National Constitutional Identities and the Legitimacy of the European Union – Two Sides of the European Coin

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A. Introduction

From today's perspective it seems that the original purpose of European integration – the establishment of peace on the continent – has been successfully implemented; there is another objective however that has become ever more important. Given the intensity of economic cooperation, a broader vision of Europe is required today,

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rooted in the human and cultural.[1] Even though it seems that over time the perception of European integration has shifted "from something that Europe does to something that Europe is",[2] the social togetherness, solidarity and tolerance among the peoples and the objective to create an ever closer union among them has turned out to be crucial.

The financial crisis could have served as an opportunity to make people aware of their fateful common bond and the need for solidarity in difficult times;[3] it became obvious however that the persistent failure to realise solidarity among European citizens and their lacking identification with the European idea are finally hindering further integration. Thus, the limits to economic integration are rooted in a lack of corresponding social cohesion. There are consistent and apparently insufficient efforts to establish a feeling of togetherness, solidarity and tolerance, to deepen mutual understanding, develop a sense of European identity and thus to create a transnational political space that is essential for a working democracy. The core strategy is the implementation of European citizenship and the associated rights, a broad understanding of which is certainly needed to make people identify themselves with the EU. At the same time it is obvious that the current Treaties do neither envisage the establishment of a European people, a *demos*, nor do they provide for an institutional framework that allows for effective participation and thus establish a real *sui generis* democratic system. Thus, today's Union still largely relies on the democratic resources of its member states rather than being able to draw on its own.[4] Democratic participation on the national level likewise requires identification by the citizens however. Constitutions, reflecting democratically legitimated fundamental choices of a people, typically express national identity and thus form substantial reference points for identification. It is therefore assumed that constitutional identity is prerequisite for democratic participation. Intensified cooperation on a supranational level while at the same time preserving national particularities should enable citizens to identify with the respective national political community on the one hand and the supranational political community on the other; this duality is crucial for the establishment of a real European identity and the legitimacy of the EU.

Free movement however, seen as a means to realise a European identity, increasingly conflicts with and undermines national constitutional choices and thus national identities by enabling EU citizens to pick and choose among the various legal systems. In this context, fundamental rights are of particular importance. Even though today the member states are bound by an increasing number of EU rights, they still have con-

1 Cf. *Weiler*, Integration through fear – Editorial, EJIL 23/2012, p. 2.
2 See ibid.
3 In this context cf. the concept of risk society *Beck*, German Europe, 2013.
4 Cf. *Weiler*, Democracy and Limits of EU competence, speech at the European Parliament on 4/10/2012, www.europarl.europa.eu/document/activities/cont/201210/20121003ATT52863/20121003ATT52863EN.pdf (9/9/2015), p. 31 et seq. Of course, there are also institutional reasons for the democratic deficit. On the link between the democratic deficit and the lack of a European identity see *Kumm/Ferreres Comella*, The Future of Constitutional Conflict in the European Union: Constitutional Supremacy after the Constitutional Treaty, JMWP 5/04, p. 19 et seq.

siderable freedom to shape their own systems of fundamental rights protection. Varying policies regarding the legality of abortions, gay marriage, assisted suicide and surrogacy reveal that there is room for diversity. Likewise the ECtHR that – by means of its margin of appreciation doctrine – strives to preserve diversity in human rights protection in Europe, it is crucial for the EU to safeguard that very diversity too by allowing for varying national preferences regarding the values attached to specific rights. Thus, for an effective realisation of free movement it is in the interest of the EU to find a proper balance between the internal market rationale, requiring a certain level of uniformity on the one hand and the rationale of safeguarding the diversity of constitutional identities on the other.

The specific form of constitutional pluralism that is at the heart of the EU today, finds its normative expression in Article 4(2) TEU, according to which the EU has to respect the identity of the member states

> "inherent in their fundamental structures, political and constitutional".

Thus, regardless of common stereotypes like the German *Oktoberfest*, Austrian *Sacher* Cake and Spanish bullfights, at the latest since the Treaty of Lisbon has substantially reframed the so called "identity clause" and subjected it to the jurisdiction of the CJEU, national identity has evolved to a concept of EU law. The operation of Article 4(2) TEU and the question whether its applicability is triggered first and foremost either by national or by EU law has given rise to controversal discussions; even though the provision is part of the *acquis*, it still requires interpretation of the core of the member states' constitutional arrangements.

It is suggested that the identity clause has the potential to operate in a way that establishes identification with the EU on the one hand and with the member states on the other not as mutually precluding concepts. Article 4(2) TEU is seen as a means to safeguard constitutional pluralism by judicial means that gives new impetus for the cooperation among the national and the supranational level. Hence, an institutionalised decision making process is proposed that triggers the process of constitutionalisation in the EU. This understanding of the provision could strengthen the EU by a clear commitment to its legal pluralist foundation and unwind the ever-lasting discussion on the EU's democratic deficit.

To start with, the relevance of identity for individuals and political communities is analysed. Thereby the constitutional aspects of identity are described and contextualised with their significance for democratic processes. After having established a link between identity and constitutionalism, the objective of the second part is to assess more specifically what is covered by national constitutional identity for the purpose of Article 4(2) TEU. Given the plurality of constitutional systems in the EU, it is assumed that there are several layers of (constitutional) identity in place. By taking a closer look at the interrelation between these layers and their demarcation, the concept of national constitutional identity is further substantiated. Special attention is paid to the question, to what extent human rights form part of this identity; thus, the so-called "*Günstigkeitsklausel*" of the Charter and its relation to the identity clause are of particular interest. Following an overview of the relevant case-law of the CJEU, the third

part of the present contribution is devoted to an assessment of potential legal consequences to be drawn from Article 4(2) TEU. Finally, a proposal is presented that could help to operate Article 4(2) TEU in a way that serves both, the EU as well as the member states.

B. Identity and constitutionalism

I. Individual, shared and collective identities

Article 4(2) TEU sets forth 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".

The provision however does not specify what is covered by the concept of constitutional identity and where to draw the line between the identity of the constitution and the identity of the people.[5] Hence, for a conceptualisation of "constitutional identity", a closer look is taken at three different categories of identity, namely individual, shared and collective identities.

When asking individuals what they associate with "identity", the answer typically comprises at least some of the following criteria: origin, character, faith, family, education, sexual orientation, political attitude and profession.[6] Thus, from the perspective of the individual, identity is associated with preferences for particular values, specific characteristics and choices that make a person. It is linked to emotional bonds and experiences in a familial, communal or national context and is unique to each person. In part, these identities are shared by (or common to) a group of individuals and as such foundational for the development of a collective identity of a political community. Thus, the collective identity of a state is based on the shared (or common) identity of a society, imprinted by factors such as a common culture, history or religion, and evolves from the togetherness of a collectivity of individuals over time. Ideally, the political community has agreed on a specific legal arrangement that constitutes an identificational reference point for the individual. Apart from democratic motives, collective identities are necessary to reduce social conflicts and for the realisation of solidarity, trust and redistribution.[7] Conversely, national identities are likely to be reinforced by governments as an artificial construct instrumental for the abovementioned reasons.[8] For the purpose of the present argument, a subjectivist understanding

5 *Martí*, Two different ideas of Constitutional Identity, in: Saiz Arnaiz/Alcoberro Llivina (eds.), National Constitutional Identity and European Integration, 2013, p. 19 et seq.
6 Based on a questionnaire and the replies of 50 randomly selected participants.
7 *Miller/Ali*, Testing the national identity argument, European Political Science Review 2014, p. 237 et seq.
8 Ibid., p. 234 et seq.

of identity[9] is believed to be essential for democratic legitimacy on the national as well as on the transnational level.

II. Identity and democracy in the EU context

In a democracy, the values shared by a people, do imprint the work of all branches of government, most notably the legislative that has to translate these very values into law. Individuals are the smallest and most essential units framing that identity by means of their participation in the democratic process;[10] as such they are the bearer of values and stand *vis-à-vis* the political community as the creator of norms and the agent who acts for them in their collectivity.[11] From this it follows that law normatively frames specific values and thus serves as an expression of identity. In view of the doctrines of direct effect and primacy and the imminent loss of sovereignty by the member states resulting therefrom, it comes clear that the latter are striving to safeguard their identities and thus their political legitimacy.[12]

For a long time European integration derived its legitimacy from delivering the results; in recent years however, due to lacking results, the focus has substantially shifted to process legitimacy.[13] Correspondingly, as from the 1960s onwards, the CJEU has continuously strived to place the individual at the core of the project; it has consistently held that European citizenship is destined to be the fundamental status of the nationals of the member states, a status that gives specific rights to the people.[14] Accordingly, the individual is perceived as a subject of rights (and duties), whose participation is sought to be ensured by establishing participatory and most notably

9 Cf. *von Bogdandy/Schill*, Overcoming absolute Primacy: Respect for national Identity under the Lisbon Treaty, CMLRev 2011, p. 1428 et seq.; *Dänzer*, Values and identity of the European Union, in: Besson/Cheneval/Levrat (eds.), Des valeurs pour l'Europe? Values for Europe?, 2008, p. 54, who identifies four meanings of identity: that of a community in its self-understanding; a collective or individual identity as objectively including the traits of an identity in the sense of its self-understanding; identity as the identification of citizens with a political community and the identity of a community as perceived from outside.

10 See *Besson/Utzinger*, Toward European Citizenship, Journal of Social Philosophy 2008, p. 188, according to whom a stable collective identity partly results from citizenship.

11 On the distinction between values and norms *Dänzer*, (fn. 9), p. 59.

12 See *Toniatti*, Sovereignty Lost, Constitutional Identity Regained, in: Saiz Arnaiz/Alcoberro Llivina, (fn. 5), p. 55 et seq. According to *López Bofill*, What is not Constitutional Pluralism in the EU: National Constitutional Identity in the German Lisbon Judgment, in: Saiz Arnaiz/Alcoberro Llivina, (fn. 5), p. 222: "any loss of the Member States' constitutional power is conceived as a loss of democratic legitimacy"; *Besson*, Sovereignty, International Law and Democracy, EJIL 2011, p. 378.

13 Cf. *Weiler*, (fn. 4).

14 See e.g. CJEU, case C-135/08, *Rottmann*, ECLI:EU:C:2010:104, para. 43 with further references.

direct democratic elements on the EU level.[15] It was expected that European citizens would understand themselves as a people, a European *demos*. The past has shown however, that they are not willing to actually participate and thus contribute to the emergence of a European political space. This becomes evident not least by the low turnout in elections to the European Parliament, the success of Eurosceptic parties and the absence of solidarity in times of crises.

The lacking identification of the citizens with the EU and its negative implications for the establishment of actual European citizenship and democratic participation make clear that the emergence of a collective European identity is essential.[16] The solution is either an artificial creation of a European identity with all it entails and thus to amend the Treaties accordingly, or to keep compensating the persistent lack of indentification and thus democratic legitimacy by drawing on the legitimacy resources of the member states. It comes clear from the Treaties and most notably Article 4(2) TEU that the second (dual) approach is the one to be pursued: citizens should identify themselves with their respective member state and additionally identify themselves as European citizens. Undermining the former identification would weaken the legitimacy of the EU, which is reliant on the member states' capability to take even unpopular measures without their existence hardly ever being called into question.[17]

III. Identity and hierarchy

After having established a link between democracy and identity, the present section is devoted to hierarchical aspects of identity. Not all identity relevant components are of equal importance; this applies with regard to individuals, states and international organisations. There are specific criteria that are more fundamental, i.e. that certain preferences cannot be replaced easily without making the entity as a whole exchangeable with any other of its kind; accordingly, the Second World War has shaped today's Germany, its culture, its understanding of the self and the other, and lastingly imprinted the values of the German people that are inseparably linked to its identity. There are indeed other identity relevant components that are less fundamental. This is again true for the individual and for political communities: for one state secularism is fundamental to its identity, for another state, even though likewise a secular state, it may be a less important identity-forming hallmark. Hence, there is definitely a hierarchical structure inherent in identity and it comes clear that the actual significance of a specific component constitutive for the identity of an entityhas to be assessed on

15 See Act concerning the election of the representatives of the European Parliament by direct universal suffrage annexed to Decision 76/787/ECSC, EEC, Euratom, OJ L 278 of 8/10/1976, p. 1 as amended by Decision 2002/772/EC, Euratom, OJ L 283 of 21/10/2002, p. 1; Art. 11(4) TEU and Regulation (EU) 211/2011 of the European Parliament and of the Council on the citizens' initiative, OJ L 65 of 11/3/2011, p. 1.

16 See *Besson*, Europe as a demoi-cratic polity, Retfaerd – Nordisk Juridisk Tidsskrift 2007, p. 3.

17 *Weiler*, (fn. 4). See *Petit*, Dispelling a Myth? The Fathers of Europe and the Construction of a Euro-Identity, ELJ 2006, p. 661.

a case-by-case basis. The inconceivability can be highly problematic, if national identity is becoming a legal concept however.The subsequent sections seek to substantiate "identity" for the purpose of Article 4(2) TEU.

IV. Identity and constitutional law

It was the German *Bundesverfassungsgericht* (BVerfG) that, in its famous *Solange I* ruling first referred to constitutional identity, more specifically to the identity of the Basic Law, and that established fundamental rights as one of the essential elements thereof;[18] since then, on the EU level, state identity has been steadily narrowed down to a constitutional dimension. The present section discusses whether or not one can speak of constitutional identity also in a transnational context.

A political community requires a set of commonly agreed foundational rules, normatively expressing the shared values of a people.[19] A subset of foundational norms is needed in order to establish basic guidelines, to impose constraints on all branches of government and to ensure stability, flexibility and efficiency of a legal regime.[20] This applies for the national as well as for the transnational level. A basic common understanding, written or unwritten, of the basic choices of a constituency is essential for safeguarding the said choices in a stable and consistent way and thus to protect them from daily politics.[21] Even though there are fundamental differences in terms of content, consistency, responsibility, pluralism, hierarchy and the *pouvoir constituant*, constitutional language is not only used in the national context, but also with regard to international law; in the latter context, constitutionality is typically ascribed to *ius cogens* as well as to foundational international treaties such as the UN Charter.[22] Whereas not formally labelled as such, the said sources of international law are

18 BVerfG 37, 271 – *Solange I*; see e.g. *Tomuschat*, The Defence of National Identity by the German Constitutional Court, in: Saiz Arnaiz/Alcoberro Llivina, (fn. 5), p. 207 et seq. Particular attention is paid to the BVerfG as compared to other constitutional courts, since it was the one that first referred to the concept and is among the most critical courts.

19 See e.g. *von Bogdandy/Schill*, in: Grabitz/Hilf/Nettesheim (eds.), Das Recht der EU, 50. EL, Art. 4 Abs. 2 EUV, para. 3.

20 See *Weiler*, Federalism and Constitutionalism: Europe's Sonderweg, JMWP 10/00; *Weiler*, Ein christliches Europa, Erkundungsgänge, 2004, p. 38 et seq.

21 See the debate between *Kumm* and *Krisch* on EJIL talk, www.ejiltalk.org/cosmopolitan-constitutionalism-a-response-to-nico-krisch/ and www.ejiltalk.org/the-dream-of-reason-a-response-to-mattias-kumm/ (9/9/2015).

22 E.g. *Schwarzenberger*, International Jus Cogens?, Texas Law Review 1964/1965, p. 455; *Kumm*, The Cosmopolitan Turn in Constitutionalism: On the Relationship between Constitutionalism in and beyond the State, in: Dunoff/Trachtman (eds.), Ruling the World? Constitutionalism, International Law, and Global Governance, 2009, p. 259 et seq., refers to domestic constitutionalism as "big C" constitutionalism and with regard to international law as "small c" constitutionalism; *Weiler*, Prologue: global and pluralist constitutionalism – some doubts, in: Weiler/De Búrca (eds.), The Worlds of European Constitutionalism, 2012, p. 10; *Halberstam*, Local, global and plural constitutionalism: Europe meets the world, in: Weiler/De Búrca, (supra), p. 159; *Peters*, Compensatory Constitutionalism: The Function and Potential of Fundamental International Norms and Structures, Leiden Journal of International Law 2006, p. 593 et seq., defines it as "micro-constitutionalization".

indeed comparable with domestic constitutions in procedural and substantial terms; one may just think of the qualified procedures set in place for the amendment of statutes of international organisations. Given the content of statutes that typically include foundational principles, provisions regarding the confinement of public power and attribution of competences,[23] there is also comparability in substantive terms. From this it follows that one can refer to constitutionalism also in the context of EU law.

V. Constitutional (identity) conflicts on the national and the EU level

Constitutional identity conflicts typically occur in multilevel legal systems, whenever identity relevant (constitutional) law is incompatible with law of the same kind. It is typical for federal systems[24] that there are one or more constitutional identities in place; it is precisely one of the benefits of a federal system that citizens are enabled "to move from one jurisdiction to another, sorting themselves into the various jurisdictions that best satisfy their individual preferences", in short: to vote by their feet.[25] They can pick and choose among different legal arrangements and, consequentially, escape democratically legitimated choices of a specific legal system. While in the domestic context there is the federal constitution and the constitutions of the constituent states, the EU legal system comprises an even greater diversity of constitutional norms: those of EU law coexist with those of 28 (in part again federally organised) member states, which, according to Article 4(2) TEU are to be equally respected by the EU. Given the CJEU's doctrine of absolute primacy and the significance attached to free movement,[26] constitutional identity conflicts are quite common in the EU context.

Furthermore there are fundamental rules of international law that have an increasing impact on national law as well as on the EU legal order.[27] In both contexts, national and EU, constitutional norms flowing from different sources are typically complementing one another and thus not overlapping in substantive terms; even though constitutional conflicts are therefore limited, they are not excluded in principle.

When it comes to constitutional conflicts, there are crucial differences between the national and the supranational level however. Within a single state there will hardly

23 According to *Besson*, The Truth about Legal Pluralism, EuConst 2012, p. 358, the "main and common claim" of constitutionalism, even though it can take different forms, "is that political and legal power should be exercised only within the limits of a constitution, such as the separation of powers, checks and balances, the rule of law, democracy and fundamental rights".

24 Cf. *Halberstam*, Federalism: Theory, Policy, Law, 2012, p. 580, defines a federal system as "the coexistence within a compound polity of multiple levels of government each with constitutionally grounded claims to some degree of organizational autonomy and jurisdictional authority".

25 Ibid., p. 586; *Halberstam*, Federalism: A Critical Guide, Public Law and Legal Theory, WPS251/2011, p. 14.

26 Conflicts are, of course, not limited to free movement constellations.

27 See GC, case T-315/01, *Kadi*, ECLI:EU:T:2005:332; CJEU, joined cases C-402/05 P and C-415/05 P, *Yassin Abdullah Kadi and Al Barakaat International Foundation*, ECLI:EU:C:2008:461. E.g. *Besson*, European Legal Pluralism after *Kadi*, EuConst 2009, p. 239.

occur as many constitutional identity related conflicts as on the transnational EU level, where 28 constitutional identities are meant to coexist with the constitutional identity of the EU. There is also a difference in the democratic legitimacy of national and EU law. While the former derives its legitimacy from "we the people", the EU Treaties do not enjoy a comparable degree of legitimacy. Against the background that here the will of the people is first and foremost mediated by the member states, primacy of EU law over national law „however framed"[28] is more problematic than in the national context, when, for intstance, federal constitutions pre-empt constitutions of constituent states. In principle, the resolution of conflicts between disparate sources of constitutional law is less problematic with regard to norms that are relatively precise and predominantly technical in character. When it comes to more indefinite and politically sensitive issues however – especially when a norm expresses constitutional identity – there are several factors that make conflict resolution more complex on the EU than on the national level.

Federal systems usually provide for some sort of predetermined hierarchy in order to solve conflicts of that kind. This does not equally apply for the EU however, where legal hierarchy has always been a controversial issue. Even though constitutional conflicts arising within (multilevel) constitutional systems are typically subject to judicial review, the role of the CJEU is far more crucial when compared to national constitutional courts. It is problematic that the former is not perceived as an independent judicial institution, but rather as a political institution mostly in favor of deepening European integration. Thus, in absence of a Treaty provision explicitly establishing a hierarchy among national and EU law, the CJEU developed direct effect and primacy;[29] accordingly, in the Court's view any conflict between EU law and the law of the member states has to be resolved by means of the latter doctrines. National constitutional courts on the contrary have been consistently striving to defend national sovereignty and identity from supranationalism; the latter is seen as relative and its acceptance reveals the respect for the constitutional identity of the EU. In this context, the identity review introduced by the BVerfG[30] is more comprehensive when compared to the fundamental rights review and the *ultra vires* review, since it equally covers fundamental rights and the allocation of competences. The aspiration to pre-

28 CJEU, case 11/70, *Internationale Handelsgesellschaft*, ECR 1970, 112, para. 3.

29 CJEU, case 26/62, *van Gend & Loos*, ECR 1963, 1, 2. See *de Witte*, The European Union as an international legal experiment, in: Weiler/De Búrca, (fn. 22), p. 42 et seq.

30 E.g. BVerfG 37, 271 – *Solange I*; BVerfG 89, 155 – *Maastricht*; Corte Costituzionale, Sent 183/73 of 18/12/1973 – *Frontini Franco*; Conseil Constitutionnel, 92-308 DC of 9/4/1992 – *Traité sur l'Unioneuropéenne/Maastricht*; Danish Hojesteret, I 361/1997 of 6/4/1998 – *Maastricht*. *Guastaferro*, Beyond the Exceptionalism of Constitutional Conflicts: The Ordinary Functions of the Identity Clause, JMWP 01/2012, p. 10; *Halberstam/Möllers*, The German Constitutional Court says "Ja zu Deutschland!", German Law Journal 2009, p. 1241; *Thym*, In the Name of Sovereign Statehood: A critical Introduction to the Lisbon Judgment of the German Constitutional Court, CMLRev 2009, p. 1795; *Tomuschat*, (fn. 18). On the "adoption" of the "German model" by other constitutional courts, cf. *Rideau*, The Case-law of the Polish, Hungarian and Czech Constitutional Courts on National Identity and the 'German Model', in: Saiz Arnaiz/Alcoberro Llivina, (fn. 5), p. 250 et seq. On "relative supremacy" see *Schütze*, European Constitutional Law, 2012, p. 358 et seq.

serve national identity is much more heterogenic and indeterminate and poses fundamental questions concerning the status of the member states within a united Europe. Therefore and given the absence of an ultimate hierarchy, the solution of constitutional (identity) conflicts in the EU requires an approach different from that on the national level. The Treaties provide for two provisions that have the potential to govern such conflicts, namely the *Günstigkeitsklausel* in Article 53 of the Charter on the one hand and the identity clause on the other.

It is necessary to first clarify the relation between the identity clause and Article 53 CFREU. Whereas the operation of the former is triggered whenever national constitutional identity is at stake, the latter applies whenever member states provide for higher standards of fundamental rights protection.[31] Accordingly, the relation could be established as one of *lex specialis/lex generalis*. Even though there is the presumption that fundamental rights are likely to be constitutive for national constitutional identity,[32] this does not necessarily hold for fundamental rights in general. Hence, in the fundamental rights context the scope of application of Article 53 CFREU is obviously different from that of Article 4(2) TEU, the application of which is confined to cases, where identity relevant national fundamental rights are concerned. Moreover, the two provisions are pursuing different objectives: the purpose of Article 53 CFREU is to rule out a race to the bottom in fundamental rights protection by adversely affecting standards already in place in the member states and thus the protection of rights of individuals. Therefore the *Günstigkeitsklausel* has to be interpreted as establishing the level of fundamental rights protection provided for by the Charter as a minimum standard.[33] Article 4(2) TEU on the contrary seeks to protect member states from identity interferences from the EU, rather than the protection of the rights of individuals. Whereas the application of Article 4(2) TEU is triggered first and foremost by differences in terms of member states' constitutional identities, for Article 53 CFREU it is "only" a negative effect on national fundamental rights standards that is decisive; for the latter it is irrelevant if other member states provide for similar standards.[34] Since both provisions pertain to primary EU law, a joint operation is conceiveable in principle; this applies where a specific implementation or interpretation of a fundamental right constitutes an expression of national constitutional identity and

31 It is difficult however to scale fundamental rights, for this mostly implies a balancing among different moral conceptions; see *Chalmers/Davies/Monti*, European Union Law, 3rd ed. 2014, p. 259. For a detailed analysis of the scope of application of Article 53 CFREU, see *Sarmiento*, Who is afraid of the Charter?, The Court of Justice, national Courts and the new Framework of Fundamental Rights Protection in Europe, CMLRev 2013, p. 1287.

32 Similar *Torres Pérez*, Constitutional Identity and Fundamental Rights: the Intersection between Art. 4(2) TEU and 53 Charter, in: Saiz Arnaiz/Alcoberro Llivina, (fn. 5), p. 144 with further references.

33 Cf. *de Witte*, in: Peers/Hervey/Kenner/Ward (eds.), The EU Charter of Fundamental Rights, 2014, Art. 53 – Level of Protection, para. 53.07.

34 See opinion AG *Bot*, case C-399/11, *Melloni*, ECLI:EU:C:2012:600, para. 142, according to whom "a concept demanding protection for fundamental rights must not be confused with an attack on the […] constitutional identity of a Member State".

at the same time establishes a higher standard of fundamental rights protection than that provided under the Charter.

With regard to constitutional identity, it is certainly the identity clause that has the potential to play a key role in the constant trade off between member states' identities and that of the EU, the latter being inherent in the constitutionalisation process in the EU. The following section evaluates the significance of constitutional identity and the nature of the specific form of constitutional pluralism in the EU from a constitutional theorist perspecitve.

VI. Identity and constitutional theory

The identity clause stimulates a debate on how the different constitutional systems in the EU are related to and demarcated against one another and thus questions the EU's constitutional arrangement at large. It is therefore not only necessary to specify what is covered by the concept of national constitutional identities, but also to establish their interrelation as well as their standing in view of the evolving identity of the EU.

There are different ways how individuals can be linked to their respective constitutions; there is the predominantly ethnic and cultural identification on the one hand and the predominantly civic (or political) identification on the other. The former refers to a cultural bond, a common language, race, religion, social mores, a common history, tradition and descent. Conversely, the civic understanding is linked to the constitution itself, to the respect for the state and its institutions.[35] The latter is – so to say – a less emotional and more rational and pragmatic conception, which is much more inclusive than the ethnic model that is more restrictive and exclusive.[36] It is typically referred to the German *Volk* as a community of blood and territory and therefore predominantly ethnic in nature, whereas the French nation serves as an example for a predominantly civic understanding.[37]

The concept of constitutional patriotism, substantially coined by *Habermas*, is based on the civic model of identification,[38] to the effect that the

> "political culture of a country crystallizes around its constitution".[39]

35 *Gamberale*, National Identities and Citizenship in the European Union, European Public Law 1995, p. 639 et seq.; *Miller/Ali*, (fn. 7), p. 247; *Peters*, A new look at 'National Identity' How should we think about 'collective' or 'national identities'? Are there two types of national identities? Does Germany have an ethnic identity, and is it different?, European Journal of Sociology 2002, p. 3 et seq.

36 *Ius sanguinis* is often linked to the more inclusive ethnic/cultural model, while *ius loci* is usually linked to the more multicultural civic/political model; *Gamberale*, (fn. 35), p. 637 et seq.; *Peters*, (fn. 35), p. 6.

37 Cf. *Gamberale*, (fn. 35), p. 639; *Peters*, (fn. 35), p. 6.

38 Cf. ibid., p. 19 et seq.

39 *Habermas*, The European Nation-State: On the Past and Future of Sovereignty and Citizenship, in: Cronin/De Greiff (eds.), The Inclusion of the Other, Studies in Political Theory, 2000, p. 118.

In his view, even though other states may share certain constitutional principles, their specific interpretation is what underlies the concept of constitutional patriotism.[40] Accordingly, in the case of the EU it is ideally constitutional patriotism that should take the place that was originally occupied by nationalism[41] and as such pave the way for an implementation of the ideal of "united in diversity".[42] *Weiler* on the contrary argues that the idea of constitutional patriotism is sort of exclusive and defensive in nature, since he infers that patriotism would invite people to defend their constitutions. Likewise based on a civic understanding of national identity and focusing primarily on the tolerance *vis-à-vis* the other, his concept of constitutional tolerance is based on the voluntary acceptance of constitutional discipline, even without the existence of a constitutional *demos*. Hence, constitutional tolerance is pervading the idea of European integration, as, regardless of how close the EU gets, it has to remain a Union

> "among distinct peoples, distinct political identities, distinct political communities".[43]

What *Weiler* calls constitutional tolerance is not only mirrored by the preamble to the Treaties, but has now found its normative expression in the identity clause.[44] The respect for and the preservation of "the other", the retention of different (constitutional) identities instead of equalising them, is what has underlied the European idea from the outset.[45] Ideally, there is a plurality of mutually tolerating national constitutional systems, each of them legitimated by a people through a democratic process. Hence, there is a diversity of democratically organised political communities that are governed by different constitutions, each of which reflects fundamental choices and establishes identificational reference points for individuals. This implies that everything must have its place, no matter if Germany's ethnic/cultural or France's civic form of identification is concerned.

For the purpose of the present argument, constitutional pluralism is referred to as a theory that, in *Maduro's* words

> "focuses on the legitimacy of European constitutionalism and its model of organizing power".[46]

40 Ibid. Similar *Krisch*, The case for pluralism in postnational law, in: Weiler/De Búrca, (fn. 22), p. 207 et seq., who suggests that constitutionalism has to be seen as a tool to strengthen tradition.

41 Cf. *Habermas*, (fn. 39), p. 118.

42 Patriotism typically includes a statement about national pride; nationalism includes one about unconditional support, see *Miller/Ali*, (fn. 7), p. 245.

43 Cf. *Weiler*, (fn. 20); *Weiler*, (fn. 22), p. 12 et seq.

44 Infra E.

45 See e.g. opinion AG *Kokott*, case C-222/07, *UTECA*, ECLI:EU:C:2008:468, para. 94, according to whom "[r]espect for and promotion of diversity in the cultural sector is also important to the European Union because it is this very diversity that is so characteristic of Europe and European culture. The idea of 'unity in diversity' therefore forms one of the cornerstones of the European Union".

46 Cf. *Poiares Maduro*, The Promise of Constitutional Pluralism, www.wzb.eu/sites/default/files/veranstaltungen/miguelmadurothreeclaimsofconstitutionalpluralismhu-collmay152012.pdf (9/9/2015).

The EU as a subject of international law derives its legitimacy from a plurality of interrelated constitutional sources. This is perfectly expressed by the identity clause that imposes the obligation upon the EU to respect these differences and thus legally frames one of the bedrocks of the EU's political legitimacy. In the EU context, constitutional pluralism is therefore a juxtaposition of different sources of constitutional law, national, EU and international, where no ultimate hierarchy exists.[47] The critique that constitutional pluralism misconstrues the very nature of the constitutional by privileging the pluralist asset over the hierarchical[48] gets to the heart of what makes the specific EU constitutional pluralism, where hierarchy takes a backseat. There is a constant demarcation, balancing, argumentation, cooperation, mutual inspiration, recognition and therefore a consistent process of constitutionalisation,[49] where different constitutional systems revealing different values and identities are steadily confronted with one another. Once this process comes to an end, the actual ideal of European integration ceases to exist and so would today's Union. This would be the case if there was a real European Constitution, establishing a formal hierarchy among the constitutional systems by setting in place an ultimate authority while at the same time dramatically weakening the pluralist element; a convergence between the different layers of constitutional identity in the EU that is likely to result therefrom is obviously not envisaged by the present Treaty regime. As EU law currently stands, primacy is indeed deemed to be accepted by the member states only within certain limits, one of which is the respect for national constitutional identity.[50]

It is however problematic that the specific EU constitutional pluralism hampers the evolution of a collective European identity. The latter is in turn needed to ensure democratic legitimacy of the EU autonomously from the member states. This is where it comes full circle, because in the absence of a European identity and thus autonomous process legitimacy, the EU remains dependent on the legitimacy resources of the member states.[51] Weakening these resources by encroaching on their constitutional core would therefore weaken the EU itself. From this it follows that, as EU law currently stands, the question is how to establish a proper balance between national and EU constitutional interests.

47 See *Besson*, (fn. 23), p. 358; *Sabel/Gerstenberg*, Constitutionalising an Overlapping Consensus: The ECJ and the Emergence of a Coordinate Constitutional Order, ELJ 2010, p. 543.

48 According to *Weiler*, (fn. 22), pp. 14 and 17, constitutional orders "inherently contain hierarchical and pluralist features"; *Shaw*, Postnational Constitutionalism in the European Union, Journal of European Public Policy 1999, p. 588.

49 Cf. ibid.; *Comtesse*, La culture politique comme métavaleur européenne, in: Besson/Cheneval/Levrat, (fn. 9), p. 50 et seq., defines the political discourse as such as *métavaleur européenne*.

50 It cannot be agreed with the opinion of AG *Cruz Villalón*, case C-62/14, *Gauweiler and Others*, ECLI:EU:C:2015:7, para. 61, according to whom "a clearly understood, open attitude to EU law should in the medium and long term give rise, as a principle, to basic convergence between the constitutional identity of the Union and that of each Member State".

51 Cf. *Weiler*, (fn. 4).

C. Constitutional identities in the EU

I. Identifying constitutional identity

The present section discusses different ways of defining constitutional identity and establishes the different types of constitutional identities in place in the EU. It is suggested that there are three categories involved:[52] first the shared identity of the member states and second, the EU's identity as a *sui generis* construct that has emancipated from the shared identity of its member states; finally there are different identities of the member states, detached from their EU membership that make them stand out among others. Against the background of the depth of European integration, the three categories are mutually reinforcing and inspiring one another; thus, they cannot be established as categorically separate.

Even though a concept of EU law, the capture of national constitutional identity necessarily requires an interpretation of national law. Neither does every constitutional norm automatically serve as an expression of the identity of a state for the purpose of Article 4(2) TEU,[53] for this would result in a discrimination of member states with less substantial constitutions,[54] nor is the expression and specification of constitutional identity necessarily limited to constitutional law.[55] Legislative acts specifying fundamental choices of a people have to be considered when assessing constitutional identity. In this context particular importance must be attached to judgments of national courts whenever they give interpretations of national law in a way that is likely to shape constitutional identity.[56] Given the wording of Article 4(2) TEU, it seems reasonable to choose constitutionality as a point of departure for a further specification of the concept. One of the most manifest characteristics of a constitutional norm is procedural, since the adoption or amendment of constitutional law is typically subject to qualified procedural requirements.[57] There may be even more restrictive procedural requirements in place for the adoption and amendment of specific constitutional norms, such as the fundamental principles (*Baugesetze*) of the Austrian Constitution, the amendment of which requires an obligatory referendum.[58] There are even constitutional provisions that are unalterable, like the so-called *eternity clause* of the German Basic Law.[59] Norms of that kind typically serve as a benchmark for "normal" constitutional law and establish the legal foundation of a polity.

52 Similar *Rodin*, National Identity and Market Freedoms after the Treaty of Lisbon, Croatian Yearbook of European Law and Policy 2011, p. 14 et seq.
53 Similar *von Bogdandy/Schill*, (fn. 9), p. 1431 et seq.
54 See opinion AG *Maduro*, case C-213/07, *Michaniki*, ECLI:EU:C:2008:544, para. 33.
55 More restrictive *von Bogdandy/Schill*, (fn. 9),p. 1430.
56 See the detailed analysis of national constitutional (case) law, *Grewe*, Methods of Identification of National Constitutional Identity, in: Saiz Arnaiz/Alcoberro Llivina, (fn. 5), p. 40 et seq.
57 E.g. *Craig*, Constitutions, Constitutionalism, and the European Union, ELJ 2001, p. 126 et seq.
58 Article 44(3) Austrian Federal Constitution.
59 Article 79(3) Basic Law.

For the identification of identity relevant norms it is crucial to understand the diachronic and synchronic dimension of constitutional law. While the former concerns the "permanence through time or continuity", the latter refers to the characteristics that make one entity different by comparison to another.[60] If a norm has been widely accepted and been in force for a certain period of time and at the same time differentiates an entity from others, it is likely to express constitutional identity. A synchronic understanding of constitutional identity, i.e. its differentiating dimension, seems relative however; there may be components of a collective identity that are at the same time part of the identity of another. Language may serve as an example here; even though shared by others, it is still constitutive for the identity of every single state. Thus, identity can be either established in the sense of differentiating one community *vis-à-vis* the other, or in an inclusive way, in the sense of comprising all elements that are constitutive for identity, including those that are shared by others.[61] In view of the three categories of identity in place in the EU,[62] Article 4(2) TEU suggests a moderate exclusionist approach, i.e. that constitutional identity for the purpose of the said provision is triggered first and foremost by identity related differences among the member states.[63]

None of the mentioned criteria in itself suffices to define constitutional identity however; neither is a mere formal or procedural assessment appropriate, nor is an evaluation limited to the content of a norm. It is rather a combination of different factors that is decisive. Therefore, it is necessary to evaluate on a case-by-case basis, whether or not a specific provision is standing out among the rest, if it is continuously imprinting a particular legal order as a whole and substantively reflecting fundamental principles and values inherent in alegal regime.

II. Member states' common (shared) identity and the sui generis identity of the EU

The Treaties determine that the EU

> "is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights".[64]

Thus, respect for these values is one of the preconditions for the accession of future member states under Article 49(1) TEU. They are shared by most liberal-democratic systems however and can be found – solemnly proclaimed – in various constitutions and statutes. If shared by so many states and international organisations, contained in

60 *Reestman*, The Lissabon-Urteil: The Franco-German Constitutional Divide, EuConst 2009, p. 377.
61 Cf. the differentiation between *similarity* and *singularity* in *Grewe*, (fn. 56), p. 37 et seq. with further references.
62 Infra C.I.
63 Similar *Besselink*, National and constitutional identity before and after Lisbon, Utrecht Law Review 2010, p. 47.
64 Article 2 TEU.

numerous constitutions and preambles of international agreements – what makes the shared identity of EU member states?

Here is relevant what *Habermas* associates with constitutional patriotism, namely the specific interpretation of principles[65] and values. Even though shared in principle, there is still discretion left for their implementation within a particular historical and societal context. What the six founding states shared back in the 1950s was their common past in a war torn continent, their hunger for peace and prosperity. Against this background, they decided to translate their common values into a legal framework that, to this day, has significantly increased in substance. The common identity of the member states, as it stands today, is not only revealed by the explicitly enumerated values and their interpretation, but also by the ideals of cooperation, solidarity and peace, as well as the constitutional tolerance among them,[66] the willingness to accept compromises and the willingness to accept decisions that were taken by a majority of states, even if the respective state disagrees. Since the whole body of EU law is informed by the endeavour to shape and strengthen the identity of the organisation, a huge amount of commitment and respect is required from the member states in order to create, shape and strengthen the identity of this unique and ever evolving construct, whose final aim is still to be defined. They are respecting the obligatory jurisdiction of a powerful and proactive European Court that has developed several legal doctrines the impact of which on the member states' sovereignty is immense, all destined to safeguard a uniform and effective application and implementation of EU law; the member states are accepting the independent role of the European Commission and its powerful status in terms of legislative initiative. According to the principle of sincere cooperation they are obliged to act coherently on the international plane and to consider the interest of the EU, instead of acting exclusively in their own. They also have to actively contribute to the realisation of the objectives of the Treaties by implementing legal acts into their domestic legal orders, even though they were adopted by procedures that do not comply with the democratic standards that are taken for granted on the domestic level. The moral conceptions and values shared by the member states and the citizens are foundational to the EU and enabled the evolution of its own constitutional identity.[67]

Given that in the 1950s the identity of the European project was essentially reflecting the common set of values and the core constitutional principles of the founding states,[68] there is the question as to what extent this identity continues to be an amalgam of the 28 national identities or to what extent a collective identity has emerged. Is *Delanty* right, when he determines that European identity would not have existed

65 See *Habermas*, (fn. 39).

66 Cf. *Weiler*, (fn. 20); *Weiler*, (fn. 22), p. 12 et seq.

67 See AG *Kokott* in opinion procedure 2/13, *Accession of the EU to the ECHR*, ECLI:EU:C:2014:2475, para. 168 et seq., who refers to the "constitutional identity of the EU" and obviously subsumes the "fundamental principles of the EU legal order" and the "structural features of the institutional framework of the EU" thereunder.

68 *Calliess*, Europe as Transnational Law – The Transnationalization of Values by European Law, German Law Journal 2009, p. 1377 et seq.

prior to its definition and codification? Against the background of the "irresolvable conflict of national cultures and oppositional collective identities", he qualifies European identity as nothing less than a "doubtful construct".[69] What is this *sui generis* construct, what are the values it stands for, what ideal does it represent, how to define its identity? The fact that the only explicit reference to the identity of the EU in the Treaties can be found in the context of the Common Foreign and Security Policy (CFSP)[70] indicates that the primary objective is to strengthen the EU's identity on the international plane,[71] rather than the creation of an identity of the European peoples in their self-understanding.[72] Considering that the driving impetus for the cooperation was to establish long-term peace in Europe, the latter is certainly one of the dominant values imprinting European integration. Peace however is seemingly taken for granted today and therefore fading into the background; it is all the more economic cooperation that has evolved from a means to realise this very objective to the actual momentum for further integration. There are other ideals coining its identity however, such as supranationality, mutual trust, the respect for linguistic diversity as well as the implementation of non-discrimination and free movement. Moreover, EU constitutional pluralism and the specific form of transnational democracy are crucial for the *sui generis* identity of the EU.[73]

III. Member states' individual constitutional identities

As has been determined above, constitutional identity for the purpose of Article 4(2) TEU cannot be limited to the proclamation and prescription of ever replicated values and principles, but all the more to their specific implementation and interpretation in a particular context.[74]

National courts do not follow a strict, but rather a moderate exclusionist approach to constitutional identity, i.e. that it is not only the differentiating components that are decisive; accordingly, they include for instance statehood, the key requirements of the rule of law, the principle of democracy and the federalist principle.[75] It follows from the demarcation between the three layers of identities in the EU that for the operation of Article 4(2) TEU it is obviously the differentiating components of national identities that are more decisive. This applies most notably with regard to fun-

69 *Delanty*, Inventing Europe, Idea, Identity, Reality, 1995, p. 3; *Fleurant*, L'identité européenne: Un débat qui met en lumière les difficulties conceptuelles de l'identité, Horizons philosophiques 2001, p. 64.

70 The reference in ex-Article 2 and Article 27a(1) TEU (Nice) was eliminated; see the Preamble of the TEU.

71 Also Article B(1) TEU (Maastricht).

72 Cf. *Dänzer*, (fn. 9), p. 54.

73 *Sarmiento*, The EU's Constitutional Core, in: Saiz Arnaiz/Alcoberro Llivina, (fn. 5), p. 179 et seq., identifies "three normative ideals", namely democracy, rights and solidarity that would "comprise at its most abstract level all the values and principles enshrined in the Treaties".

74 Cf. *Habermas*, (fn. 39), on constitutional patriotism.

75 Cf. *von Bogdandy/Schill*, (fn. 9), p. 1435 et seq.

damental rights protection; enshrined within domestic constitutions and as interpreted by national (constitutional) courts, fundamental rights typically reveal basic political choices of a people that are at the core of national identity. Their relevance when it comes to identity has been consistently confirmed by national constitutional courts[76] and is reinforced by primary EU law that explicitly claims respect for national identities in the fundamental rights context. Accordingly, the preamble of the Charter stresses the need to preserve and develop common values and at the same time claims that the EU has to respect

> "the diversity of the cultures and traditions of the peoples of Europe as well as their national identities".

Furthermore, the *Günstigkeitsklausel* in Article 53 CFREU is intended to safeguard different standards of fundamental rights protection in the member states; nothing in the Charter "shall be interpreted as restricting or adversely affecting human rights and fundamental freedoms as recognized, in their respective fields of application, by Union law and international law and by international agreements to which the Union or all the Member States are party", including the ECHR and by the member states' constitutions.[77]

There is, however, a plurality of interrelated sources of congruent or at least similarly framed fundamental rights that have far-reaching implications on national standards of fundamental rights protection: international human rights treaties, the Charter and unwritten general principles of EU law.[78] EU fundamental rights, the scope of application of which seems to be consistently broadened by the CJEU,[79] form part of primary law and enjoy direct effect and primacy. Hence, one can legitimately ask whether there is any discretion left for the states to preserve their own fundamental rights arrangements.

In this context it is worth to briefly look at the ECHR regime that is decisively imprinting the actual interpretation of EU fundamental rights. Even though no explicit claim to respect national identities can be found in the Convention, national specificities are nevertheless considered by the ECHR. Based on the idea that due to their

76 In BVerfG 37, 271 – *Solange I*, the BVerfG held that fundamental rights are at the core of national identity. For the jurisprudence of other national constitutional courts see *Torres Pérez*, (fn. 32), p. 143 et seq.

77 Cf. e.g. *Lindner*, Grundrechtsschutz in Europa – System einer Kollisionsdogmatik, EuR 2007, p. 168.

78 See CJEU, opinion 2/13, *Accession of the EU to the ECHR*, ECLI:EU:C:2014:2454.

79 CJEU, case C-555/07, *Kücükdeveci*, ECLI:EU:C:2010:21; CJEU, case C-144/04, *Mangold*, ECLI:EU:C:2005:709; CJEU, case C-115/08, *ČEZ*, ECLI:EU:C:2009:660. See e.g. *de Mol*, Kücükdeveci: Mangold Revisited – Horizontal Direct Effect of a General Principle of EU Law: Court of Justice of the European Union (Grand Chamber) Judgment of 19 January 2010, Case C-555/07, Seda Kücükdeveci v. Swedex GmbH & Co. KG., EuConst 2010, p. 293; *Seifert*, Mangold und kein Ende: die Entscheidung der Großen Kammer des EuGH v. 19.1.2010 in der Rechtssache Kücükdeveci, EuR 2010, p. 802; *Obwexer*, Der Schutz der Grundrechte durch den Gerichtshof der EU nach Lissabon, Auslegung und Anwendung der Grundrechte-Charta gegenüber EU-Organen, den Mitgliedstaaten und dem allgemeinen Völkerrecht, ZÖR 2013, p. 487.

expertise national representatives are better suited to assess the relevance of state specific peculiarities, in specific cases, national judges are appointed *ex-officio* members to the bench of the ECtHR.[80] The latter court safeguards diversity by means of the margin of appreciation doctrine. The Grand Chamber's decision in *Lautsi*, a case concerned with the presence of crucifixes in classrooms and its compatibility with the freedom of/from religion, serves as an example here. Following an intervention by *Weiler*, who insisted on the importance of tolerance for diversity within the European arrangement,[81] the Chamber decision was turned down. By taking into account of "the fact that Europe is marked by a great diversity between the States of which it is composed, particularly in the sphere of cultural and historical development", the Grand Chamber ruled that the decision whether or not to perpetuate a tradition

> "falls in principle within the margin of appreciation of the respondent State".[82]

In *A, B and C v. Ireland*, where Irish abortion law was at stake, the ECtHR held that the prohibition in Ireland of abortions for health and well-being reasons was based "on the profound moral views of the Irish people as to the nature of life [...] and [...] the consequent protection to be accorded to the right to life of the unborn" and as such does not exceed the margin of appreciation accorded to the Irish state.[83] Thus the regime allows for varying national fundamental rights preferences.

There are fundamental differences when compared to the supranational EU setting that is not confined to fundamental rights issues but mainly pursuing a market centred approach of integration; the juxtaposition of the internal market rationale on the one hand and the fundamental rights rationale on the other in a *sui generis* legal environment results in a diffuse situation. Accordingly, there are fundamental differences in the reasoning of the two courts; whereas the CJEU's argument is typically based on the rationale of ensuring uniformity and effectiveness of EU law,[84] the ECtHR balances uniform standards of fundamental rights protection against the rationale of respecting diversity. Nonetheless, there are obvious similarities in the judgments of the two Courts, when the CJEU rules that the need for and proportionality of a national provision intended to ensure a specific standard of fundamental rights protection is not excluded "merely because one Member State has chosen a system of protection different from that adopted by another State" and thus allows for differing standards of fundamental rights protection.[85]

80 See *López Guerra*, National Identity and the European Convention on Human Rights, in: Saiz Arnaiz/Alcoberro Llivina, (fn. 5), p. 305 et seq.; also *Brehms*, Human Rights: Universality and Diversity, 2001, p. 341 et seq.; *Schokkenbroek*, The Basis, Nature and Application of the Margin of Appreciation Doctrine in the Case-Law of the European Court of Human Rights, Human Rights Law Journal 1998, p. 30.
81 Cf. e.g. *Weiler*, Lautsi: A reply, ICON 2013, p. 230.
82 ECtHR [GC], no. 30814/06, *Lautsi and others v. Italy*.
83 ECtHR [GC], no. 25579/05, *A, B and C v. Ireland*, para. 241.
84 See e.g. CJEU, case C-399/11, *Melloni*, ECLI:EU:C:2013:107, para. 57 et seq.
85 CJEU, case C-36/02, *Omega*, ECLI:EU:C:2004:614, para. 38.

D. Identity clause – scope and legal consequences

I. Evolution of the identity clause

When the identity clause was incorporated into the Treaties in 1992, Article F TEU determined that

> "[t]he Union shall respect the national identities of its Member States, whose systems of government are based on the principles of democracy".[86]

Against the background of the fall of the Iron Curtain and the accession of three states, the democratic structures of which had been established only recently, the reference to the democratic systems of the member states was set in place as an implicit precondition for accession.[87] In the course of the subsequent Treaty revision, the said reference was dropped however.[88] A rephrased and more nuanced version of the Article was later contained in Article I-5(1) of the draft Treaty establishing a Constitution for Europe (TECE)[89] and later maintained by the Treaty of Lisbon. Accordingly, current Article 4(2) TEU determines 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."[90]

Systematically, the identity clause is found alongside other principles governing the relationship between the EU and the member states, namely the principle of conferral in Article 4(1) TEU, the principle of equality in Article 4(2) TEU and the principle of sincere cooperation in Article 4(3) TEU. The principle of conferral determines that EU action is dependent on prior member state action, more specifically the conferral of competences upon the EU; it also stipulates a general presumption in favour of member states' competence. Only after having previously established the equality of the member states, Article 4(2) TEU claims that the EU has to respect national constitutional identities. Hence, equality is prerequesite for the respect claimed by the identity clause. Finally, the principle of sincere cooperation determines that there must

86 According to *Ritleng*, De l'utilité du principe de primauté du droit de l'Union, RTDE 2009, p. 677, the ECJ implicitly respected the Member States' constitutional identities, when it acknowledged unwritten general principles of law inspired by the common constitutional traditions of the Member States.

87 Cf. *Claes*, National Identity: Trump Card or Up for Negotiation?, in: Saiz Arnaiz/Alcoberro Llivina, (fn. 5), p. 116 et seq.

88 Article 6(3) TEU (Amsterdam) and Article 6(3) TEU (Nice).

89 Article I-5 TECE.

90 The Working Group of the European Convention exemplarily referred to issues such as national citizenship, territory, the legal status of churches and religious societies, national defense and the organisation of armed forces or the choice of languages as coming under fundamental structures and essential functions of the Member States within the identity clause. See Working Group V, Final Report of 4/11/2002, CONV 375/1/02 REV 1, p. 11; for a comprehensive analysis of the *travaux préparatoires*, see *Guastaferro*, (fn. 30), p. 13 et seq.

be mutual assistance between the EU and the member states in carrying out the tasks flowing from the Treaties. This assertion is at the heart of Article 4 TEU, linking the EU's duty to respect member states' identities on the one hand and the member states' duty to respect the EU and its objectives on the other. It is further specified that the member states have to positively take appropriate measures to implement the obligations under EU law and negatively refrain from jeopardising the attainment of the EU's objectives. Therefore, the principle of sincere cooperation can be established as counterpart of the identity clause;[91] whereas the former is mainly addressed to the member states, the latter is addressed to the EU. Interestingly, the identity clause does not similarly specify the duty of the EU by framing positive and negative duties. It can be assumed however, that the obligation to respect imposed on the EU by the identity clause likewise requires the EU to negatively refuse from actions that are unduly encroaching on national constitutional identity and also to take, whenever appropriate, positive action to protect the latter.

In his opinion in *Michaniki*, Advocate General *Maduro* notes that, when the previous versions of the provision referred to "national identities", *constitutional* identity was likewise covered.[92] The reference to "fundamental structures, political and constitutional" in the actual version of the provision is seen as a shift however from a predominantly cultural and linguistic to a constitutional understanding of identity.[93] The fact that the duty to respect the cultural diversity of the member states can be found among the objectives of the EU set out in Article 3(3) subpara. 4 TEU further supports the more differentiated understanding of national identity and reveals that constitutional identity has somehow emancipated from national identity.[94] The major difference between the TECE and the Treaty of Lisbon, namely that in the TECE the identity clause had to be read in combination with the primacy clause in Article I-6 TECE, may serve as an explanation for the emancipation of the constitutional from other components of national identity. Thus, the insertion of the duty to respect an identity relevant national constitutional core can be seen as a precondition for the codification of primacy. As is well known, the wording of Article I-5(1) TECE was maintained by the Treaty of Lisbon, while Article I-6 TECE was not. Accordingly, the question arises as to whether the identity clause is now – since the primacy clause was dropped – quoted out of context, or if the retention of the clause implies a possible relativisation ofprimacy. These questions will be addressed in the following sections after having first discussed, who is competent to interpret Article 4(2) TEU.

91 *Millet*, L'Union Européenne et l'Identité Constitutionelle des États Membres, 2013, p. 83 et seq., sees that the reciprocal dimension of the principle was reinforced by the Treaty of Lisbon.

92 Opinion AG *Maduro*, case C-213/07, *Michaniki*, ECLI:EU:C:2008:544, para. 31.

93 See *von Bogdandy/Schill*, Die Achtung der nationalen Identität unter dem reformierten Unionsvertrag, Zur unionsrechtlichen Rolle nationalen Verfassungsrechts und zur Überwindung des absoluten Vorrangs, ZaöRV 2010, p. 711.

94 *Besselink*, (fn. 63), p. 44.

II. The question of interpretation

There is some disagreement as to who should have the ultimate authority to define what is covered by national constitutional identity for the purpose of Article 4(2) TEU. Formally, the identity clause is part of the *acquis* and as such under the obligatory jurisdiction of the CJEU. At the time Article I-5(1) TECE was drafted and later, when the provision was maintained by the Treaty of Lisbon, it was clear that by its codification, constitutional identity would become a concept of EU law, the interpretation of which, according to Article 19 TEU, is within the sole competence of the CJEU.[95] In order to ensure uniform application of EU law it is therefore obligatory for national courts, at least for those against whose decisions there is no judicial remedy available under domestic law, to refer questions regarding the interpretation of EU law, including that of Article 4(2) TEU, to the CJEU. The problem is that the provision requires an interpretation of national (constitutional) law that is obviously outside the competences conferred to the CJEU by the Treaties. Additionally, from a teleological point of view, a centralised and standardised interpretation of what is constitutive for 28 individual national constitutional identities by the supranational EU judiciary does certainly not live up to the ideal of "united in diversity" as envisaged by the Treaties. From this it follows that the competence of the CJEU is confined to the establishment of guidelines for the identification of national constitutional identity.[96]

In its *Lisbon* decision, the BVerfG obviously found an acceptable middle ground based on the duality of judicial protection in the EU, when it allocated the competence between the CJEU and national (constitutional) courts. When the BVerfG states that "the guarantee of national constitutional identity under constitutional and under Union law go hand in hand in the European legal area", it obviously understands constitutional identity as a national constitutional concept on the one hand and as a concept of EU law on the other, just as two sides of the same coin.[97] Hence, it claims it for itself to review

> "whether the inviolable core content of the constitutional identity of the Basic Law […] is respected".[98]

According to the BVerfG, the exercise of the review power follows the principle of *Europarechtsfreundlichkeit* (the openness towards EU law) of the Basic Law[99] and thus satisfies the principle of sincere cooperation. There are critical voices however; according to Advocate General *Cruz Villalón*, an "absolute" reservation of identity

95 Working Group V, (fn. 90), p. 11.
96 See for example the guidelines established by the CJEU in the context of the proportionality test, e.g. CJEU, case C-73/08, *Nicolas Bressol*, ECLI:EU:C:2010:181, para. 71 et seq.
97 BVerfG, 2 BvE 2/08 – *Lisbon*, para. 240 (English).
98 Ibid. *Von Bogdandy/Schill*, (fn. 9), p. 1446, for instance state that "[i]t is not convincing […] to understand national identity as an absolute barrier and to interpret it as broadly" as the BVerfG indicated in *Lisbon*. See also BVerfG, 2 BvR 2661/06 – *Honeywell*.
99 BVerfG, 2 BvE 2/08 – *Lisbon*, para. 240 (English).

"independently formed and interpreted by the competent – often judicial – bodies of the Member States would very probably leave the EU legal order in a subordinate position, at least in qualitative terms".[100]

III. National (constitutional) identity in the case-law of the CJEU

Hitherto there are about eleven judgments and orders[101] as well as 15 Advocates General opinions[102] that are relevant in the context of national (constitutional) identity. They are concerned with federal structures, language regimes and accession to specific professions that is subject to certain constitutionally determined requirements in some member states.

It is not particularly surprising that, since the identity clause has become judicially enforceable by the end of 2009, the use of the concept of national/constitutional iden-

100 Opinion AG *Cruz Villalón*, case C-62/14, *Gauweiler and others*, ECLI:EU:C:2015:7, para. 59.

101 CJEU, case C-473/93, *Commission v. Luxembourg*, ECLI:EU:C:1996:263 (teaching); CJEU, case C-344/01, *Germany v. Commission*, ECLI:EU:C:2004:121 (federal structure); CJEU, case C-145/04, *Spain v. United Kingdom*, ECLI:EU:C:2006:543 (national electoral procedure); GC, case T-185/05, *Italy v. Commission*, ECLI:EU:T:2008:519 (language regime); CJEU, case C-208/09, *Sayn-Wittgenstein*, ECLI:EU:C:2010:806 (recognition of nobility titles); CJEU, case C-51/08, *Commission v. Luxembourg*, ECLI:EU:C:2011:336 (language requirement for accession to profession); GC, joined cases T-267/08 and T-279/08, *Région Nord-Pas-de-Calais v. Commission*, ECLI:EU:T:2011:209 (local authorities' freedom of administration); CJEU, case C-391/09, *Runevič-Vardyn*, ECLI: EU:C:2011:291 (language regime); CJEU, case C-393/10, *O'Brien*, ECLI:EU:C:2012:110 (remuneration of part-time judges); CJEU, case T-453/10, *Northern Ireland Department of Agriculture and Rural Development v. Commission*, ECLI:EU:T:2012:106 (regional self government); CJEU, joined cases C-58/13 and C-59/13, *Torresi*, ECLI:EU:C:2014:2088 (accession to the profession of lawyer).

102 Opinion AG *Jacobs*, case C-120/94, *Commission v. Greece*, ECLI:EU:C:1995:109 (use of name and national symbols); AG *Léger*, case C-473/93, *Commission v. Luxembourg*, ECLI:EU:C:1996:80 (teaching); AG *Maduro*, case C-160/03, *Spain v. Eurojust*, ECLI:EU:C:2004:817 (language regime); joined cases C-53/04 and C-180/04, *Marrosu and Sardino*, ECLI:EU:C:2005:569 (employment contracts in the public sector); case C-213/07, *Michaniki*, ECLI:EU:C:2008:544 (procedure for awarding public works contracts) and case C-135/08, *Rottman*, ECLI:EU:C:2009:588 (composition of the national body politic); AG *Kokott*, joined cases C-428/06 to C-434/06, *UGT Rioja*, ECLI:EU:C:2008:262 (division of competences within a member state); case C-222/07, *UTECA*, ECLI:EU:C:2008:468 (national culture) and opinion procedure 2/13, *Accession of the EU to the ECHR*, ECLI:EU:C:2014:2475 (recognition of judgments of ECtHR); AG *Colomer*, case C-205/08, *Umweltanwalt von Kärnten*, ECLI:EU:C:2009:397 (allocation of judicial duties to quasi-judicial bodies); AG *Cruz Villalón*, joined cases C-47/08, C-50/08, C-51/08, C-53/08, C-54/08, C-61/08, *Commission v. Belgium/France/Luxembourg/Austria/Germany/Greece*, ECLI:EU:C:2010:513 (accession to the profession of notary) and case C-62/14, *Gauweiler and others*, ECLI:EU:C:2015:7 (vertical division of powers); AG *Jääskinen*, case C-391/09, *Runevič-Vardyn*, ECLI:EU:C:2010:784 (language regime); AG *Bot*, case C-364/10, *Hungary v. Slovakia*, ECLI:EU:C:2012:124 (application of EU law to heads of state) and joined cases C-473/13 and C-514/13, *Bero and Bouzalmate*, ECLI:EU:C:2014:295 (federal structure); AG *Wahl*, joined cases C-58/13 and C-59/13, *Torresi*, ECLI:EU:C:2014:265 (accession to the profession of lawyer).

tity before the CJEU has increased.[103] *Sayn-Wittgenstein*,[104] a preliminary reference of the Austrian *Verwaltungsgerichtshof* concerning Article 21 TFEU and the non-recognition of a nobility title acquired in Germany, was the first one to be dealt with by the CJEU after the entering into force of the Treaty of Lisbon.[105] The Austrian Law on abolition of the nobility, which has constitutional status, implements the general principle of equal treatment and prohibits the acquisition, possession or use by its citizens of noble titles or status.[106] According to the Austrian Government the objective pursued by that prohibition, i.e. to protect the constitutional identity of the republic by ensuring formal equality against the background of Austria's history as an empire, justifies any restriction on the right to free movement.[107] The CJEU first determined that the Austrian measure constitutes a restriction on the freedoms conferred by Article 21 TFEU.[108] While Advocate General *Sharpston* did not even mention national identity in her opinion,[109] the Court explicitly referred to Article 4(2) TEU when examining possible grounds for justification. It held that, in conformity with the observations submitted by the Commission,[110] the status of a state as a republic belongs to its national identity that has to be respected by the EU.[111]

The CJEU did not engage in a discussion concerning the applicability or the effects of Article 4(2) TEU. It was rather *en passant*, while assessing the proportionality of the measure justified on grounds of public policy that the Court referred to constitutional identity. Unlike in previous cases, where the CJEU determined that "the preservation of […] national identities is a legitimate aim respected by the Community legal order",[112] in *Sayn-Wittgenstein* it it established national identity as an additional criterion for assessing the proportionality of the Austrian measure. It clarified that the constitutional organisation of a state falls within the scope of Article 4(2) TEU,[113] and thus generally applies to the different constitutional arrangements in the member

103 See *Burgorgue-Larsen*, A Huron at the Kirchberg Plateau or a few naive thoughts on constitutional identity in the case-law of the European Union, in: Saiz Arnaiz/Alcoberro Llivina, (fn. 5), p. 283 et seq.

104 CJEU, case C-208/09, *Sayn-Wittgenstein*, ECLI:EU:C:2010:806.

105 *Besselink*, Case C-208/09, Ilonka Sayn-Wittgenstein v. Landeshauptmann von Wien, Judgment of the Court (Second Chamber) of 22 December 2010, CMLRev 2012, p. 671; *di Salvatore*, Il Caso Sayn-Wittgenstein: ordine pubblico e identità costituzionale dello Stato membro, Quaderni costituzionali 2011, p. 435; *Jastrzebska*, Le principe de l'identité nationale des Étatsmembres – signification incertaine d'une disposition ambiteuse, in: Besson/Pichonnaz (eds.), Les principes en droiteuropéen, Principles in European Law, 2011, p. 176 et seq.; *Kröll*, Der EuGH als "Hüter" des republikanischen Grundprinzips der österreichischen Bundesverfassung?, Anmerkungen zum Urteil des EuGH vom 22. Dezember 2010 in der Rs. Sayn-Wittgenstein, JÖR 2011, p. 313; *von Bogdandy/Schill*, (fn. 9), p. 1423 et seq.

106 CJEU, case C-208/09, *Sayn-Wittgenstein*, ECLI:EU:C:2010:806, para. 88.

107 Ibid., para. 74 et seq.

108 Ibid., para. 71.

109 Opinion AG *Sharpston*, case C-208/09, *Sayn-Wittgenstein*, ECLI:EU:C:2010:608.

110 CJEU, case C-208/09, *Sayn-Wittgenstein*, ECLI:EU:C:2010:806, para. 80.

111 Ibid., para. 92.

112 CJEU, case C-473/93, *Commission v. Luxemburg*, ECLI:EU:C:1996:263, para. 35.

113 See *von Bogdandy/Schill*, (fn. 9), p. 1424 et seq.

states. Additionally, from the fact that the Court qualified the republican form of government as part of national constitutional identity it follows that the operation of Article 4(2) TEU is (also) triggered by identity relevant components that are not exclusive, but rather shared by other member states.[114]

In two other free movement cases concerned with linguistic diversity, *Runevič-Vardyn*[115] and *Las*,[116] the CJEU – again when examining a possible justification – determined that the respect for national identity claimed by Article 4(2) TEU includes the protection of a state's official national language.[117] Quite recently, in *Torresi and others*, the CJEU was concerned with the access to the profession of a lawyer, more specifically with the question whether or not a provision of secondary EU law should be held invalid due to its incompatibility with a constitutional provision under which access to that profession is dependent on having passed a state examination. The directive at issue implements the right to establishment for lawyers,[118] allowing them to practice in other member states under the professional title obtained in the member state of origin. After having determined that the directive does not allow for a circumvention of the constitutional rule, the CJEU concluded that the provision of the directive

> "in so far as it enables nationals of a Member State who obtain the professional title of lawyer in another Member State to practice the profession of lawyer in the State of which they are nationals under the professional title obtained in the home Member State, is not, in any event, capable of affecting either the fundamental political and constitutional structures or the essential functions of the host Member State within the meaning of Article 4(2) TEU".[119]

It comes as no surprise that the access to a profession, the exercise of which is not even connected with the exercise of public authority, even if constitutionally determined, cannot be constitutive for constitutional identity. In *O'Brian*, the CJEU came quite straight to the point. In response to the Latvian government, according to which the application of EU law to the judiciary, more precisely to the remuneration of part-time judges, would as such be contrary to Article 4(2) TEU, the Court simply held that this

> "cannot have any effect on national identity".[120]

Given that cases such as *O'Brian* and *Torresi and others* reveal a tendency of the member states to generously invoke constitutional identity, an expedient understand-

114 Supra C.
115 CJEU, case C-391/09, *Runevič-Vardyn*, ECLI:EU:C:2011:291, para. 86; see opinion AG *Maduro*, case C-160/03, *Spain v. Eurojust*, ECLI:EU:C:2004:817, para. 35.
116 CJEU, case C-202/11, *Las*, ECLI:EU:C:2013:239, para. 26.
117 See also CJEU, case C-51/08, *Commission v. Luxemburg*, ECLI:EU:C:2011:336, para. 124.
118 Directive 98/5/EC, OJ L 77 of 14/3/1998, p. 36.
119 CJEU, joined cases C-58/13 and C-59/13, *Torresi and others*, ECLI:EU:C:2014:265, para. 53 et seq.
120 CJEU, case C-393/10, *O'Brien*, ECLI:EU:C:2012:110, para. 49.

ing of the provision indeed requires a "less is more" approach.[121] Correspondingly, the CJEU obviously limits the scope of application of the identity clause to the most fundamental rules underlying a specific legal order like the form of government, the official language or the specific interpretation of certain fundamental rights.

IV. National (constitutional) identity and the primacy of EU law

Notwithstanding the fact that with the failure of the TECE the primacy clause was dropped, it is beyond dispute that primacy still constitutes an unwritten structural element of EU law; this was not least affirmed by Declaration No 17 attached to the Treaty of Lisbon.[122] In *Melloni*, the CJEU gave a clear rebuff to the idea of a possible neutralisation of primacy in the context of Article 53 CFREU; the referring court envisaged an interpretation of the said provision to the effect that a member state, the constitution of which provides for a higher standard of fundamental rights protection than the Charter, should be authorised to apply its standard. According to the CJEU however, higher national standards are allowed only if

> "the primacy, unity and effectiveness of EU law are not thereby compromised".[123]

By generally giving priority to the preservation of the *effet utile* of EU law over the rationale to preserve specific national standards of fundamental rights protection, the CJEU confirms its intransigent position with regard to the special characteristics of EU law. This general determination is significant, as with fundamental rights an area is concerned that has been widely accepted as being fundamtental to (constitutional) identity.[124] From the supranational perspective, it comes as no surprise what the Court ruled in *Melloni*;[125] eroding the principle of primacy in such a case would open up *Pandora*'s *Box*. If the CJEU would have allowed for national fundamental rights to generally neutralise primacy, it would be difficult to argue why this should not apply with regard to all other sources referred to in Article 53 CFREU, such as human rights recognised in international agreements concluded by the EU or the member states, and possibly with regard to national constitutional identity.

121 In *Melloni* however, Spain stated that the participation of the defendant at his trial is not covered by the national identity of Spain. Opinion AG *Bot*, case C-399/11, *Melloni*, ECLI:EU:C:2012:600, para. 141.

122 OJ C 326 of 26/10/2012, p. 346.

123 CJEU, case C-399/11, *Melloni*, ECLI:EU:C:2013:107, para. 56 et seq. Cf. *Sarmiento*, (fn. 31), note 89 with further references; also *Besselink*, Entrapped by the Maximum Standard: On Fundamental Rights, Pluralism and Subsidiarity in the European Union, CMLRev 1998, p. 629 et seq.

124 See BVerfG 37, 271 – *Solange I*; CJEU, case C-36/02, *Omega*, ECLI:EU:C:2004:614.

125 See opinion AG *Bot*, case C-399/11, *Melloni*, ECLI:EU:C:2012:600, para. 141.

There is the opinion however that Article 4(2) TEU has the potential to render EU law inapplicable in certain cases.[126] Correspondingly, the BVerfG underlined that the so called "identity review" is destined to ensure that the primacy of EU law only applies

> "by virtue and in the context of the constitutional empowerment that continues in effect".[127]

Thus, Article 4(2) TEU is meant to operate as precluding EU measures that have the effect of depriving the member states and their citizens of the substance of national (constitutional) law that is constitutive for their identities. However, most probably the CJEU will establish comparable constraints with regard to the Article 4(2) TEU as it has done with regard to Article 53 CFREU; from this it follows that member states' constitutional identities would have to be respected by the EU as long as the primacy, unity and effectiveness of EU law are not thereby compromised.[128] As far as is apparent from the actual case-law on Article 4(2) TEU, the CJEU is just as unwilling to relativise absolute primacy as it is in the context of the *Günstigkeitsklausel*; national identity is at best considered as a possible derogation from EU law subject to a proportionality test.[129] By simply "downgrading" national constitutional identity to a mere supporting argument in the context of the proportionality assessment, the CJEU fails to attach due importance to the issue though.[130] There should, in the first place, be a duty to consistent application of EU law flowing from Article 4(2) TEU, i.e. that the respective provisions of EU law have to be applied by the EU and the member states in a way that is most likely to comply with identity relevant national law.[131] There are cases however, where this solution is not viable, i.e. where a reinterpretation of EU law is required or where such an application is obviously inconsistent

126 See *von Bogdandy/Schill*, (fn. 9), p. 1419, who understand the identity clause as enabling national constitutional courts in exceptional cases to invoke limits to primacy. *Besselink*, (fn. 8), p. 47 et seq., argues in the same direction, stating that identity-related exceptions to primacy should be confined to constitutional provisions that are fundamental and contributing to the identity of a member state's constitution. *Kumm/Ferreres Comella*, (fn. 4), p. 6, assume that in the context of the TECE and thus in combination with the primacy clause provided for therein, national courts should be authorised *qua* EU law to set aside secondary EU law in certain cases where national constitutional identity is at stake; the capacity of national courts to interfere with the uniform application of EU law should be limited to cases, where they can claim that a specific legal rule "explicitly incorporated" in the national constitution justifies non-compliance with EU law. According to *Claes*, (fn. 87), p. 112, Article 4(2) TEU should not be understood as a limitation to primacy, but rather as an obligation of the EU to provide for exceptions to the uniform application and thus to engage with those member states who claim that their national identities are at stake; similar *Torres Pérez*, (fn. 32), p. 146 et seq.

127 BVerfG, 2 BvE 2/08 – *Lisbon*, para. 240 (English).

128 CJEU, case C-399/11, *Melloni*, ECLI:EU:C:2013:107, para. 56 et seq.

129 Article I-5 TECE was intended to "safeguard the role and importance of the Member States" within the Treaties and at the same time allow for a margin of flexibility, see Working Group V, (fn. 90), p. 11.

130 Similar *Besselink*, (fn. 105), p. 684.

131 See e.g. CJEU, case C-106/89, *Marleasing*, ECLI:EU:C:1990:395, para. 8.

with the wording of a specific provision of EU law.[132] In such cases, a decision making setting involving the national as well as the EU level should allow for a common say on whether or not EU law is unduly interfering with national constitutional identity in a specific case. Alongside the justification test, the review should take the form of a self standing identity test, but only after a violation of EU law has been established by the CJEU.

Most authors agree that an intensified judicial dialogue between EU and national courts is crucial for a serious balancing of national and EU interests. Accordingly, *von Bogdandy/Schill* propose sort of a "reverse preliminary ruling", where the CJEU is meant to request information on the view of the constitutional court of the respective member state regarding the interpretation of national constitutional identity in a specific case. Based on the information it receives, it has to balance member state and EU interests by taking due account of the view expressed by the constitutional court. According to them, the final decision would be left with the CJEU, whereas national constitutional courts would have the possibility to carry out an identity control test themselves; under the assumption that national constitutional courts respect the principle of sincere cooperation, remaining divergences would have to be accepted in a pluralistic legal environment.[133] Under the proposal of *Kumm/Ferreres Comella*, it should be for the constitutional legislator and not for constitutional courts to decide on a potential overruling of EU law, provided the national law at issue is specific in nature and not just an abstract right. Their intention is to reduce the risk for the uniform enforcement of EU law by establishing a "specificity" requirement.[134]

V. An "Identity Committee" for the EU

Based on the fact that neither the CJEU nor national courts are on their own competent to give authoritative interpretations of the national *and* the EU concept of constitutional identity, it is an institutionalised decision making process involving the judiciary as well as the political branch that is proposed here. Corresponding to the prevailing opinion, a qualified EU-wide discourse on the issue is needed;[135] what would be counterproductive however is either a general neutralisation of primacy, constituting an encroachment on the constitutional identity of the EU, nor a final say of the CJEU. Both options would not correspond to the concept of constitutional pluralism that is at the heart of the EU legal arrangement.

The objective is therefore to establish a procedural reconciliation of the two concepts of national constitutional identity as identified by the German BVerfG, one of them rooted in EU law, more precisely in Article 4(2) TEU and the other in national

132 In this context see e.g. CJEU, case 14/83, *von Colson and Kamann*, ECR 1984, 1891, para. 26.

133 *Von Bogdandy/Schill*, (fn. 9), p. 1449.

134 *Kumm/Ferreres Comella*, (fn. 4), pp. 21, 25 – their proposal has to be seen in the TECE context though.

135 E.g. *Arnull*, Judicial Dialogue in the European Union, in: Dickson/Eleftheriadis (eds.), Philosophical Foundations of European Union Law, 2012, p. 109.

(constitutional) law. Hence, the establishment of an "Identity Committee" is proposed,[136] an *ad-hoc* body that meets whenever a violation of Article 4(2) TEU is claimed before the CJEU. In cases where consistent application of EU law[137] is not viable and the CJEU has already established a violation of EU law, the latter should be obliged to confer the issue to the Committee.[138] The identity review conducted by the Committee could take the form of interlocutory proceedings comparable to preliminary references initiated by national courts according to Article 267 TFEU.[139]

Ideally, the Committee should be composed of two representatives per member state, one of whom representing the judiciary and the other representing the political branch; at best, the Committee should be complemented by two EU representatives, one from the CJEU and the Commission respectively, who should not be entitled to vote but still have an advisory and observing function. The representation of the political and the judicial branch is meant to ensure that identity relevant issues are neither exclusively decided by the non-democratic judiciary, nor by politicians whose decisions are often influenced by party political considerations. The debate in the Committee, chaired by the representatives of the member state the identity of which is concerned, should result in a common final opinion that is binding on the CJEU i.e. that it has to take the opinion as a basis for its judgment; the Court is obliged to draw respective conclusions therefrom that do not go beyond what is necessary in order to attain the objective of preserving different national identities.[140] In order to ensure transparency and to allow for an EU-wide discourse, it is decisive that separate opinions are permissible and disclosed together with the final opinion of the Identity Committee *before* the CJEU adopts its judgment. Finally, the vote of the presiding member state should be accorded relatively more weight in relation to all other votes, since its representative can best assess the specificities of the legal system concerned.

The introduction of such an identity review would require an amendment of the Statute of the CJEU,[141] more specifically the insertion of provisions governing the obligation of the CJEU to stay proceedings in identity relevant cases, to confer them to the Committee and to base its judgments on the final opinions of the latter. According to Article 281(2) TFEU the insertion of the respective provisions would require the EU legislators – either at the request of the Commission and after consultation of the CJEU or *vice versa* – to amend the Statute by acting in accordance with the ordinary legislative procedure.

The review conducted by the Identity Committee would not interfere with the exclusive jurisdiction of the CJEU under Article 344 TFEU. It would remain exclusively for the latter to establish guidelines for the identification of what is covered by

136 Cf. the proposal of a "Constitutional Council", *Weiler*, To be a European Citizen – Eros and Civilization, WPS in European Studies, 1998, p. 45 et seq.

137 Cf. supra D.IV.

138 Of course, this should apply equally in cases not linked to free movement.

139 In this context cf. the proposal of *von Bogdandy/Schill*, (fn. 9), p. 1449 – supra D.IV.

140 Regarding the justification of restrictions to market freedoms see e.g. CJEU, case C-137/09, *Josemans*, ECLI:EU:C:2010:774, para. 69 with further references.

141 Protocol (No. 3) on the Statute of the Court of Justice of the European Union, OJ C 326 of 26/10/2012, p. 210.

the EU law concept of national constitutional identity provided for by Article 4(2) TEU and thus to interpret EU law. The competence of the Committee would be confined to the interpretation of the national concept of constitutional identity and would therefore not involve the interpretation of EU law.

Moreover, the Committee should not be set up as an institution or body of the EU, but rather as an intergovernmental body outside the Treaty regime by means of an international agreement concluded among the 28 member states. The agreement should contain provisions governing procedural aspects such as voting mechanisms and the composition of the Committee. To date, several international agreements have been concluded among the member states, such as the Treaty on Stability, Coordination and Governance in the Economic and Monetary Union (Fiscal Compact, 2012). Even though the agreement establishing the proposed Identity Committee would have to comply with EU law, it would not form an integral part thereof. As a consequence, disputes relating to the agreement or to the duties of the Committee could not be brought before the CJEU, unless the member states would agree otherwise.[142]

E. Conclusion

Against the background that there are three layers of constitutional identities coexisting in the EU, establishing Article 4(2) TEU as an absolute reservation would unduly encroach on the constitutional identity of the EU for the benefit of member states identities. This is perfectly framed by Advocate General *Cruz Villalón*, who determines that

> "it seems […] an all but impossible task to preserve this Union, as we know it today, if it is to be made subject to an absolute reservation, ill-defined and virtually at the discretion of each of the Member States, which takes the form of a category described as 'constitutional identity'".[143]

Hence, the identity clause should be operated in such a way as to stimulate the process of constitutionalisation that is characteristic for the pluralistic EU legal arrangement. As such, EU and national actors should jointly engage in the conceptualisation of constitutional identity and accept a common say on identity-related issues. Ideally, the proposed review procedure results in a broad and intensified EU-wide dialogue instead of conferring the decision making power exclusively either upon national courts or the CJEU. It would adequately take account of the significance of different national constitutional identities in a pluralistic legal environment and bring about additional legitimation by the revaluation of the member states on the EU level. The discourse, at best including the public sphere, could be triggered by the publication not only of the final opinions of the Identity Committee, but also of separate opinions of national representatives. This could urge the CJEU even more to adequately sub-

142 See e.g. Article 8 Fiscal Compact in conjunction with Article 273 TFEU.
143 Opinion AG *Cruz Villalón*, case C-62/14, *Gauweiler and others*, ECLI:EU:C:2015:7, para. 59.

stantiate its judgments when it is concerned with identity relevant issues. Adhering to the principle of sincere cooperation is of utmost importance however, since it prohibits interpretations of the concept of national constitutional identity in a way that jeopardises the implementation of the Treaty objectives.

The opinions of the proposed *ad hoc* body, the to be major player in identity relevant issues, would not interfere with the CJEU's exclusive jurisdiction, as the competence of the Identity Committee would be confined to the interpretation of national law within the framework of the general guidelines established by the CJEU. Assumed that the judicial and the political branch would be equally represented in the Identity Committee, legitimate concerns that the non-democratic judiciary is competent to define identity-related limits to European integration would be obviously unfounded.[144] Given that under the current regime it is only for the EU judiciary to decide on identity relevant issues, within the limits imposed by national constitutional courts though, the proposed identity review could be a fair trade-off between the national interest of preserving national identity and the EU interests of deepening integration and strengthening the EU; consequentially the procedure could serve the EU and the member states alike. As such, it would be evidence that EU constitutional pluralism is still alive.

144 See *von Bogdandy/Schill*, (fn. 9), p. 1437.