România"*, joined cases C-83/19, C-127/19, C-195/19, C291/19, C-355/19, and C-397/19, ECLI:EU:C:2021:393.

[159] Ibid., paras. 106-162, 178 and 249.

[160] Decision of the Curtea Constituțională of 8 June 2021, n° 390/2021.

[161] Note that in a dissenting opinion, two judges pointed at Article 148(4) of the Romanian Constitution, which binds all public authorities (Parliament, President, Government, and the judicial authority) to guarantee the implementation of the obligations resulting from Romania's accession to the EU and the primacy of EU law over national law.

authorities in their decision-making.[162] What is more, these decisions are an exception to the rule that these courts usually do not clash with the CJEU in these matters. On the contrary, they seem to generally welcome the CJEU's take on constitutional identity.[163] This does however not detract from the fact that both the Bulgarian and Romanian cases led to hard and unresolved conflicts with the CJEU.

2.4.4. Constitutional identity as a tool to limit EU integration: Poland and Hungary

The national courts have sometimes been tempted to use constitutional identity as an instrument to settle normative conflicts in the EU sphere in favor of domestic law.[164] The conflicts between the EU institutions and the governments and courts of certain Member States, such as Poland and Hungary are a case in point.

In a judgment that assessed the constitutionality of Poland's accession to the EU, the Polish Constitutional Tribunal affirmed that the interpretation of Polish law in a manner "*sympathetic to EU law*" finds its limits in "*contradicting the explicit wording of constitutional norms or being irreconcilable with the minimum guarantee functions realised by the Constitution*".[165] The Polish Tribunal contested the primacy of EU law over the Constitution, modeling its jurisprudence according to the German Constitutional Court's *Solange I* decision. In doing so, it emphasised individual rights protection as a minimal threshold and absolute limit to Union law. In 2009 the Polish Tribunal reverted to the *Solange II* approach, indicating that it would exercise constitutional review in case of a (demonstrated) considerable decline in the standard of protection of rights and freedoms, in comparison with the domestic standard.[166] In 2010 the Tribunal explicitly invoked the GFCC's *Maastricht* and *Lisbon* judgments, popular sovereignty, and Polish political self-determination.[167]

In the past years, the Polish government has increasingly reverted to the discourse of constitutional identity. The captured and unconstitutionally composed Polish Constitutional Tribunal also made increasing use of the notion of constitutional identity, gradually shifting to an explicit and particular interpretation of identity review.[168] In the *Kp1/17* case concerning the constitutionality of a new type of public assembly, the Constitutional Tribunal based its arguments on nation-values and social-

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[162] P. Bárd, N. Chronowski, and Z. Fleck, "Use, Misuse, and Abuse of Constitutional Identity in Europe", in M. Tushnet and D. Kochenov, *Research Handbook on the Politics of Constitutional Law*, Cheltenham, Edward Elgar Publishing, 2023, 612-634. Anna Bobić, on the contrary, describes the Romanian case as a destructive constitutional conflict: A. Bobić, *The Jurisprudence of Constitutional Conflict in the European Union*, Oxford, Oxford University Press, 2022, 125-127.

[163] L. Popravka, "The Impact of EU Identity on Constitutional Identities – Romanian and Bulgarian Examples", *Hungarian Journal of Legal Studies* 63/1, 107-118. For a more critical analysis, highlighting the interference of the Romanian Constitutional Court's decisions with judicial activity: B. Selejan-Gutan, "A tale of Primacy Part II. The Romanian Constitutional Court on a Slippery Slope", *Verfassungsblog*, https://verfassungsblog.de/a-tale-of-primacy-part-ii/, accessed on 29 February 2024.

[164] P. Faraguna, "Constitutional Identity in the EU. A Shield or a Sword?", *German Law Journal* 18 (2017), 1617-1640; T. Konstadinides, "Constitutional Identity as a Shield and as a Sword: The European Legal Order within the Framework of National Constitutional Settlement", *Cambridge Yearbook of European Legal Studies* 13 (2010-2011), 195-218.

[165] Judgment of the Trybunał Konstytucyjny of 11 May 2005, K 18/04, paras. 14 and 23.

[166] Judgment of the Trybunał Konstytucyjny of 11 November 2011, SK 45/09, para. III 8.5.

[167] Judgment of the Trybunał Konstytucyjny of 7 October 2010, K 32/09, point III.3.2 and III.3.3. For the Tribunal's (mostly methodological) reasons to revert to the German doctrinal take on constitutional identity, consult M. Ziółkowski, "Constitutional Identity in Poland: Transplanted and Abused", in K. Kovács (ed.), *The Jurisprudence of Particularism: National Identity Claims in Central Europe*, Oxford, Hart Publishing, 2023, 132-134 and 134-139 (127-148).

[168] M. Ziółkowski, "Constitutional Identity in Poland: Transplanted and Abused", in K. Kovács (ed.), *The Jurisprudence of Particularism: National Identity Claims in Central Europe*, Oxford, Hart Publishing, 2023, 127-148.

engineering arguments without explicitly referring to identity review.[169] In its *K 1/20* judgment with regard to the right to abortion in case of a fetal abnormality, the Tribunal made use of an exclusionary and particularistic interpretation of human dignity as a fundamental constitutional value to attribute constitutional protection to the foetus.[170]

In a series of cases concerning the controversial judicial reforms, the Tribunal eventually claimed absolute primacy of the Polish Constitution over EU law together with identity review, by referring to the terminology of 'national identities' in Article 4(2) TEU.[171] This eventually led the Tribunal to openly clash with the CJEU: in 2019 the Polish Parliament adopted the Amending Act, which introduced new disciplinary measures for judges and prevented Polish courts from directly applying certain provisions of EU law protecting judicial independence.[172] The law also prohibited the courts from making references for preliminary rulings on such questions to the CJEU under Article 267 TEU. However, according to the CJEU, the Polish national courts and Supreme Court were allowed to use European standards in assessing the legality of domestic judicial appointments when treating matters arising under EU law.[173] Relying on the CJEU's ruling, the Polish Supreme Court issued a resolution in early 2020 that voided the judgments issued by incorrectly selected benches.[174] In response, the Polish Constitutional Tribunal suspended this resolution and considered it to be violating the Polish Constitution.[175] At the same time, the Disciplinary Chamber (added to the structure of the Supreme Court, but recognised by the CJEU not to be impartial according to EU law) ignored the CJEU's judgment and continued in taking disciplinary measures against national courts' judges. The CJEU thereupon imposed an interim measure to prevent the Disciplinary Chamber from persisting in violating the judicial independence of the Polish judiciary.[176] This led to the *P 7/20* case, in which the Polish Constitutional Tribunal directly relied on constitutional identity to declare the CJEU's interim measure *ultra vires*.[177]

In March 2021, the CJEU's ruled on the appointment of judges to the Polish Supreme Court,[178] setting aside earlier decisions from the Polish Constitutional Tribunal. In turn, the Polish Constitutional Tribunal issued its *K 3/21* judgment, declaring Article 1 TEU, read in conjunction with Articles 2, 4(3), and 19 TEU to be inconsistent with the Polish Constitution insofar as these provisions allow national judges to question judicial independence of Polish courts. According to the Polish Constitutional Court, the CJEU's imposition of conditions for judicial independence interfered with the organisation of the Polish judiciary, going beyond the competences conferred on the EU. As such, the CJEU's requirements infringed on Polish sovereignty and the supreme position of the Polish Constitution consecrated

[169] Judgment of the Trybunał Konstytucyjny of 16 March 2017, Kp 1/17.

[170] Judgment of the Trybunał Konstytucyjny of 22 October 2020, K 1/20.

[171] Judgment of the Trybunał Konstytucyjny of 7 October 2021, K 3/21.

[172] Act of 26 April 2019 Amending the Act on the Organisation of Ordinary Courts, the Act on the Supreme Court and Certain Other Acts. The law also prohibited them from making references for preliminary rulings on such questions to the CJEU.

[173] Judgment of the Court of Justice of 19 November 2019, *A.K.*, joined cases C–585/18, 624/18, and 625/18, ECLI:EU:C:2019:982.

[174] Translation of the Polish Civil, Criminal, and Labour & Social Security Chambers of the Supreme Court of 23 January 2020 on judicial appointments, https://ruleoflaw.pl/translation-of-polish-supreme-court-resolution-on-judicial-appointments/, accessed on 29 February 2024.

[175] Resp. decision of the Trybunał Konstytucyjny of 28 January 2020, Kpt 1/20 and decision of the Trybunał Konstytucyjny of 20 April 2020, U 2/20.

[176] Order of the Court of Justice of 8 April 2020, C-791/19 R, ECLI:EU:C:2020:277.

[177] Judgment of the Trybunał Konstytucyjny of 14 July 2021, P 7/20.

[178] Judgment of the Court of Justice of 2 March 2021, *A.B. and Others*, C-824/18, ECLI:EU:C:2021:153, see esp. paras. 140-150.

respectively in Articles 2 and 8 of the Polish Constitution. The Tribunal concluded that the right to examine the organisation and structure of a Member State's judicial system (derived from Article 19(1) TEU and the shared values in Article 2 TEU) would come to violate Polish constitutional identity.[179]

While the Polish Constitutional Tribunal maintained that it was inspired in the use of constitutional identity by GFCC's understanding of the concept, it has been argued that the Tribunal actually remodeled the concept to abuse it for political motives: next to the flawed (or even lacking) justification for the use of constitutional identity in the said cases, the Tribunal relies on an instrumental and arbitrary narrative of the Polish Constitution that allows for a static and essentialist conception of Polish constitutional identity which can be interpreted exclusively by the (captured) Tribunal.[180] This enables the Tribunal to put an absolute limit to EU law, preventing dialogue with the CJEU and removing any leeway for the latter to balance the different principles and values at stake.[181]

The Hungarian Constitutional Court also referred to existing jurisprudence to affirm its review prerogatives of EU law's compliance with fundamental rights, Hungary's national sovereignty, and its respect for Hungarian constitutional identity.[182] Following a campaign against the European Refugee Relocation Decision,[183] the Hungarian Government called for a national referendum that aimed to challenge this measure. The referendum of 4 October 2016 proved to be invalid but was instrumental to the pursuit of amending the Hungarian Constitution, dismissing the refugee quotas (the so-called 'Seventh Amendment'). However, in the absence of a two-thirds majority, the amendment failed. Two months later, the Hungarian Constitutional Court delivered its *22/2016* judgment.[184] Next to fundamental rights review and *ultra vires* review, the Court assigned itself 'sovereignty review' and identity review: it would examine whether the joint exercise of competences by Hungarian public power and the EU institutions foreseen in Article (E) (2) of the Hungarian Constitution infringes upon human dignity, other fundamental rights, Hungary's sovereignty, or its self-identity.[185] According to the Court, these values are the achievements of the 'Historical Constitution' and the Fundamental Law, upon which the whole Hungarian legal system rests.[186]

Relying on the German *Lisbon* judgment,[187] the Hungarian Court construed an idiosyncratic version of Hungarian constitutional identity and the notion of Hungary's 'Historical Constitution' to resist EU

[179] Judgment of the Trybunał Konstytucyjny of 7 October 2021, K 3/21, paras. 254-256.

[180] For a critical assessment of the validity of the judgments of this packed Tribunal, see M. Szwed, "What Should and What Will Happen After Xero Flor. The judgement of the ECtHR on the composition of the Polish Constitutional Tribunal", *Verfassungsblog*, https://verfassungsblog.de/what-should-and-what-will-happen-after-xero-flor/, accessed on 29 February 2024.

[181] M. Ziółkowski, "Constitutional Identity in Poland: Transplanted and Abused", in K. Kovács (ed.), *The Jurisprudence of Particularism: National Identity Claims in Central Europe*, Oxford, Hart Publishing, 2023, 146-147 (127-148).

[182] Alkotmánybíróság, judgment n° 22/2016 (XII. 5.), CC (5 December 2016), para. 69.

[183] Council Decision 2015/1601 of 22 September 2015, 2015 O.J. (L 248) (EC).

[184] For a contextualization of this decision, see *i.a.* T. Drinóczi, "Constitutional Identity in Europe: The Identity of the Constitution. A Regional Approach", *German Law Journal* 21 (2020), 109-110 (105-130); G. Halmai, "Abuse of Constitutional Identity. The Hungarian Constitutional Court on Interpretation of Article E) (2) of the Fundamental Law", *Review of Central and East European Law* 43 (2018), 23-42.

[185] The Hungarian Court also drew on a comparative study to find these limitations to the joint exercise of competences. Judgment of the Alkotmánybíróság of 5 December 2016, n° 22/2016 (XII. 5.), CC, paras. 34-46.

[186] Judgment of the Alkotmánybíróság of 5 December 2016, n° 22/2016 (XII. 5.), CC, para. 65.

[187] B. Bakó, "The Zauberlehrling Unchained? The Recycling of the German Federal Constitutional Court's Case Law on Identity, Ultra Vires, and Fundamental Rights Review in Hungary", *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 78 (2018), 864 (863-902).

integration.[188] Although the Court acknowledged that the recognition of the Member States' constitutional identity ensued from Article 4(2) TEU and that its protection was left to the CJEU,[189] it affirmed its competence to determine Hungary's constitutional identity on a case-by-case basis and following the 'National Avowal'.[190] Furthermore, the Court contended that Hungary's self-identity is a fundamental value that is not created, but merely recognised by the Hungarian Constitution, which makes it impossible to be waived by an international treaty.[191] The Court held that Hungary's constitutional identity does not encompass an exhaustive list of "*static and closed values*", highlighting some of them as examples: the division of power, the republican form of government, parliamentarism, the respect for public law autonomies, the freedom of religion, the principle of legality, the principle of equality, the recognition of the judicial power, and the protection of nationalities in Hungary.

After the Hungarian Government introduced a legal regime and administrative practice which made illegal immigration and its international protection provided for by EU law nearly impossible, the CJEU ruled Hungary in violation with the relevant EU law provisions.[192] Following the Hungarian Government's subsequent petitioning of the Hungarian Constitutional Court on this CJEU judgment, the Hungarian Court declared that Hungary has the right to legislate in breach of EU law if the effective application of EU law is not guaranteed.[193]

Although the Hungarian Constitutional Court explicitly referred to the framework of informal cooperation with the CJEU based on the principles of equality, collegiality, and mutual respect,[194] the Hungarian Court's stance can hardly be considered as a frame for genuine judicial dialogue between European and national courts: first, because it did not initiate any preliminary reference proceeding. Second, because its reasoning on the notion of constitutional identity provided the government with an avenue to strike down EU measures (the Hungarian Court did however not provide a pronouncement on the issue it was referred to, namely the Refugee Relocation decision).[195] On the other hand, it has been observed that, although clearly loyal to the Hungarian government in opposing the primacy of EU law, the Hungarian Court's support of government has its limits:[196] despite the government's overt bidding in the cases at issue, the Hungarian Court has – at least until now – avoided open conflict between the Hungarian Fundamental Law and EU law, refusing to control the constitutionality of EU law acts.[197] Yet, it is clear that the Hungarian Court's references to the jurisprudence of other Member States' courts (and even the CJEU) mainly served to justify its own interpretations, eventually undermining a genuine commitment to European constitutional dialogue.

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[188] G. Halmai, "Abuse of Constitutional Identity. The Hungarian Constitutional Court on Interpretation of Article E) (2) of the Fundamental Law", *Review of Central and East European Law* 43 (2018), 23-42.

[189] Judgment of the Alkotmánybíróság of 5 December 2016, n° 22/2016 (XII. 5.), CC, para. 63.

[190] Ibid., para. 64. The Court nevertheless did not elaborate further on this 'National Avowal'.

[191] Ibid., para. 67. See also the judgment of the Alkotmánybíróság of 25 February 2019, n° 2/2019 (III. 5.) AB.

[192] Judgment of the Court of Justice of 17 December 2020, *Commission v Hungary (Acceuil des demandeurs de protection internationale)*, C-808/18, ECLI:EU:C:2020:1029.

[193] Judgment of the Alkotmánybíróság of 7 December 2021, n° 32/2021 (XII. 20.) AB.

[194] Judgment of the Alkotmánybíróság of 5 December 2016, n° 22/2016 (XII. 5.), CC, para. 63.

[195] For the Hungarian government's response on the 22/2016 decision, discussed in G. Halmai, "Abuse of Constitutional Identity. The Hungarian Constitutional Court on Interpretation of Article E) (2) of the Fundamental Law", *Review of Central and East European Law* 43 (2018), 36 (23-42).

[196] E. Várnay, "The Hungarian sword of constitutional identity", *Hungarian Journal of Legal Studies* 63/2 (2022), 79-106.

[197] Ibid., 79-106. Note that the Hungarian Constitutional Court in the *32/2021* judgment did not refer to the confrontational *K 3/21* judgment from the Polish Constitutional Tribunal.

2.4.5. Constitutional dialogue: Italy

While in the Hungarian and Polish cases, the use of constitutional identity can be considered as motivated by political efforts to resist EU law and to shift relative authority between the national and the European sphere in favor of the former,[198] the Italian Constitutional Court's use of constitutional identity is generally perceived as a more appropriate example of (genuine) constitutional dialogue between these spheres.[199] Despite its strained relationship vis-à-vis the CJEU,[200] the ICC exemplified the dialogical use of the notion of constitutional identity in the *Taricco* saga. At issue was the application of the CJEU's preliminary ruling, demanding that Italian courts would disapply national statutes of limitations rules that would undermine the domestic prosecution of tax crimes against the financial interests of the EU. In a 2014 preliminary reference, the *Tribunale di Cuneo* (ordinary court) had asked the CJEU whether it should disapply the national provisions on limitations periods, even when this conflicted with the constitutional principle of legality in Italian criminal law.[201] In response, the CJEU stated that the situation of *de facto* impunity for VAT frauds would undermine the EU Treaties, and more specifically Article 325 of the Treaty on the Functioning of the European Union (TFEU), which stipulates that Member States should indiscriminately counter fraud affecting the financial interest of the EU. The CJEU therefore asked national courts to give full effect to EU law,[202] if need be, by disapplying domestic penal provisions on limitation periods. This so-called '*Tarrico* rule' required more specifically that the national courts would disapply the national provisions when two conditions are fulfilled: firstly, when the prosecution of serious VAT frauds would otherwise be time-barred in a significant number of cases (based on Article 325 (1) TFEU). Secondly, when the limitation period is shorter than that established by national law for analogous cases of fraud affecting the Member State (Article 325(2) TFEU).

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198 For an in-depth critique, consult J. Scholtes, *The Abuse of Constitutional Identity in the European Union*, Oxford University Press, Oxford, 2023, esp. 191-198.

199 M. Bonelli, "The Taricco Saga and the Consolidation of Judicial Dialogue in the European Union: CJEU, C-105/ 14 Ivo Taricco and Others, ECLI:EU:C:2015:555; and C-42/ 17 M.A.S., M.B., ECLI:EU:C:2017:936 Italian Constitutional Court, Order No. 24/ 2017", *Maastricht Journal of European and Comparative Law* 25 (2018), 357-373; D. Paris, "Carrot and Stick. The Italian Constitutional Court's Preliminary Reference in the Case Taricco" *Questions of International Law* 37 (2017), 5-20; G. Piccirilli, "The "Taricco Saga": The Italian Constitutional Court Continues Its European Journey", *European Constitutional Law Review* 14 (2018), 814-833. For a more critical analysis based on recent developments in the Italian Constitutional Court's jurisprudence, see F. Fabbrini and O. Polliccino, "Constitutional Identity in Italy: Institutional Disagreements at a Time of Political Change", in C. Calliess and G. van der Schyff (eds.), *Constitutional Identity in a Europe of Multilevel Constitutionalism*, Cambridge, Cambridge University Press, 2020, 201-221; O. Scarcello, *Radical Pluralism in Europe*, London, Routledge, 2023, 111-115.

200 For several years, the Italian Court resisted the application of the principle of supremacy of EU law. It came only gradually to admit it. See esp. the *Frontini*, *Granital* and *Fragd* cases: judgment of the Corte Costituzionale of 18 December 1973, *Frontini*, n° 183/1973, ECLI:IT:COST:1973:183; judgment of the Corte Costituzionale of 5 June 1984, *Granital*, n° 170/1984, ECLI:IT:COST:1984:170; judgment of the Corte Costituzionale of 13 April 1989, *Fragd*, n° 232/1989, ECLI:IT:COST:1989:232. The cooperation with the CJEU was also hindered by the Italian Constitutional Court's initial refusal to directly engage with the CJEU, leaving this task to ordinary courts. Furthermore, the Italian Constitutional Court was one of the first courts to identify limitations to the application of EU law in the national legal order with the so-called *controlimiti* doctrine, which established the non-application of supranational norms that would be violating the core principles of the Italian Constitution. This does not detract from the fact that the Italian Constitutional Court has been considered as one of the most 'euro-friendly' courts, entering into an ever closer dialogue with the CJEU through preliminary references. F. Fabbrini and O. Polliccino, "Constitutional Identity in Italy: Institutional Disagreements at a Time of Political Change", in C. Calliess and G. van der Schyff (eds.), *Constitutional Identity in a Europe of Multilevel Constitutionalism*, Cambridge, Cambridge University Press, 2020, 214.

201 Request from the Tribunale di Cuneo of 5 March 2014 for a preliminary ruling.

202 And more precisely Article 325 TFEU, which stipulates that Member States should indiscriminately counter fraud affecting the financial interest of the EU. Judgment of the Court of Justice of 8 September 2015, *Ivo Taricco and Others*, C-105/14, ECLI:EU:C:2015:555, esp. paras. 18-27, 34-43, 47, 49 and 52.

When Italian courts later referred questions to the ICC on the constitutionality of *Taricco*, the latter initiated a process of judicial dialogue with the CJEU. In short, the ICC considered that the inferred rule from *Taricco* was incompatible with the principle of legality, which it identified as a fundamental principle of the Italian Constitution.[203] Article 235 TFEU would only be applicable in so far as it would be compatible with Italy's constitutional identity.[204] At the same time, the ICC highlighted this principle as "*a common requirement to the constitutional traditions of the member states,* […] *present in the system of protection of the ECHR, and as such it enshrines a general principle of EU law*".[205] Furthermore, the ICC pointed out that the Italian Constitution offers a higher level of fundamental rights protection than provided for under EU law. It concluded that, in line with Article 53 of the Charter of Fundamental Rights of the European Union (CFR), Member States may maintain higher levels of fundamental rights protection than those provided for under EU law. Thus, whilst refraining from playing the 'counter-limit' card, the ICC invited the CJEU to reassess its previous ruling, stressing the correspondence of the principle of legality in Italy's constitutional tradition with the common values of the EU and its Member States.[206] While the ICC recognised the importance of EU law primacy, it suggested at the same time the relative nature of this primacy. In the context of potential constitutional conflict, the ICC opted for genuine cooperative dialogue.[207]

In response to the ICC's ruling, the CJEU revisited its point of view taken earlier in *Taricco*. In the *M.A.S. and M.B.* judgment,[208] the CJEU showed itself in a conciliatory way: after having acknowledged that at the time of the *Taricco* judgment, it was not well informed of certain elements of the Italian constitutional system,[209] it first stressed the obligation stemming from Article 325 TFEU.[210] The CJEU then acknowledged that limitation was at the time not subject to EU harmonization, which allowed for the limitation rules to be considered substantive criminal law and thereby making them subject to the principle of legality.[211] The CJEU continued its reasoning by recalling the importance of the principle of legality and its three requirements enshrined in Article 49 CFR – foreseeability, precision, and non-retroactivity –, both in the Member States' legal systems and in the EU legal order.[212] Because of this,

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[203] Order of the Corte Costituzionale of 23 November 2016, n° 24/2017, para. 4.

[204] Ibid., para. 6.

[205] Ibid., para. 9. See also para. 4.

[206] According to some legal scholars, the terminological reference to 'constitutional tradition' instead of 'constitutional identity' was also proof of the Italian Court's cooperative attitude, as the former term features arguably a more pluralistic approach to fundamental Member States principles than the latter. F. Fabbrini and O. Polliccino, "Constitutional Identity in Italy: Institutional Disagreements at a Time of Political Change", in C. Calliess and G. van der Schyff (eds.), *Constitutional Identity in a Europe of Multilevel Constitutionalism*, Cambridge, Cambridge University Press, 2020, 215-216 (201-2022). According to Matteo Bonelli, the ICC considered renouncing elements of national sovereignty in the context of EU integration legitimate "*only as far as they preserve the national identities of the Member States, both as matter of national constitutional law and also as matter of EU law, in particular on the basis of Articles 2 and 4 TEU. The concept of constitutional identity, in other words, is not presented as a merely national (Italian) one, but as a EU law concept, part and parcel of the project of European integration*." M. Bonelli, ""The Taricco saga and the consolidation of judicial dialogue in the European Union – CJEU, C-105/14 Ivo Taricco and others, ECLI:EU:C: C:2015:555. C-42/17 M.A.S, M.B., ECLI:EU:C:2017:936 Italian Constitutional Court, Order no. 24/2017", *Maastricht Journal of European and Comparative Law* 25/3 (2018) 370, fn. 89 (357-373).

[207] G. Rugge, "The Italian Constitutional Court on Taricco: Unleashing the Normative Potential of 'National Identity'?", *Questions of International Law*, Zoom-in 37 (2017), 21-29. For a more critical analysis of the dialogical nature of the *Taricco* saga, see O. Scarcello, *Radical Pluralism in Europe*, London, Routledge, 2023, 111-115.

[208] Judgment of the Court of Justice of 5 December 2017, *M.A.S. and M.B.*, C-42/17, ECLI:EU:C:2017:936 (also called the *Taricco II* case).

[209] Ibid., esp. at paras. 27-28.

[210] Ibid., paras. 30-38.

[211] Ibid., paras. 44-48.

[212] Ibid., paras. 51-52.

the CJEU upheld the obligation from Article 325 TFEU only as far as the disapplication of domestic law would not entail a breach of these requirements.[213]

By attaching the principle of legality's understanding to the common constitutional traditions of the EU Member States, the CJEU achieved two things: first, it de-escalated the constitutional conflict by granting an exception to the primacy of EU law. At the same time, it framed this exception as stemming from EU law, which allowed for reaffirming EU law primacy.[214] Secondly, with *M.A.S. and M.B.*, the CJEU avoided ruling on the issue of constitutional identity. Although not explicitly put up front by the ICC, the question slumbered in the reasoning of the latter's preliminary reference, providing the CJEU with an opportunity to clarify the scope of Article 4(2) TEU.[215] Arguably, by ruling that the identity clause can be rightfully invoked to dismiss EU law in case of constitutional conflict, the CJEU would set a dangerous precedent that could potentially undermine the primacy of EU law.[216] On the other hand, dismissing the application of the identity clause and merely affirming the absolute primacy of EU law would challenge the obligations the EU Treaties hold for the EU institutions, including the CJEU.[217] Instead of relying on the identity clause, the CJEU preferred to revert to characterizing the prohibition of retroactivity as a 'constitutional tradition common to the Member States',[218] which is more reminiscent of the protection of fundamental rights as general principles of EU law in Article 6(3) TEU).[219] Instead of acknowledging constitutional identity as a concept that differentiates a constitutional order from another,[220] in *M.A.S. and M.B.* the CJEU focussed on European standards, rather than on the specific features of the Italian legal order, emphasizing the 'shared dimension of the European constitutional heritage'.[221]

The ICC thereupon acknowledged the shift from *Taricco* to *M.A.S. and M.B.*, but dismissed the direct effect of Article 325 TFEU. It reasoned that criminal law should be precisely circumscribed, while Article 325 TFEU comes short in legal certainty.[222] It furthermore affirmed that the retroactive disapplication of the statute of limitation in the *Taricco* rule cannot be applied in the Italian constitutional system because it is contrary to the Italian Constitution.[223] Accordingly, the ICC reserved the right to judge on the constitutionality of measures under the *Taricco* rule exclusively for itself.[224]

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[213] Ibid., paras. 60-61.

[214] R. Bruggeman and J. Larik, "The Elusive Contours of Constitutional Identity: Taricco as a Missed Opportunity", *Utrecht Journal of International and European Law* 35/1 (2020), 29-30 (20-34).

[215] M. Bonelli, ""The Taricco Saga and the Consolidation of Judicial Dialogue in the European Union – CJEU, C-105/14 Ivo Taricco and others, ECLI:EU:C: C:2015:555. C-42/17 M.A.S, M.B., ECLI:EU:C:2017:936 Italian Constitutional Court, Order no. 24/2017", *Maastricht Journal of European and Comparative Law* 25/3 (2018) 370 (357-373).

[216] D. Burchardt, "Belitting the Primacy of EU Law in *Taricco II*", *Verfassungsblog*, https://verfassungsblog.de/belittling-the-primacy-of-eu-law-in-taricco-ii/, accessed on 29 February 2024.

[217] R. Bruggeman and J. Larik, "The Elusive Contours of Constitutional Identity: Taricco as a Missed Opportunity", *Utrecht Journal of International and European Law* 35/1 (2020), 29-30 (20-34).

[218] Judgment of the Court of Justice of 5 December 2017, *M.A.S. and M.B.*, C-42/17, ECLI:EU:C:2017:936, para. 53.

[219] F. Fabbrini and O. Polliccino, "Constitutional Identity in Italy: Institutional Disagreements at a Time of Political Change", in C. Calliess and G. van der Schyff (eds.), *Constitutional Identity in a Europe of Multilevel Constitutionalism*, Cambridge, Cambridge University Press, 2020, 215-216 (201-221).

[220] See on constitutional identity 'as difference' and 'despite difference', P. Faraguna, "Constitutional Identity in the EU. A Shield or a Sword?", *German Law Journal*, 18/7 (2017), 1617 (1617-1640).

[221] N. Lupo, "The Advantage of Having the "First Word" in the Composite European Constitution", *Italian Journal of Public Law*, 2018, 10/2 (2018), 196 (186-204).

[222] Judgment of the Corte Costituzionale of 10 April 2018, n° 115/2018, ECLI:IT:COST:2018:115, 10.

[223] Ibid., 11.

[224] Ibid., 8. It has been suggested that the Italian Constitutional Court's final judgment could have been meant as an incentive for Italian courts – and especially the Court of Cassation, Italy's court of last resort – to submit references regarding

Although the outcome of the *Taricco* saga raised concerns about the attitude of the ICC, it can certainly be understood as a positive culmination of multilevel constitutional dialogue: first, because a preliminary reference to the CJEU precedes the identity review by the domestic court(s), revealing the possibility of a less combative approach to adjudicating on grounds of constitutional identity. Second, the ICC's attitude and approach in this saga highlight that a single point of conflict must not inevitably lead to undermining the mutual respect and sincere cooperation between the different constitutional orders in the EU.[225]

2.4.6. The establishment of the EU's constitutional identity

Whereas constitutional identity finds an explicit basis in Article 4(2) TEU, it is less clear whether the EU possesses constitutional identity. One of the reasons for uncertainty is that there is no European *demos*, nation, or people.[226] However, as of recently a majority in legal scholarship seems to have accepted the idea of EU constitutional identity. Some have based this identity on a legal theoretical avenue, arguing that, through the distinctiveness of constitutional orders – either national or supranational, codified or not – the EU acquired constitutional identity in addition to the national constitutional orders.[227] Today, most academics, as well as the CJEU acknowledge EU constitutional identity, basing this identity on the underlying values and principles of the EU as common constitutional principles of the Member States.[228] These values are to be found in Article 2 TEU which provides that "*(t)he Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities*".[229]. Article 3(1) TEU provides that the EU

constitutionality to the Italian Constitutional Court instead of submitting preliminary references to the CJEU. C. Amalfitano and O. Pollicino, "Two Courts, two Languages? The Taricco Saga Ends on a Worrying Note", *Verfassungsblog*, https://verfassungsblog.de/two-courts-two-languages-the-taricco-saga-ends-on-a-worrying-note/, accessed on 29 February 2024.

225 A. Bobić, *The Jurisprudence of Constitutional Conflict in the European Union*, Oxford, Oxford University Press, 2022, 154. For a further discussion of the contrast between the German and Italian dialogical approaches on the one hand, and the Hungarian and Polish destructive approaches on the other: T. Drinóczi and P. Faraguna, "The Constitutional Identity of the EU as a Counterbalance for Unconstitutional Constitutional Identities of the Member States", in J. de Poorter, G. van der Schyff, M. Stremler, M. de Visser, I. Leijten and C. van Oirsouw, *European Yearbook of Constitutional Law 2002. A Constitutional Identity for the EU?*, The Hague, Asser Press, 2023, 74-75 (57-87).

226 A. Madeja, "European values and the Rule of Law", in T. Drinóczi and A. Bień-Kacała (eds.), *Rule of Law, Common Values, and Illiberal Constitutionalism. Poland and Hungary within the European Union*, Routledge, London, 2021, 63 (45-76).

227 G. van der Schyff, "Exploring Member State and European Union Constitutional Identity", *European Public Law* 22/2 (2016), 227-242. See also G. van der Schyff, "Constitutional Identity of the EU Legal Order: Delineating its Roles and Contours", *Ancilla Iuris* 1 (2021), 1-12.

228 L. Besselink, "The Bite, the Bark, and the Howl. Article 7 TEU and the Rule of Law Initiatives", in A. Jakab and D. Kochenov (eds.), *The Enforcement of EU Law and Values. Ensuring Member States' Compliance*, Oxford, Oxford University Press, 2017, 128-129 and 142-143 (128-144); A. Kaczorowska-Ireland, *European Union Law*, London, Routledge, 2013, 28; S. Kadelbach, "Are Equality and Non-Discrimination Part of the EU's Constitutional Identity?", in T. Giegerich (ed.), *The European Union as Protector and Promoter of Equality. European Union and its Neighbours in a Globalized World*, Springer, 2020, 13-24; T. Drinóczi and P. Faraguna, "The Constitutional Identity of the EU as a Counterbalance for Unconstitutional Constitutional Identities of the Member States", in J. de Poorter, G. van der Schyff, M. Stremler, M. de Visser, I. Leijten and C. van Oirsouw, *European Yearbook of Constitutional Law 2002. A Constitutional Identity for the EU?*, The Hague, Asser Press, 2023, 77 (57-87). For the CJEU cases, see ECJ case *Hungary v Parliament and Council* (16 February 2022), C-156/21, EU:C:2022:97, esp. at para. 127; ECJ case *Poland v Parliament and Council* (16 February 2022), C-157/21, EU:C:2022:98, esp. at para. 234.

229 See also Article 6 TEU that provides that the EU recognises the rights, freedoms, and principles set out in the Charter of Fundamental Rights of the European Union of 7 December 2000 which, resulting from the constitutional traditions common to the Member States, constitute general principles of the Union's law.

must realise these values. Already in 2008, the CJEU put this to practice in its *Kadi* judgment,[230] drawing constitutional limits to international law that aimed at securing individual rights and featuring them as parts of the EU constitutional identity.[231] In this judgment, the CJEU differentiated between limitations placed on fundamental freedoms of the internal market – which the Court found to be permissible under certain exceptional conditions – and limitations that must be rejected for violating the core of EU fundamental principles. In the *Taricco* saga, the CJEU proceeded along this path, using the language of 'common constitutional traditions of the Member States'.[232] The use of this language is not very surprising, considering that common constitutional tradition is 'by design' a European concept that aligns with cooperative constitutionalism in Europe.[233]

In the recent *Conditionality Judgements* concerning the examination of the Conditionality Regulation,[234] the CJEU went further by making clear that Article 2 TEU is not merely a statement of guidelines and recommendations but that the values expressed in this disposition "*define the very identity of the European Union as a common legal order*" and must be considered legally binding obligations for the Member States.[235] Since the Member States committed themselves to respect those values as long as they remain Member States, they must respect Article 2 TEU values at all times and not merely at the moment of accession.[236] Hence, the respect for constitutional identities provided for by Article 4(2) TEU shall be balanced with other fundamental principles of the EU.[237] This prevents the Member States from manipulating their (national) constitutional identity in such a way that it would violate the constitutional identity of the EU or would lead to (post-accession) 'value regression'.[238] In

[230] Judgment of the Court of Justice of 3 September 2008, *Yassin Abdullah Kadi and Al Barakaat International Foundation v Council and Commission*, joined cases C-402/05 P and C-415/ 05 P, ECLI:EU:C:2008:461, esp. at para. 303; judgment of the Court of Justice of 18 July 2013, *Commission, Council, United Kingdom v Yassin Abdullah Kadi*, joined cases C-584/10 P, C-593/10 P, and C-595/10 P, ECLI:EU:C:2013:518.

[231] G. Martinico, "The Autonomy of EU Law – A Joint Celebration of Kadi II and Van Gend En Loos" in M. Avbelj, F. Fontanelli and G. Martinico (eds.), *Kadi on Trial: A Multifaceted Analysis of the Kadi Judgment*, London, Routledge, 2014, 166– 171.

[232] *Supra*, point 2.4.5.

[233] M. Bassini and O. Pollicino, "The Taricco Decision: A Last Attempt to Avoid a Clash between EU Law and the Italian Constitution", *Verfassungsblog*, https://verfassungsblog.de/the-taricco-decision-a-last-attempt-to-avoid-a-clash-between-eu-law-and-the-italian-constitution/, accessed on 29 February 2024.

[234] Regulation (EU, Euratom) 2020/2092 of the European Parliament and of the Council of 16 December 2020 on a general regime of conditionality for the protection of the Union budget. On the Conditionality Regulation: *infra*, point 3.2.2.d.

[235] Judgment of the Court of Justice of 16 February 2022, *Hungary v Parliament and Council*, C-156/21, ECLI:EU:C:2022:97, para. 232; judgment of the Court of Justice of 16 February 2022, *Poland v Parliament and Council*, C-157/21, ECLI:EU:C:2022:98, para. 234. Note that theoretically the protection of the EU's constitutional identity can also be found in the unconstitutional constitutional amendments doctrine, which prohibits the amendment of fundamental principles that may be considered unamendable. Although the literature on this avenue is very limited, it has been linked to the protection of an untouchable core of the EU. T. Drinóczi and P. Faraguna, "The Constitutional Identity of the EU as a Counterbalance for Unconstitutional Constitutional Identities of the Member States", in J. de Poorter, G. van der Schyff, M. Stremler, M. de Visser, I. Leijten and C. van Oirsouw, *European Yearbook of Constitutional Law 2002. A Constitutional Identity for the EU?*, The Hague, Asser Press, 2023, 77 with references in fn. 86-89, 78-80 (57-87). On the doctrine of unconstitutional constitutional amendments: *supra*, point 2.1.2.

[236] Judgment of the Court of Justice of 16 February 2022, *Hungary v Parliament and Council*, C-156/21, ECLI:EU:C:2022:97, para. 234; judgment of the Court of Justice of 16 February 2022, *Poland v Parliament and Council*, C-157/21, ECLI:EU:C:2022:98, para. 266.

[237] I. Pernice, "Der Schutz nationaler Identitat in der EU", *Archiv des offentlichen Rechts*, 136 (2011) 185-221; L.D. Spieker, "Framing and Managing Constitutional Identity Conflicts: How to Stabilize the Modus Vivendi between the Court of Justice and National Constitutional Courts", *Common Market Law Review* 57 (2020), 361–398.

[238] P. Faraguna and T. Drinóczi, "Constitutional Identity in and on EU Terms", *Verfassungsblog*, https://verfassungsblog.de/constitutional-identity-in-and-on-eu-terms/, accessed on 29 February 2024; K. Lenaerts, "The Rule of Law and the Constitutional Identity of the European Union", speech delivered by the CJEU's President on 17 February 2023 delivered at *the conference organized by the Bulgarian Association for European Law in Sofia,* https://evropeiskipravenpregled.eu/the-rule-of-law-and-the-constitutional-identity-of-the-european-union/, accessed

consequence, although divergent interpretations of these values exist and the Member States dispose of a relatively large margin of interpretation, the national legislators should respect the EU values and bring their national legal values in conformity with the EU values.[239] After all, being part of a Union of European Member States presupposes that one would obey what was collectively decided and agreed upon, making compromise and acceptance necessary conditions of such participation.[240]

on 29 February 2024. See also the CJEU on the principle of non-regression: judgment of the Court of Justice of 20 April 2021, *Repubblika v Il-Prim Ministru*, C-896/19, ECLI:EU:C:2021:311, para. 61. Note that Advocate General Poiares Maduro, referring to the ECJ case *Internationale Handelsgesellshaft*, stated that national constitutions cannot be used as points of reference to review the lawfulness of EU acts. This is because "*the effect of being able to rely on national constitutions to require the selective and discriminatory application of Community provisions in the territory of the Union would, paradoxically, be to distort the conformity of the Community legal order with the constitutional traditions common to the Member States*". Opinion of Advocate General Poiares Maduro of 21 May 2008 in case *Société Arcelor Atlantique et Lorraine,* C-127/07, ECLI:EU:C:2008:292, paras. 16 and 17.

[239] A. Madeja, "European Values and the Rule of Law", in T. Drinóczi and A. Bień-Kacała (eds.), *Rule of Law, Common Values, and Illiberal Constitutionalism. Poland and Hungary within the European Union*, London, Routledge, 2021, 64-5 (45-76).

[240] Ibid., 67-68 (45-76).

3. THE INFLUENCE OF CONSTITUTIONAL IDENTITY IN SHAPING THE RELATIONS BETWEEN THE MEMBER STATES AND THE EU INSTITUTIONS

The notion of constitutional identity has been taken up in different Member States of the EU.[241] This increasing use of identity as a legal concept within the European context is not surprising considering the coexistence of different identities and national legal orders within the same legal space.[242] In such a context, the concept of constitutional identity can serve as a legal tool that channels constitutional conflicts and promotes constitutional dialogue between national courts and the CJEU.[243] This is all the more the case since Article 4(3) TEU imposes a duty of loyal and mutual cooperation on the Union's Member States. Accordingly, the duty of loyal cooperation is considered to be a limitation on the discretion of Member States in the application of Article 4(2) TEU.[244]

In this light, the identity clause of Article 4(2) TEU can be seen as a link between the diversity of EU Member States and the unity that the EU aspires to. This provision constitutes an important reference point for a "shared normativity" between European and national legal orders: the normative content of the identity clause is formed by the relationship between EU law and the national law of the Member States.[245]

3.1. The actors interpreting constitutional identity

3.1.1. National institutions and bodies

a. Judicial actors

It is usually assumed that courts are best placed to determine the constitutional identity of a Member State.[246] As the elements of Article 4(2) TEU explicitly refer to the equality of the Member States and to

[241] For an overview, see P. Faraguna, "On the Identity Clause and Its Abuses: 'Back to the Treaty'", *European Public Law* 27 (2021), 427–446; G. Martinico, "Taming National Identity: A Systematic Understanding of Article 4.2 TEU", *European Public Law* 27/3 (2021), 447-464.

[242] P. Faraguna, "Identity", in R. Grote, F. Lachenmann and R. Wolfrum (eds.), *Max Planck Encyclopedia of Comparative Constitutional Law*, Oxford, Oxford University Press, 2017, https://oxcon.ouplaw.com/display/10.1093/law-mpeccol/law-mpeccol-e792, accessed on 29 February 2024.

[243] C. Calliess and A. Schnettger, "The Protection of Constitutional Identity in a Europe of Multilevel Constitutionalism", in C. Calliess and G. van der Schyff (eds.), *Constitutional Identity in a Europe of Multilevel Constitutionalism*, Cambridge, Cambridge University Press, 2020, 348-371; F.-X. Millet, "Succesfully Articulating National Constitutional Identity Claims: Strait Is the Gate and Narrow Is the Way", *European Public Law* 27/3 (2021), 571-596; J. Scholtes, "Abusing Constitutional Identity", *German Law Journal* 22 (2021), 534-556.

[244] See Opinion of Advocate General Wathelet of 11 January 2018 in case *Coman,* C-673/16, ECLI:EU:C:2018:2, para. 40.

[245] C. Calliess and A. Schnettger, "The Protection of Constitutional Identity in a Europe of Multilevel Constitutionalism", in C. Calliess and G. van der Schyff (eds.), *Constitutional Identity in a Europe of Multilevel Constitutionalism*, Cambridge, Cambridge University Press, 2020, 348-371.

[246] See e.g. Opinion of Advocate General Poiares Maduro of 20 September 2005 in case *Marrosu and Sardino,* C-53/04, ECLI:EU:C:2006:517, para. 40. See also E. Orbán, "Constitutional Identity in the Jurisprudence of the Court of Justice of the European Union", *Hungarian Journal of Legal Studies* 63/2 (2022), 168 (142-173). For an overview, see G. van der Schyff, "Member States of the Union, Constitutions, and Identity. A Comparative Perspective", in C. Calliess and G. van der Schyff (eds.), *Constitutional Identity in a Europe of Multilevel Constitutionalism*, Cambridge, Cambridge University Press, 2020, 313-317 (305-347).

their national constitutional law, the methods of identification of constitutional identity are primarily related to domestic law, more specifically to the Member States' constitutional documents and their judicial interpretation by the national courts.[247] In practice, the constitutional courts of the Member States – in their capacity of 'guarantors' of national constitutions – are often considered the natural interpreters of the Member States' constitutional identity.[248] This is principally because the application of national constitutions and the enforcement of their supremacy as a legal source of domestic law are often subject to constitutional review by the judiciary.[249] Constitutional courts are generally designed to control governmental authority and to protect fundamental liberties from encroachments.[250] Arguably, they dispose of the legal-technical know-how and experience to evaluate identity-related issues that are constitutional.[251] Furthermore, whereas political mechanisms are often slower in process and less flexible in terms of change, the courts appear better equipped to assess in a relatively fast way the protection of interests that relate to constitutional identity.[252] This not only prompts the court to articulate more quickly the content of constitutional identity but also allows them to accommodate this content more efficiently in view of changes in constitutional identity over time.

It should be noted, however, that the interpretation of constitutional identity is not reserved exclusively for constitutional courts, but can also fall to ordinary courts. First, because Member States do not necessarily dispose of a centralised constitutional review system, or rely either on a diffuse or hybrid constitutional review system.[253] To obtain an interpretation of Union law any court can raise preliminary questions, thus indirectly identifying what could be part of the national constitutional identity.[254] Secondly, specialised courts do not necessarily dispose of exclusive and ultimate jurisdiction in

[247] C. Grewe, "Methods of Identification of National Constitutional Identity", in A. Saiz Arnaiz and C. Alcoberro Llivina (eds.), *National Constitutional Identity and European Integration*, Cambridge, Intersentia, 2013, 38 (37-48).

[248] Report of the Venice Commission, "The European model of constitutional review of legislation (1), https://www.venice.coe.int/SACJF/2006_02_Venice_Strasbourg/report_mazak.htm, accessed on 29 February 2024; V. Ferreres Comella, "The European model of constitutional review of legislation: Toward decentralization?", *International Journal of Constitutional Law*, 2/3 (2004), 461-491; M. de Visser, *Constitutional Review in Europe: A Comparative Analysis*, Oxford, Hart Publishing, 2014.

[249] There are of course exceptions, such as the Netherlands, where the Constitution explicitly prohibits courts from setting aside legislation on grounds of unconstitutionality (art. 120 of the Dutch Constitution). For an overview, see e.g. M. Florczak-Wątor (ed.), *Judicial Law-Making in European Constitutional Courts*, 2020, Routledge, London.

[250] It is worth noting here that the notion of constitutional identity emerged in the legal field as a counter-majoritarian legal instrument that procured courts the possibility of putting substantial limits to democratic constitutional change: in 1793 India's Supreme Court established the 'Basic Structure doctrine', proclaiming certain features and elements of the Indian Constitution to be unamendable the extent that the Court considered these elements fundamental for the integrity of the constitutional system. Some authors argue that it would be preferable to revert to such a liberal understanding of the notion's function. P. Faraguna, "Identity", in R. Grote, F. Lachenmann, and R. Wolfrum (eds.), *Max Planck Encyclopaedia of Comparative Constitutional Law*, 2017, at n° 15 and esp. n° 28, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3615784, accessed on 29 February 2024.

[251] Hence, some courts – e.g. the German Constitutional Court in its *Lisbon* judgment – claim an exclusive review on matters that belong to constitutional identity.

[252] S. Doroga, "Understanding Constitutional Identity Through the Language of Courts", in A. Mercescu (ed.), *Constitutional Identities in Central and Eastern Europe*, Peter Lang, Berlin, 2020, 91-116.

[253] M. de Visser, Constitutional Review in Europe: A Comparative Analysis, Oxford, Hart Publishing, 2014.

[254] For a concrete case of an ordinary court raising a question relating to constitutional identity, see the *Taricco* 'saga', discussed in this study (*supra*, point 2.4.5). For a more recent case, see the *WABE* case on the various Member States' approaches to fundamental rights protection and more specifically, the delineation of religious freedom in a manner consistent with the German constitutional tradition. Judgment of the Court of Justice of 15 July 2021, *WABE eV and EH Müller*, joined cases C804/18 and C341/19, ECLI:EU:C:2021:594, para 80-90.

constitutional issues.[255] In Belgium, for instance, there are different apex courts,[256] each of them holding their views on the primacy of EU law and grounding these either in EU law or in the national constitution.[257] This, in turn, might lead to different – potentially conflicting – views on constitutional identity and its limitation of EU integration.[258] In other countries, like France, the constitutional review of the French Constitutional Council is limited.[259] This is especially the case for matters regarding European and international law: first, the Council only reviews the respect for the French Constitution,[260] ignoring supra-constitutional norms as a review benchmark.[261] Furthermore, the Constitutional Council only scrutinises primary EU law by evaluating *ex ante* the conformity of EU treaties in in view of the French Constitution,[262] and more specifically the respect of primary EU law for the exercise of France's national sovereignty.[263] In Denmark, on the contrary, the Supreme Court has review competences that go beyond reviewing the constitutionality of legislation, allowing it to also review constitutional amendments and transposition measures of EU law.[264]

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[255] G. van der Schyff, "Member States of the Union, Constitutions, and Identity. A Comparative Perspective", in C. Calliess and G. van der Schyff (eds.), *Constitutional Identity in a Europe of Multilevel Constitutionalism*, Cambridge University Press, Cambridge, 2020, 315-316 (305-347).

[256] The Belgian Constitutional Court, the *Cour de Cassation* – the Belgian's supreme (ordinary) court –, and the Council of State – the highest administrative court.

[257] S. Sottiaux, "Het Stabiliteitsverdragarrest in het licht van de rechtspraak van de hoogste Belgische rechtscolleges", *Tijdschrift voor Bestuurswetenschappen en Publiekrecht* 6 (2017), 305-309.

[258] Conflicting visions on what is part of a constitutional identity between courts of a single Member State could also result in interpretive inconsistencies *within* the Member States' constitutional identity. This observation is not merely theoretical: what if one court would consider the indivisibility of national sovereignty to be a core constitutional principle and another court would label language legislation as recognition of cultural rights of minorities or sub-communities to be part of constitutional identity? For an example of this issue – although decided by a single judicial instance –, consult L. Allezard, "Constitutional Identity, Identities and Constitutionalism in Europe", *Hungarian Journal of Legal Studies* 63 (2022), 67 (58-77): whereas the French Constitutional Council initially spoke against the ratification of the European Charter for Regional or Minority Languages for the reason that this would undermine the constitutional principles of indivisibility of the Republic and of the equality of French citizen, it later accepted special measures taken in favor of the Polynesian population because of 'local necessities' and local labor protection. Respectively, the Conseil Constitutionnel's decision of 15 March 1999, n° 99-410 DC and decision of 12 February 2004, n° 2004-490 DC.

[259] E. Dubout, "« Les règles ou principes inhérents à l'identité constitutionelle de la France » : une supra-constitutionallité ?", *Revue française de droit constitutionnel* 83/3 (2010), 476 a.f. (451-482).

[260] F.-X. Millet, "Constitutional Identity in France : Vices and – Above All – Virtues", in C. Calliess and G. van der Schyff (eds.), *Constitutional Identity in a Europe of Multilevel Constitutionalism*, Cambridge, Cambridge University Press, 2020, 136 a.f. (134-152). See also B. Mathieu, "La supra-constitutionnalité existe-t-elle ? Réflexions sur un mythe et quelques réalités », *Petites Affiches* 29 (1995), 12 (12-17).

[261] Except issues that are regulated by the French Constitution. In these cases, the Acts of implementation are reviewed by the Council with regard to EU secondary Acts. F.-X. Millet, "Constitutional Identity in France : Vices and – Above All – Virtues", in C. Calliess and G. van der Schyff (eds.), *Constitutional Identity in a Europe of Multilevel Constitutionalism*, Cambridge, Cambridge University Press, 2020, 137, fn. 5 (134-152).

[262] It is worth noting that measures of transposition can also be taken by the French executive (Article 38 French Constitution). In this event, it is the *Conseil d'État* (Council of State) that has jurisdiction to examine the validity of the transposing measure. Although in the *Arcelor* case, the Council of State has taken a similar position as the Constitutional Council on testing transposing measures to France's constitutional identity, the former generally reverts to fundamental rights review. See the judgment of the Conseil d'État of 8 February 2007, *Société Arcelor Lorraine*, req. n° 287110.

[263] In the case of established incompatibilities between EU law and the French Constitution, the issue was resolved by amending the Constitution. It was only starting from 2006 when the French Constitutional Council came to test primary EU law against the French constitutional identity, that constitutional conflicts in matters of EU law increased. F.-X. Millet, "Constitutional Identity in France : Vices and – Above All – Virtues", in C. Calliess and G. van der Schyff (eds.), *Constitutional Identity in a Europe of Multilevel Constitutionalism*, Cambridge, Cambridge University Press, 2020, 138 and 140-142 (134-152).

[264] H. Krunke, "Constitutional Identity in Denmark: Extracting Constitutional Identity in the Context of a Restrained Supreme Court and a Strong Legislature", in C. Calliess and G. van der Schyff (eds.), *Constitutional Identity in a Europe of Multilevel Constitutionalism*, Cambridge, Cambridge University Press, 2020, 120-121 and 124 (114-133).

A court-centric approach has nevertheless possible shortcomings: a potential drawback of determining constitutional identity along judicial lines is that the scope and content of constitutional identity might become susceptible to appropriation by 'louder courts'.[265] But possibly more problematic is that assigning the final words – if not the entire discussion – on defining the Member States' constitutional identities to non-elected bodies risks producing elitist outcomes that lack persuasive force for the population. One could indeed question whether judges have the legitimacy and the capability to decide on and possibly settle for an indeterminate period (even to the detriment of an elected constituent power) fundamental aspects of policy that have been determined in a consensual way by the political community under specific socio-legal conditions.[266]

b. Legislative actors

Although historically, the courts had (and still have) a prominent role in managing differences through the notion of constitutional identity, other authorities and bodies may also be involved in defining constitutional identity.[267] Elected political institutions, such as ordinary or constitutional legislators, for example, are sometimes considered as potential interpreters.[268] Legal scholars also suggest that when courts fail to supplement the Member States' constitutional identity with content, it comes to the political bodies to expound on this. In Spain for instance, it has been suggested that because the Constitutional Tribunal has failed to define the basic or core structures of the Spanish Constitution, legislative bodies should set forth the elements of Spain's constitutional identity by amending the Constitution and inserting a 'European clause' that would regulate the relations between the domestic and EU institutions.[269] Also, some Member States do not dispose of a judiciary with constitutional review competences. As mentioned earlier, the Dutch Constitution prevents judges from controlling legislative acts or treaties.[270] It therefore comes to the Dutch Parliament to give its insights on constitutional identity.[271] Some scholars are however skeptical of the establishment of constitutional identity via public deliberation considering the crisis of representative democracy in the EU.[272]

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[265] S. Doroga, "Understanding Constitutional Identity Through the Language of Courts", in A. Mercescu (ed.), - *Constitutional Identities in Central and Eastern Europe*, Berlin, Peter Lang, 2020, 91-116.

[266] M. Belov, "The Functions of Constitutional Identity Performed in the Context of Constitutionalization of the EU Order and Europeanization of the Legal Orders of EU Member States", *Perspectives on Federalism*, 9/2 (2017), E-92-93 (E-72-97).

[267] Opinion of Advocate General Poiares Maduro of 20 September 2005 in case *Marrosu and Sardino,* C-53/04, ECLI:EU:C:2006:517, para. 40.

[268] G. van der Schyff, "Member States of the Union, Constitutions, and Identity. A Comparative Perspective", in C. Calliess and G. van der Schyff (eds.), *Constitutional Identity in a Europe of Multilevel Constitutionalism*, Cambridge, Cambridge University Press, 2020, 317-319 (305-347).

[269] J. Martín Y Pérez De Nanclares, "Constitutional Identity in Spain. Commitment to European Integration without giving up the Essence of the Constitution", in C. Calliess and G. van der Schyff (eds.), *Constitutional Identity in a Europe of Multilevel Constitutionalism*, Cambridge, Cambridge University Press, 2020, 279-280 (268-283).

[270] See also B. Oomen, "Strengthening Constitutional Identity where there is none: the Case of the Netherlands", *Revue interdisciplinaire d'études juridiques* 77/2 (2016), 245 (235-263; E. Hirsch Ballin, "Constitutional Identity in the Netherlands. Sailing with Others", in C. Calliess and G. van der Schyff (eds.), *Constitutional Identity in a Europe of Multilevel Constitutionalism*, Cambridge, Cambridge University Press, 2020, 224-225 (222-242).

[271] E. Hirsch Ballin, "Constitutional Identity in the Netherlands. Sailing with Others", in C. Calliess and G. van der Schyff (eds.), *Constitutional Identity in a Europe of Multilevel Constitutionalism*, Cambridge, Cambridge University Press, 2020, 239-241 (222-242).

[272] Consult on this on this M. Belov, "The Functions of Constitutional Identity Performed in the Context of Constitutionalization of the EU Order and Europeanization of the Legal Orders of EU Member States", *Perspectives on Federalism*, 9/2 (2017), E-92-93 (E-72-97).

c. Executive actors

Next to national legislators, it is also conceivable to consider the executive power. As a policy-maker, the government is well placed to express certain political and social trends that are important in the context of (a dynamic) constitutional identity. Although this is not always conspicuous, the Member States' governments regularly play a role in the interpretation of constitutional identity: they can prompt the courts to address the issue of identity by intervening in preliminary reference procedures to the CJEU. An example is the constitutional dialogue between the Danish Supreme Court and the CJEU in the 2016 *Ajos* case, in which the Court considered that there was no legal basis in the Danish Accession Act to apply the general principle of EU law prohibiting discrimination on grounds of age when balancing this principle against the principle of legal certainty. In a preliminary reference procedure, the Supreme Court had asked the CJEU to reconsider its case law on this matter. The CJEU, however, stated that the Supreme Court must either consider the Danish legislation in conformity with EU law or not apply Danish legislation.[273] With the 2016 *Ajos* decision the Supreme Court eventually set aside the CJEU's preliminary ruling.[274] Before the judgment, the Danish government had intervened in the preliminary procedure, referring to Article 4(2) TEU.[275] Although it acknowledged that the identity clause could not alter the principle of EU law primacy, the government argued that the principle of legal certainty is part of the Danish constitutional identity. In light of this, the government requested that the CJEU would leave the balancing of interests in this case to national actors.[276] More recently, in a preliminary reference procedure concerning the prohibition of a Belgian municipality's staff member from wearing the headscarf, the French authorities intervened and raised the argument of Article 4(2) TEU. They argued that the imposition of restrictions on the freedom of public sector employees to manifest their political, philosophical, or religious beliefs in the performance of their duties is based on an exclusive conception of strict neutrality, which according to the authorities is part of the French constitutional identity. Although the CJEU seems to have found the identity clause of no importance in this case,[277] this goes to show that governments can weigh in on the judicial interpretation of constitutional identity. Furthermore, it is conceivable that the government would explicitly advise on the domestic order's constitutional identity during the political process of constitutional amendment or the transposition of EU legislation. Some courts have also pointed out the obligation of political actors not only to implement EU law but also to assess this implementation.[278]

In this respect, political actors can at times be credited for having helped to solve some identity crises.[279] The drawback of an assessment of constitutional identity by political organs on the other hand, is that there is always the danger of temporary majorities, resulting in fleeting changes to constitutional

[273] Judgment of the Court of Justice of 19 April 2016, *Ajos A/S* v. *the estate after Karsten Eigil Rasmussen*, C-441/14, ECLI:EU:C:2016:278.

[274] Judgment of the Højesteret of 6 December 2016, *Dansk Industri (DI) acting for Ajos A/S vs. The estate left by A.*, n° 15/2014.

[275] Intervention by the Danish Government of 19 December 2014 in case *Ajos A/S* v. *estate of KarstenEigil Rasmussen*, C-441/14.

[276] H. Krunke and S. Klinge, "The Danish Ajos Case: The Missing Case from *Maastricht* and *Lisbon*", *European Papers* 3/1 (2018), 169-170 (157-182).

[277] See also Opinion of Advocate General Collins of 4 May 2023 in case *OP v Commune de Ans*, C-148/22, ECLI:EU:C:2023:378, paras. 70-73.

[278] Judgment of the Højesteret of 20 February 2013, n° 199/2012.

[279] Next to the *Ajos* case, political actors prevented (further) conflict with the EU in Germany's *Weiss/PSPP* crisis and the *Slovak Pensions* case. For these cases: see respectively *supra*, points 2.4.1 and 2.4.2.

identity. Another impediment to attributing interpretive power to political organs is the possible risk of instrumentalization through an essentialist reading of a Member State's constitutional identity.[280]

3.1.2. EU institutions and bodies

The interpretation of constitutional identity is not exclusively reserved for national institutions. Being part of the EU's primary law, the identity clause of Article 4(2) TEU entails that the CJEU CJEU has the competence to interpret and appreciate the application of Article 4(2) TEU in the light of other primary norms and principles of EU law.[281] Although it is generally accepted that it is not for the EU to determine, for each Member State, the elements that are part of the latter's constitutional identity,[282] it is the CJEU that must ensure the uniform application of EU law (Article 19 TEU). This is especially true for the EU's values and principles of primacy of EU law and direct effect.[283] Since constitutional identity makes it possible to limit the impact of EU law in areas considered essential for the Member States,[284] it must be respected by the CJEU. Consequently, each judge – national or supranational - remains the interpretative master of this notion, as is recognised by their judicial system.[285]

Furthermore, constitutional identity must be recognised by any other EU institution, body, office, and agency when interpreting and applying the law.[286] This includes the European Parliament, the Commission, and the Council.[287] Various institutions have referred to the clause in the emission of their

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[280] See e.g. the Polish K-3/21 case, which was driven by the Polish government's intention to trigger an identity crisis with the EU. *Supra*, point 2.4.4.

[281] C. Grewe, "Methods of Identification of National Constitutional Identity", in A. Saiz Arnaiz and C. Alcoberro Llivina (eds.), *National Constitutional Identity and European Integration*, Cambridge, Intersentia, 2013, 38-39 (37-48). In light of this, some authors argue that the notion of 'constitutional identity' would procure national constitutional courts with the power to guarantee the supremacy of national constitutions, while the notion of 'national identity' confirms the power of the CJEU to assure the respect for the primacy of EU law. A. Śledzińska-Simon and M. Ziółkowski, "Constitutional Identity in Poland. Is the Emperor Putting on the Old Clothes of Sovereignty?", in C. Calliess and G. van der Schyff (eds.), *Constitutional Identity in a Europe of Multilevel Constitutionalism*, Cambridge, Cambridge University Press, 2020, 254 (243-267). This corroborates to a certain extent with the assessment that national constitutional courts and the CJEU have different answers to the conflict between EU law and domestic law because of two different narratives on the foundation of the European legal order: in the CJEU's view, since the EU is an autonomous legal order, EU law can take precedence over every national provision. Domestic courts on the other hand will generally deduce the authority of EU law from national constitutions delegating sovereign powers to the supranational level, entailing limits to the primacy of EU law to be found in the principles enshrined in national constitutions. B. Guastaferro, "Beyond the *Exceptionalism* of Constitutional Conflicts: The *Ordinary* Functions of the Identity Clause". *Yearbook of European Law*, 31/1 (2012), 314 (263-318).

[282] Opinion of Advocate General Kokott of 15 April 2021 in case *V.M.A. v Stolichna obshtina, rayon 'Pancharevo'*, C-490/20, ECLI:EU:C:2021:296, paras. 70 to 73. More recently: Opinion of Advocate General Emiliou of 8 March 2022 in case *Cilevičs and Others*, C-391/20, ECLI:EU:C:2022:166, para. 86; Opinion of Advocate General Collins of 4 May 2023 in ECJ case *OP v Commune de Ans*, C-148/22, ECLI:EU:C:2023:378, para. 45.

[283] Opinion of Advocate General Wahl of 8 June 2017 in case *Global Starnet*, C-322/16, ECLI:EU:C:2017:442, paras. 59 and 60.

[284] Opinion of Advocate General Kokott of 15 April 2021 in case *V.M.A. v Stolichna obshtina, rayon 'Pancharevo'*, C-490/20, ECLI:EU:C:2021:296, paras. 86.

[285] F.-V Guiot, "La participation de la France à la détermination des enjeux constitutionnels d'une République européenne", *Politeia* 27 (2015), 481 (451-491).

[286] Opinion of Advocate General Kokott of 31 May 2016 in case *G4S Secure Solutions*, C-157/15, ECLI:EU:C:2016:382, para. 32; Opinion of Advocate General Emiliou of 8 March 2022 in case *Cilevičs and Others*, C-391/20, ECLI:EU:C:2022:166, para. 83. See also T. Konstadinides, "Dealing with Parallel Universes: Antinomies of Sovereignty and the Protection of National Identity in European Judicial Discourse", *Yearbook of European Law*, 34/1 (2015), 132-133 (127-169).

[287] E. Cloots, *National Identity in EU Law*, Oxford, Oxford University Press, 2015, 75; B. Guastaferro, "Beyond the *Exceptionalism* of Constitutional Conflicts: The *Ordinary* Functions of the Identity Clause", *Yearbook of European Law*, 31/1 (2012), 299-300 (263-318).

acts,[288] at times stressing the importance of regional and local self-government,[289] or expressing their commitment to the Member States' constitutional identities in implementing their policies.[290] In this regard, it has been argued that the identity clause could have a positive impact on the delimitation of competences between the Member States and the EU:[291] identity-related issues could appear in reasoned opinions of national parliaments monitoring the issue of subsidiarity.[292] The Commission would then have the possibility to reply by taking into account the national parliament's observations and reformulating the legislative proposal. Since the principle of subsidiarity has more chances to be respected in the *ex ante* phase, remediating these kinds of issues during this process could prove much more efficient in limiting a competence creep driven by the pre-emptive capacity of EU integration measures.[293] Another initiative in this sense is the European rule of law mechanism; a preventive tool that provides an annual dialogue between the Commission, the Council, and the European Parliament together with the Member States, and stakeholders (*i.a.* the Council of Europe and the Venice Commission) on the rule of law.[294]

3.1.3. National and EU electorate

Finally, some scholars also consider that the electorate could have a part to play in defining constitutional identity, at least indirectly.[295] In many Member States, the electorate has a role as a constituent power (in the constitutional amendment procedure) or as a legislator (in normal elections).[296] Citizens also take part in elections for the European Parliament and help to shape the EU through the Citizens' Initiative. In some Member States, the electorate also takes part in deciding on the extent of future EU cooperation in the form of elections or referendums (e.g. the ratification of the

[288] More in-depth, see E. Cloots, *National Identity in EU Law*, Oxford, Oxford University Press, 2015, 176-177.

[289] Opinion of the Committee of the Regions of 18 February 2005 on the Proposal for a Directive of the European Parliament and of the Council on services in the internal market, OJ C43/6, paras 2.29–2.30; Opinion of the Committee of the Regions of 11 January 2012 on the Strategy for the effective implementation of the Charter of Fundamental Rights by the European Union, 2012, OJ C 9, 61–64 (para. 6).

[290] Communication From The Commission To The European Parliament, The Council, The European Economic and Social Committee, and The Committee of the Regions, An EU Framework for National Roma Integration Strategies up to 2020, COM/2011/0173 final, esp. at para. 8.

[291] B. Guastaferro, "Beyond the *Exceptionalism* of Constitutional Conflicts: The *Ordinary* Functions of the Identity Clause", *Yearbook of European Law*, 31/1 (2012), 315-316 (263-318).

[292] E.g. the Reasoned Opinion of the Austrian Parliament (Reasoned Opinion of the European Affairs Committee of the Federal Council of 1 February 2011 on COM(2011) 897 final) and the Draft Resolution of the Bavarian State Parliament on the Proposal for a Directive on the award of concession contracts COM (2011) 897. For the discussion of these examples, consult B. Guastaferro, "Beyond the *Exceptionalism* of Constitutional Conflicts: The *Ordinary* Functions of the Identity Clause", *Yearbook of European Law*, 31/1 (2012), 307-308 (263-318),

[293] B. Guastaferro, "Beyond the *Exceptionalism* of Constitutional Conflicts: The *Ordinary* Functions of the Identity Clause", *Yearbook of European Law*, 31/1 (2012), 315-316 (263-318).

[294] In the most recent Evaluation of the annual rule of law dialogue, the Council reaffirmed among other things the respect of national identities of the Member States. Presidency conclusions of 12 December 2023, 16547/23, point 3.

[295] H. Krunke, "Constitutional Identity in Denmark: Extracting Constitutional Identity in the Context of a Restrained Supreme Court and a Strong Legislature", in C. Calliess and G. van der Schyff (eds.), *Constitutional Identity in a Europe of Multilevel Constitutionalism*, Cambridge, Cambridge University Press, 2020, 122-123 (114-133).

[296] It is worth mentioning Ireland here, where various constitutional referenda have played a role in developing a more secular and modern form of constitutional identity. See in this respect also fn. 43.

European Constitution, but also the decisions on opt-outs).[297] In this respect, the Member States citizens have an impact on primary EU law.

They can also influence the application of secondary EU law, as the notion of constitutional identity holds the potential to broaden the procedural litigation standing when a core constitutional value of a Member State is at stake. The German Constitutional Court in its *Lisbon* judgment, for example, interpreted the right to vote in federal elections as an individual 'right to democracy', entitling every citizen eligible to vote with the necessary legal standing to take legal action against an alleged disregard of this right, in particular by too far-reaching European integration.[298] More recently, the Belgian Constitutional Court ruled in the same vein that it must review whether the challenged provisions regarding the Treaty on Stability, Coordination, and Governance directly affected an aspect of the democratic rule of law which it considers to be an essential guarantee that concerns all citizens.[299]

In summary, there are always multiple actors participating in the interpretation (and formation) of constitutional identity: whereas the Member States, through national actors such as courts, parliaments, and governments submit the content of their constitutional identity to the CJEU, the latter oversees the interpretation of the identity clause and the effect given to it.[300] In this way, the Member States not only inform the CJEU about the content of their constitutional identities, but also link the normative content of their constitutional order to the objectives, values, and provisions of the EU.[301]

3.2. Accommodation and enforcement of constitutional identity

Article 4(2) TEU stipulates the 'respect' of the Union for the Member States' constitutional identities. At the same time, Article 4(3) TEU highlights the obligation of the Union and the Member States to pursue the principle of sincere cooperation and mutual respect. Thus, although the identity clause consists of a legal obligation to respect the Member States' constitutional identity and can be enforced, if need

[297] For Denmark, see H. Krunke, "Constitutional Identity in Denmark: Extracting Constitutional Identity in the Context of a Restrained Supreme Court and a Strong Legislature", in C. Calliess and G. van der Schyff (eds.), *Constitutional Identity in a Europe of Multilevel Constitutionalism*, Cambridge, Cambridge University Press, 2020, 122-123 (114-133). For the opt-outs and especially the political motivations for the United Kingdom's overturned opt-out in social policy, consult P. Faraguna, "Taking Constitutional Identities Away from the Courts", *Brooklyn Journal of International Law* 41/2 (2016), 541 and 555-556 (492-578).

[298] See on this aspect C. Calliess, "Constitutional Identity in Germany. One for Three or Three in One?", in C. Calliess and G. van der Schyff (eds.), *Constitutional Identity in a Europe of Multilevel Constitutionalism*, Cambridge, Cambridge University Press, 2020, 153-181.

[299] Judgment of the Belgian Constitutional Court of 28 April 2016, n° 62/2016, para. B.8.2. For a discussion of this procedural dimension of Belgian constitutional identity, see M. El Berhoumi, L. Detrouw, J. Clarenne, P.-O. de Broux, H. Lerouxel, Y. Mossoux, C. Nennen, C. Rizcallah, N. Tulkens, S. Van Drooghenbroeck, D. Van Eeckhoutte and J. Van Meerbeeck, "Het stabiliteitsverdrag-arrest van het Grondwettelijk Hof: een arrest zonder belang?", *Chroniques de Droit Public* 3 (2017), 410 and 428 (398-429).

[300] C. Grewe, "Methods of Identification of National Constitutional Identity", in A. Saiz Arnaiz and C. Alcoberro Llivina, (eds.), *National Constitutional Identity and European Integration*, 2013, Cambridge, Intersentia, 38-39 (37-48).

[301] D. Burchardt, "The Relationship between the Law of the European Union and the Law of its Member States - A norm-based conceptual framework", *European Constitutional Law Review* 15 (2019), 94 a.f. (73-103); B. Nabli, "L'identité constitutionnelle européenne de l'État de l'Union", in C. Boutayeb, J.-C. Masclet, S. Rodrigues and H. Ruiz Fabri (eds.), *L'union européenne; Union de droit, union des droits – Mélanges en l'honneur de Philippe Manin*, Paris, Pedone, 2010, 159 (155-171); A. Schnettger, "Article 4(2) TEU as a Vehicle for National Constitutional Identity in the Shared European Legal System", in C. Calliess and G. van der Schyff (eds.), *Constitutional Identity in a Europe of Multilevel Constitutionalism*, Cambridge, Cambridge University Press, 2020, 9-37.

be, this duty does not seem to imply absolute protection, nor unilateral application of Article 4(2) TEU by the Member States. The Member States' and the EU's legal orders both rest on constitutional principles and values, which need to be accommodated to each other. Ultimately, this entails a balancing exercise between the various values and principles at stake.[302]

3.2.1. Enforcement of the Member States' constitutional identity

a. Domestic identity review and constitutional dialogue

National courts should set aside national provisions inconsistent with EU law.[303] If it becomes apparent that national legislation is incompatible with EU law, it is furthermore for the Member States' authorities to take the necessary measures to ensure compliance with EU law as possible and to ensure that EU law is given full effect.[304] Conversely, national courts could possibly set aside EU law for violation of the Member State's constitutional identity. In the past years, domestic identity review has proved to be an efficient way to enforce constitutional identity,[305] or at least to engage in a productive dialogue on this issue with the CJEU. As Elke Cloots has observed, the Member State courts' refusal to abide by the EU's primacy principle in case of a violation of the identity clause, setting aside the EU act in question, is an ultimate means of enforcing the latter.[306]

It should be noted, however, that it is not up to the national courts to correct EU law should EU institutions lack sensitivity to the Member State's national identity. The respect for the Member States' constitutional identity can only be the outcome of a *bona fide* and constructive dialogue between the national courts and the CJEU. Article 267 TFEU provides the possibility of the preliminary reference procedure, which is key in applying the identity clause. In light of their assessment, national courts can refer to the CJEU a question on the interpretation of the Treaties, asking to what extent the correct interpretation of EU law precludes national provisions.

The *erga omnes* effect of the CJEU's preliminary rulings entails that all courts – but also other actors such as EU institutions, Member States, and private parties – are bound to apply the operative part of the preliminary ruling, as well as its *ratio*.[307] At the same time, it is only when the CJEU fails to accommodate the Member State's national identity or to explain why integration must prevail over such an accommodation, that the national court may consider setting aside EU law.[308]

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[302] D. Preshova, "Battleground or Meeting Point? Respect for National Identities in the European Union – Article 4(2) of the Treaty on European Union", *Croatian Yearbook of European Law and Policy* 8 (2012), 273-274 (267-298). For an elaboration on this balancing exercise: *infra*, point 4.3.

[303] Judgment of the Court of Justice of 9 March 1978, *Amministrazione delle Finanze dello Stato v Simmenthal SpA*, 106/77, ECLI:EU:C:1978:49, para. 17.

[304] Judgment of the Court of Justice of 21 June 2007, *Emilienne Jonkman*, joined cases C-231/06 to C-233/06, ECLI:EU:C:2007:373, para 41.

[305] For a more comprehensive analysis of identity review and its relation to other types of review: *infra*, point 4.3.

[306] E. Cloots, *National Identity in EU Law*, Oxford, Oxford University Press, 2015, 183.

[307] M. Broberg, "Preliminary References as a Means of Enforcing EU Law", A. Jakab and D. Kochenov (eds.), *The Enforcement of EU Law and Values. Ensuring Member States' Compliance*, Oxford, Oxford University Press, 2017, 107-108 (99-111).

[308] E. Cloots, *National Identity in EU Law*, Oxford, Oxford University Press, 2015, 183-184.

b. Institutional design of the EU

When assessing the enforcement of the respect for the Member States' constitutional identities, one should keep in mind that the EU and its institutions are organised in such a way that they respect the interests and identities of the Member States, at least to a certain extent.[309]

First, regarding primary law, the EU allows for a mechanism of differentiated integration, giving countries the possibility to opt out of certain EU policies. Some scholars have considered this differentiated integration as a viable means of accommodating (nonshared) features of the Member States' constitutional identities, allowing for 'identity-tailored' opt-outs, protocols, and derogations.[310]

Secondly, with regard to secondary law, the Member States have the possibility of weighing in on the EU decision-making process in identity-sensitive policy areas through their representation in the Council of Ministers and the European Council (Article 10 TEU) and more indirectly through the consociational nature of certain institutions, such as the Commission and the CJEU.[311] Although there have been developments that reduce the influence of Member States on EU decision-making, the institutional design of the EU mitigates the risk of EU policies that would counter the Member States' constitutional identities.[312]

c. The European subsidiarity principle

The principle of subsidiarity encourages the EU to act in areas that do not fall within its exclusive competence only if and in so far as the objectives of the proposed action – either at the central level or at the regional and local level – can better be achieved at EU level than at the domestic level because of the scale or effects of the proposed action (Article 5(3) TEU). Since the introduction of the Treaties, this principle has been a central tenet of EU law, next to the principles of conferral and proportionality. Legal scholars have pointed out the possibilities that the subsidiarity principle could offer to express identity-related concerns and enforce the identity clause.[313] The requirements of these principles have been elaborated in the Protocol on the application of the principles of subsidiarity and proportionality, which stipulates that the EU legislator must substantiate by qualitative and, wherever possible, quantitative indicators the reasons for concluding that a Union objective can be better achieved at EU level.[314] Even from a minimalist perspective concerning the effectiveness of the subsidiarity principle, the requirements of subsidiarity discourage the EU from interfering with the Member States' autonomy, making it more likely that shared powers will be exercised with respect for the Member States' national identities:[315] in view of subsidiarity review by the national parliaments (Early Warning System) [316] and the CJEU, the EU legislature's will be directed to examining and evaluating the adequacy

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309 Ibid., 39-43.

310 P. Faraguna, "Taking Constitutional Identities Away from the Courts", *Brooklyn Journal of International Law* 41/2 (2016), 534 a.f. (492-578).

311 E. Cloots, *National Identity in EU Law*, Oxford, Oxford University Press, 2015, 41-42.

312 Ibid., 41-42.

313 See e.g. P. Faraguna, "Taking Constitutional Identities Away from the Courts", *Brooklyn Journal of International Law* 41/2 (2016), 567 a.f. (492-578); B. Guastaferro, "Coupling National Identity with Subsidiarity Concerns in National Parliaments' Reasoned Opinions", *Maastricht Journal of European and Comparative Law* 21/2 (2014), 320-340.

314 Article 5 of Protocol n° 2 on the Application of the Principles of Subsidiarity and Proportionality (joined to the Treaty of Lisbon).

315 E. Cloots, *National Identity in EU Law*, Oxford, Oxford University Press, 2015, 43-46.

316 For explicit mentions of the identity clause in the national parliaments' reasoned opinions, see e.g. the Austrian and German Parliaments' reasoned opinions on the Commission's proposal on the award of concession contracts (stressing

of its decisions and the conformity of these decisions not only with the subsidiarity principle but also with Article 4(2) TEU.[317] By connecting subsidiarity and identity, the national parliaments are reinforcing both principles, preventing the EU legislature from interfering in national regulatory autonomy.[318]

d. Popular action[319]

Finally, some legal scholars have pointed out the necessity of Member State nationals' attachment to EU bodies and policies.[320] Public support impacts the legitimacy of EU integration (e.g. by voting against the ratification of reform treaties), as well as the effectiveness of EU law (e.g. by the nationals' potential refusal to consent to EU acts that would breach their national constitutional identity.[321] The EU must therefore remain sensitive to the Member States' identities, should it want to enhance its legitimacy and authority.[322]

3.2.2. Enforcement of EU constitutional identity[323]

The EU is based on solidarity and loyal cooperation between the Member States, arising from their shared values and interests. The EU institutions, as 'guardians of the Treaties' are the embodiments of this solidarity, realizing it in practice.[324] This entails the Member States' sincere cooperation and compliance with the common values and principles, as well as a form of loyalty towards the EU institutions. In the procedural sense, cooperation and mutual respect are channeled through the preliminary reference procedure, prompting the Member States and EU actors to constitutional dialogue.

In case the CJEU refuses to recognise a Member State's constitutional identity, the Member State will have to conform to the application of EU law. This entails that the national courts would apply the EU act and, if need be, disapply the national provision in breach of EU law. This could lead the Member

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the risk of reduced flexibility for the Member States in the area of services of general economic interest). See also the other examples of reasoned opinions from the Spanish and Italian Parliaments, mentioned in B. Guastaferro, "Coupling National Identity with Subsidiarity Concerns in National Parliaments' Reasoned Opinions", *Maastricht Journal of European and Comparative Law* 21/2 (2014), 328-332 (320-340). For the discussion of the Dutch and Swedish Parliaments' references to Article 4(2) TEU, see their respective reasoned opinions on the Commission's proposal on the decree to provide common rules regarding the temporary reintroduction of border controls at internal borders in exceptional circumstances: P. Faraguna, "Taking Constitutional Identities Away from the Courts", *Brooklyn Journal of International Law* 41/2 (2016), 571 (591-578).

317 For the sensitivity of EU institutions to identity-related issues in the context of the subsidiarity principle, see the Commission's Task Force's recommendations on improving national, regional, and local authorities in policymaking. Report of the Task Force on Subsidiarity, Proportionality, and "Doing Less is More Efficiently" (10 July 2018), at 14.

318 B. Guastaferro, "Coupling National Identity with Subsidiarity Concerns in National Parliaments' Reasoned Opinions", *Maastricht Journal of European and Comparative Law* 21/2 (2014), 331 (320-340).

319 For popular action, see also *supra*, point 3.1.3.

319 E. Cloots, *National Identity in EU Law*, Oxford, Oxford University Press, 2015, 55-57.

320 E. Cloots, *National Identity in EU Law*, Oxford, Oxford University Press, 2015, 55-57.

321 See also H. Krunke, "Constitutional Identity in Denmark: Extracting Constitutional Identity in the Context of a Restrained Supreme Court and a Strong Legislature", in C. Calliess and G. van der Schyff (eds.), *Constitutional Identity in a Europe of Multilevel Constitutionalism*, Cambridge, Cambridge University Press, 2020, 122-123 (114-133).

322 E. Cloots, *National Identity in EU Law*, Oxford, Oxford University Press, 2015, 57.

323 For the EU's constitutional identity: *supra*, point 2.4.6.

324 A. Madeja, "European Values and the Rule of Law", in T. Drinóczi and A. Bień-Kacała (eds.), *Rule of Law, Common Values, and Illiberal Constitutionalism. Poland and Hungary within the European Union*, London, Routledge, 2021, 63-64 (45-76).

States to amend their national constitution or legislation to align their national identity with EU law.[325] A recent example is the 2019 case *Czech Republic v Parliament and Council*:[326] following the CJEU's judgment confirming the validity of Directive 91/477/EEC on control of the acquisition and possession of weapons, the Czech government amended national legislation to avoid prospective sanctions from the EU.

Should the national institutions fail to comply with EU law, the EU and its institutions dispose of several enforcement possibilities. Failure to comply with EU law could lead to infringement procedures and eventually sanctioning of the Member State. In the past, such conflicts have mostly been resolved by political means, bringing the conflicting measures in conformity with EU law.

a. Preliminary reference procedure

As mentioned earlier, the recognition of the Member States' constitutional identity can only be the product of a constructive dialogue between the courts.[327] This is all the more the case as a Member State's constitutional identity could conflict with the EU's constitutional identity.

Moreover, as the CJEU's jurisprudence shows, the identity clause cannot simply lead to the refusal of applying EU law. This became very clear in the *RS* case, where the CJEU stated that although the CJEU must respect the national identity of the Member States in determining an obligation of EU law for the latter, the identity clause "*has neither the object nor the effect of authorizing a constitutional court of a Member State, in disregard of the obligations under, in particular, Article 4(2) and (3) and the second subparagraph of Article 19(1) TEU, to disapply a rule of EU law, on the ground that that rule undermines the national identity of the Member State concerned as defined by the national constitutional court*".[328] The CJEU went even further by stating that if a domestic court would consider that a provision of secondary EU law – as interpreted by the CJEU – infringes the obligation to respect the constitutional identity of that Member State, that court must stay the proceedings and make a reference to the Court for a preliminary ruling under Article 267 TFEU to assess the validity of that provision in the light of Article 4(2) TEU.[329] With this judgment, the Court confirmed that the CJEU has exclusive jurisdiction to assess an EU act (Article 263 TFEU) and declare this act void if found illegal (Article 264 TFEU). This also applies when this act is in breach of Article 4(2) TEU.

The *erga omnes* effect of the CJEU's preliminary rulings entails that the referring court, but also other actors (EU institutions, Member States, and private parties) are obliged to apply the preliminary ruling.[330]

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[325] See on this e.g. the comparison of German Constitutional Court's view (considering constitutional identity to be an 'absolute' limit to EU integration, making any changes impossible) and the French Conseil Constitutionnel (viewing constitutional identity as a 'relative' limit that can be overcome by constitutional amendment). J. Scholtes, *The Abuse of Constitutional Identity in the European Union*, Oxford, Oxford University Press, 2023, 31

[326] Judgment of the Court of Justice of 3 December 2019, *Czech Republic v Parliament*, C-482/17, ECLI:EU:C:2019:1035, referring in para. 23 to Article 4(2) TEU.

[327] *Supra*, point 2.3.

[328] Judgment of the Court of Justice of 22 February 2022, *RS*, C-430/21, EU:C:2022:99, para. 69-70.

[329] Ibid., para. 71.

[330] M. Broberg, "Preliminary References as a Means of Enforcing EU Law", in A. Jakab and D. Kochenov (eds.), *The Enforcement of EU Law and Values. Ensuring Member States' Compliance*, Oxford, Oxford University Press, 2017, 107-108 (99-111).

b. Article 7 TEU and the suspension of rights

The preliminary reference procedure is nevertheless only useful in so far as independent national courts can be relied upon to apply the responses by the CJEU faithfully.[331] When national courts and authorities misuse or abuse the identity clause, this can be remediated through the protection given by Article 2 TEU, as both Article 2 and 4(2) TEU are legally on the same level.[332] Various provisions of the Treaties grant EU institutions the possibility to examine and determine the existence of breaches of the values referred to in Article 2 TEU.

The EU institutions also dispose of instruments to impose penalties for violations committed by the Member States. One of the possible mechanisms for the protection of EU values enshrined in Article 2 TEU can be found in Article 7 TEU which provides that "*(o)n a reasoned proposal by one third of the Member States, by the European Parliament or by the European Commission, the Council, acting by a majority of four fifths of its members after obtaining the consent of the European Parliament, may determine that there is a clear risk of a serious breach by a Member State of the values referred to in Article 2*". This procedure allows the Council to act upon a decision of the European Union to suspend certain rights of a Member State (such as voting rights in the Council of the European Union). This 'nuclear' option is however generally considered ineffective since it requires unanimity in the political sphere for its activation. The application of Article 7 TEU is nevertheless more than merely symbolic, as the reasoned proposal addressed by the Commission to the Council on the basis of Article 7(1) TEU can be relevant when a Member State must (dis)apply EU law.[333] It can moreover inform the broader public of the European concerns concerning the breach of fundamental EU values in the Member States.[334] In this respect, it can be helpful to protect the EU's constitutional identity.

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[331] It is worth mentioning that courts and tribunals belonging to the national judiciary are presumed to satisfy the requirements for having access to the preliminary reference procedure. This presumption can be rebutted by a final decision from a national or international court on grounds of partiality or a lack of independence of the referring court or tribunal, depriving them of access to the preliminary reference mechanism. Moreover, national measures that curtail the wide discretion of national courts in referring matters to the CJEU are not permitted. In the *A.B. and Others* case, the CJEU ruled that organizational changes of national courts may not produce the specific effects of preventing national courts from dialoguing with the CJEU through the preliminary request procedure. See resp. Judgment of the Court of Justice of 5 October 2010, *Elchinov*, C-173/09, ECLI:EU:C:2010:581; judgment of the Court of Justice of 26 March 2023 *Miasto Łowicz*, joined cases C-558/18 and C-563/18, ECLI:EU:C:2020:234, at para. 59; judgment of the Court of Justice of 2 March 2021, *A.B. and Others*, C-824/18, ECLI:EU:C:2021:153, at para. 95 and 106. See also K. Lenaerts, "The Rule of Law and the Constitutional Identity of the European Union", speech delivered by the CJEU's President on 17 February 2023 at *the conference organised by the Bulgarian Association for European Law in Sofia,* https://evropeiskipravenpregled.eu/the-rule-of-law-and-the-constitutional-identity-of-the-european-union/, accessed on 29 February 2024.

[332] T. Drinóczi and P. Faraguna, "The Constitutional Identity of the EU as a Counterbalance for Unconstitutional Constitutional Identities of the Member States", in J. de Poorter, G. van der Schyff, M. Stremler, M. de Visser, I. Leijten and C. van Oirsouw, *European Yearbook of Constitutional Law 2002. A Constitutional Identity for the EU?*, The Hague, Asser Press, 2023, 76 (57-87).

[333] E.g. in the CJEU case *X and Y v Openbaar Ministerie* a breach of the fundamental right to a fair trial was considered as a justification for the refusal from a Member State to surrender a person to another Member State under the European Arrest Warrant system. Judgment of the Court of Justice of 22 February 2022, *X and Y v Openbaar Ministerie*, joined cases C-562/22 PPU and C-563/211 PPU, ECLI:EU:C:2022:100, para. 78. On Article 7 TEU as a 'preventive mechanism', see also L. Besselink, "The Bite, the Bark, and the Howl. Article 7 TEU and the Rule of Law Initiatives", in A. Jakab and D. Kochenov (eds.), *The Enforcement of EU Law and Values. Ensuring Member States' Compliance*, Oxford, Oxford University Press, 2017, 128-144.

[334] M. Bonelli, "Let's Take a Deep Breath: On the EU (and academic) reaction to the Polish Constitutional Tribunal's ruling", *Maastricht University Blog*, https://www.maastrichtuniversity.nl/blog/2021/10/let%E2%80%99s-take-deep-breath-eu-and-academic-reaction-polish-constitutional-tribunal%E2%80%99s-ruling, accessed 29 February 2024.

c. Infringement procedure

Next to the political mechanism of Article 7 TEU, there is a more plausible option to be found in the infringement procedure of Articles 258 and 259 TFEU. When a Member State infringes on EU law by misusing or abusing the identity clause (failure to notify the Commission in time of its measures to turn a directive into national law; non-conformity of the Member State's law with the requirements of EU directives; infringement of the Treaties, EU regulations or decisions; or incorrect or non-application of EU law by national authorities), the Commission or the Member States can take legal action, eventually referring the concerned Member State to the CJEU. If the CJEU establishes breaches of EU law and the Member State fails to take the necessary measures to comply with this judgment, the Commission could then ask for the imposition of financial sanctions (Article 260 TFEU). Recent examples of infringement procedures concerning *ultra vires* and identity review can be found in the Commission's infringement proceedings concerning the violation of the rule of law in Hungary and Poland.[335]

A more creative step in this direction could be the enforcement of the values of Article 2 TEU through a 'systematic infringement action'.[336] This form of infringement action would consist of bundling a group of specific alleged violations together to demonstrate the systemic and persistent nature of the infringement of EU law.[337] By linking the measures that are undermining the values addressed in Article 2 TEU, the Commission could bring a pattern of violations to the CJEU that, taken separately, might arguably be considered at most as minor infringements. Together, however, these measures would show – next to individual *acquis* violations – additional violations of the principles under Article 2 TEU or the principle of sincere cooperation under Article 4(3) TEU. Such systemic infringements suppose remedies in terms of systemic compliance.[338] To prevent Member States from cherry-picking or making mere apparent changes, remediation would not be limited to small technical countermeasures but should entail redress of the systemic threats to EU principles and values.[339] As with individual infringements, the financial penalties of Article 260 TFEU would apply to systemic infringements. However, it has been argued that withholding EU funds immediately would provide in a stronger incentive to compliance than the prospect of paying a fine in the future.[340]

A specific deployment of the systemic infringement procedure that has been proposed in the context of Rule of Law enforcement is what Dimitry Kochenov has coined 'biting intergovernmentalism':[341] instead of the Commission bringing systemic infringement cases to the CJEU based on Article 258 TFEU, the Member States themselves would bring their Treaty-violating peers to the CJEU based on Article 259 TFEU.[342] While the infringement procedure of Article 258 TFEU is subject to the criticism that

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[335] *Infra*, point 3.2.2.d. For an overview of the identity-based infringement cases, consult E. Orbán, "Constitutional Identity in the Jurisprudence of the Court of Justice of the European Union", *Hungarian Journal of Legal Studies* 63/2 (2022), esp. the summary table at 163-165 (142-173).

[336] K. Lane Scheppele, D. Kochenov, and B. Grabowska-Moroz, "EU Values Are Law, after All: Enforcing EU Values through Systemic Infringement Actions by the European Commission and the Member States of the European Union", *Yearbook of European Law* 39 (2021), 3-121.

[337] Ibid., 19-20 (3-121).

[338] Ibid., 103-104 (3-121).

[339] Ibid., 103-104 (3-121).

[340] Ibid., 113 a.f. (3-121); L. Prete, *Infringement Proceedings in EU Law*, The Hague, Kluwer Law International, 2017, 225.

[341] D. Kochenov, "Biting Intergovernmentalism: The Case for the Reinvention of Article 259 TFEU to Make It a Viable Rule of Law Enforcement Tool", *The Hague Journal of the Rule of Law* 7 (2015), 153-174; K. Lane Scheppele, D. Kochenov, and B. Grabowska-Moroz, "EU Values Are Law, after All: Enforcing EU Values through Systemic Infringement Actions by the European Commission and the Member States of the European Union", *Yearbook of European Law* 39 (2021), 96 a.f. (3-121)

[342] An illustration of an identity-related case based on Article 259 TFEU (although not related to the EU's constitutional identity) is the infringement proceeding between Hungary and Slovak Republic. The case concerned Slovakia's prohibition

the Commission may be overstepping its role, this horizontal form of enforcement would not only have the advantage of not being limited to the discretion of the Commission but could also highlight the Member States' shared commitment to the common EU project.[343] As such, biting intergovernmentalism could prove a particular way of prompting a Member State to comply.[344]

d. Conditionality Regulation

Another possibility is making use of the new Conditionality Regulation.[345] This mechanism allows for the suspension of payments from the EU budget to the Member State concerned in case of breaches of the principles of the rule of law that "*affect or seriously risk affecting the sound financial management of the Union budget or the protection of the financial interests of the Union in a sufficiently direct way*".[346] Although the conditionality mechanism applies to the rule of law,[347] the Regulation foresees that this principle "*shall be understood having regard to the other Union values and principles enshrined in Article 2 TEU*".[348] In its rulings on the application of this mechanism in Hungary and Poland, the CJEU stressed the importance of compliance with the values on which the EU is founded for as long as a Member State remains within the EU: the respect for the values in Article 2 TEU is namely a condition for the

of Hungary's President from entering Slovak territory to participate in an inaugural ceremony of a statue of St. Stephen. In reaction, Hungary started a procedure against the Slovak Republic for infringing the right of Union citizens to move and reside freely within the Member State's territory. The Slovak Republic thereupon referred to Article 4(2) TEU, arguing that "*as the sovereignty of the State which he represents is vested in the Head of State, he may enter another sovereign State only with the latter's knowledge and consent*". Admitting to the contrary would constitute a violation of Slovakia's constitutional identity. The CJEU eventually solved the dispute by accepting a limitation of EU law based on the status of the head of state in international law, thereby circumventing identity-based reasoning. It has however been argued that the CJEU's decision latently implied the acceptance of Slovak Republic's argument concerning the respect of its constitutional identity as a 'fundamental political and constitutional structure'. Judgment of the Court of Justice of 16 October 2012, *Hungary v. Slovakia*, C-364/10, ECLI:EU:C:2012:630, esp. at para 35. For a discussion, see E. Orbán, "Constitutional Identity in the Jurisprudence of the Court of Justice of the European Union", *Hungarian Journal of Legal Studies* 63/2 (2022), 153-154 (142-173).

343 A. Jakab and D. Kochenov, "Defiance by a Constitutional Court – Germany", in A. Jakab and D. Kochenov (eds.), *The Enforcement of EU Law and Values. Ensuring Member States' Compliance*, Oxford, Oxford University Press, 2017, 20-21 (9-27).

344 Other proposals, such as Member States' mutual peer review and 'Horizontal *Solange*' have been suggested too, but these seem to have more drawbacks. For an analysis of these proposals, see A. Jakab and D. Kochenov, "Defiance by a Constitutional Court – Germany", in A. Jakab and D. Kochenov (eds.), *The Enforcement of EU Law and Values. Ensuring Member States' Compliance*, Oxford, Oxford University Press, 2017, 24-25 (9-27).

345 Regulation (EU, Euratom) 2020/2092 of the European Parliament and of the Council of 16 December 2020 on a general regime of conditionality for the protection of the Union budget. The Regulation is part of a set of financial conditionality mechanisms, including The Recovery and Resilience Facility Regulation (which governs the NextGenerationEU funding) and the Common Provisions Regulation (which refers to the EU Charter). Regulation (EU) 2021/241 of the European Parliament and of the Council of 12 February 2021 establishing the Recovery and Resilience Facility; Regulation (EU) 2021/1060 of the European Parliament and of the Council of 24 June 2021 laying down common provisions on the European Regional Development Fund, the European Social Fund Plus, the Cohesion Fund, the Just Transition Fund and the European Maritime, Fisheries and Aquaculture Fund and financial rules for those and for the Asylum, Migration and Integration Fund, the Internal Security Fund and the Instrument for Financial Support for Border Management and Visa Policy. For a discussion, see L. Detre, A. Jakab and T. Lukácsi, "Comparing Three Financial Conditionality Regimes and their Application to Hungary: The Conditionality Regulation, the Recovery and Resilience Facility Regulation, and the Common Provisions Regulation", *Max Planck Institute for Comparative Public Law & International Law* 23 (2023), Research Paper n° 2023-23.

346 Regulation (EU, Euratom) 2020/2092, Article 1.

347 Ibid., Article 3.

348 Ibid., Article 2.

enjoyment of all the rights deriving from the application of the Treaties to that Member State.[349] The EU is based on equality and solidarity between the Member States. In that regard, the EU budget is one of the principal instruments for giving practical effect to the principle of solidarity, which reflects the values and interests that the Member States have in common.[350] The CJEU furthermore reasoned that the implementation of solidarity is based on mutual trust between the Member States in the responsible use of the common resources included in the EU budget. Mutual trust, in turn, is based on the commitment of the Member States to comply with their obligations under EU law and to continue to comply with the values contained in Article 2 TEU.[351] The CJEU, therefore, observed that the EU "*cannot be criticised for implementing, in defence of its identity, which includes the values contained in Article 2 TEU, the means necessary to protect that sound financial management or those financial interests by adopting appropriate measures which, in accordance with Article 5(1) of the contested regulation, relate exclusively to the implementation of the Union budget*".[352]

Considering all of this, some scholars argue that, whereas Article 7 TEU consists of a procedural safeguard for the protection of EU constitutional identity, the conditionality mechanism should be considered as a substantive safeguard.[353] Accordingly, Tímea Drinóczi and Pietro Faraguna suggest that if an identity-based claim is to be 'constitutional', Member States should refer not merely to the principles of the concerned Member States' constitution, but to its European clause or provisions in participation in international/supranational organization, and to the principles attaining at having a constitution in general as well.[354]

[349] Judgment of the Court of Justice of 16 February 2022, *Hungary v Parliament and Council*, C-156/21, ECLI:EU:C:2022:97, paras. 125-126.

[350] Ibid., para. 129; judgment of the Court of Justice of 16 February 2022, *Poland v Parliament and Council*, C-157/21, ECLI:EU:C:2022:98, para. 147. See also the judgment of the Court of Justice of 15 July 2021, *Germany* v *Poland*, C-848/19 P, ECLI:EU:C:2021:598, para. 38.

[351] The CJEU also referred to recital 5 of the contested regulation. Judgment of the Court of Justice of 16 February 2022, *Hungary v Parliament and Council*, C-156/21, ECLI:EU:C:2022:97, para. 129; judgment of the Court of Justice of 16 February 2022, *Poland v Parliament and Council*, C-157/21, ECLI:EU:C:2022:98, para. 147. For the conditionality mechanism falling within the scope of EU law, consult K. Lenaerts, "The Rule of Law and the Constitutional Identity of the European Union", speech delivered by the CJEU's President on 17 February 2023 at *the conference organised by the Bulgarian Association for European Law in Sofia,* https://evropeiskipravenpregled.eu/the-rule-of-law-and-the-constitutional-identity-of-the-european-union/, accessed on 29 February 2024.

[352] Judgment of the Court of Justice of 16 February 2022, *Poland v Parliament and Council*, C-157/21, ECLI:EU:C:2022:98, para. 268.

[353] T. Drinóczi and P. Faraguna, "The Constitutional Identity of the EU as a Counterbalance for Unconstitutional Constitutional Identities of the Member States", in J. de Poorter, G. van der Schyff, M. Stremler, M. de Visser, I. Leijten and C. van Oirsouw, *European Yearbook of Constitutional Law 2002. A Constitutional Identity for the EU?*, The Hague, Asser Press, 2023, 78 (57-87).

[354] Ibid., 80 (57-87).

4. THE INFLUENCE OF CONSTITUTIONAL IDENTITY IN SHAPING THE RELATIONSHIP BETWEEN NATIONAL LAW AND EU LAW

From the study's overview on the interpretation of the notion of constitutional identity in various Member States can be concluded that different Member States have not unconditionally accepted the principle of primacy of EU law over their national constitution.[355] Historically, one of the reasons for the refusal of Member States to acknowledge the primacy of EU law relates to the different application of EU law in the Member States' legal systems: in 'monist' systems, the primacy of Community law – now EU law – automatically applied in the Member State's domestic system (e.g. the Netherlands and Belgium). By contrast, in 'dualist' systems international law is considered separate from domestic law (e.g. the U.K.). This means that the international legal provisions will only form part of the domestic legal system insofar as they have been transposed or incorporated by a provision of domestic law. International law can then, at most, have indirect effects through national law provisions.[356] Since the establishment of the EU, most legal systems combine 'monist' and 'dualist' elements, having amended their constitutions to authorise the transfer of decision-making competences to the EU.

However, the Member States' transfer of competences did not necessarily make less problematic the acceptance of the principles of direct effect and primacy of EU law in the Member States – especially those with a dualist tradition.[357] Member States that disposed of a system of constitutional review soon questioned the extent of the primacy of EU law when the latter conflicted with national constitutional law. Since then, three forms of review of EU law have been developed.[358]

4.1. Fundamental rights review

The first form of review of the Member States' constitutional courts is the fundamental rights review, which was gradually established in the German and Italian constitutional courts' jurisprudence.[359] This type of review concerns the protection of fundamental rights against possible infringements of EU acts. Both courts would however refrain from reviewing EU legislation insofar as the EU and the CJEU would guarantee an equivalent level of fundamental rights protection.[360] In other words, fundamental rights review would be performed only if the CJEU fails to observe the standards of national constitutions.

[355] *Supra*, point 2.4.

[356] R. Schütze, *European Union Law*, Cambridge, Cambridge University Press, 2018, 76 a.f.

[357] Regarding this issue in Germany and Italy, see O. Scarcello, *Radical Constitutional Pluralism*, London, Routledge, 2022, 33 a.f.

[358] For an in-depth analysis of these three review forms, see A. Bobić, *The Jurisprudence of Constitutional Conflict in the European Union*, Oxford, Oxford University Press, 2022, 174-237.

[359] *Supra*, points 2.4.1 and 2.4.5.

[360] See also the judgment of the Bundesverfassungsgericht of 7 June 2000, BVerfGE, 2 BvL 1/97. For a similar reasoning in Italy, see the *Granital* and *Fragd* judgments from the Italian Constitutional Court: judgment of the Corte Costituzionale of 8 June 1984, *Granital*, n° 170/1984; judgment of the Corte Costituzionale of21 April 1989, *Fragd*, n° 232/1989.

After the introduction of the CFR and the expansion of the CJEU's jurisdiction in fundamental rights review,[361] a central point of contention between domestic courts and the CJEU became the appropriate standard for fundamental rights protection. Against the backdrop of the application of the European Arrest Warrant Framework Decision (EAW),[362] several national courts submitted references to the CJEU in an attempt to obtain clarification on the relationship between domestic and EU standards of fundamental rights protection. In a 2014 preliminary reference procedure, the Spanish Constitutional Court asked if Article 53 CFR allowed a Member State to provide for a higher level of protection than the level of protection provided for by EU law.[363] In response, the CJEU asserted in the *Melloni* judgment that national authorities and courts may apply national standards of fundamental rights protection only to the extent that the application of these standards would not curb the primacy, unity, and effectiveness of EU law.[364] In other words, although the wording of the provision might suggest setting a minimum standard, according to the CJEU, national law only outweighs EU law if it does not curb the effectiveness and uniform application of EU law. [365] In the *Melloni* case, but also on several other occasions, the CJEU stressed the necessity of mutual trust between Member States, which presumes that all Member States are complying with the CFR. The Spanish Constitutional Court accepted the interpretation of the Court of Justice but also asserted that it would only do so insofar as it will not conflict with the Spanish constitutional identity.[366] A similar concern of conflicting law regarding the application of the EAW Framework Decision occurred in France.[367] In this case, however, the CJEU expressly consecrated the maximum level of fundamental rights protection by upholding the constitutionally protected right at stake – *in casu* a right to appeal – at the expense of the execution of the EAW.[368] After the German Constitutional Court ruled that it would carry out a review – even in cases relating to areas that are fully harmonised – when a fundamental right at issue is part of German constitutional identity,[369] the CJEU clarified that only systemic deficiencies will suffice to invoke the breach of inhumane and degrading treatment.[370]

The fact that fundamental rights review continuously develops through sincere cooperation and mutual feedback with the Member States, possibly resulting in a change of approach on the EU level,

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[361] For an overview of the incentives for this expansion, consult A. Bobić, *The Jurisprudence of Constitutional Conflict in the European Union*, Oxford, Oxford University Press, 2022, 187-199.

[362] Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States, OJ L190/1.

[363] Decision of the Tribunal Constitucional of 13 February 2014, *Melloni*, n° 26/2014.

[364] Judgment of the Court of Justice of 26 February 2013, *Melloni*, C-399/11, ECLI:EU:C:2013:107, paras. 55-64. The concrete issue concerned the question of whether Spain could make the execution of a European arrest warrant conditional upon observance of stricter protection of the right to be heard than ensured under the CFR.

[365] See also judgment of the Court of Justice of 7 May 2013, *Åkerberg Fransson*, C-617/ 10, ECLI:EU:C:2013:105, para. 29; judgment of the Court of Justice of 29 July 2019, *Funke Medien NRW*, C-469/ 17, ECLI:EU:C:2019:623, para. 32; judgment of the Court of Justice of 29 July 2019, *Pelham and others*, C-476/ 17, ECLI:EU:C:2019:624, para. 80; judgment of the Court of Justice of 29 July 2019, *Spiegel Online*, C-516/ 17, ECLI:EU:C:2019:625, para. 21; judgment of the Court of Justice of 15 October 2019, *Dorobantu*, C-128/ 18, ECLI:EU:C:2019:857, para. 79.

[366] Decision of the Tribunal Constitucional of 13 February 2014, *Melloni*, n° 26/2014, ground 3.

[367] Decision of the Conseil Constitutionnel of 4 April 2013, *Mr Jeremy F*, 2013-314P QPC.

[368] Judgment of the Court of Justice of 30 May 2013, *Jeremy F*, C-168/13, ECLI:EU:C:2013:358, see esp. para 40. For a discussion of this case, consult F.-X. Millet, "How Much Lenience for How Much Cooperation? On the First Preliminary Reference of the French Constitutional Council to the Court of Justice", *Common Market Law Review* 51/1 (2014), 195-218.

[369] Judgment of the Bundesverfassungsgericht of 15 December 2015, *Mr R.*, BVerfGE, 2 BvR 2735/14, para. 34. For a discussion, see G. Anagnostaras, "Solange III? Fundamental Rights Protection under National Identity Review", *European Law Review* 42 (2017), 234-253.

[370] Judgment of the Court of Justice of 5 April 2016, *Aranyosi and Căldăraru*, joined cases C-404/15 PPU and C-659/15 PPU, ECLI:EU:C:2016:198.

becomes even more apparent in the context of the implementation of the Data Retention Directive.[371] Although the Directive left broad discretion to the Member States in implementing it, many national courts raised concerns, as the implementing legislation on the national level could possibly breach constitutionally protected rights to private and family life, freedom of expression, and data retention.[372] These concerns eventually led the CJEU to annul the Data Retention Directive in 2014.[373] Interestingly, the Austrian court, although it acknowledged the *Melloni* judgment in that a single provision cannot prevail on the CFR's standard of protection, raised the question of whether a higher standard of fundamental rights protection in numerous Member States could displace the CFR's standard.[374] As Ana Bobić has observed, this would entail that common developments in domestic constitutional law could change the interpretation of fundamental rights in the CFR through the idea of 'shared constitutional traditions', without putting the primacy of EU law into question.[375] Although the CJEU did not respond to this issue in the Data Retention saga, the CJEU's *Conditionality Regulations* judgments seem to corroborate this view.[376]

The process of constitutional dialogue between the courts regarding fundamental rights review shows that the CJEU gradually established the CFR as the relevant standard for fundamental rights review, allowing the CJEU to harmonise the different approaches taken by national courts and reassuring them that it will check the legislative activities of EU institutions for upholding fundamental rights.[377]

4.2. Ultra vires review

The *ultra vires* review allows courts to monitor the exercise of competences of the EU. With the *Maastricht* judgment, the German Constitutional Court established the *ultra vires* review, affirming that it would review EU acts as to their conformity with the competences conferred on the EU. Later, in the *Lisbon* judgment, the GFCC refined its position on *ultra vires* review, stating that it would make use of the *ultra vires* review in case of 'obvious transgressions of competences'.[378] The GFCC furthermore announced that it would make use of the *ultra vires* review insofar as legal protection could not be guaranteed at the EU level. In case of an act declared *ultra vires*, the act would be inapplicable in the

[371] A. Bobić, *The Jurisprudence of Constitutional Conflict in the European Union*, Oxford, Oxford University Press, 2022, 227 and 230.

[372] For an overview of the reviews or preliminary questions by the Bulgarian, Romanian, German, Cypriot, German, Czech, Irish, and Austrian courts, see A. Bobić, *The Jurisprudence of Constitutional Conflict in the European Union*, Oxford, Oxford University Press, 2022, 223-229.

[373] Judgment of the Court of Justice of 8 April 2014, *Digital Rights Ireland*, joined cases C-293/12 and C-594/12, ECLI:EU:C:2014:238.

[374] Decision of the Verfassungsgerichtshof of 28 November 2012, cases G 47/12-11, G 59/12-10, G 62,70,71/12-11 (28 November 2012), 5.2.

[375] A. Bobić, *The Jurisprudence of Constitutional Conflict in the European Union*, Oxford, Oxford University Press, 2022, 229 and 228-229.

[376] *Supra*, point 3.2.2.d.

[377] A. Bobić, *The Jurisprudence of Constitutional Conflict in the European Union*, Oxford, Oxford University Press, 2022, 229 and 232.

[378] Judgment of the Bundesverfassungsgericht of 30 June 2009, *Lissabon*, BVerfGE, 2 BvE 2/08, para. 240. For an overview of the German jurisprudence on constitutionality review: *supra*, point 2.4.1.

German legal order.[379] The Court nevertheless stated that *ultra vires* review had to be exercised in an EU law-friendly manner.[380]

Following much criticism in legal scholarship the GFCC expanded on the 'obvious' nature of the transgressions in the *Honeywell* case, indicating that transgressions of the boundaries of the competences must be sufficiently serious and entail a 'structurally significant shift' in the appropriation of competences to the prejudice of the Member States.[381] The breach of competences must in other words be sufficiently qualified. The Court added that it would exercise *ultra vires* review only after the CJEU would have had the opportunity to interpret the treaties and rule on the validity of the EU act at issue.[382] Importantly, it also stated that this interpretation must be subject to the preliminary ruling procedure of Article 267 TFEU. Consequently, the GFCC considers the *ultra vires* review as a measure of last resort that is an integral part of dialogue and loyal cooperation with the CJEU.[383]

In essence, the *ultra vires* review relates to the question of who has the final say in interpreting the extent of EU competences and the application of EU law by EU institutions. It concerns the relationship between the CJEU's exclusive interpretive autonomy in EU law and the principle of conferral, which seems to assign the Member States as the source of autonomy of EU law.[384] Although the CJEU considers itself to have final authority in interpreting EU law and its application, it has been argued that the national courts' *ultra vires* review will prompt the CJEU not to 'overstretch' the competences of the EU.[385] This also seems to be motivating the use of *ultra vires* review by national courts: drawing on the jurisprudence of the GFCC, courts in the Czech Republic and Denmark have both found decisions from the CJEU to be *ultra vires*.[386] These decisions on the monitoring of competences have nevertheless recently been considered as a form of constructive and reasonable disagreement within the scope of commonly accepted values consecrated in Article 2 TEU.[387] Decisions of other courts – e.g. in Poland and Romania – on the other hand, have been far less constructive.[388] These decisions, however, should not detract from the added value of national courts constructively checking and controlling the acts of EU institutions, including the CJEU's jurisprudence.[389]

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379 Ibid., para. 240-241.

380 Ibid., headnote 5, paras. 225, 240 a.f.

381 Judgment of the Bundesverfassungsgericht of 6 July 2010, *Honeywell*, BVerfGE, 2 BvR 2661/06, para. 78.

382 Ibid., para. 60.

383 C. Calliess, "Constitutional Identity in Germany. One for Three or Three in One?", in C. Calliess and G. van der Schyff (eds.), *Constitutional Identity in a Europe of Multilevel Constitutionalism*, Cambridge, Cambridge University Press, 2020, 171 (153-181).

384 But also other EU institutions, e.g. the European Central Bank with regards to monetary policy, which as the point of contention in the *Gauweiler/Weiss* dialogue between the GFCC and the CJEU. See on this: *supra*, point 2.4.1.

385 P.M. Huber, "The Federal Constitutional Court and European Integration", *European Public Law* 21/1 (2015), 106 (83-107).

386 For the discussion of these cases: *supra*, points 2.4.2 and 3.1.1.c.

387 The Danish Supreme Court's jurisprudence, stressing the 'extraordinary' character of transgressions, is revealing in this respect, ultimately setting a demanding prerequisite for *ultra vires* review and upholding the Danish tradition of judicial self-restraint in favor of the national legislator. For a discussion of the Danish Supreme Court's on *ultra vires* review, consult H.P. Olsen, "The Danish Supreme Court's Decision on the Constitutionality of Denmark's Ratification of the Lisbon Treaty", *Common Market Law Review* 50 (2013) 1489-1503.

388 *Supra*, point 2.4.4.

389 P.M. Huber, "The Federal Constitutional Court and European Integration", *European Public Law* 21/1 (2015), 106 (83-107).

4.3. Identity review

Next to fundamental law review and *ultra vires* review, a third method of review for national courts is the identity review. This type of review has been developed by national constitutional courts in an attempt to reassert their position in determining constitutional limits to the primacy of EU law.

According to the German Constitutional Court's jurisprudence, whereas the *ultra vires* review is designed as a control mechanism to safeguard the principle of conferral of powers, the identity review serves as a mechanism to check the compatibility of EU law with fundamental constitutional principles, regardless of whether EU competences are transgressed.[390] This understanding of identity review leaves national courts with a wide margin of appreciation in deciding what exactly belongs to the constitutional identity.[391] Accordingly, identity review is a weapon that cuts deeper than the *ultra vires* review:[392] while the *ultra vires* review allows for remediation by the action of national and EU institutions, constitutional identity relates to the fundamental core of constitutional orders, possibly preventing or complicating such redress.[393]

Developments in jurisprudence and legal scholarship suggest however that the *ultra vires* review and identity review are in a process of blending, and remodeling *ultra vires* review in a sub-category of identity review.[394] The GFCC was the first to link both reviews through the principle of democracy.[395] A breach of competence would violate the conferring act (*ultra vires* review). Since this act is voted by the people's representatives, every qualified transgression of competencies could be considered to violate the principle of democracy,[396] which is a core principle of the German constitution (identity review). In other words, whereas *ultra vires* review is formally focused on whether the EU conforms to its conferred powers, identity review is aimed at the substantial protection of the core content of the national constitutional order.

Many European courts have retained the *ultra vires* and an identity review as a relative limit to the primacy of EU law.[397] This means that the courts consider it to be an important part of their constitutional mandate to safeguard the fundamental principles of 'core aspects' of the national constitution against excessive infringements by the EU.[398]

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[390] *Supra*, point 2.4.1.

[391] M. Payandeh, "The OMT Judgment of the German Federal Constitutional Court: Repositioning the Court within the European Constitutional Architecture", *European Constitutional Law Review* 3 (2017) 414 (400-416).

[392] A. Bobić, *The Jurisprudence of Constitutional Conflict in the European Union*, Oxford, Oxford University Press, 2022, 137.

[393] This is because constitutional identity often ties to unamendability or necessitates the intervention of the national constituent power.

[394] C. Calliess, "Constitutional Identity in Germany. One for Three or Three in One?", in C. Calliess and G. van der Schyff (eds.), *Constitutional identity in a Europe of multilevel constitutionalism*, Cambridge, Cambridge University Press, 2020, 172-175 (153-181); M. Payandeh, "The OMT Judgment of the German Federal Constitutional Court: Repositioning the Court within the European Constitutional Architecture", *European Constitutional Law Review* 3 (2017) 414 (400-416).

[395] *Supra, point* 2.4.1.

[396] On the legitimacy problem of EU integration following competence creep and a critique of constitutional identity review as a possible remedy to this competence creep, see S. Garben, "Collective Identity as a Legal Limit to European Integration in Areas of Core State Powers", *Journal of Common Market Studies* 58/1 (2020), 41-55.

[397] For overviews, see also A. Bobić, *The Jurisprudence of Constitutional Conflict in the European Union*, Oxford, Oxford University Press, 2022, 95-122 and 130-156; E. Cloots, *National Identity in EU Law*, Oxford, Oxford University Press, 2015, 51-55; O. Scarcello, *Radical Constitutional Pluralism in Europe*, London, Routledge, 2022, 115-131.

[398] P. Gérard and W. Verrijdt, "Belgian Constitutional Court Adopts National Identity Discourse. Belgian Constitutional Court No. 62/216, 28 April 2016", *European Constitutional Law Review* 13 (2017), 200 (182-205).

Whereas the notion of constitutional identity has emerged in the jurisprudence of various national courts, the CJEU has interpreted the notion of constitutional identity within Article 4(2) TEU only in a limited amount of cases.[399] It appears in all these cases that the CJEU did not interpret constitutional identity as an autonomous concept of EU law, identically and uniformly applied in all Member States.[400] Various features that were put forward as belonging to constitutional identity, and deserving protection (e.g. public policy,[401] nationality requirements,[402] national language,[403] fundamental rights[404]), have either been recognised by the CJEU[405] or discarded.[406] Furthermore, the aspect of constitutional identity seems to never have been an exclusive, nor a decisive ground for the CJEU to

[399] The CJEU mentioned constitutional identity (without necessarily elaborating on the interpretation of the identity clause) in the following cases: judgment of the Court of Justice of 28 November 1989, *Groener,* 37/87, ECLI:EU:C:1989:599, para. 18; judgment of the Court of Justice of 2 July 1996, *Commission v Luxembourg,* C-473/93, ECLI:EU:C:1996:263, paras. 32 and 35–36; judgment of the Court of Justice of 14 October 2004, *Omega*, C-36/02, ECLI:EU:C:2004:614, para. 32; judgment of the Court of Justice of 22 December 2010, *Sayn-Wittgenstein*, C-208/ 09, ECLI:EU:C:2010:806, para. 92; judgment of the Court of Justice of 12 May 2011, *Runevič- Vardyn and Wardyn*, C-391/09, ECLI:EU:C:2011:291, para. 86; judgment of the Court of Justice of 1 March 2012, *O'Brien*, C-393/10, ECLI:EU:C:2012:110, para. 49; judgment of the Court of Justice of 16 April 2013, *Las*, C-202/11, ECLI:EU:C:2013:239, para. 26; judgment of the Court of Justice of 24 October 2013 *Commission v Spain,* C-151/12, ECLI=EU:C:2013:690, para 37; judgment of the Court of Justice of 12 June 2014, *Digibet*, C-156/13, ECLI:EU:C:2014:1756, para. 34; judgment of the Court of Justice of 17 July 2014, *Torresi,* joined cases C-58/13 and C-59/13, ECLI:EU:C:2014:2088, para. 55; judgment of the Court of Justice of 3 September 2014, *Commission v Spain*, C-127/12, ECLI:EU:C:2014:2130, para 61; judgment of the Court of Justice of 2 June 2016, *Bogendorff von Wolffersdorff*, C-438/14, ECLI:EU:C:2016:401, para. 73; judgment of the Court of Justice of 21 December 2016, *Remondis*, C-51/15, ECLI:EU:C:2016:985, paras. 40-41; judgment of the Court of Justice of 5 June 2018, *Coman*, C-673/16, ECLI:EU:C:2018:385, paras. 43-44; judgment of the Court of Justice of 18 June 2020, *Porin kaupunki*, C-328/19, ECLI:EU:C:2020:483, paras. 46-48.

[400] A. Bobić, *The Jurisprudence of Constitutional Conflict in the European Union*, Oxford, Oxford University Press, 2022, 157 and 170; F.-X. Millet, "Successfully Articulating National Constitutional Identity Claims: Strait is the Gate and Narrow Is the Way", *European Public Law* 27/3 (2021), 573 a.f. (571-596). See also G. van der Schyff, "Member States of the Union, Constitutions, and Identity. A Comparative Perspective", in C. Calliess and G. van der Schyff (eds.), *Constitutional Identity in a Europe of Multilevel Constitutionalism*, Cambridge, Cambridge University Press, 2020, 328 (305-347). It has nevertheless been argued that it would only be natural that the CJEU would treat the identity clause as an autonomous concept of EU law since the identity clause is contained in the Treaties. A. Bobić, *The Jurisprudence of Constitutional Conflict in the European Union*, Oxford, Oxford University Press, 2022, 170. See also P. Gérard and W. Verrijdt, "Belgian Constitutional Court Adopts National Identity Discourse. Belgian Constitutional Court No. 62/216, 28 April 2016, *European Constitutional Law Review* 13 (2017), 200 (182-205).

[401] Although it did not mention constitutional identity, the CJEU considered the German constitutional protection of human dignity as a justified restriction to the provision of free services: judgment of the Court of Justice of 14 October 2004, *Omega*, C-36/02, ECLI:EU:C:2004:614; stressing the importance of regional and local self-government and the division of competences between different levels of governance: judgment of the Court of Justice of 12 June 2014, *Digibet*, C-156/13, ECLI:EU:C:2014:1756; judgment of the Court of Justice of 21 December 2016, *Remondis*, C-51/15, ECLI:EU:C:2016:985. See also the Opinion of Advocate General Bobek of 16 July 2020 in case *Région de Bruxelles-Capitale v. European Commission*, C-352/19, ECLI:EU:C:2020:588, para 97. Note that the CJEU stressed that public policy derogations have to be interpreted strictly: they are applicable only when the case at hand entails a "*genuine and sufficiently serious threat to a fundamental interest of society*". Judgment of the Court of Justice of 22 December 2010, *Sayn-Wittgenstein*, C-208 09, ECLI:EU:C:2010:806, para. 86.

[402] Judgment of the Court of Justice of 2 July 1996, *Commission v Luxembourg,* C-473/93, ECLI:EU:C:1996:263.

[403] Judgment of the Court of Justice of 28 November 1989, *Groener,* 37/87, ECLI:EU:C:1989:599; judgment of the Court of Justice of 24 May 2011, *Commission v. Luxembourg*, C-51/08, ECLI:EU:C:2011:336; judgment of the Court of Justice of 16 April 2013, *Las*, C-202/11, ECLI:EU:C:2013:239; judgment of the Court of Justice of 12 May 2011, *Runevič- Vardyn and Wardyn*, C-391/09, ECLI:EU:C:2011:291.

[404] Stating that the right to family reunification of same- sex spouses trumps the autonomy of the Member States: judgment of the Court of Justice of 5 June 2018, *Coman*, C-673/16, ECLI:EU:C:2018:385. See also the judgment of the Court of Justice of 5 December 2017, *M.A.S. and M.B.*, C-42/17, ECLI:EU:C:2017:936 (for the point of contention in *M.A.S. and M.B.*: *supra*, point 2.4.5.).

[405] Judging that the republican form of government and abolishment of nobility references could trump the right to free movement: judgment of the Court of Justice of 22 December 2010, *Sayn-Wittgenstein*, C-208/ 09, ECLI:EU:C:2010:806.

[406] Judgment of the Court of Justice of *Coman* (5 June 2018), C-673/16, ECLI:EU:C:2018:385.

pass judgment.[407] Article 4(2) TEU provided merely for an 'additional argumentative layer' in the reasoning of the Court: in most cases where the CJEU accepted an identity-based claim to prevail over EU law provisions, the identity-related arguments were 'genuine' and touched upon subjects that did not allow for the coexistence of EU law and national law.[408] The lack of a systematic approach to interpreting the identity clause makes it difficult to assess the views of the CJEU on the scope, meaning, and use of constitutional identity.[409]

What comes forward in the CJEU's jurisprudence however, is that the Court's attention is principally on keeping national law within the 'traditional' limits deriving from EU law, regardless of the 'proper' characterization of the national provision in issue.[410] What matters from the EU perspective is that EU law is effectively granted primacy over domestic law.[411] Conversely, this means that the CJEU will uphold constitutional identity after balancing it with the requirements of integration and with EU substantive rules, in particular market freedoms and fundamental rights.[412] Regarding integration and uniformity, the CJEU appears to prioritise EU law and EU fundamental rights protection over the Member States' constitutional identity in areas that have been fully harmonised by the EU legislature, thus leaving no leeway for the Member States' discretion.[413]

Cases that fall outside areas that have been fully harmonised and that revolve around substantive EU rules (market freedoms and EU fundamental rights) seem to leave more room for derogations to EU law.[414] In these cases, the CJEU granted exceptions to market freedoms based on the principle of proportionality (Article 5(4) TEU):[415] on several occasions, the CJEU ruled that the protection of constitutional identity is a legitimate objective,[416] but that the measures established to reach this aim

[407] F.-X. Millet, "Successfully Articulating National Constitutional Identity Claims: Strait is the Gate and Narrow Is the Way", *European Public Law* 27/3 (2021), 582-584 (571-596).

[408] To be 'genuine', Millet argues that identity-based claims must be specifically national, relate to substantive elements of constitutional identity (distinguishing them from mere *ultra vires* claims), and relate to an axiologically crucial feature of the Member State (*i.e.* "*crucial for the ethos and psyche of the national political community*"). F.-X. Millet, "Successfully Articulating National Constitutional Identity Claims: Strait is the Gate and Narrow Is the Way", *European Public Law* 27/3 (2021), 586-588 (571-596). See also A. Kaczorowska-Ireland, "What Is the European Union Required to Respect Under Article 4(2) TEU?: The Uniqueness Approach", *Europan Public Law* 25/1 (2019), 57-82.

[409] A. Bobić, *The Jurisprudence of Constitutional Conflict in the European Union*, Oxford, Oxford University Press, 2022, 156-157.

[410] F.-X. Millet, "Successfully Articulating National Constitutional Identity Claims: Strait is the Gate and Narrow Is the Way", *European Public Law* 27/3 (2021), 574-575 (571-596). See also the judgment of the Court of Justice of 2 March 2010, *Janko Rottmann*, C-135/08, ECLI:EU:C:2010:104, para. 41.

[411] K. Lenaerts, P. Van Nuffel, T. Corthout, *EU Constitutional Law*, Oxford, Oxford University Press, 2021, 646, n° 23.027.

[412] F.-X. Millet, "Successfully Articulating National Constitutional Identity Claims: Strait is the Gate and Narrow Is the Way", *European Public Law* 27/3 (2021), 576-582 (571-596).

[413] Referring to the ECJ cases *Funke Medien NRW*, *Pelham and others*, and *Spiegel online*, Millet observes that this will mostly be the case in secondary EU law, as the discretion shrinks in the progress of harmonization. EU primary law, on the contrary, is often more undetermined and less strict, arguably allowing for more successful identity-based claims (e.g in ECJ cases *Sayn-Wittgenstein*, *Bogendorf von Wolffersdorff*, *Runevič-Vardyn and Wardyn*, *Las*, and *Remondis*). F.-X. Millet, "Successfully Articulating National Constitutional Identity Claims: Strait is the Gate and Narrow Is the Way", *European Public Law* 27/3 (2021), 576-577 (571-596), with the relevant case law in fn. 15-18.

[414] Judgment of the Court of Justice of 7 May 2013, *Åkerberg Fransson*, C-617/ 10, ECLI:EU:C:2013:105. For a case involving the absence of full harmonization, leading to the applicability of national constitutional standards, see e.g. the judgment of the Court of Justice of 5 December 2017, *M.A.S. and M.B.*, C-42/17, ECLI:EU:C:2017:936, paras. 29– 62.

[415] The four-step proportionality test is considered a well-established practice when evaluating national measures restricting free movement. See on this Opinion of Advocate General Maduro of 13 July 2006 in case *Leppik*, C-434/04, ECLI:EU:C:2006:462, paras. 23-31.

[416] K. Lenaerts, P. Van Nuffel, T. Corthout, *EU Constitutional Law*, Oxford, Oxford University Press, 2021, 148-149, n° 6.020. Arguably, Member States invoking constitutional identity as a legitimate aim could benefit from a wider margin of discretion. B. Guastaferro, "Beyond the *Exceptionalism* of Constitutional Conflicts: The *Ordinary* Functions of the Identity Clause", *Yearbook of European Law*, 31/1 (2021), 295 a.f. (263-318).

were disproportionate.[417] This balancing exercise has the benefit of finding a solution that is adequate both for EU and national law, ultimately upholding both the primacy of EU law as well as the diversity in the Member States.[418] Legal scholars have furthermore pointed to the CJEU's inclination for taking a differentiated approach when EU fundamental rights are at stake, next to free movement:[419] depending on the relevant right, the element of constitutional identity at issue, and the systemic significance of the case, the EJC will either strike the balance between the fundamental right at stake and the element of constitutional identity itself[420] or defer the proportionality test to the national courts.[421]

In any case, however, where an EU measure fully determines the action of the Member States (and in doing so reveals the intention of the EU legislature to set the protection of fundamental rights to a

[417] E.g. in the ECJ cases *Las* (concerning the promotion of the use of the Dutch language) and *Commission v. Luxembourg* (concerning the conditionality of nationality for access to the profession of civil-law notary). See also Lenaerts *et al*., maintaining that "*when a Member State relies on the protection of national identity (Article 4(2) TEU) to promote the use of one or more official languages, such an objective does not justify restrictions on the free movement that go further than is necessary for attaining that objective*". K. Lenaerts, P. Van Nuffel, T. Corthout, *EU Constitutional Law*, Oxford, Oxford University Press, 2021, 322, n° 9.054.; E. Orbán, "Constitutional Identity in the Jurisprudence of the Court of Justice of the European Union", *Hungarian Journal of Legal Studies* 63/2 (2022), 147-149 (142-173).

[418] F.-X. Millet, "Successfully Articulating National Constitutional Identity Claims: Strait is the Gate and Narrow Is the Way", *European Public Law* 27/3 (2021), 582-583 (571-596). Some are however more critical about the application of the proportionality principle. Mitchel Lasser for instance argues that in certain cases the CJEU's proportionality analysis can hardly be considered as a balancing exercise, but instead as a "*straightforward threshold determination about whether an exception to a rule is justified*". By prioritizing the EU market requirements – even in combination with fundamental rights – over domestic fundamental rights protection, this approach tends to instrumentalise the proportionality test to the benefit of EU integration aims. Elke Cloots advocates a rule-like method instead (for the sake of legal certainty). Others see more coherence in the CJEU's application of constitutional identity within the proportionality test, by approaching this from the perspective of constitutional pluralism. Martin Belov for instance, points at the added value of constitutional identity in this respect, as constitutional identity does not rely on hierarchical argumentation for derogations to EU law, but on value preference and the 'insulation' of key features of the constitutional design: "*In contrast to the formal and rigid principles of the primacy of EU law and the supremacy of domestic constitutions of EU MS, constitutional identity does not allow for the application of universally applicable hierarchical schemes for conferring precedence of legal standards or for normative conflict resolution*". In this respect, Anna Bobić adds that "*the underlying assumption of such an interpretation is that all the courts involved are aware of the need to preserve a peaceful relationship in the European judicial space, without a clear or prior declaration of superiority or subordination*". Subjecting the respect for national particularities to the principle of proportionality would furthermore provide a common method of adjudication, ultimately contributing to equality among the Member States. A. Bobić, *The Jurisprudence of Constitutional Conflict in the European Union*, Oxford, Oxford University Press, 2022, 170-171; M. Belov, "The Functions of Constitutional Identity Performed in the Context of Constitutionalization of the EU Order and Europeanization of the Legal Orders of EU Member States". *Perspectives on Federalism*, 9/2 (2017), E-84-85 (E-72-97). Compare with E. Cloots, *National Identity in EU Law*, Oxford, Oxford University Press, 2015, 196 a.f.; M. Lasser, "Fundamentally Flawed: The c's Jurisprudence on Fundamental Rights and Fundamental Freedoms", *Theoretical Inquiries in Law* 15 (2014), 247 (229-260). See also J. Scholtes, *The Abuse of Constitutional Identity in the European Union*, Oxford, Oxford University Press, 2023, 179-180.

[419] F.-X. Millet, "Successfully Articulating National Constitutional Identity Claims: Strait is the Gate and Narrow Is the Way", *European Public Law* 27/3 (2021), 579-582 (571-596). See also A. Bobić, *The Jurisprudence of Constitutional Conflict in the European Union*, Oxford, Oxford University Press, 2022, 235.

[420] As was e.g. the case in *Coman*, concerning the right of residence for a same-sex couple who married in a third Member State. In this case, the CJEU gave precedence to the fundamental right to respect for family life (the right of residence of a national with a citizen of another Member State, based on their lawful same-sex marriage) over constitutional identity (the traditional institution of marriage in Romania, which the CJEU acknowledged as an element of Romania's constitutional identity). The CJEU decided itself, stating that there was no breach of constitutional identity as the Member State is not obliged to establish the institution of same-sex marriage, but merely to recognise it when lawfully concluded in another Member State. Judgment of the Court of Justice of 5 June 2018, *Coman*, C-673/16, ECLI:EU:C:2018:385, paras. 45-50. In *Sayn-Wittgenstein*, the CJEU acknowledged the abolition of nobility given the republican form of government as an element of Austria's constitutional identity to the detriment of the claimant's right to respect for family life. Judgment of the Court of Justice of 22 December 2010, *Sayn-Wittgenstein*, C-208/ 09, ECLI:EU:C:2010:806.

[421] As was e.g. the case in *Runevič-Vardyn and Wardyn*, in which the court had to strike a fair balance between the right to respect private life and the protection of the Member States' official national language and traditions. Judgment of the Court of Justice of 12 May 2011, *Runevič- Vardyn and Wardyn*, C-391/09, ECLI:EU:C:2011:291.

uniform level, fully consistent with the Charter), the Member States cannot hinder the application of that measure on the grounds that it would go counter or diminish the national fundamental rights protection.[422] In this respect, François-Xavier Millet has considered harmonization and uniformity as an absolute limit to constitutional identity, and free movement in association with fundamental rights as a relative substantive limit.[423]

In addition, legal scholars seem to find an additional 'ultimate' limit in the EU's constitutional identity, expressed in Articles 2 and 6 TEU:[424] when fundamental rights are concerned, the combination of Article 4(2) TEU and Article 53 CFR will lead to the application of the better-protected right, actually enhancing the EU fundamental rights protection. In this case, the identity-based claim conforms with the EU's constitutional identity. When such claims violate an EU fundamental right or the values mentioned in Article 2 TEU, these values would still trump the identity-based claim. When these rights or values are not at stake, the CJEU could still balance the interests against each other, examining whether a measure is suitable, necessary, and proportional to reach the aim of protecting the Member States' constitutional identity. The same would be applicable for market freedoms.

This understanding of constitutional identity, which has come to be accepted both in the jurisprudence of the CJEU and legal scholarship, fits well in bridging the EU and the national legal orders. Being both a concept of Union law and domestic law, constitutional identity should not be considered merely as a norm of resistance but also a norm of convergence that can potentially provide a valuable answer to constitutional conflicts between those legal orders.[425]

[422] K. Lenaerts, P. Van Nuffel, T. Corthout, *EU Constitutional Law*, Oxford, Oxford University Press, 2021, 670, n° 25.012.

[423] F.-X. Millet, "Successfully Articulating National Constitutional Identity Claims: Strait is the Gate and Narrow Is the Way", *European Public Law* 27/3 (2021), 582 (571-596).

[424] T. Konstadinides, "Dealing with Parallel Universes: Antinomies of Sovereignty and the Protection of National Identity in European Judicial Discourse", *Yearbook of European Law* 34/1 (2015), at 145 (127-169); A. Von Bogdandy and S. Schill, "Overcoming Absolute Primacy: Respect for National Identity under the Lisbon Treaty", *Common Market Law Review* 48 (2011), 1430 (1417-1454). Article 2 TEU contains only the founding values of the EU, without references to Article 6 TEU (referring to the CFR). See however A. Bobić, *The Jurisprudence of Constitutional Conflict in the European Union*, Oxford, Oxford University Press, 2022, 131 and 172-173; F.-X. Millet, "Successfully Articulating National Constitutional Identity Claims: Strait is the Gate and Narrow Is the Way", *European Public Law* 27/3 (2021), 591-593 (571-596). For the notion of the EU's constitutional identity: *supra*, point 2.4.6.

[425] F.-X. Millet, L'union Européenne et l'identité constitutionnelle des états membres, Paris, LGDJ, 2013.

5. HOW THE EVOLUTION OF THE NOTION OF CONSTITUTIONAL IDENTITY COULD AFFECT THE FUTURE OF THE EUROPEAN INTEGRATION

5.1. Constitutional identity as a norm of reference in a setting of constitutional pluralism

Since the introduction of the identity clause in the Treaty of Maastricht, the role and function of constitutional identity have become an important point of contention in the political and constitutional dimensions of the EU. Originally conceived as a provision to reassure the Member States' concerns regarding their political autonomy, Article 4(2) TEU is increasingly invoked as a normative argument for reinforcing the authority of one constitutional site vis-à-vis other constitutional sites.[426] As such, constitutional identity has been progressively deployed as a strategic substitute for national sovereignty claims and a convenient instrument to refuse the primacy of EU law.

Because of possible abuses of constitutional identity, some have suggested discarding this notion.[427] However, constitutional identity is not going away.[428] The notion has explicitly been acknowledged in the EU Treaties, leading legal scholars and the CJEU to consider constitutional identity to be 'law'.[429] Abandoning the concept of constitutional identity would thus necessitate the abrogation of Article 4(2), which is believed to be an unrealistic scenario.[430]

What is more, the emergence of identity-based conflicts within a pluralist constitutional system that is the EU are inevitable: the principle of constitutional identity in Article 4(2) TEU, together with the principle of proportionality in Article 5(3) TEU prohibit that EU law provisions would unreasonably restrict the 'national constitutional space'.[431] Following Article 4(2) TEU EU institutions have a legal obligation to respect the Member States' constitutional identities when interpreting and enforcing EU law.[432] Yet at the same time, it is clear that this space cannot always prevail in the EU.[433] Member States must act loyally and cooperatively (Article 4(3) TEU), with respect for the EU values (Article 2 TEU) and

[426] J. Scholtes, *The Abuse of Constitutional Identity in the European Union*, Oxford, Oxford University Press, 2023, 204.

[427] See e.g. F. Fabbrini and A. Sájo, "The Dangers of Constitutional Identity", *European Law Journal* 25 (2019), 457-473; R.D. Kelemen and L. Pech, "The Uses and Abuses of Constitutional Pluralism: Undermining the Rule of Law in the Name of Constitutional Identity in Hungary and Poland", *Cambridge Yearbook of European Legal Studies* 21 (2019), 59-74.

[428] J. Scholtes, "Abusing Constitutional Identity", *German Law Journal* 22 (2021), 534-556.

[429] E. Cloots, *National Identity in EU Law*, Oxford, Oxford University Press, 2015, 35-80; T. Drinóczi and P. Faraguna, "The Constitutional Identity of the EU as a Counterbalance for Unconstitutional Constitutional Identities of the Member States", in J. de Poorter, G. van der Schyff, M. Stremler, M. de Visser, I. Leijten and C. van Oirsouw, *European Yearbook of Constitutional Law 2002. A Constitutional Identity for the EU?*, The Hague, Asser Press, 2023, 75-76 (57-87).

[430] T. Drinóczi and P. Faraguna, "The Constitutional Identity of the EU as a Counterbalance for Unconstitutional Constitutional Identities of the Member States", in J. de Poorter, G. van der Schyff, M. Stremler, M. de Visser, I. Leijten and C. van Oirsouw, *European Yearbook of Constitutional Law 2002. A Constitutional Identity for the EU?*, The Hague, Asser Press, 2023, 75-76 (57-87).

[431] K. Lenaerts, P. Van Nuffel, T. Corthout, *EU Constitutional Law*, Oxford, Oxford University Press, 2021, 108, n° 5.041.

[432] E. Cloots, *National Identity in EU Law*, Oxford, Oxford University Press, 2015, 36.

[433] L.D. Spieker, "Framing and Managing Constitutional Identity Conflicts: How to Stabilize the Modus Vivendi Between the Court of Justice and National Constitutional Courts", *Common Market Law Review* 57 (2020), 361-397.

EU rights (Article 6 TEU). Those provisions are legally on the same level as Article 4(2) TEU.[434] This inevitably leads to contestation of and within the EU's constitutional system. As long as future Treaties do not introduce a hierarchical multilevel structure between the EU and its Member States, this contestation is here to stay.[435] Moreover, in view of various transformative EU policies and the prospects of enlargement of the EU – which would expand the number of constitutional courts at play within the multi-level adjudicative system – contestation and conflicts can only be expected to increase.

Subsequently, the notion of constitutional identity will certainly continue to play a role in the future. Interpretive disagreements on the relation between domestic and EU law are always possible.[436] Contestation and legal interaction, however, make constitutional identity a fundamental idea that lies at the core of the complex and heterarchical system that is the EU: by recognizing the coexistence of different collective identities and national constitutional orders within the same legal space, the identity clause upholds the EU's central idea of unity in diversity.[437] In this view, constitutional identity has been considered by many commentators as a legal tool that channels constitutional conflicts and promotes constitutional dialogue between the Member States and the EU institutions.[438]

Concurrently, Article 4(2) TEU establishes an important reference point for the enmeshment of EU and national law, resulting in a shared normativity between the European and the national legal orders.[439]

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[434] T. Drinóczi and P. Faraguna, "The Constitutional Identity of the EU as a Counterbalance for Unconstitutional Constitutional Identities of the Member States", in J. de Poorter, G. van der Schyff, M. Stremler, M. de Visser, I. Leijten and C. van Oirsouw, *European Yearbook of Constitutional Law 2002. A Constitutional Identity for the EU?*, The Hague, Asser Press, 2023, 76 (57-87).

[435] A. Bobić, *The Jurisprudence of Constitutional Conflict in the European Union*, Oxford, Oxford University Press, 2022, 263-264. In the same vein: G. van der Schyff, "Constitutional Identity of the EU Legal Order: Delineating its Roles and Contours", *Ancilla Iuris* 1 (2021), 12 (1-12).

[436] G. Martinico, "The Autonomy of EU Law – A Joint Celebration of Kadi II and Van Gend En Loos" in M. Avbelj, F. Fontanelli and G. Martinico (eds.), *Kadi on Trial: A Multifaceted Analysis of the Kadi Judgment*, London, Routledge, 2014, 170 (166– 171). In the same vein, but linking it to the disagreement over sovereignty and legal hierarchy: M. Belov, "The Functions of Constitutional Identity Performed in the Context of Constitutionalization of the EU Order and Europeanization of the Legal Orders of EU Member States", *Perspectives on Federalism* 9/2 (2017), E-81 (E-72-97).

[437] In recognizing the principle of national autonomy that guided the EU integration process, the specific reference in Article 4(2) TEU to the regional and local dimension adds to this. D. Fromage and B. De Witte, "Guest Editors' Introduction. National Constitutional Identity Ten Years on: State of Play and Future Perspectives", *European Public Law* 27/3 (2021), 422 (411-424); B. Guastaferro, "Beyond the *Exceptionalism* of Constitutional Conflicts: The *Ordinary* Functions of the Identity Clause", *Yearbook of European Law* 31/1 (2012), 315-316 (263-318). See also A. Schnettger, "Article 4(2) TEU as a Vehicle for National Constitutional Identity in the Shared European Legal System", in C. Calliess and G. van der Schyff (eds.), *Constitutional Identity in a Europe of Multilevel Constitutionalism*, Cambridge, Cambridge University Press, 2021, 9-37.

[438] C. Calliess and A. Schnettger, "The Protection of Constitutional Identity in a Europe of Multilevel Constitutionalism", in C. Calliess and G. van der Schyff (eds.), *Constitutional Identity in a Europe of Multilevel Constitutionalism*, Cambridge, Cambridge University Press, 2021, 348-371; F.-X. Millet, "Successfully Articulating National Constitutional Identity Claims: Strait Is the Gate and Narrow Is the Way", *European Public Law* 27(3), 2021, 571-596; J. Scholtes, "Abusing Constitutional Identity", *German Law Journal* 22 (2021), 534-556; E. Orbán, "Constitutional Identity in the Jurisprudence of the Court of Justice of the European Union", *Hungarian Journal of Legal Studies* 63/2 (2022), 142-173. At the very least, constitutional identity is a useful device that offers a common vocabulary through which various positions can be classified and evaluated; either a functional device, that allows to compare constitutional differences and similarities between the different legal orders, or an analytical device that can map the different points of view and arguments on the relationship between the EU and the Member States. G. van der Schyff, I. Leijten, J. de Poorter, C. van Oirsouw, M. Stremler, and M. de Visser, "Introduction: Exploring the Concept of a Constitutional Identity for the European Union", in J. de Poorter, G. van der Schyff, M. Stremler, M. de Visser, I. Leijten and C. van Oirsouw, *European Yearbook of Constitutional Law 2002. A Constitutional Identity for the EU?*, The Hague, Asser Press, 2023, 9-10 (1-12).

[439] Concurrently, the notion of constitutional identity helps to conceptualise the constitutional dimension of the EU as a multi-level legal system. M. Belov, "The Functions of Constitutional Identity Performed in the Context of Constitutionalization of the EU Order and Europeanization of the Legal Orders of EU Member States", *Perspectives on Federalism* 9/2 (2017), E-94 (E-72-97). On the shared normativity, see D. Burchardt, "The Relationship between the Law of the European Union and the Law of its Member States - a Norm-based Conceptual Framework", *European Constitutional Law Review* 15 (2019), 94 e.v. (73-103).

Since both the domestic and European accounts of constitutional identity are equally relevant, no single constitutional authority can claim exclusive and absolute ownership in the application of the Member States' constitutional identity, nor the shared values in Article 2 TEU (based on the Member States' common constitutional traditions).[440] Arguably, it is not merely desirable, but even necessary for the question of the final interpretative authority to remain open:[441] cross-references, preliminary questions, (re-)interpretation, (implicit) acknowledgment of national and European concerns, and indirect interactions shape the dialogue and mutual cooperation between the constitutional actors of the EU sphere. The contestation and feedback that arises between the national and EU levels mutually influence those actors, potentially conducting them to auto-correct themselves or to develop certain constitutional standards, both on the domestic and EU levels.[442]

Consequently, it has generally been accepted that the identity clause should be interpreted in a pluralist way, allowing it to accommodate both domestic constitutional concerns and the principle of primacy of EU law: the interpretation and application of Article 4(2) TEU is in principle reserved for the CJEU. On the other hand, it is for national institutions – not the CJEU – to interpret which aspects of a national constitutional order fall within the content of a Member State's constitutional identity.[443] Hence, the CJEU will accommodate identity-based claims when they do not undermine the uniformity reached in certain areas through legislative harmonization and when they do not limit free movement or fundamental rights protected under the CFR.[444] Conversely, in areas in which the EU has no competence, national claims for accommodation of constitutional identity will have a stronger standing.[445]

Tímea Drinóczi and Pietro Faraguna have therefore argued that it would prove much more effective and straightforward to recognise the success of the process of legalization and 'positivisation' of constitutional identity in the EU and to pay more attention to abuses and misuses of the notion.[446] In the same vein, Julian Scholtes maintains that contextualizing constitutional identity and locating it within the transnational discourse of liberal democracy can help expose constitutional identity claims that do not live up to this discourse.[447]

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[440] A. Bobić, *The Jurisprudence of Constitutional Conflict in the European Union*, Oxford, Oxford University Press, 2022, 263. See also J. Scholtes, *The Abuse of Constitutional Identity in the European Union*, Oxford, Oxford University Press, 2023, 169-199.

[441] A. Bobić, *The Jurisprudence of Constitutional Conflict in the European Union*, Oxford, Oxford University Press, 2022, 76-77.

[442] As was the case in the annulment of the Data Retention Directive, which led to the development of the EU's standard of fundamental rights protection (*supra*, point 4.1.). Next to constitutional conflicts, evolving insights in constitutional law also could trigger developments through the use of the identity clause. See A. Bobić, *The Jurisprudence of Constitutional Conflict in the European Union*, Oxford, Oxford University Press, 2022, 228-229, 235-237 and 263; D. Fromage and B. De Witte, "Guest Editors' Introduction. National Constitutional Identity Ten Years on: State of Play and Future Perspectives", *European Public Law* 27/3 (2021), 424 (411-424); M. Polzin, "Constitutional Identity as a Constructed Reality and a Restless Soul", *German Law Journal* 18/7 (2017), 1595-1616; A. Schnettger, "Article 4(2) TEU as a Vehicle for National Constitutional Identity in the Shared European Legal System", in C. Calliess and G. van der Schyff (eds.), *Constitutional Identity in a Europe of Multilevel Constitutionalism*, Cambridge, Cambridge University Press, 2021, 9-37.

[443] L. Besselink, "National and Constitutional Identity before and after Lisbon", *Utrecht Law Review* 6/3 (2010), 45 (36-49).

[444] F.-X. Millet, "Successfully Articulating National Constitutional Identity Claims: Strait is the Gate and Narrow Is the Way", *European Public Law* 27/3 (2021), 582 (571-596).

[445] M. Bonelli, "National Identity and European Integration Beyond 'Limited Fields'", *European Public Law* 27/3 (2021), 537-558.

[446] T. Drinóczi and P. Faraguna, "The Constitutional Identity of the EU as a Counterbalance for Unconstitutional Constitutional Identities of the Member States", in J. de Poorter, G. van der Schyff, M. Stremler, M. de Visser, I. Leijten and C. van Oirsouw, *European Yearbook of Constitutional Law 2002. A Constitutional Identity for the EU?*, The Hague, Asser Press, 2023, 75-76 (57-87).

[447] J. Scholtes, *The Abuse of Constitutional Identity in the European Union*, Oxford, Oxford University Press, 2023, 204.

5.2. Dealing with future destructive conflicts

The pluralist understanding of constitutional identity will indeed not prevent the generation of destructive conflicts that feature a lack of sincere cooperation and mutual trust between the Member States and EU institutions. In these cases (e.g. when courts – possibly under pressure from national authorities – refuse to apply the preliminary reference procedure, reject the EU-friendly interpretation of domestic law provisions, make a selective or arbitrary use of constitutional identity), the identity clause is used to deny the primacy of EU law or to pull out certain policy fields from the influence of EU law to settle them within the Member States' exclusive competence. In these situations, there is no possibility of genuine dialogue. Ties between the different sites of constitutional authority are intentionally or strategically cut or severed, allowing national courts to evade the requirements of Articles 2 and 6 TEU and making judicial resolution insufficient.[448]

Legal scholars therefore have argued that destructive conflicts can only be resolved by legal and political actions at the national and EU level.[449] This can consist of remediations and sanctions imposed by EU institutions.[450] Responses at the political EU level could have much more promising results than stretching the interpretation of EU law provisions that are not intended to cope with destructive conflicts.[451] Rather than framing identity claims as being 'legal' or 'illegal', possibly impairing the recognition of genuine and constructive identity claims put forward by other Member States, destructive conflicts should be brought into the political field where they belong.[452]

Judicial responses should not be discarded altogether, however. Especially when it comes to securing the rule of law, political interventions devoid of judicial actions could prove ineffective or too slow to tackle the issues at stake.[453] Judicial response on the other hand can be swift and effective, possibly making judicial protection of EU values a more reliable method for enforcing their realization than political mechanisms.[454] A combination of judicial, legal, and political mechanisms for coping with such destructive conflicts could ultimately prove most useful.

Sometimes neglected, but certainly as important as EU responses are the bottom-up actions, initiated within the Member States (e.g. in the form of preliminary references from national judges to the CJEU, seeking to defend their judicial independence vis-à-vis political interference). A mere top-down imposition of EU values, rules, and sanctions in case of non-compliance will possibly result in increased controversy and further subversion at the domestic level under the pretext of the protection of

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448 A. Bobić, *The Jurisprudence of Constitutional Conflict in the European Union*, Oxford, Oxford University Press, 2022, 128 and 263.

449 *Supra*, point 3.2

450 *Supra*, point 3.2.2.

451 M. Bonelli, "Let's Take a Deep Breath: On the EU (and Academic) Reaction to the Polish Constitutional Tribunal's Ruling", *Maastricht University Blog*, https://www.maastrichtuniversity.nl/blog/2021/10/let's-take-deep-breath-eu-and-academic-reaction-polish-constitutional-tribunal's-ruling, accessed on 29 February 2024.

452 J. Scholtes, *The Abuse of Constitutional Identity in the European Union*, Oxford, Oxford University Press, 2023, 205.

453 *Supra*, point 3.1.1. See also Lane Scheppele and Kochenov, pointing at "*a 'meaningless political ping-pong' with a rogue Member State in 'dialogue' with various EU institutions*". K. Lane Scheppele, D. Kochenov, and B. Grabowska-Moroz, "EU Values Are Law, after All: Enforcing EU Values through Systemic Infringement Actions by the European Commission and the Member States of the European Union", *Yearbook of European Law* 39 (2021), 119 (3-121).

454 A. Jakab, "The EU Charter of Fundamental Rights as the Most Promising Way of Enforcing the Rule of Law against EU Member States", in C. Closa and D. Kochenov (eds.), *Reinforcing Rule of Law Oversight in the European Union*, Cambridge, Cambridge University Press, 2016, 190 (187-205).

constitutional identity.[455] This would be counterproductive and could have perverse effects. Also, the advantage of bottom-up actions, is that they can enhance the EU's constitutional system by inspiring and engaging citizens[456] and institutional actors with EU values.[457] Eventually, this would help the development of both the Member States' constitutional identity and the EU's.[458]

5.3. Dealing with future constructive conflicts

Next to coping with destructive conflicts, the question remains how constructive conflicts between national courts and the CJEU could be appeased. As was mentioned earlier in this study, there are legal mechanisms provided by the Treaties that allow for remediation when Member States' courts and authorities refuse to honor their obligations (e.g. the infringement procedure).[459] Intergovernmental options exist too.[460] Although most of these options have the advantage that they are already in place, the efficiency of these possibilities is sometimes questioned.[461]

At the national level, it could be possible to amend the Member State's constitution to clarify the issues raised before the courts.[462] Given the aim, this is a drastic and often sluggish process, further complicated by the fact that it relies on political initiative at the national level.

In most cases – especially in the event of constructive conflicts – all these procedures might prove blunt and excessive. Conflict prevention within the process of constitutional dialogue could be more useful: assessing the legitimacy and validity of constitutional identity claims depends to a large extent on contextualizing the Member States' constitutional commitments that are unique and essential for the ethos and psyche of the Member State's political community.[463] This is not only true for the interpretation by national courts, but also the CJEU. Although it is not for the CJEU to pinpoint what is part of a Member State's constitutional identity, it is the CJEU that must ensure the uniform application

[455] This also links up with the bottom-up enforcement of national identity through citizen control. *Supra*, points 3.1.3 and 3.2.1.d. See also T. Drinóczi and P. Faraguna, "The Constitutional Identity of the EU as a Counterbalance for Unconstitutional Constitutional Identities of the Member States", in J. de Poorter, G. van der Schyff, M. Stremler, M. de Visser, I. Leijten and C. van Oirsouw, *European Yearbook of Constitutional Law 2002. A Constitutional Identity for the EU?*, The Hague, Asser Press, 2023, 82 (57-87).

[456] P. Blokker, "Systemic Infringement Action: An Effective Solution or rather Part of the Problem?", *Verfassungsblog*, https://verfassungsblog.de/systemic-infringement-action-an-effective-solution-or-rather-part-of-the-problem, accessed on 29 February 2024.

[457] A. Bobić, *The Jurisprudence of Constitutional Conflict in the European Union*, Oxford, Oxford University Press, 2022, 126-127.

[458] T. Drinóczi and P. Faraguna, "The Constitutional Identity of the EU as a Counterbalance for Unconstitutional Constitutional Identities of the Member States", in J. de Poorter, G. van der Schyff, M. Stremler, M. de Visser, I. Leijten and C. van Oirsouw, *European Yearbook of Constitutional Law 2002. A Constitutional Identity for the EU?*, The Hague, Asser Press, 2023, 82 (57-87). See also G. van der Schyff, "Constitutional Identity of the EU Legal Order: Delineating its Roles and Contours", *Ancilla Iuris* 1 (2021), 12 (1-12).

[459] *Supra*, point 3.2.2.c.

[460] *Supra*, point 3.2.2.c.

[461] For a critique, see A. Jakab and D. Kochenov, "Defiance by a Constitutional Court – Germany", in A. Jakab and D. Kochenov (eds.), *The Enforcement of EU Law and Values. Ensuring Member States' Compliance*, Oxford, Oxford University Press, 2017, 20-21 and 24-25 (9-27).

[462] F.C. Mayer, "Defiance by a Constitutional Court – Germany", in A. Jakab and D. Kochenov (eds.), *The Enforcement of EU Law and Values. Ensuring Member States' Compliance*, Oxford, Oxford University Press, 2017, 420-421 (403-421).

[463] *Supra*, fn. 408.

of EU law, including Article 4(2) TEU.[464] Accordingly, the CJEU will make a balancing exercise between the different values at stake.

This assessment is not necessarily an easy task for the CJEU, as every constitutional conflict inevitably relates to a plurality of national and EU norms. Moreover, the elements of the Member States' constitutional identity are provided for by national courts and authorities, leading the CJEU at times to be misinformed or make mistakes. This was e.g. the case in the *Slovak Pensions* case, where the Czech Constitutional Court tried to intervene in the preliminary reference procedure initiated by the Czech Supreme Administrative Court to present its views on Czech Constitutional law.[465] The intervention was, however, dismissed because the Court's rules of procedure do not foresee such interventions. In consequence, the CJEU was late to realise and take into account the constitutional implications and specificities of the case.[466] Similarly, in the *Taricco* saga, the CJEU indicated that it had not been informed on certain decisive elements of domestic law.[467] More generally, recent empirical research signals that the CJEU does not sufficiently engage with arguments that domestic courts raise in preliminary reference procedures, frustrating the national courts and impairing judicial dialogue and cooperation.[468]

In this respect, it has been suggested to provide an *amicus curiae* procedure, allowing constitutional courts to introduce their observations with the CJEU.[469] Especially in cases referred to by high courts or ordinary courts and which could potentially put the views of the constitutional courts aside, this could prove useful. Concurrently, it would be advisable to render concurring and dissenting opinions of CJEU judges public. This would allow national constitutional actors to better grasp which elements and arguments the CJEU took into consideration (but eventually discarded). At the same time, the publication of these opinions would contribute to the public debate on issues that relate to fundamental aspects of both the EU's and the domestic legal orders.

Another possibility is to develop standards of higher scrutiny for the CJEU. It has been proposed that the CJEU may examine the reasonableness (not the correctness) of identity claims based on a context-sensitive interpretation of constitutional practices, scrutinizing identity claims more closely when historical narratives of struggle and progress for the realization of constitutional principles are absent.[470] When this claim proves to be grounded on a simple constitutional practice or commitment, it would not fall under the application of the identity clause. Higher scrutiny could also apply when EU values and integration issues are at stake. Such standards would not only allow to better assess the issues at stake in constructive conflicts, but also to unveil instrumental and abusive identity-based claims that are merely meant to put absolute limits to EU integration.

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[464] *Supra*, point 3.1.2.

[465] M. Bobek, "*Landtová, Holubec*, and the Problem of an Uncooperative Court: Implications for the Preliminary Ruling Procedure", *European Constitutional Law Review* 10 (2014), 80 (54-89). See also *supra*, point 2.4.2 on constitutional identity in the Czech Republic.

[466] A. Bobić, *The Jurisprudence of Constitutional Conflict in the European Union*, Oxford, Oxford University Press, 2022, 111-112.

[467] *Supra*, point 2.4.5. See also fn. 209 and 224.

[468] A. Wallerman Ghavanini, "It Takes Two to Tango: The Preliminary Reference Dance Between the Court of Justice of the European Union and National Courts", *European Papers* 5/2 (2020), 887-910.

[469] M. de Visser, "National Constitutional Courts, the Court of Justice and the Protection of Fundamental Rights in a Post-Charter Landscape", *Human Rights Review* 15 (2014), 48 (39-51); F.-X. Millet, "Successfully Articulating National Constitutional Identity Claims: Strait Is the Gate and Narrow Is the Way", *European Public Law* 27/3 (2021), 571-596.

[470] M. Kumm, "Un-European Identity Claims: On the Relationship between Constituent Power, Constitutional Identity and its Implications for Interpreting Article 4(2) TEU", in K. Kovács (ed.), *The Jurisprudence of Particularism: National Identity Claims in Central Europe*, Oxford, Hart Publishing, 2023, 184 (173–186).

Next to preventive measures, curative measures for constructive conflicts can also be considered. One could think of putting into place bodies and working groups that coordinate and supervise the enforcement of the CJEU's preliminary rulings. A similar approach could be adopted when envisaging the establishment or reinforcement of EU bodies that monitor the Member States, such as the 'Copenhagen Commission'.[471] Such bodies could also provide an opportunity to strengthen the multilevel constitutional dialogue: implementing a channeling, conciliatory mechanism could allow Member States' courts to communicate their observations on the preliminary rulings (including expressions of legitimate dissent), providing in a more efficient resolution of differences between domestic courts and the CJEU.

In this regard, a concrete proposal for a procedural mechanism of constitutional dialogue has been introduced by Joseph Weiler and Daniel Sarmiento. They propose the establishment of a 'Mixed Grand Chamber' of the CJEU.[472] Establishing such an appeal jurisdiction within the Court of Justice would allow to "*delineate the jurisdictional line between the Member States and the EU*".[473] This Chamber would only rule on the distribution of competences between the EU and the Members States, and have jurisdiction to declare null and void an EU act in case of a serious breach of the principle of conferral. The Mixed Chamber could however only rule when the Court of Justice has made an explicit ruling in a direct action or in a preliminary reference on the EU's competence to enact a policy measure, either reversing or validating a prior decision of the Court of Justice. The proposal foresees that apex courts, as well as national governments and parliaments, could seize the Mixed Chamber, allowing also for EU institutions (including the ECB) to intervene and defend their proposals. This Mixed Chamber would be composed of an equal number of judges of the Court of Justice (but not those who were involved in the establishment of the preliminary ruling)[474] and judges from the Member States' supreme or constitutional courts (based on a rotational system, but including the president or a judge from the court which dismissed the preliminary ruling), headed by the President of the Court of Justice (or another judge in case the President was part of the chamber whose decision is disputed). Arguably, the integration of national judges in the CJEU's decision-making process would increase the authority and legitimacy of the latter's rulings, making them more difficult to contest by the Member States.[475]

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[471] For a discussion of the implementation of such a commission, consult J.-W. Müller, "A Democracy Commission of One's Own, or What it would take for the EU to safeguard Liberal Democracy in its Member States", in A. Jakab and D. Kochenov (eds.), *The Enforcement of EU Law and Values. Ensuring Member States' Compliance*, Oxford, Oxford University Press, 2017, 234-251. For a brief overview of the bodies and mechanisms monitoring the respect for the EU values covered by Artide 2 TEU: O. Marzocchi, "The Protection of Article 2 TEU Values in the EU", *Fact Sheets on the European Union* (European Parliament), March 2023, 7-8 (1-8).

[472] J.H.H. Weiler and D. Sarmiento, "The EU Judiciary After Weiss: Proposing a New Mixed Chamber of the Court of Justice", *EU Law Live*, www.eulawlive.com/op-ed-the-eu-judiciary-after-weiss-proposing-a-new-mixed-chamber-of-the-court-of-justice-by-daniel-sarmiento-and-j-h-h-weiler, accessed on 29 February 2024. Reiterated more recently: J.H.H. Weiler and D. Sarmiento, "The Comeback of the Mixed Chamber", *Verfassungsblog*, https://verfassungsblog.de/the-comeback-of-the-mixed-chamber/, accessed on 29 February 2024.

[473] Ibid.

[474] Note that the CJEU is divided into two courts: the Court of Justice deals with requests for preliminary rulings from national courts, certain actions for annulment, and appeals. The General Court rules on actions for annulment brought by individuals, companies, and EU governments. Although this is not specified in the proposal, considering the Mixed Chamber to be an appeal jurisdiction that can only rule *after* the Court of Justice has ruled on the matter, this Mixed Chamber would consist of Members of the Court of Justice, next to judges from national courts.

[475] Although the authors acknowledge that their proposal would not prevent domestic courts from defying decisions of the Mixed Chamber, the introduction of this Chamber would have the advantage over confirming the primacy of EU law through Treaty amendment as the latter could call into question what is already an *acquis constitutionnel* of the EU's legal order. J.H.H. Weiler and D. Sarmiento, "The EU Judiciary After Weiss: Proposing a New Mixed Chamber of the Court of Justice. A Reply to Our Critics",

Considering the sensitivity of the issues at stake and the importance of the outcome for the Member States' constitutional orders, hearings and written submissions would be made public. Although this 'Mixed Grand Chamber' has been suggested for *ultra vires* review,[476] the proposal could be expanded to identity review. Doing so could help to improve the awareness of national constitutional sensibilities.

The proposal of a Mixed Grand Chamber is however not without critique: considering that the CJEU and national courts approach conflicts of competences through distinctive lenses,[477] it is questioned whether such a jurisdiction could effectively defuse these kind of conflicts. A Mixed Chamber could furthermore create a perception of bias, potentially undermining the CJEU's legitimacy. This is especially true in matters of identity review, since national courts – not EU bodies – are supposed to be the interpreters of national constitutional values.[478] It has also been questioned why national judges should be involved in deciding on issues already considered when exhausting domestic remedies and whether such a Chamber would be adequate in a system that focuses on judicial dialogues between EU institutions and the Member States.[479] For this reason, some argue that the creation of a 'Joint Chamber of the Highest Courts and Tribunals of the EU', put forward in the 2023 Franco-German report,[480] would be more suitable.[481] This is because the Franco-German Working Group's proposal precludes any binding power for this jurisdiction, making the Joint Chamber more 'dialogue-oriented':[482] the preliminary reference procedure tends to be a form of asymmetrical dialogue without guarantees for the national courts to be heard. The Joint Chamber would therefore add to the existing procedure by allowing courts to actively engage in a dialogical resolution of the constitutional conflict.

https://www.europarl.europa.eu/cmsdata/210052/AFCO%20JURI%20Hearing%2014%20July%20-%20JHH%20Weiler-2.pdf, accessed on 29 February 2024.

476 J.H.H. Weiler and D. Sarmiento, "The EU Judiciary After Weiss: Proposing a New Mixed Chamber of the Court of Justice", *EU Law Live*, www.eulawlive.com/op-ed-the-eu-judiciary-after-weiss-proposing-a-new-mixed-chamber-of-the-court-of-justice-by-daniel-sarmiento-and-j-h-h-weiler, accessed on 29 February 2024.

477 The CJEU considers itself mandated to interpret EU law, including the limits of EU competences, according to Article 19 TEU. National courts, on the other hand, see themselves as the interpretive actors of national constitutions and the values and principles underpinning the national constitutional order. See on this also *supra*, point 3.1.2.

478 *Supra*, point 3.1.1.a.

479 See e.g. Helen Keller's analogous critique regarding the ECHR system: Report of the Committee on Legal Affairs and Human Rights, Parliamentary Assembly of the Council of Europe, adopted on 22 March 2023, 14-16 (1-16). See also the European Parliament's Resolution of 18 April 2023 on the institutional relations between the EU and the Council of Europe, C/2023/442. Note also that Weiler and Sarmiento acknowledge that, depending on the specific context of each case, nothing prevents national courts from making a second preliminary reference instead of requesting a ruling of the Mixed Chamber. J.H.H. Weiler and D. Sarmiento, "The EU Judiciary After Weiss: Proposing a New Mixed Chamber of the Court of Justice. A Reply to Our Critics", https://www.europarl.europa.eu/cmsdata/210052/AFCO%20JURI%20Hearing%2014%20July%20-%20JHH%20Weiler-2.pdf, accessed on 29 February 2024.

480 Report of the Franco-German Working Group on EU Institutional Reform of 18 September 2023, 'Sailing on High Seas: Reforming and Enlarging the EU for the 21st Century', Paris-Berlin, 28. Note that the report does not discuss this Joint Chamber in detail.

481 A. Bobić, "The Joint Chamber of the Highest Courts and Tribunals of the EU: an appraisal", *EU Law Live*, https://eulawlive.com/op-ed-the-joint-chamber-of-the-highest-courts-and-tribunals-of-the-eu-an-appraisal-by-ana-bobic/, accessed on 29 February 2024.

482 Ibid. Weiler and Sarmiento's proposal criticizes the lack of binding power, arguing that non-binding decisions "*are the domain of mediation, not adjudication*". Their preference for a final decision-making power seems to be motivated by the jurisdiction they foresee for the Mixed Chamber, namely determining the attribution of competence between the EU and the Member States, which they consider instrumental for upholding the principles of primacy and autonomy of EU law. J.H.H. Weiler and D. Sarmiento, "The Comeback of the Mixed Chamber", *Verfassungsblog*, https://verfassungsblog.de/the-comeback-of-the-mixed-chamber/, accessed on 29 February 2024.

At the same time, a Joint Chamber without binding power would reduce the perception of a hierarchical jurisdiction that imposes its decisions on the Member States.

Yet, regardless of the institutional possibilities, for the identity clause of Article 4(2) to work for every actor in the heterarchical multilevel system of the EU, it will always come down to striking a reasonable balance between national constitutional features and interests, and the primacy of EU law. In such an open-ended system all the actors will preserve a certain form of relative authority.

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Since the introduction of Article 4(2) of the Treaty on European Union, the meaning and function of the notion of constitutional identity have become an important point of contention. This study, commissioned by the European Parliament's Policy Department for Citizens' Rights and Constitutional Affairs at the request of the AFCO Committee, examines what the concept of constitutional identity means and how it has been understood in various EU Member States. It assesses the impact of this concept on the relations between the Member States and the European Union. Finally, the study evaluates how the notion of constitutional identity can play a role in future EU integration.

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