

Constitutional identity in the jurisprudence of the Court of Justice of the European Union

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ABSTRACT

Court rulings and publications on constitutional identity have spread in a sort of viral way since the entry into force of the Lisbon Treaty in 2009. Accordingly, many scholars analyse the possible sources of the term and the risks associated with its use, including the fact that opponents of constitutional democracy can use it as a great weapon, as there is no objective standard in terms of its content. In this regard two different positions can be distinguished concerning the function of the constitutional identity clause and the determination of the content elements of the constitutional identity. The first perspective looks at the notion of identity as a manifestation of Euroscepticism, according to which the identity clause is in fact a possible form of derogation under obligations deriving from European integration. In contrast, the second perspective leads to a cooperative interpretation of the concept of identity, if you like, an integration-friendly dissolution of the concept of sovereignty in a sort of post-Westphalian meaning of identity, which can be linked to the concept of ‘unity in diversity’. Accordingly, Article 4 (2) TEU allows for the articulation of individual Member State specificities and establishes a mechanism in which different Member State and supranational perspectives can be harmoniously aligned with each other. This paper looks at Article 4 (2) TEU as an embodiment of the idea of ‘cooperative constitutionalism’ having the function of a ‘valve’ and presents all the relevant cases where constitutional identity as a legal standard has been raised in front of the Court of Justice of the European Union up to 2020.

KEYWORDS

constitutional identity, national identity, judicial dialogue, CJEU

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1. INTRODUCTION

Philosophically speaking, the concept of ‘identity’ has two aspects; the first refers to sameness ($X = Y$, *idem*, *équivalence*, *Gleichheit*), while the other refers to temporal identity, selfhood ($X = X$, *ipse*, *ipséité*, *Selbstheit*).¹ While the former approach focuses on separation from others, the latter draws attention to the fact that the self can change without losing its identity. Thus, for example, a person changes over the years but when they look in the mirror, they recognize themselves, since their identity and self-consciousness are self-identical, despite the physical changes. Descartes illustrates all this with the identity of the candle and the melted candle, according to which it is not the material appearance of the thing that should be the same, but the idea of the candle.² Kantorowitz’s example, which is invoked by Zoltán Szente presenting the Hungarian doctrine of the Holy Crown,³ is the sentence ‘the king is dead, long live the king!’, which emphasizes the continuity of the kingdom – i.e., that the latter is not represented by the individual identity of the king, but by the mere idea of the king – if you like, the mystical body of the king, which is permanent.

Putting this into the context of constitutional law, one may talk about a constitution and its amendments which do or do not change the original identity of the constitutional text.⁴ Nevertheless, today if one hears the term ‘constitutional identity’, one’s first association might not be the issue of constitutional amendments and the theory of unconstitutional constitutional amendments⁵ but another connotation: the relationship structure and potential collusion between EU law and national constitutions. This issue has taken the form of a simple theoretical debate for quite long time⁶ but a few decisions of constitutional courts⁷ have given it practical relevance, which has captured the attention of the literature. It is not surprising therefore that Joseph H.H. Weiler stylishly notes in the preface to Francois-Xavier Millet’s doctoral dissertation on constitutional identity in 2012 that ‘la défense de l’identité nationale et de la spécificité constitutionnelle est, elle, à la mode’.⁸ That is to say, the discourse on national and constitutional identity is very fashionable, so to speak, and is the spirit of the age, and part of the *Zeitgeist*.⁹ Indeed, court rulings and publications on *constitutional identity* have spread in a sort of viral way since the entry into force of the Lisbon Treaty in 2009.¹⁰

¹Ricoeur (1992) 116.

²Viala (2011) 14.

³Szente (2020) 60.

⁴Sajó and Uitz (2017).

⁵Roznai (2017).

⁶Jakab and Sonnevend (2020).

⁷2 BvR 2735/14.; BVerfGE 146, 216.

⁸Millet (2013) 13.

⁹Magee (2010) 262.

¹⁰Reestman (2009) 376; Besselink (2010) 36; Dubout (2010) 451; Troper (2010) 187; von Bogdandy and Schill (2011) 1417; Bourgogue-Larsen (2011); van der Schyff (2012) 563; Millet (2013); Claes and Reestman (2015) 917; Polzin (2017) 1595; Sterck (2018) 281; Callies and van der Schyff (2019); Drinóczi (2020) 105.



As a result, many scholars have started to analyse the potential sources of the term and the risks associated with its use, including the fact that opponents of constitutional democracy can use it as a weapon,¹¹ as there is no objective standard in terms of its content. From this perspective, constitutional identity is seen as a shield or sword¹² in the hands of constitutional courts who can use or misuse¹³ it as a reservation *vis-à-vis* EU law similar to its previous archetypes: the fundamental rights reservation developed in the 1970s,¹⁴ and the *ultra vires* reservation invented in relation to the Maastricht Treaty.¹⁵

Another approach to the concept of identity is its description as a kind of elegant formulation of Westphalian sovereignty, which allows differentiation between the nation–state and post-Westphalian states. For example, Martin Belov highlights the oscillation of identity between universalism and particularism and formulates the need to deconstruct the concept of identity based on the Westphalian tradition in order to fulfil the constitutional identity’s true twenty-first century function as a point of contact between Member States [MSs] and the supranational level.¹⁶ The examination of the fulfilment of this function can be carried out by analyzing the dialogue between the Court of Justice of the European Union [CJEU] and national courts, based on the interpretative dilemmas surrounding Article 4 (2) of the Treaty on the European Union [TEU], which formulates that ‘[t]he 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.’

Therefore, this contribution aims to present the relevant cases of the CJEU and the way CJEU handles this concept doctrinally. In order to be able to determine whether CJEU is successful using the concept and neutralizing the risks associated with Art. 4 (2) TEU, the paper first analyses the formulation of the clause and the notion of national identity that could be interpreted as the European term constitutional identity. Section 3 will present the jurisprudence of the CJEU following the entry into force of the Lisbon Treaty until 2020. In this regard the study also aims at exploring the less well known cases when an argument built on Article 4(2) TEU was put forward by the litigant parties. After the previous descriptive chapter, Section 4 aims at structuring the procedural and substantive aspects of the accumulated case law, while Section 6 concludes.

2. THE CONTOURS OF ARTICLE 4 PARAGRAPH (2) TEU

The relationship structure between the MSs and EU institutions is an evergreen issue in the European Union. The concept most recently emerging as part of the dispute is the topos of constitutional identity, which represents the fundamental and ever-present tension between

¹¹Corrias (2016) 6–26.

¹²Faraguna (2017) 1617.

¹³Halmai (2018) 23.

¹⁴BVerfGE 37, 271.

¹⁵BVerfGE 89, 155.

¹⁶Belov (2020) 73.



unity and diversity. The underlying reason is that the European Union means not only market and monetary integration, but also inevitably constitutional integration, which makes it possible to integrate further policies.¹⁷ However, this specific EU constitutionalism does not lead to the nullification or replacement of the constitutional orders of MSs, but to their reinterpretation in the context of EU law. In this framework, the EU and the MSs have developed a new multi-level constitutional space¹⁸ where debates about normapluralism and the hierarchy of legal systems take place. One of the main linguistic tools or *terminus technicus* of this debate is the concept of *constitutional identity*.¹⁹

With regard to constitutional identity and the concepts associated with it (national identity, constitutional particularity, etc.), the adoption of the Treaty of Lisbon meant a *caesura*.²⁰ Besides the conceptual clarification of the relevant article in TEU,²¹ this is indicated by the increasing number of cases dealing with the identity clause: the statistics show that there were only four decisions that referred to the issue of identity before 2009, while more than twenty such cases have been closed since the entry into force of the Treaty of Lisbon. At the same time, there were seven more cases prior to the Lisbon Treaty in which the advocate generals' opinions addressed the topic, while one may observe an additional twenty similar cases after 2009.

Nevertheless, Article 4 (2) TEU does not use the term 'constitutional identity'. It operates simply with the requirement to respect 'national identity'. However, the latter concept is considered to be equivalent to the obligation to respect constitutional identity in the vast majority of the literature,²² as well as in some decisions of MSs' constitutional courts²³ and also in the opinions of advocates general.²⁴ In contrast, Elke Cloots²⁵ considers that there is no solid basis for identifying or merging these two concepts. In her view, the concept of constitutional identity is an expression of the specific sovereignty concept of the constitutional courts of the MSs, and in comparison, the need to respect national identity is based on the idea of liberal equal treatment. In her view, the enshrinement of national identity in the TEU serves to promote social justice based on the idea of equal dignity and strengthens the inclusive nature of the multi-ethnic European political community, in return for which the loyalty of the members of the political community can be expected. Consequently, according to Cloots, national identity refers to cultural (e.g., historical, linguistic) factors of national communities that appear in the text of the national constitutions.

At the same time, the CJEU has never made an equivalence between the two terms as it has never reflected on arguments built on constitutional identity. Instead, the CJEU has always

¹⁷Pernice (2009) 391–92.

¹⁸von Bogdandy (2017) 24.

¹⁹Callies and van der Schyff (2019) 3.

²⁰von Bogdandy and Schill (2011) 1417–54.

²¹CONV 375/1/02 REV 1. 12., [link1](#).

²²Simon (2011) 27.; van der Schyff (2012) 563.

²³E.g. Decision 1/2004 of the Constitutional Court of Spain, Decision K 32/09 of the Constitutional Court of Poland, Decision 22/2016 of the Constitutional Court of Hungary, Decision 62/2016 of the Constitutional Court of Belgium.

²⁴The most famous are the Opinion of Advocate General Poiares Maduro in case C-213/07 *Michaniki* and of Advocate General Yves Bot in cases C-399/11 *Melloni* and C-42/17. *M.A.S. and M.B.*

²⁵Cloots (2016) 82–83, 89–90.



attempted to circumvent such an analysis²⁶ by way of different techniques that will be discussed below. Nevertheless, such a lack of reflection leaves room for future interpretation, so the CJEU still could follow the literature in perceiving constitutional identity as the legal formulation of the concept of national identity. The main reason behind this approach is the clearer wording of the identity clause in TEU. The adopted text no longer leaves the concept of national identity without contours,²⁷ but states that it is an ‘inseparable part of’ (*inhérente* in French) the basic political and constitutional system of the MSs. This formulation of a part-whole relationship brings the notion of constitutional identity closer to the notion of national identity on the one hand, and excludes cultural and other meanings from its scope on the other hand. This vision is supported by a systematic interpretation, since Article 4 (2) TEU is preceded by Article 3 (3) TEU, which deals specifically with respect for the cultural and linguistic diversity of the Union as a separate obligation of the EU. Nevertheless, as will be presented below, the distinction is less strict in the jurisprudence of the CJEU as MSs have repeatedly invoked Article 4 (2) TEU for linguistic and cultural reasons too.

Another element of the identity clause is the use of ‘essential’ that narrows down the scope of applicability of the clause. This suggests that it is not the entire political and constitutional system that fills the content of national identity but its core, its most important provisions that may be able to do so.²⁸ This is also in line with Advocate General Maduro’s position, as presented in the *Michaniki* case. He considers that the respect for constitutional identity cannot mean that all constitutional rules are indiscriminately recognized as elements of constitutional identity, as in such case national constitutions could become instruments allowing MSs to derogate from European law in certain areas which could lead to discrimination between MSs on the basis of constitutional content defined by themselves.²⁹

As the next step of the textual analysis, it is worth referring to the word ‘arrangement’ which directs attention to structural and state organizational elements, raising the question of its applicability to constitutional values and principles. While the term ‘arrangement’ could greatly narrow the scope of the identity clause, it is noteworthy that the literature still interprets a wider range of constitutional values as part of it.³⁰ Nevertheless, the text of the clause emphasizes the importance of the sub-national levels that are protected through the principle of subsidiarity as well: Article 263 (3) TFEU empowers the Committee of the Regions to challenge EU legislative acts before the CJEU if they infringe the principle of subsidiarity.

Finally, attention should be drawn to the Union’s obligation to ‘respect’. What can this task mean? A legal obligation that allows for balancing in the event of a conflict between the legal system of the EU and that of a MS? Or can such a possibility never arise since such respect

²⁶Sometimes the CJEU simply did not answer questions that raised issues of constitutional identity – e.g. the third question raised by the Italian Constitutional Court in *C-42/17 M.A.S. and M.B.* ECLI:EU:C:2017:936 and the fifth question raised by the Federal Constitutional Court in *C-493/17 Weiss* ECLI:EU:C:2018:1000.

²⁷Article F of the Maastricht Treaty simply stated that ‘The Union shall respect the national identities of its Member States’.

²⁸In contrast, one may observe the attempt of litigant parties ‘to level up’ issues to the sphere of constitutional identity. See for example the newest petition of the Hungarian Government in front of the Constitutional Court of Hungary that presented migration and asylum policy as a matter of national identity: 32/2021. (XII.20.) CC Decision.

²⁹*C-213/07 Michaniki* AE ECLI:EU:C:2008:731. Opinion of Advocate General 33.

³⁰Preshova (2012) 274.



marks the limit of the Union's competences when, in extreme cases, a MS invokes it? Constitutional courts of some MSs have formulated their own reservations about the protection of identity in the latter sense, but the CJEU's interpretation is essentially in line with the first approach: it accepts the protection of national identity as a legitimate aim of a derogation but the invocation of Article 4 (2) TEU has to fulfil the requirement of proportionality, too.³¹

In line with this dual approach, two different positions can be distinguished regarding the function of the national identity clause and the identification of its content. The first perspective looks at the notion of identity as a potential derogation under the obligations stemming from European integration, which may also represent Euroscepticism.³² In contrast, the second perspective leads to a cooperative interpretation of the concept of identity – if you like, an integration-friendly dissolution of the concept of sovereignty within a sort of post-Westphalian meaning of identity, which can be linked to the concept of 'unity in diversity'. This means that in terms of deepening integration, the various identities of the MSs are still present in a way that must be preserved, but in most cases the functioning of the integration is otherwise not dependant on particular identities, especially because of the presence of the shared common values as expressed by Article 2 TEU.³³ At the same time, the identity clause allows the articulation of MSs individual specificities and establishes a mechanism whereby the different national and supranational perspectives can be harmoniously aligned with each other before the CJEU. Following this second approach, the next chapter presents and discusses the cases in which the identity clause has been invoked.

3. THE JURISPRUDENCE OF THE CJEU AFTER THE ENTRY INTO FORCE OF THE LISBON TREATY

3.1. a) National identity as culture-related issues

In contrast to the textual and systemic interpretation of Article 4(2) TEU, the first decision after the adoption of the Lisbon Treaty concerning national identity targeted a possible cultural aspect of the clause. The ruling was the result of an infringement proceeding against Luxembourg. According to the facts giving rise to the case, the Grand Duchy made the exercise of the profession of notary conditional on nationality and the key issue was whether such a condition was compatible with freedom of establishment under Article 43 EC and with the provisions of Council Directive 89/48/EEC of 21 December 1988 regarding a general system for the recognition of higher-education diplomas awarded on completion of professional education and training of at least three years' duration. Luxembourg argued, on the one hand, that notaries were involved in the exercise of official authority, and on the other hand that the condition of nationality was based on history, culture, tradition, and Luxembourg identity.

³¹C-473/93 *Commission v Luxembourg* ECLI:EU:C:1996:263.

³²Besselink (2010) 36.

³³The values contained in Article 2 TEU have been identified and are shared by the Member States. They define the very identity of the European Union as a common legal order. Thus, the European Union must be able to defend those values, within the limits of its powers as laid down by the Treaties'. C-156/21 *Hungary v Parliament and Council* ECLI:EU:C:2022:97 127. and C-157/21 *Poland v Parliament and Council* ECLI:EU:C:2022:98 145.



The CJEU built the reasoning of the judgment essentially on the lack of exercise of public power, but at the same time it also reflected on the invocation of the identity clause. It pointed out that ‘the preservation of the national identities of the MSs is a legitimate objective respected by the legal order of the Union, which is otherwise recognized in Article 4 (2) TEU’. That is to say, the CJEU accepted the protection of identity as a legitimate aim, but – referring to the case of *Commission v Luxembourg*³⁴ – it concluded that MSs’ interest could be protected by other means than the complete exclusion of nationals of other MSs. As a result, the identity-based defence turned out to be unsuccessful, as the objective of the national legislation could have been achieved by other, less restrictive means.

A further question referred to a preliminary ruling procedure concerned the mandatory use of a specific language in contracts of employment, which were seen as an obstacle to the right of free movement.³⁵ According to the English version of the Letter of Employment of 10 July 2004 in the case which gave rise to the question, Mr Las, a Dutch national resident in the Netherlands, was employed indefinitely as Chief Financial Officer by PSA Antwerp. The employment contract provided that the place of employment was primarily Belgium but that certain tasks had to be performed in the Netherlands.

On 7 September 2009, the contract of Mr Las was terminated with immediate effect by a letter written in English and, pursuant to Article 8 of the contract of employment, PSA Antwerp paid severance pay equal to three months’ salary and additional severance pay equal to six months’ salary. Mr Las’s lawyer stated that Article 8 of the contract of employment was void pursuant to Article 10 of the Language Regulation of 19 July 1973 as it was not drafted in the Dutch language provided for in Article 2 of that regulation. Therefore, Mr Las was entitled to a much larger amount of money from his former employer and Mr. Las applied to the Court of Appeal of Antwerp, asking it to determine the amount of severance pay to be paid to him.

With regard to the assessment of a restriction on the freedom of movement, the CJEU recalled the proportionality test according to which provisions prescribed by MSs which are liable to interfere with or make less attractive the exercise of the fundamental freedoms guaranteed by the Treaty are subject to conditions: they must pursue an objective in the public interest, have to be suitable for securing the attainment of those objectives, and should not go beyond what is necessary to attain them.

According to the CJEU, the objective of promoting and encouraging the use of the Dutch language in Belgium constituted a legitimate interest which, in principle, was capable of justifying a restriction of the obligations imposed by Article 45 TFEU. In support of this, the CJEU referred to both the EU’s obligation to respect cultural and linguistic diversity in Article 3 (3) TEU and to national identity in Article 4 (2) TEU, which includes the protection of the official national language of the MSs.³⁶ Importantly, one must note that a cultural aspect of constitutional identity came up in this decision as the CJEU relied both on Article 3 (3) TEU and Article 4 (2) TEU. Together with this, the legislation in question did not pass the test of proportionality. The CJEU stated that parties to a cross-border employment contract do not necessarily speak the official language of the MS concerned. In such a situation, the establishment of a free and

³⁴C-473/93.

³⁵C-202/11 *Anton Las és a PSA Antwerp NV* ECLI:EU:C:2013:239.

³⁶Opinion of Advocate General 26.



clear agreement between the parties requires that the parties are able to draft their contract in a language other than the official language of that MS. A less restrictive rule would have been, for example, if national law had allowed the authentic version of the contracts to be drafted in a language spoken by all the parties concerned.

With regard to the cultural aspects of constitutional identity, a case concerning a Hungarian minority group deserves special attention.³⁷ The applicants for annulment, Balázs Izsák-Árpád and Attila Dabis, together with five other persons, presented a proposal for a citizens' initiative entitled 'Cohesion Policy in favour of regional equality and the sustainability of regional cultures' to the European Commission. This was intended to change the European Union's cohesion policy in order to give priority to regions that are distinguished from those around them by national, ethnic, cultural, religious and linguistic specificities. The applicants argued that the so-called 'national minority regions' mean specific geographical areas which do not necessarily have administrative powers, but which do have communities with different ethnic, cultural, religious or linguistic characteristics from the surrounding regions. Another characteristic is that they form a majority or a significant number at a local level, although they represent only a minority at national level and have expressed their will to obtain autonomous status within a given MS.³⁸ These national minority regions are, according to the applicants, significant sources of cultural and linguistic diversity in the EU and in wider Europe.

The Commission refused to register the contested proposal, arguing that the topic fell outside of its competences. As a result, and considering the application for annulment, the General Court dealt in detail with the interpretation of Article 4 (2) TFEU and Articles 174 to 178 TFEU. It concluded that the concept of 'region' shall be defined in the light of the current political, administrative, and institutional situation of the MSs.³⁹ In contrast, it was clear from the contested proposal that national minority regions must be defined independently from the existing administrative units of the MSs. Therefore, the proposal should lead to a redefinition of the concept of 'region' of the treaties, giving national minority regions real status, regardless of the political, administrative and institutional situation in the MSs concerned. However, without prejudice to Article 4 (2) TEU, the Union legislator may not adopt such an act.

The interesting point about the case is that, similarly to the dichotomy of cultural nation and political nation,⁴⁰ it raises two different interpretations of regional identity: as a sort of bottom-up cultural approach, and as a top-down political/administrative definition established by the MS. In this regard, the General Court's interpretation confirmed the top-down, state structure basis of Article 4 (2) TEU in contrast to its possible cultural aspects,⁴¹ and contrary to the broad interpretation used in *Anton Las*, the identity clause of Article 4 (2) TEU was interpreted in opposition to the protection of cultural identity enshrined in Article 3 TEU.

³⁷T-529/13 *Izsák et al. v Commission* ECLI:EU:T:2016:282.

³⁸Szalayné (2003) 224–28.

³⁹T-529/13 *Izsák et al. v Commission* ECLI:EU:T:2016:282. 70.

⁴⁰Györi Szabó (2006) 36–40.

⁴¹Later, the decision of the General Court was annulled by the CJEU without interpreting further the concept of constitutional identity. See: C-420/16 *Izsák et al. v Commission* ECLI:EU:C:2019:177.



3.2. b) National identity as fundamental political and constitutional structures

Following the adoption of the Lisbon Treaty, the clause concerning the respect of national identities made clear reference to regional and local authorities. Perhaps this is why more and more decentralized and federal state entities have turned to the CJEU. This was the case in an action for annulment in which the subject of the original proceeding was Arbel Fauvet Rail ('AFR'), a company established in Douai, France, which manufactured industrial railway rolling stock.⁴² In 2005, AFR received two advances of EUR 1 million from the Nord-Pas de-Calais (NPDC) region and Douaisis agglomeration association (CAD), with an annual interest rate of 4.08%. This had to be repaid in half-yearly instalments over a period of three years starting from 1 January 2006. Following a complaint, the Commission informed the French Republic that it had initiated a formal investigation procedure in respect of alleged state aid and the final decision of the Commission indeed concluded that the advances granted by NPDC region and CAD constituted illegal state aid.⁴³

An action was brought before the General Court by the NPDC Region and CAD in order to annul the Commission's decision. The second plea of the petition relied – among other elements – on the breach of respect of the constitutional characteristics of the MS. As the Commission did not consult either the competent committee of NPDC Regional Council concerning the granting of aid or the President of that Regional Council responsible for implementing the aid, the applicants considered that the Commission had infringed the principles of sound administration and the respect for the constitutional characteristics of the MS in connection with the self-government of territorial communities provided for in the 1958 French Constitution.

In its decision, the General Court emphasized that territorial organizations, such as that of the applicants which had granted aid, had the same procedural rights as potential complainants in relation to the control of state aid. The General Court pointed out that it could not be ruled out that an organization below the state level would have a legal and factual status which gave it sufficient autonomy *vis-à-vis* the central government of a MS to play a key role in shaping the political and economic environment in which companies operate. However, the role of stakeholders other than the MSs concerned in the state aid control procedure is limited.⁴⁴ Such interested parties may not claim to have an adversarial dispute with the Commission which is open to that MSs only. On that basis, the argument built on the constitutional order of the particular MS was rejected by the General Court.

A similar short decision was the result of another action for annulment that was brought against Commission Decision 2010/399/EU of 15 July 2010 excluding certain agricultural subsidies.⁴⁵ In this case, the issue of constitutional identity was raised by Northern Ireland, since it sought to obtain *locus standi* before the General Court. It argued that it stemmed from the specific constitutional system of the United Kingdom that a central government without economic interests could not be expected to challenge a Commission decision, but the regional

⁴²T-267/08 and T-279/08 *Région Nord-Pas-de-Calais, Communauté d'agglomération du Douaisis v Commission* ECLI:EU:T:2011:209.

⁴³The Commission subsequently revoked its decision on the grounds that it had failed to state adequate reasons. The new decision is: C 38/2007 (ex NN 45/2007) 23 June 2010.

⁴⁴An administrative proceeding based on Article 108 (2) TFEU.

⁴⁵T-453/10 *Northern Ireland v Commission* ECLI:EU:T:2012:106.



authority with broad autonomy and appropriate incentives must do so. Yet again, the General Court did not accept this line of argumentation, since Article 263 TFEU allowed only to MSs to bring an action for annulment before the CJEU. The court also added that if it was to open up this possibility to regional or local authorities, it would call into question the institutional balance⁴⁶ laid down in the founding treaties.⁴⁷

In the same vein, another action for annulment was brought by the Brussels–Capital Region against an implementing regulation of the European Commission whereby it renewed the use of the chemical compound glyphosate as a so-called phytopharmaceutical.⁴⁸ Again, since an action for annulment can be brought only by the central governments, the applicant sought to justify the *locus standi* and the admissibility of the action by relying on the federal state structure of Belgium. In its answer, the General Court used different argumentation than in the previous two cases as it accepted that in line with the constitution of a MS a regional authority may be individually and directly concerned by a Commission decision, but added that for being concerned it is also important that the contested decision precludes the regional authority from exercising its powers. In the present case, however, the environmental competences conferred on the regional level by the Belgian Constitution were not directly affected by the contested act, since it concerned only the authorization of the chemical. In view of the lack of direct concern, the General Court dismissed the action.

In counter to the annulment proceedings, MSs may refer to their specific state structural features as a possible reason for exemption in infringement proceedings and in preliminary ruling procedures. For example, this happened when the European Commission asked the CJEU to declare that Spain had not complied with obligations under Directive 2000/60/EC establishing a framework for Community action in the field of water policy.⁴⁹ Spain argued that the transposition into national law of the obligations arising from the directive in the case of river basins within the Autonomous Communities other than Catalonia was guaranteed by an additional section at the end of Article 149 (3) of the Spanish Constitution. It follows, *inter alia*, from the additional section that, where an autonomous community in a particular area does not exercise its legislative power (or exercises it only in part), then state rules will continue to apply, in whole or in part, to matters not covered by the autonomous community. Advocate General Kokott argued, in the context of the constitutional system, that the transposition of EU law could indeed be ensured in federal states or decentralized systems through the secondary application of ‘all-state rules’. However, this secondary application must be ‘worry-free’ and the Spanish law did not meet this requirement.

In its decision, the CJEU invoked the case law of the *Tribunal Constitucional*, according to which Article 149 (3) of the Constitution did not seem to allow the complementary application of state rules in the absence of Autonomous Communities’ regulations, as it served only for closing potential legal gaps. In addition, Spain confirmed at the hearing that the Autonomous

⁴⁶See also C-417/04 P. *Regione Siciliana v Commission* ECLI:EU:C:2006:282; C-180/97. *Regione Toscana v Commission* ECLI:EU:C:1997:451.

⁴⁷The CJEU upheld the decision of the General Court; however, in this proceeding the issue of constitutional identity was not addressed. See: C-248/12 P *Northern Ireland v Commission* ECLI:EU:C:2014:137.

⁴⁸T-178/18 *Région de Bruxelles-Capitale v Commission* ECLI:EU:T:2019:130.

⁴⁹C-151/12 *Commission v Spain* ECLI:EU:C:2013:690.



Communities, with the exception of Catalonia, had not exercised their legislative powers. As a result, the CJEU found that the invocation of Article 4 (2) TEU – in the context of the Spanish state's view that the Commission had in fact sought to prescribe how the provisions in question should have been transposed – was based on a misinterpretation of the Commission's application. Therefore, according to the CJEU, there was no substantive connection between the petition and the identity clause of the TEU.

In another Spain-related infringement procedure concerning the free movement of capital in relation to the discriminatory application of taxes and levies on gifts and inheritances, the defendant Spain relied again on Article 4 (2) TEU, stating that fiscal autonomy belonged to its constitutional identity. Nevertheless, according to the CJEU, the subject matter of the case was not the determination of the competences of the MS or its autonomous communities, but the tax advantage provided for in Spanish law which could be obtained only by Spanish entities for gifting or inheriting property in Spain. This is therefore another case in which the CJEU took into account the argument based on constitutional identity in relation to organizational and state-structure specificities, but considered the invocation of the identity clause to be unfounded⁵⁰ and stated that the Spanish law-maker had restricted the free movement of capital without acceptable justification.

The following case that involved specific organizational state features was a lawsuit between the North Rhine–Westphalia State Lottery Company and the internet gambling site 'digibet.com' based in Gibraltar.⁵¹ The constitutional background of the case is that, under Articles 70 and 72 of the German Basic Law, legislation in the field of gambling falls within the competence of the German *Länder*. In 2008, the sixteen *Länder* adopted a state contract for the organization and transmission of gambling *via* the internet (*Glücksspielstaatsvertrag*), which was renewed in 2012 with the exception of Schleswig–Holstein. The latter adopted a law on the reorganization of gambling, which, in principle, permitted the advertising of public gambling on television and on the internet.

Regarding the legal context of the case, the CJEU has repeatedly classified gambling regulation in areas where there are significant moral, religious and cultural differences between MSs, and in the absence of harmonization at an EU level, it is up to each MS to assess the requirements arising from the protection of the interests concerned. This meant that the previously adopted German prohibition was evaluated as a justified restriction on the freedom to provide services under EU law.

The referring court sought to ascertain whether this proportionate and coherent nature of the restrictive rules in the main proceedings would be called into question by the fact that more permissive rules were applied in one of the constituent states between 1 January 2012 and 8 February 2013, or if the regulation in other parts of the MS would become contrary to EU law. The interesting element put forward by the parties is that Digibet relied on paragraph 61 of the judgment in *Winner Wetten*, recalling the *Internationale Handelsgesellschaft* decision according to which provisions of national law, even constitutional ones, cannot adversely affect the coherence and effectiveness of Union law.⁵² However, contrary to the raised case, which upheld

⁵⁰C-127/12 *Commission v Spain* ECLI:EU:C:2014:2130. 61.

⁵¹C-156/13 *Digibet Ltd, Gert Albers and Westdeutsche Lotterie GmbH & Co. OHG* ECLI:EU:C:2014:1756.

⁵²C-409/06 *Winner Wetten GmbH v Bürgermeisterin der Stadt Bergheim* ECLI:EU:C:2010:503. 61.



the principle of absolute primacy, the CJEU took the view that the division of competences between the Länder could not be disputed as it enjoyed the protection afforded by Article 4 (2) TEU. Consequently, the CJEU answered that EU law does not preclude common rules applied by the majority of federal units in a MS with a federal structure which, in principle, prohibit the organization and broadcasting of gambling on the internet, even though a single federal unit had adopted a more permissive rule. Such rules may comply with the principle of proportionality, which must be examined by the referring court in accordance with the principle of judicial subsidiarity.⁵³

Another German reference for a preliminary ruling in which the CJEU expressed its openness to an argument relating to constitutional identity concerned the waste management association of Hanover Region.⁵⁴ The request concerned the interpretation of a public contract as defined in Article 1 (2) (a) of Directive 2004/18/EC on the coordination of procedures for the award of public work contracts, public supply contracts, and public service contracts. The lawsuit was brought by Remondis, a trading company operating in the waste sector, since, according to the latter, the association set up by the municipalities, which had a turnover of EUR 189 020 912 in 2011, was established by a resolution of the municipalities, but later fell under the scope of a public contract as 6% of its transactions came from commercial transactions with third parties. According to Remondis, the association was in fact the recipient of irregular awards of public contracts and, as such, those must be regarded as void. In its view, the Hanover Region, which is the body responsible for waste collection, should organize a procedure for the award of a public contract should it not want to carry out this task itself.

In its reply, the CJEU first pointed out that the division of competences within a MS enjoys the protection provided for in Article 4 (2) TEU. It also added that the division of competences is not rigid, but the protection provided by Article 4 (2) TEU also applies to the reorganization of competences within a MS: ‘... as that division of competences is not fixed, the protection conferred by Article 4(2) TEU also concerns internal reorganisations of powers within a MS, as observed by the Advocate General in points 41 and 42 of his Opinion. Such reorganisations, which may take the form of reallocations of competences from one public authority to another imposed by a higher-ranking authority or voluntary transfers of competences between public authorities, have the consequence that a previously competent authority is released from or relinquishes the obligation or power to perform a given public task, whereas another authority is henceforth entrusted with that obligation or power’.⁵⁵

On this basis, the CJEU has decided that an agreement concluded between two local or regional authorities establishing a municipal association entrusted with delegated powers is not to be evaluated as a public contract. However, the delegation of power can be accepted only if the powers are accompanied by responsibilities; that is to say, the newly competent authority must have decision-making and financial autonomy, which must be examined by the referring court.

And finally, this group of cases ends with a politically sensitive one – an infringement proceeding between two MSs.⁵⁶ According to the facts, on 21 August 2009, László Sólyom,

⁵³Gyenyey (2006) 99.

⁵⁴C-51/15 *Remondis* ECLI:EU:C:2016:985.

⁵⁵C-51/15 *Remondis* ECLI:EU:C:2016:985. 41.

⁵⁶Kochenov (2015).



President of the Republic of Hungary, should have visited the Slovak Republic at the invitation of a Slovak-based social organization in order to participate at the inauguration ceremony of the statue of St. Stephen. Following several diplomatic exchanges between the embassies of the two MSs, the Slovak Ministry of Foreign Affairs issued an oral note to the Hungarian Ambassador prohibiting the President of Hungary from entering the Slovak territory.

As a consequence, Hungary initiated an infringement action against Slovakia for infringing the right of Union citizens to move and reside freely within the territory of the Member State. In response, the Slovak Republic claimed that its constitutional identity had been infringed: ‘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. In that regard, the Slovak Republic points out that Article 4(2) TEU provides that ‘the Union shall respect the equality of MSs before the Treaties as well as their national identities’ and that the principle of free movement may not, under any circumstances, lead to a change in the ambit of the EU Treaty or of the provisions of secondary legislation’.⁵⁷

Despite the presented arguments based on EU law, the CJEU circumvented the resolution on the issue, and deduced the limitation of EU law based on public international law with regard to the status of the head of state, and consequently dismissed Hungary’s action. Although the CJEU did not evaluate the objection based on the national identity clause of the TEU, it can be argued that the CJEU’s decision was in line with the Slovak side’s argument on the merits thereof, so the decision, emphasising the special status of head of states under international law, latently implied the acceptance of an objection concerning a ‘fundamental political and constitutional structure’.

3.3. c) National identity as constitutional values

Following the Lisbon reform, the very first case in which the protection of national identity arose with success was a preliminary ruling procedure concerning the interpretation of Article 21 TFEU. The case was brought before the CJEU in the context of the right to a name, and a similar issue was raised in two further cases as well.

According to the background of the first case, the plaintiff in the main proceedings was adopted by Lothar Fürst von Sayn Wittgenstein, a German national, and the former acquired the prefix ‘Fürstin von’. Later, Landeshauptmann von Wien ordered the registry office to replace the acquired surname with the simple form of ‘Sayn Wittgenstein’.⁵⁸ The reason behind this decision is that in Austria, pursuant to § 149 (1) of the Federal Constitutional Act, the Act of 3 April 1919 on the Abolition of Nobility, Secular Knights and Ladies Ranks and Certain Titles and Dignities has the force of a constitutional law and its Section 2 abolishes the right to use the nobiliary particle ‘von’. In comparison, in Germany, Article 109 of the German Imperial Constitution, adopted in Weimar on 11 August 1919, abolished all privileges based on birth or legal status, but provided that noble titles could be used as part of a surname, although they could not be re-acquired.

In addition, the Austrian Verfassungsgerichtshof delivered a judgment on 27 November 2003 in a situation similar to that represented by the claimant. Summarizing the situation of the

⁵⁷C-364/10 *Hungary v Slovakia* ECLI:EU:C:2012:630. 35.

⁵⁸C-208/09 *Ilonka Sayn-Wittgenstein and Landeshauptmann von Wien* ECLI:EU:C:2010:806.



Austrian law, the court decided that the law on the abolition of nobility together with the principle of equality prevents Austrian citizens from obtaining a surname containing a noble title. Following that judgment, the Landeshauptmann von Wien took the view that the registration of the plaintiff in the main proceedings was incorrect and therefore informed the plaintiff that it intended to correct the entry of the surname in the register. As a consequence, the plaintiff went to court, which suspended the proceeding and initiated a preliminary ruling at the CJEU. The question was whether it was contrary to the freedom of movement if the competent authorities of a MS refused to recognize the surname of an adopted child in the form prescribed in another MS because it contains a noble title which is not constitutionally permitted in that MS.

In this case, the argument related to constitutional identity proved to be significant; however, an interesting aspect of the case is that it appeared in relation to a form of a constitutional prohibition formulated for political reasons. Moreover, on the other hand the freedom of movement was invoked together with the need for the protection of fundamental rights. Accordingly, the CJEU first emphasized that the name of a person is an integral part of his or her identity and privacy, which is protected by Article 7 of the Charter of Fundamental Rights of the European Union and Article 8 of the European Convention of Human Rights. Moreover, it would amount to a ‘serious disadvantage’ that the applicant should alter a number of formal traces of her name that she was using in the given form in her current passport and driving license. In addition, there was a risk that in future she would always have to dispel any doubt resulting from the discrepancy between the corrected name in her Austrian identity documents and the name she had used in everyday life for fifteen years. Therefore, the refusal to recognize all elements of a surname might constitute a restriction of Article 21 (1) TFEU.⁵⁹

According to the case-law of the CJEU, a restriction on the free movement of persons may be justified if it is based on objective considerations and is proportionate to the objective legitimately pursued by the national law. Therefore, the central question was whether the restriction could be considered proportionate. In support of that justification, the Austrian Government argued that the restriction on Austrian nationals was justified in the light of history and by the fundamental values of the Republic of Austria and it was therefore covered by the exemption relating to public policy. Furthermore, it raised that the provisions in question did not restrict the exercise of freedom of movement beyond what was necessary to attain that objective. Supporting this line of reasoning, the Commission pointed out at the hearing that ‘in the light of Austrian constitutional history, the law on the abolition of the nobility must be considered as an element of national identity’.⁶⁰ Therefore, an assessment was required to strike a balance between the constitutional interest (namely, the removal of noble elements from the name of the plaintiff in the main proceedings), and the interest in retaining that name which had been registered in the Austrian registry for 15 years.

In line with the Commission’s reasoning, the CJEU concluded that in the light of Austrian constitutional history the Law on the Abolition of Nobility can be taken into account as an element of national identity when comparing legitimate interests with the right to free movement of persons recognized by EU law. However, besides recalling Article 4 (2), the CJEU

⁵⁹C-353/06 *Grunkin and Paul* ECLI:EU:C:2008:559.

⁶⁰C-208/09 *Ilonka Sayn-Wittgenstein and Landeshauptmann von Wien* ECLI:EU:C:2010:806. 80.



channelled the whole argumentation into the public policy clause⁶¹ and concluded that the justification for the Austrian constitutional situation should be interpreted as a reference to public policy being a fundamental public interest. In addition, it also pointed out that even the EU legal order itself seeks to ensure respect for the principle of equality as a general principle of law, which is enshrined in Article 20 of the Charter of Fundamental Rights. As a result, on the one hand it concluded that the objective of respecting the principle of equality was compatible with EU law, and on the other that the CJEU ruled that it did not seem disproportionate for a MS to prohibit its nationals from pursuing noble titles or acquire, possess, or use elements of name that are capable of giving the appearance that the bearer of the name holds such a rank. Accordingly, if the Austrian authorities refuse to recognize such elements of a name which indicate nobility, they do not go beyond what is necessary to ensure the attainment of the fundamental constitutional objective which they pursue.

The second issue concerning the right to a name was another preliminary ruling procedure in a case involving Malgožata Runevič Vardyn and his Polish spouse, Łukasz Paweł Wardyn, and the Vilnius Registry Office. The proceeding was initiated because the Registry Office refused to change the surnames and forenames of the claimants in the registration documents issued to them.⁶² According to the facts, Mr Runevič Vardyn was born in Vilnius and is a member of the Polish minority living in the Republic of Lithuania, but he has no Polish nationality, only Lithuanian. He claimed that his parents gave him the surname Runiewicz and the Polish first name Małgorzata. He lived for a time in Poland where he married Ł. P. Wardyn, the other plaintiff in the main proceedings. In the marriage certificate issued by the Vilnius Registry Office, the name Łukasz Paweł Wardyn is in the form of Lukasz Paweł Wardyn, while the name of his spouse is in the form of Malgožata Runevič Vardyn – i.e. it contains only Lithuanian letters. Therefore, Mrs. Vardyn applied to the Vilnius Registry Office to change her surname and forename in the birth certificate and in the marriage certificate. However, the Vilnius Registry Office informed Mrs. Vardyn that, under the national legislation in force, it was not possible to amend the data in the registers in question.

The constitutional root of the legal problem is related to Article 14 of the Lithuanian Constitution which states that the official language of the state is Lithuanian. Furthermore, the Lithuanian Constitutional Court ruled on 21 October 1999 that in passports, the surnames and forenames of persons must be written in accordance with the rules of spelling in the official national language in order to protect the constitutional status of the Lithuanian language. In light of the foregoing, the central issue in the case was whether it was contrary to Article 18 TFEU and Article 21 TFEU if the competent authorities of a MS refuse a change in the spelling of a person's surname and forename.

In its reply, the CJEU emphasized that the implementation of a policy aimed at protecting the national language, which is the first official language of a MS, was not contrary to the provisions of EU law.⁶³ In this context, the decision referred to Article 3 (3) TEU and Article 22 of the Charter of Fundamental Rights of the European Union which state that the Union shall respect cultural and linguistic diversity. In addition, the CJEU referred also to Article 4 (2) TEU

⁶¹Besselink (2012) 681.

⁶²C-391/09 *Runevič-Vardyn and Wardyn* ECLI:EU:C:2011:291.

⁶³C-379/87 *Groener* ECLI:EU:C:1989:599.



and stated that this clause included the protection of the official national language of that MS, too.

Consequently, the CJEU ruled that the purpose of a national legislation similar to the one in the main proceedings, which is to protect the official language by making spelling rules mandatory, constitutes a legitimate aim capable of justifying a restriction of the right to freedom of movement and residence under Article 21 TFEU, and referring to the *Sayn-Wittgenstein* case, the CJEU reiterated the application of the proportionality test.⁶⁴ However, in contrast to *Sayn-Wittgenstein*, the CJEU did not decide on the question of proportionality, but left it to the national judge to balance whether the refusal of the concrete case amounted to a ‘significantly disadvantage’ on the part of the applicants.⁶⁵

Finally, in 2016, the issue of noble titles came up again at the intersection of the free movement and the protection of constitutional identity.⁶⁶ The applicant in this case was born in Karlsruhe as Nabil Baghdad and then moved to London and acquired British nationality by naturalization. As a result of several name changes, he was registered by the Supreme Court of England and Wales as Peter Mark Emanuel Graf von Wolffersdorff Freiherr von Bogen-dorff. Later, he moved back to Germany where the registry office of the city of Karlsruhe refused to change the applicant’s first names and surnames in his birth certificate and to register the noble parts of his surname obtained in another MS. The dispute between the German authorities and the applicant turned into a lawsuit and the Amtsgericht Karlsruhe referred the case to the CJEU.

Again, the CJEU reiterated that the refusal to recognize registered names and surnames is indeed a restriction on the freedom recognized by Article 21 TFEU for all EU citizens. However, as regards the justification of the restriction, the CJEU considered that the principle of equality before the law enshrined in the third paragraph of Article 109 of the Weimar Constitution – being also a general principle of EU law – could be interpreted as a public policy objection. According to the CJEU, the principle of equality can be seen as an element of national identity referred to in Article 4 (2) TEU which may justify a restriction on the right to free movement of persons recognized by EU law. However, in comparison with the Austrian legislation analysed in *Sayn-Wittgenstein*, the German legal system does not strictly prohibit the maintenance of noble titles; it prescribes only the fact that no new titles can be granted. As a result, the CJEU reiterated its openness to the protection of constitutional identity, as it also recalled Article 4 (2) TEU as a source of justification for a public policy related exemption, and it emphasized that the authorities were not required to recognize a name change if the national court found that the restriction in question was proportionate.

As one can see, in these cases the freedom of movement was strengthened by a fundamental right (the right to a name) but it could still be proportionately limited by a derogation connected to constitutional identity. This may have been acceptable due to the fact that the derogation was backed by Articles 20 and 22 of the Charter of Fundamental Rights. That is to say, the successful invocation of Article 4 (2) did not simply have a constitutional background but also an adequate basis in European law.

⁶⁴C-391/09 *Runevič-Vardyn and Wardyn* ECLI:EU:C:2011:291. 83 and 88.

⁶⁵*Van Eijken* (2012) 816–819.

⁶⁶C-438/14 *Bogendorff von Wolffersdorff* ECLI:EU:C:2016:401.



A further reference for a preliminary ruling concerned the interpretation of Council Directive 97/81/EC of 15 December 1997 on the framework agreement on part-time work.⁶⁷ The British regulation transposing the directive prohibited the unjustified application of less favourable treatment to part-time workers. However, Article 17 of the regulation, entitled 'Persons performing judicial functions', provided that the regulation 'shall not apply to persons who are remunerated on a daily basis for the performance of a judicial function'. Meanwhile, in the United Kingdom, the number of part-time judges has increased significantly since the entry into force of the Courts Act 1971. A distinction was made between those judges who received their remuneration on a daily basis, such as recorders, and those who received a monthly salary. Their daily allowance was 1/20th of the salary of a full-time circuit judge (district judge) and, unlike full-time judges and part-time judges who receive a monthly salary, recorders were not entitled to pension at their retirement.

The reference in the present case was made in a lawsuit between DP O'Brien who was a recorder of the Crown Court from 1978 to 2005 until his retirement at the age of 65 and the Ministry of Justice. Neither Advocate General Kokott nor the referring court, and not even the parties to the main proceedings raised the issue of constitutional identity. It was the Latvian government's intervention that argued that the application of EU law to the judiciary of a MS would consist of an infringement of respect for the national identities of the MSs, and would, therefore, be contrary to Article 4 (2) TEU.

However, according to the CJEU: 'It must be held that the application (...) of Directive 97/81 and the Framework Agreement on part-time work cannot have any effect on national identity, but merely aims to extend to those judges the scope of the principle of equal treatment, which constitutes one of the objectives of those acts, and to protect them against discrimination as compared with full-time workers'.⁶⁸ Therefore, the CJEU decided that it was for the MS to decide whether judges fell under the definition of 'employed persons' according to the meaning of the directive in question, but their potential exclusion could not be arbitrary and the justificative objective reasons for the different treatment should be examined by the referring court. As a result, the CJEU reacted to the identity argument, which, however, seemed to lack any substantive connection with the merits of the case.

The next case concerned the interpretation and validity of Article 3 of Directive 98/5/EC of 16 February 1998 in relation to facilitating the practice of the profession of lawyer in MSs other than the country of qualification. In this respect, the Council of the Italian National Bar⁶⁹ turned to the CJEU. According to the facts in the main proceedings, A Torresi and P Torresi, after obtaining their university degrees in law in Italy, also obtained university degrees in law in Spain and were registered as lawyers on 1 December 2011 by the Santa Cruz de Tenerife Bar. Then the lawyers applied for registration at the Council of the Macerata Chamber, who failed to decide in time. The lawyers appealed to the Council of the National Bar Association, which considered that such a situation when a person with a law degree in one MS goes to another MS to obtain the title of lawyer with the intention to return immediately to the former MS to pursue their

⁶⁷C-393/10 *O'Brien* ECLI:EU:C:2012:110.

⁶⁸C-393/10 *O'Brien* ECLI:EU:C:2012:110. 49.

⁶⁹The eligibility of the council to initiate a preliminary ruling procedure was already established in C-55/94 *Gebhard* EU:C:1995:411.



professional activity consists an abuse of their rights. In addition, the Council of the National Bar Association also expressed its constitutional doubts in its second question referred to the CJEU, stating that the effect of Article 3 of Directive 98/5 was capable of circumventing Article 33(5) of the Italian Constitution, under which access to the profession of lawyer was dependent on having successfully passed a state examination. Consequently, the provision of the Directive is contrary to Article 4(2) TEU and should therefore be held to be invalid.

In its reply, the CJEU pointed out that the contested provision of the Directive merely regulated the right of establishment when it allowed nationals of one MS who had obtained the profession of lawyer in another MS to practice legal profession in the MS of their nationality. According to the CJEU, such an opportunity does not constitute an abusive exercise of the freedom of establishment and this possibility of establishment ‘shall in no way affect the fundamental political and constitutional order or functions of the host MS within the meaning of Article 4 (2) TFEU’.⁷⁰ As a result, the CJEU again took into account the context in which a reference was made to a constitutional rule and considered the invocation of the identity clause to be unfounded in substance.

Furthermore, two cases initiated by the German Federal Constitutional Court concerning the competences of the European Central Bank (ECB) should be mentioned. The first case concerned the validity of the Governing Council’s decisions of 6 September 2012 in relation to certain technical features of final securities transactions in the secondary market for Eurosystem government bonds (OMT decisions).⁷¹ What is relevant to the topic of the present article is that the initiators of the main proceedings argued in part that the OMT decisions constituted an *ultra vires* act, as they did not fall within the ECB’s competence and infringed Article 123 TFEU, which prohibits monetary financing, and that the decisions violated the principle of democracy enshrined in the German Basic Law and also the German constitutional identity. Out of the two pillars, however, the German Constitutional Court addressed only the issue of competences, the *ultra vires* pillar, in the questions referred, and accordingly, the CJEU judgment did not deal with the issue of constitutional identity.

Nor did the second reference of the Federal Constitutional Court bring one closer to the European understanding of the issue of constitutional identity. The purpose of this request was the validity of Decision (EU) 2015/774 of the European Central Bank of 4 March 2015 concerning a program for the purchase of public sector assets on the secondary market, as amended by European Central Bank Decision (EU) 2017/100 of 11 January 2017, and the interpretation of Article 4 (2) TFEU and Articles 123 and 125 TFEU. In the course of the constitutional complaint procedure, the Constitutional Court referred five questions to the CJEU, the fifth of which addressed the issue of constitutional identity in addition to four questions focusing on *ultra vires* issues. Accordingly, the CJEU should have answered whether potentially unrestricted risk-sharing between the National Central Banks of the Eurosystem was contrary to Articles 123 and 125 TFEU and Article 4 (2) TEU.⁷²

Nevertheless, the CJEU avoided answering this question by declaring it inadmissible because it assessed the question as being hypothetical in the light of the facts of the case and, if it

⁷⁰C-58/13 *Torresi* ECLI:EU:C:2014:2088. 58.

⁷¹C-62/14 *Gauweiler* et al. ECLI:EU:C:2015:400.

⁷²C-493/17 *Weiss* et al. ECLI:EU:C:2018:1000. 16.



answered, it would go beyond its powers and would be giving an advisory opinion. Ironically, despite the self-restrained analysis of its competences, this was the decision of the CJEU that was finally overturned by the Federal Constitutional Court, which stated that the interpretation given by the CJEU constituted an *ultra vires* act.⁷³

Finally, one of the most important preliminary ruling proceedings on constitutional issues was initiated by the Romanian Constitutional Court concerning the interpretation of the concept of ‘member of the family’ of Directive 2004/38/EC of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the MSs.

According to the facts of the case, R A Coman, a Romanian and American citizen, settled in Brussels where he married an American citizen, R C Hamilton. In December 2012, they contacted the Romanian General Inspectorate for information on obtaining a legal residence permit for R C Hamilton in Romania for more than three months, the latter being a family member of R A Coman. The Inspectorate informed them that Hamilton had only a three-month-long right of residence because the Romanian state did not recognize the same-sex marriage under the Romanian Civil Code. Subsequently, Coman and others brought an action against the General Inspectorate before the Fifth District Court, Bucharest for a declaration that the discrimination on grounds of sexual orientation constituted an obstacle to freedom of movement within the EU, and they asked to order the General Inspectorate to put an end to this discrimination and to pay them compensation for nonpecuniary damages. In the course of the dispute, Coman filed also an objection of unconstitutionality against Article 277 (2) and (4) of the Civil Code, and the Fifth District Court of Bucharest sent the matter to the constitutional court which referred the case to the CJEU.

Above all, the CJEU acknowledged that marital status, which includes the rules about marriage, belongs to the competence of MSs, and MSs enjoy freedom whether they acknowledge same-sex marriage or not.⁷⁴ However, in exercising that power, MSs must comply with EU law, in particular with the provisions of the Treaty relating to the right of all citizens of the Union to move and reside freely within the territory of the MSs.⁷⁵

The Latvian Government intervened in the proceedings before the CJEU, and submitted its opinion stating that even if a refusal to recognize a same-sex marriage in another MS constitutes a restriction under Article 21 TFEU, such a restriction may be justified on the grounds of public policy or respect for national identity in line with the meaning of Article 4 (2) TEU. In view of this, the CJEU separated the obligation of a MS to recognize a marriage concluded in another MS in accordance with its legal order and the exercise of those persons’ rights under EU law from the issue concerning the definition of the institution of marriage provided by the national law of a MS. As CJEU put it, the obligation to recognize the former ‘does not require that MS to provide, in its national law, for the institution of marriage between persons of the same sex. [...] Accordingly, an obligation to recognise such marriages for the sole purpose of granting a derived right of residence to a third-country national does not undermine the national identity or pose a threat to the public policy of the MS concerned’.⁷⁶

⁷³Baraggia and Martinico (2020). Garner (2020). Dani et al. (2020).

⁷⁴C-673/16 *Coman* et al. ECLI:EU:C:2018:385. 37.

⁷⁵Sulyok (2018) 117.

⁷⁶C-673/16 *Coman* et al. ECLI:EU:C:2018:385. 45–46.



The most interesting feature of this decision is that CJEU made a comment regarding the possible justification of the public policy clause in light of the fundamental rights. Accordingly, a national measure which constitutes an obstacle to the free movement of persons could be justified only if it complied with the fundamental rights guaranteed by the Charter of the Fundamental Rights as interpreted according to the European Convention of Human Rights. Nevertheless, according to the case law of the European Court of Human Rights, a relationship maintained by a homosexual couple falls indeed under the same title of ‘private life’ and ‘family life’ as a relationship between a heterosexual couple in a similar situation. It follows from all this that fundamental rights delimit public policy grounds and references to constitutional identity when they are invoked as possible grounds for derogation under EU law. Importantly, this interpretation is in line with the *Sayn-Wittgenstein* and *Vardyn/Wardyn* cases, where the competing interests seemed to have the opposite structure: the freedom of movement strengthened by a fundamental right (right to a name) was proportionately limited by reference to public interest and Article 4 (2) TEU. Following the logic of *Coman*, this could have been concluded due to the fact that in those cases the derogation was supported by general principles of European law and articles of the Charter of Fundamental Rights; namely, by the principle of equality and the right to cultural, religious, and linguistic diversity.

3.4. d) National identity as a reference point for interpretation

One of the most recent decisions on the subject presented a new aspect of Article 4 (2) TEU. This reference for preliminary ruling concerned the interpretation of Council Directive 2001/23/EC of 12 March 2001 on the approximation of the laws of the MSs relating to the safeguarding of employees’ rights in the event of transfers of undertakings, businesses, or parts of undertakings. The reference was made in the course of the proceeding between Cátia Correia Moreira and the Municipality of Portimão, Portugal concerning the lawfulness of the termination of an employment contract.

According to the facts, Moreira entered into several successive service contracts with Portimão Urbis, the termination of which and the conditions for its liquidation were decided by the municipality of Portimão on 15 October 2014. Some of the activities of the company were outsourced to the municipality, while other activities were outsourced to another municipal company. For the latter, all the rights previously linked to the employment contracts concluded by Portimão Urbis remained in force, but the employees who were included in the internalisation plan were informed that they would have to engage in competition. Following this, and despite Moreira finishing at the top of the list, she was notified that her salary would be lower than she had received at Portimão Urbis, which she did not accept. As a consequence, she was notified on 26 April 2017 that her employment contract would be terminated due to company closure.

In its preliminary ruling request, the court invoked Article 4 (2) TEU, which appeared in the operative part of the judgment for the first time in the case-law of the CJEU. That is to say, in the answer the CJEU recalled that ‘it should be pointed out that, in an area where MSs have transferred competence to the Union, such as the matter of safeguarding employees’ rights in the event of transfers of undertakings, that provision cannot be interpreted so as to deprive a worker of the protection granted to her by the Union law in force in that area’.⁷⁷ Therefore, the CJEU

⁷⁷ C-317/18 *Correia Moreira* ECLI:EU:C:2019:499. 62.



took the view that Directive 2001/23, in the context of Article 4 (2) TEU, must be interpreted as precluding national legislation which, in the event of a transfer within the meaning of the directive, requires the workers concerned to take part in a competitive process and to establish a new legal relationship with the beneficiary municipality.

3.5. e) National identity as a decorative argument

As can be seen, there have already been quite a few cases that raised to some extent the interpretation of Article 4 (2) since the adoption of the Treaty of Lisbon. In this context, there was also a case when a MS invoked a breach of Article 4 (2) TEU on a purely incidental basis. Such redundancy is to be found in the action for annulment brought by the Italian Republic against a note issued by the European Commission by which the European Commission notified the Italian Republic of the automatic withdrawal of European Regional Development Fund (ERDF) commitments under the Italy-Malta cross-border cooperation program 2007–2013 starting from 31 December 2013.

The second plea in the petition referred to the need to respect constitutional identity, but it did so only as a reinforcing argument concerning the principle of partnership enshrined in Article 11 of Council Regulation (EC) No 1083/2006 of 11 July 2006 laying down the general provisions on the European Regional Development Fund, the European Social Fund, and the Cohesion Fund and repealing Regulation (EC) No 1260/1999.⁷⁸ However, the essence of the argument simply complained about the delay of the European Commission, so the inclusion of the constitutional identity argument had a purely decorative function.

4. THE PROCEDURAL AND SUBSTANTIVE ASPECTS OF ARTICLE 4 (2) TEU

Based on the cases discussed here, several conclusions can be drawn concerning the interpretation of the identity clause in Luxembourg. First of all, certain areas can be detected that fall under the concept of identity and these typically include cultural elements, issues of state organization, constitutional principles, values of paramount importance, and fundamental rights. Typical topics within these broad categories are territorial and municipal issues, the right to a name, the protection of the national language, and so on.⁷⁹ Nevertheless, it can also be observed that most of the cases where MSs invoked Article 4(2) do not seem as significant cases as one would have anticipated them. In this regard, one's preliminary expectations are influenced by constitutional identity reservations developed by constitutional courts that are capable to endanger the unity of European law.

Nevertheless, it is probably this inherent risk or potential threat of the concept that shapes the general attitude of the CJEU to be rather reluctant about the interpretation of the identity clause. This is well illustrated by the fact that the CJEU has so far refused to answer important questions related to identity conflicts that were articulated by constitutional courts (e.g. the fifth

⁷⁸T-770/14 *Italy v Commission* ECLI:EU:T:2016:440. 57.

⁷⁹Some additional topics appeared in the pre-Lisbon jurisprudence of CJEU or were raised in the opinions of advocates general, such as the denial of citizenship, questions about the European Arrest Warrant, the concept of marriage, Church regulation, and specific constitutional principles such as civil service and secularism.



Case	Type of proceeding	Reference to Article 4 (2) TEU						
		Decorative function on the part of the MS	Not admissible	Unfounded	Decorative function in the CJEU ruling	Decision on merit, CJEU resolved the conflict	Decision on merit but CJEU left the balancing to national-level courts	Successful referencing of Art 4 (2)
C-51/08 Commission v Luxembourg	I				X			
T-267/08 and T-279/08 Région Nord-Pas-de-Calais	A		X					
C-208/09 Sayn-Wittgenstein	PRP					X		X
C-391/09 Runevič-Vardyn	PRP						X	X
C-364/10 Hungary v Slovakia	I							X
C-393/10 O'Brien	PRP			X				
T-453/10 Northern Ireland	A		X					

(continued)





Continued

Case	Type of proceeding	Reference to Article 4 (2) TEU						
		Decorative function on the part of the MS	Not admissible	Unfounded	Decorative function in the CJEU ruling	Decision on merit, CJEU resolved the conflict	Decision on merit but CJEU left the balancing to national-level courts	Successful referencing of Art 4 (2)
C-202/11 Anton Las	PRP					X		
C-151/12 Commission v Spain	I			X				
C-127/12 Commission v Spain	I			X				
C-58/13 Torresi	PRP			X				
C-156/13 Digibet	PRP					X		X
T-529/13 Izsák et al.	A					X		X
C-438/14 Bogendorff von Wolffersdorff	PRP						X	X
T-770/14 Italy v Commission	A	X						
C-51/15 Remondis	PRP						X	X

(continued)

Continued

Case	Type of proceeding	Reference to Article 4 (2) TEU						
		Decorative function on the part of the MS	Not admissible	Unfounded	Decorative function in the CJEU ruling	Decision on merit, CJEU resolved the conflict	Decision on merit but CJEU left the balancing to national-level courts	Successful referencing of Art 4 (2)
C-673/16 Coman et al.	PRP			X				
C-493/17 Weiss et al.	PRP		X					
T-178/18 Brussels	A		X					
C-317/18 Correia Moreira	PRP					X		X

Summary table of Article 4 (2) TEU cases following Lisbon (PRP: preliminary ruling procedure; I: infringement procedure; A: action for annulment).



question in *Weiss*, the third question in *M.A.S.*)⁸⁰ In other cases, one may observe that the reasoning of many judgments has been based on a different legal basis (typically on public policy such as in *Sayn-Wittgenstein*) where the CJEU already has a well-established jurisprudence. In most of these decisions, any references to the identity clause play only a secondary role. Nevertheless, counter to this self-restrained position, a new function has been added to Article 4 (2) TEU in *Moreira* as the CJEU interpreted a provision of a directive in the light of the identity clause. In addition, in *Digibet*, Article 4 (2) TEU was confronted with the principle of primacy as confirmed in *Winner Wetten*, and the CJEU decided to resolve the conflict in favour of the former.

It should be noted that, despite CJEU's reluctance to interpret the identity clause, the reference to constitutional identity has often proved to be a successful strategy. It was relatively soon made clear in a case related to the teaching staff in Luxembourg (C-473/93) that CJEU would accept a reliance on the protection of identity as a legitimate aim for limiting EU law. In that specific case, the reference was not successful but other cases, explicitly or implicitly, ended with the acceptance of the constitutional claims of MSs. From among the 'explicit' successes one may list the importance of local government associations in *Remondis*, the constitutional prohibition of nobility titles in *Sayn-Wittgenstein*, and the protection of the national language in *Vardyn*. Of the 'implicit' successes, first the *M.A.S.* case should be highlighted, whereby the CJEU overruled its previous decision due to an argument based on the protection of the Italian constitutional identity.

Furthermore, one can list some other cases when the CJEU did not address the interpretation of the identity clause but when the final ruling was in favour of those arguments which were supported by making a reference to the identity clause, such as *Tjebbes* on the determination of the composition of the national community,⁸¹ *Samira Achbita* on the admissibility of the French principle of legality,⁸² the protection of the linguistic diversity of the EU on EU job applications⁸³ and the issue of the revocation of *Brexit*, when the argument related to constitutional identity was essentially absorbed by the reference to sovereignty.⁸⁴

In contrast, the reference to Article 4 (2) TEU was not accepted in some other occasions. On the one hand, the CJEU sometimes rejected the identity-based argument as part of the proportionality test. Thus, the restriction based on the nationality condition of the notarial posts in Luxembourg (C-51/08) and the language condition of contracts in *Anton Las* proved to be disproportionate. On the other hand, it sometimes turned out that either concepts of identity under national and EU law could be different, or MSs simply attempted to present an irrelevant issue as a matter of constitutional identity. Accordingly, the reference to constitutional identity was not convincing in substance in the following cases: in relation to the pension rights of part-time British judges (*O'Brien*), in the correct implementation of the Water Framework Directive (C-51/12), concerning the resettlement of lawyers under EU law (*Torresi*), regarding Spanish gift

⁸⁰C-42/17. *M.A.S. and M.B.* ECLI:EU:C:2017:936.

⁸¹C-221/17 *M. G. Tjebbes, G. J. M. Koopman, E. Saleh Abady, L. Duboux v Minister van Buitenlandse Zaken* ECLI:EU:C:2019:189.

⁸²C-157/15 *Samira Achbita* ECLI:EU:C:2017:203.

⁸³C-566/10 P *Italy v Commission* ECLI:EU:C:2012:752.

⁸⁴C-621/18 *Wightman* ECLI:EU:C:2018:999.



and inheritance taxes and duties (C-127/12), and the recognition of the right of free movement of same-sex couples (*Coman*).

Nevertheless, it must be emphasized that in order for the CJEU to address the issue of identity in a meaningful way, it is necessary that the parties of the proceedings articulate their position on that matter and invoke Article 4 (2) TEU. The role of national governments and national judges, including constitutional courts, in this regard is not negligible, which is also linked to the type of proceedings before the CJEU.⁸⁵

Thus, in the case of infringement proceedings,⁸⁶ reference to Article 4(2) TEU seems to be a plausible argument since governments can invoke it as a defensive argument or as a *shield*.⁸⁷ The success of such an invocation can also be approached from the perspective of the potential legal consequences of the different procedures, and in the case of a successful infringement proceeding, it may result in not being condemned for a breach of EU law by the CJEU.

In the case of an action for annulment, the situation is similar, but in the opposite direction: the validity of an EU act can be challenged by the applicant on the grounds of breaching the identity clause whereby the clause has a *sword* function. Here, the stakes may be great, especially if a MS wishes to achieve the annulment of a regulation or a directive applicable to all MSs that could have been adopted under ordinary legislative procedure against the will of the petitioner MS. This would mean that the constitutional objection of a single MS would affect all other MSs in a similar way as a veto right. In such a case, perhaps the most adequate solution would be the prohibition of the application of the impugned EU legislative act in a given MS; however, this would lead to the fragmentation of the unity of EU law and would also go against another element of Article 4(2) TEU, the equality of Member States.

Interestingly, one may identify a special group of cases within this category where litigants have relied on the protection of constitutional identity for procedural reasons. As such, the reference to constitutional identity was made in favour of *locus standi* in several actions for annulment. It was cited by Nord Pas de Calais (T-267/08), Northern Ireland (T-453/10), and Brussels Capital Region (T-178/18). Nothing new under the sun: similar references to constitutional identity had already appeared as an argument for admissibility in earlier cases, i.e. against legal acts of Eurojust,⁸⁸ and in another case where the judicial character of the *Umweltsenat* (an independent environmental tribunal) was at stake.⁸⁹

Furthermore, preliminary ruling procedures are of particular importance given the fact that most of the successful invocations of the protection of constitutional identity can be detected in this procedure. It provides a forum for judicial dialogue between the national courts and the CJEU where legal arguments are channelled into a reasoned discourse. Accordingly, it is primarily the requesting court that can expose the violation of constitutional identity. Here, the issue of constitutional identity can gain importance in two ways. On the one hand, it could theoretically justify a lower level of protection; that is to say, a derogation respecting the

⁸⁵Millet (2018) 836.

⁸⁶Schütze (2018) 192.

⁸⁷Konstadinides (2011) 195.

⁸⁸C-160/03 *Spain v Eurojust* ECLI:EU:C:2005:168.

⁸⁹C-205/08 *Umweltanwalt von Kärnten and Alpe Adria Energia SpA* ECLI:EU:C:2009:767.



principle of proportionality,⁹⁰ in accordance with Article 52 (1) of the Charter of Fundamental Rights. In this regard, it is the national judges who are typically entitled to carry out the proportionality test because they are best placed to evaluate the national environment and to interpret national law, including constitutional rules, as one could already learn from *Omega*.⁹¹ Nevertheless one may also observe that in some cases CJEU itself has determined whether a restriction based on constitutional identity has been proportionate (e.g. *Sayn-Wittgenstein*).

On the other hand, the identity clause could theoretically provide an even higher level of protection within the margin of appreciation of a MS in accordance with Article 53 of the Charter. However, the *Melloni* doctrine – focusing on the possibility of a higher level of protection of fundamental rights by the different MSs – seems to hinder such an outcome. In this case, the CJEU's response was the trinity of primacy, unity, and effectiveness, given that MSs had taken harmonization measures in a certain area and had adopted clear and precise rules which precluded the approach laid down in Article 53 of the Charter.⁹²

From among the referring courts, constitutional courts are of particular importance. This is why it is not by accident that in some cases (e.g. *Weiss*)⁹³ the CJEU chose the technique of remaining silent on the topic, and in other cases, where appropriate, awarded decisive importance to the interpretations given by the constitutional courts such as in C-151/12 *Commission v Spain*. Another significant example is *Sayn-Wittgenstein*, where it does not seem to be convincing enough that the republican form of government was the reason why the CJEU found the total ban on titles of nobility proportionate. It surely contributed to this conclusion that the CJEU did not want to go against the previously delivered decision of the constitutional court. In addition, constitutional courts are particularly important for another reason that can be seen from a well-known case decided prior to Lisbon: the *M.A.S.* case, which proves⁹⁴ that constitutional courts can provide convincing arguments for CJEU which signals their function as being best placed to elaborate the MSs' constitutional identity at the highest level of expertise.

5. CONCLUSION: NATIONAL IDENTITY AS A FUNCTIONING LEGAL STANDARD?

The principle of primacy and effectiveness must also apply to Article 4 (2) TEU. Consequently, the notion of national identity in Article 4 (2) TEU could functionally become the embodiment of the idea of 'cooperative constitutionalism'⁹⁵ that allows the various constitutional claims to be weighed against each other. Within this framework, the national identity clause can be

⁹⁰de Búrca (1993) 105.

⁹¹C-36/02 *Omega* ECLI:EU:C:2004:614.

⁹²However, another decision of the German Federal Constitutional Court of December 2015 interpreting the right to human dignity as an element of constitutional identity can be regarded as a response to this ruling of the CJEU, which actually pushed the CJEU to correct the *Melloni* doctrine in the *Aranyosi and Căldăraru* judgment delivered in April 2016. See: Perez (2014) 311–315.; Hong (2016) 560–63.

⁹³Dicosola et al. (2015) 1318.

⁹⁴Rauchegger (2018) 1542–43.

⁹⁵Schütze (2009) 346.



interpreted as a new legal standard which seeks to reduce the difficulties arising from the principal-agent situation of the Member States and EU institutions⁹⁶ by formulating an equilibrant requirement that moderates the idea of an ever closer Union.⁹⁷ As a result, the central role of the Court of Justice of the European Union has to be emphasised as its proceedings have the role of maintaining the smooth functioning of the whole European structure.⁹⁸

In this construction, the legal procedures in front of the CJEU concerning the protection of constitutional identity have the function of a *valve*, which promises real success, as evidenced by the fact that CJEU indeed accepts the protection of national constitutional claims as a legitimate aim and MSs have relied on Article 4 (2) TEU with success many times. Furthermore, especially in light of Brexit and similar concepts as *Polexit*,⁹⁹ Article 4 (2) TEU could have an elementary function in the context of the *exit-voice-loyalty* trinity formulated by Albert O. Hirschman.¹⁰⁰ In the case of membership in an international organization, there are strong arguments for not giving up membership but for creating various channels so that the organization we deem dysfunctional can be remedied and the different interests expressed and, where possible, asserted. Even though the voice strategy requires a lot of energy and direct action, there may be an even higher cost to exiting, and loyalty also pushes stakeholders in the direction of favouring voice strategies. This loyalty *vis-à-vis* the EU is not simply the loyalty clause enshrined in Article 4 (3) TEU but a European affection, or if you like, a sense of European identity.¹⁰¹ This is expressed in the constitutions of the MSs which formulate the contribution to the peaceful coexistence of Europe, or even more strongly, the creation of a ‘European unity’ as a state objective.¹⁰²

For this dialogue to work smoothly it is necessary that constitutional courts make use of the preliminary ruling procedure whenever they face a case they consider to be related to constitutional identity. In this regard, more and more CCs have already referred questions to the CJEU¹⁰³ but it is still not a prevalent practice.¹⁰⁴ Furthermore, institutionalizing the opportunity of the constitutional courts to express their opinion is imaginable – e.g. through allowing national constitutional courts to submit observations to the CJEU,¹⁰⁵ and *vice versa*: it would be conceivable to make it possible for the CJEU to seek clarification from the constitutional courts

⁹⁶Orban (2021) 61–90.

⁹⁷Somek and Rendl (2019).

⁹⁸Azoulai and Dehousse (2012) 354.

⁹⁹Bieñ-Kacala (2020).

¹⁰⁰Hirschman (1970).

¹⁰¹Sarmiento (2012) 338.

¹⁰²Decision 2004–496 DC of the Conseil constitutionnel; Decision 2/2019. (III. 5.) of the Constitutional Court of Hungary quoting the German term ‘Europafreundlichkeit’.

¹⁰³Dicosola et al. (2015) 1318.

¹⁰⁴E.g. the Constitutional Court of Hungary has simply suspended its proceedings due to parallel proceedings before the CJEU instead of initiating its own preliminary ruling procedures: 3198/2018. (VI.21.) CC Order, 3199/2018. (VI.21.) CC Order, 3200/2018. (VI.21.) CC Order, 3220/2018. (VII.2.) CC Order.

¹⁰⁵Unsuccessful inquiry happened in case C-399/09. *Landtová* (ECLI:EU:C:2011:415) by the Constitutional Court of the Czech Republic and recently by the Constitutional Court of Romania in C-379/19.



about specific cases when constitutional issues arise, which would assure the CJEU that it can decide the relevant case as a final arbiter having all potential sources of information.

Nevertheless, to make national identity a workable and viable standard¹⁰⁶ of EU law, a robust interpretation given by the CJEU would be essential. In this regard, the CJEU should not be reluctant as it has a strong interpretative toolkit that can be used to accommodate the identity clause: besides the proportionality test, the CJEU can rely on the equality of the Member States that is also part of Article 4 (2) TEU. Furthermore, fundamental rights shall be emphasised as being a limit to constitutional identity claims, as one could observe in *Coman*, and this function of fundamental rights can be extrapolated to the entire value catalogue enshrined in Article 2 TEU. In this respect, bundling Articles 2 and 49 TEU in *Repubblika* was a remarkable step.¹⁰⁷

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¹⁰⁶Kaplow (1992) 586.

¹⁰⁷C-896/19 *Repubblika* ECLI:EU:C:2021:311. Kochenov and Dimitrovs (2021).



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Link1: CONV 375/1/02 REV 1. 12. <<http://european-convention.europa.eu/pdf/reg/en/02/cv00/cv00375-re01.en02.pdf>> accessed 15 September 2021.

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