

COMMON MARKET LAW REVIEW

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Aims

The Common Market Law Review is designed to function as a medium for the understanding and implementation of Community Law within the Member States and elsewhere, and for the dissemination of legal thinking on Community Law matters. It thus aims to meet the needs of both the academic and the practitioner. For practical reasons, English is used as the language of communication.

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The Common Market Law Review is designed to function as a medium for the understanding and analysis of European Union Law, and for the dissemination of legal thinking on all matters of European Union Law. It thus aims to meet the needs of both the academic and the practitioner. For practical reasons, English is used as the language of communication.

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OVERCOMING ABSOLUTE PRIMACY: RESPECT FOR NATIONAL IDENTITY UNDER THE LISBON TREATY

ARMIN VON BOGDANDY and STEPHAN SCHILL*

1. Introduction

Determining the relationship between EU law and the constitutional law of the Member States is one of the most difficult issues in the European legal space. While the Lisbon Treaty, unlike Article I-6 of the Treaty Establishing a Constitution for Europe (Constitutional Treaty, CT),¹ has refrained from explicitly addressing the topic,² it has given prominence to another provision that can arguably serve as a basis for easing the conflicting positions of the Court of Justice of the European Union and the constitutional and supreme courts of many Member States on the primacy of EU law.³ That provision is Article 4(2) TEU, which reads:

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1. On primacy under the Constitutional Treaty, see Kwiecień, “The Primacy of European Union Law over National Law under the Constitutional Treaty”, (2005) *German Law Journal (GLJ)*, 1479; Kumm and Ferreres Comella, “The Primacy Clause of the Constitutional Treaty and the Future of Constitutional Conflict in the European Union”, (2005) *International Journal of Constitutional Law (I.CON)*, 473; Rittleng, “Le principe de primauté du droit de l’Union”, 41 *RTDE* (2005), 285; Kadelbach, “Vorrang und Verfassung: Das Recht der Europäischen Union im innerstaatlichen Bereich”, in Gaitanides, Kadelbach, Rodríguez Iglesias (Eds.), *Europa und seine Verfassung – Liber Amicorum Manfred Zuleeg* (Nomos, 2005), p. 219.

2. Member States have only accepted, in a Declaration to the Lisbon Treaty, the primacy of EU law over the law of Member States “in accordance with well settled case law of the Court of Justice of the European Union”, recalling Case 6/64, *Costa v. ENEL*, [1964] ECR 1251. See Declaration 17 of the Final Act of the Intergovernmental Conference, O.J. 2008, C 115/344. This has not prevented domestic constitutional courts from retaining constitutional limits to the primacy of EU law under the reformed European treaties. See, above all, Decisions of the German Federal Constitutional Court: *Lisbon* (BVerfGE) 123, 267, 353 et seq. (English translation at <www.bverfg.de/en/decisions/es20090630_2bve000208en.html>) (2009); *Honeywell* (BVerfGE), Decision of 6 July 2010, (2010) NJW, 3422, 3423 et seq. (English translation at <www.bverfg.de/entscheidungen/rs20100706_2bvr266106en.html>).

3. Not all Member States have specialized constitutional jurisdiction. Instead, the supreme courts in some Member States also exercise constitutional jurisdiction. In the following, for purposes of simplification we will refer summarily to domestic constitutional courts or

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

In our view, this (compared to the Maastricht Treaty) revised identity clause can help to reconceptualize the relationship between EU law and domestic constitutional law and guide the way to a more nuanced understanding beyond the categorical positions of the ECJ on the one side, which supports the doctrine of absolute primacy of EU law even over the constitutional law of Member States,⁴ and that of most domestic constitutional courts on the other, which largely follow a doctrine of relative primacy in accepting the primacy of EU law subject to certain constitutional limits.⁵

constitutional courts of Member States, which for our purposes encompasses the supreme courts of Member States to the extent they exercise constitutional jurisdiction.

4. Foundational on the primacy of EU law: *Costa v. ENEL*, cited *supra* note 2, 1269; most recently, Case C-409/06, *Winner Wetten*, judgment of 8 Sept. 2010, nyr, paras 53 et seq. On the primacy of EU law in relation to the constitutional law of Member States see Case 11/70, *Internationale Handelsgesellschaft*, [1970] ECR 1125, para 3; Case 106/77, *Simmenthal*, [1978] ECR 629, paras. 21 et seq.; Case 149/79, *Commission v. Belgium* [1980] ECR 3881, para 19; Joined Cases C-46 & 48/93, *Brasserie du Pêcheur and Factortame II*, [1996] ECR I-1029, para 33; Case C-473/93, *Commission v. Luxemburg*, [1996] ECR I-3207, paras. 37 et seq.; Joined Cases C-10-22/97, *IN.CO.GE.'90 et al*, [1998] ECR I-6307, paras. 11, 20 et seq.; Case C-285/98, *Tanja Kreil*, [2000] ECR I-95, paras. 25 et seq.; Case C-213/07, *Michaniki*, [2008] ECR I-9999, paras. 62 et seq.

5. For discussion on the primacy of EU law and the relationship between the ECJ and national constitutional courts see Grabenwarter, “National Constitutional Law Relating to the European Union”, in von Bogdandy and Bast (Eds.), *Principles of European Constitutional Law*, 2nd ed. (Hart, 2010), p. 83; Huber, “Offene Staatlichkeit: Vergleich”, in von Bogdandy, Cruz Villalón and Huber (Eds.), *Handbuch Ius Publicum Europaeum*, Vol. II (Müller Verlag, 2008), § 26 paras. 34 et seq.; Albi, “Supremacy of EC Law in the Member States”, 3 *EuConst* (2007), 25; Mayer, *Kompetenzüberschreitung und Letztbegründung* (Beck, 2000), p. 76 et seq.; Mayer, “Multilevel Constitutional Jurisdiction”, in von Bogdandy and Bast, *ibid.*, p. 399; Slaughter, Sweet Stone and Weiler (Eds.), *The European Court and National Courts – Doctrine and Jurisprudence* (Hart, 1998); Grewe and Ruiz Fabri, *Droits constitutionnels européens* (P.U.F., 1995), p. 118 et seq.; Cartabia, de Witte and Pérez Tremps (Eds.), *Constitución europea y constituciones nacionales* (Tirant lo Blanch, 2005); Bosco, “La primauté du droit communautaire dans les ordres juridiques des Etats membres de l’Union européenne”, in Due, Ole, Lutter, Marcus and Schwarze (Eds.), *Festschrift für Ulrich Everling* (Nomos, 1995), p. 149; Alter, *Establishing the Supremacy of European Law. The Making of an International Rule of Law in Europe* (OUP, 2001); Celotto and Groppi, “Diritto UE e diritto nazionale: Primauté vs controlimiti”, (2004) *Riv. ital. dir. pubb. Com.*, 1309; Claes, *The National Courts’ Mandate in the European Constitution* (Hart, 2006), p. 387 et seq.

By focusing national identity on the fundamental political and constitutional structures of Member States, Article 4(2) TEU, we argue, provides a perspective for overcoming the idea of absolute primacy of EU law and the underlying assumption of a hierarchical model for understanding the relationship between EU law and domestic constitutional law, because this provision endorses a pluralistic vision of the relationship between EU law and domestic constitutional law.⁶ Article 4(2) TEU should be seen as integrating the thrust of the jurisprudence of numerous domestic constitutional courts on the relationship between EU law and national constitutional law. The revised identity clause in Article 4(2) TEU not only demands the respect for national constitutional identity, but can be understood as permitting domestic constitutional courts to invoke, under certain limited circumstances, constitutional limits to the primacy of EU law.⁷ At the same time, Article 4(2) TEU, in tandem with the principle of sincere cooperation contained in Article 4(3) TEU, embeds these constitutional limits in an institutional and procedural framework in which domestic constitutional courts and the ECJ interact closely as part of a composite system of constitutional adjudication. This aims at ensuring both respect for EU law and the constitutional identity of the Member States.

This perspective is in line with concepts for understanding the relationship between EU law and the law of Member States that follow multilevel approaches, the network concept⁸ and – especially in Germany⁹ – the concept

6. See Maduro, “Contrapunctual Law: Europe’s Constitutional Pluralism in Action”, in Walker (Ed.), *Sovereignty in Transition* (Hart, 2003), p. 501; Walker, “The Idea of Constitutional Pluralism”, (2002) *MLR*, 317; Kumm, “Who is the Final Arbiter of Constitutionality in Europe?: Three Conceptions of the Relationship between the German Federal Constitutional Court and the European Court of Justice”, 36 *CML Rev.* (1999), 351. From a comparative perspective with the constitutional order of the United States: Halberstam, “Constitutional Hierarchy: The Centrality of Conflict in the European Union and the United States”, in Dunoff and Trachtman (Eds.), *Ruling the World? Constitutionalism, International Law, and Global Governance* (Cambridge U.P., 2009), p. 326.

7. Similarly already in respect of the situation under the Constitutional Treaty, Kumm and Ferreres Comella, op. cit. *supra* note 1, 491–492; Pernice, *Das Verhältnis europäischer zu nationalen Gerichten im europäischen Verfassungsverbund* (de Gruyter, 2006), p. 56. For a similar understanding of Art. 4(2) TEU as the one presented here see Besselink, “National and Constitutional Identity before and after Lisbon”, (2010) *Utrecht Law Review*, 36; Pernice, “Der Schutz nationaler Identität in der Europäischen Union”, 136 *AöR* (2011), 185.

8. See Peters, *Elemente einer Theorie der Verfassung* (Duncker & Humblot, 2001), pp. 215–228, 253–255; Franchini, “Les notions d’administration indirecte et de coadministration”, in Auby and Dutheil de la Rochère (Eds.), *Droit Administratif Européen* (Bruylant, 2007), p. 245, 252 et seq.; Goldmann, “Der Widerspenstigen Zähmung, oder: Netzwerke dogmatisch gedacht”, in Boysen et al. (Eds.), *Netzwerke* (2007), p. 225.

9. For a similar view outside Germany see Besselink, *A Composite European Constitution* (Europa Law Publishing, 2007).

of *Verbund* (i.e., a composite structure).¹⁰ Against this background, we examine the content of Article 4(2) TEU as an expression of European composite constitutionalism in which EU law and domestic constitutional law interact closely in determining the national identity clause (section 2). We argue that the principles of constitutional law protected by domestic constitutional courts against the primacy of EU law are paradigmatic in elucidating the content of national identity (section 3). National identity, however, does not enjoy absolute protection under EU law, but has to be balanced, against the principle of uniform application of EU law; implementing this duty is a task for both the ECJ and national constitutional courts as parts of a system of composite constitutional adjudication (section 4). This interaction between the ECJ and domestic constitutional courts, as well as any remaining potential for conflict, should be understood as a forceful and welcome mechanism of separation of powers (section 5).

2. Article 4(2) TEU as an expression of Europe's composite structure

The characteristic feature of a composite structure (*Verbund*) is the intertwining of cooperation and hierarchy as ordering paradigms for the conduct of actors in the European legal space. The concept of composite constitutionalism transcends traditional and somewhat simplistic ideas about the relationship between different constitutional orders, especially those that operate with simple supra- and subordination, where one legal order necessarily trumps another. Instead, the *Verbund* concept highlights both the autonomy of the actors at EU and national levels, and their mutual dependence in their quest to achieve common aims, thus requiring loyal cooperation and the submission to a uniform legal regime.¹¹ In that sense, the *Verbund* concept can be used both to conceptualize the constitutional situation within the EU,

10. In the 1990s, the *Verbund* concept figured prominently above all in the two competing macro-interpretations of Paul Kirchhof's (primarily intergovernmental) *Staatenverbund* (composite of States) and Ingolf Pernice's (far more federal) concept of *Verfassungsverbund* (composite constitutionalism). Compare Kirchhof, "The European Union of States", in von Bogdandy and Bast, op. cit. *supra* note 5, p. 735 with Pernice, "Theorie und Praxis des Europäischen Verfassungsverbundes", in Calliess (Ed.), *Verfassungswandel im europäischen Staaten- und Verfassungsverbund* (Mohr Siebeck, 2007), p. 61. Over time, however, the *Verbund* concept was freed from these competing interpretations and further developed in light of pluralistic understandings. See Schönberger, "Die Europäische Union als Bund", 129 AöR (2004), 81; see further the contributions in Calliess, *ibid*.

11. Schmidt-Aßmann, "Einleitung: Der Europäische Verwaltungsverbund und die Rolle des Europäischen Verwaltungsrechts", in Schmidt-Aßmann and Schöndorf-Haubold (Eds.), *Der Europäische Verwaltungsverbund* (Mohr Siebeck, 2005), p. 1, 6 et seq.; Voßkuhle,

giving rise to a composite constitution made up of EU and national constitutions,¹² and to frame the relationship between the ECJ and the national constitutional courts as part of a composite system of constitutional adjudication (*Verfassungsgerichtsverbund*).¹³

The concept of composite constitutionalism (*Verfassungsverbund*) can be based on various legal provisions. It transpires, for example, in structural safeguard clauses in domestic constitutions. The most explicit one is Article 23(1)(1) of the German Constitution which requires that Germany's participation in the EU take place in accordance with its core constitutional principles.¹⁴ At the European level, the concept of composite constitutionalism emerges, *inter alia*, in Article 7 TEU, which lays down a mechanism to make Member States comply with the constitutional principles upon which the Union is founded. In addition, in EU law, the concept of composite constitutionalism can explain Articles 6(2) and 6(3) TEU, Article 48 TEU, Article 267 TFEU and the principle of dual legitimation, which is implied in Article 1(1), 10(2) and 12 TEU and according to which the democratic legitimacy of the EU depends to a large extent on the involvement of national parliaments.¹⁵

The concept of composite constitutionalism also comes to light in the revised identity clause in Article 4(2) TEU. This provision builds on Article 6(3) TEU (Amsterdam version) and the earlier Article F(1)(1) TEU (Maastricht version) which simply set out: “[T]he Union [respects]...the

“Multilevel Cooperation of the European Constitutional Courts: Der Europäische Verfassungsgerichtsverbund”, 6 *EuConst* (2010), 175, 183–184.

12. See Pernice, *op. cit. supra* note 10. Pernice himself, however, translates the term “Verfassungsverbund” by making use of the term *multilevel constitutionalism*; see Pernice, “Multilevel Constitutionalism in the European Union”, 5 *EL Rev.* (2002), 511. The French translation, by contrast, makes reference to the composite constitution; see Pernice and Mayer, “De la constitution composée de l’Europe”, 36 *RTDE* (2000), 623. See also Besselink, *op. cit. supra* note 9. For a critical view see Galetta, “Coamministrazione, reti di amministrazioni, Verwaltungsverbund: modelli organizzativi nuovi o alternative semantiche alla nozione di ‘cooperazione amministrativa’ dell’Article 10 TCE, per definire il fenomeno dell’amministrazione intrecciata?” (2009) *Rivista italiana di diritto pubblico comunitario*, 1689; della Cananea, “Is European constitutionalism really ‘multilevel’?”, (2010) *ZaöRV*, 283.

13. Voßkuhle, *op. cit. supra* note 11, 184; see also Pernice (2006), *op. cit. supra* note 7, pp. 43–56. In the present context, we use the term adjudication rather than jurisdiction in order to focus on the process of judicial decision-making and less on the institutional aspects of jurisdiction.

14. Other constitutional texts are less explicit in this respect, but similar safeguards have been developed in constitutional adjudication, see *infra* 3.2.

15. Others understand these provisions as reflecting a federal paradigm. See Oeter, “Federalism and Democracy”, in von Bogdandy and Bast, *op. cit. supra* note 5, p. 55. See the clarification in relation to a federal reading Pernice, “Europawissenschaft oder Staatsrechtslehre?”, in Schulze-Fielitz (Ed.), *Staatsrechtslehre als Wissenschaft, Die Verwaltung, Supplement 7* (2007), p. 225 et seq.

national identities of its Member States.” However, these earlier versions of the identity clause were not subject to the jurisdiction of the ECJ, and therefore remained largely inoperative as governing the relationship between Member States and EU.¹⁶ The Treaty of Lisbon, by contrast, institutionally increases the importance of the identity clause and further develops its content.

As to the content, Article 4(2) TEU, in following Article I-5(1) CT, links the notion of national identity to the “fundamental political and constitutional structures” of Member States. Institutionally, Article 4(2) TEU is now within the jurisdiction of the ECJ and, perhaps unsurprisingly, already has been used by the Court in one case to address the tension between fundamental freedoms and domestic constitutional law.¹⁷ Conversely, several domestic constitutional courts have relied on Article 4(2) TEU, respectively its predecessor in the Constitutional Treaty, to justify constitutional limits *vis-à-vis* EU law.¹⁸ Yet, the contours of Article 4(2) TEU remain hazy. In this section, we therefore aim at clarifying the notion of national identity by analysing the case law of the ECJ (2.1); by embedding Article 4(2) TEU in its systematic context (2.2); and by analysing the etymology of the notion of national identity (2.3).

2.1. *The case law of the ECJ on national identity*

Although the identity clause was not subject to the jurisdiction of the Court before the entry into force of the Lisbon Treaty, the ECJ had already made reference, albeit in passing, to the notion of national identity on a few occasions. In a dispute concerning the legality of a nationality requirement for employment in public education in the Luxembourgian Constitution, the Court observed that “the preservation of the Member States’ national identities is a legitimate aim respected by the Community legal order (as is

16. However, it needs to be noted that the ECJ understood the duty of loyalty in Art. 10 EC as an expression of a general principle of law and applied it not only to the Member States but also to the organs of the EU. See Case 230/81, *Luxembourg v. Parliament*, [1983] ECR 255 paras. 37 et seq.; Case 2/88 *Imm.*, *Zwartveld*, [1990] ECR I-3365, para 17; Case C-94/00, *Roquette Frères*, [2002] ECR I-9011, para 31; Case C-275/00, *First und Franex*, [2002] ECR I-10943, para 49; Case C-339/00, *Ireland v. Commission*, [2003] ECR I-11757, para 71; Case C-45/07, *Commission v. Greece*, [2009] ECR I-701, para 25. The duty of loyalty thus imposed on the EU also included the duty to respect basic constitutional values. See Giegerich, *Europäische Verfassung und deutsche Verfassung im transnationalen Konstitutionalisierungsprozeß* (2003), p. 792 et seq.; Hilf, “Europäische Union und nationale Identität der Mitgliedstaaten”, in Randelzhofer, Scholz and Wilke (Eds.), *Gedächtnisschrift für Eberhard Grabitz* (1995), p. 157, 167 et seq.; Kahl, in Calliess and Ruffert, *EUV/EGV*, 3rd ed. (2007), Art. 10 EGV, paras. 70 et seq. (with further references).

17. Case C-208/09, *Sayn-Wittgenstein*, judgment of 22 Dec. 2010, nyr, paras. 81 et seq.

18. See *infra* section 3.2.

indeed acknowledged in Article F(1) of the Treaty on European Union)¹⁹ that can justify the restriction of a fundamental freedom. However, the Court ruled that in the case at hand, the restriction was disproportionate.²⁰ In addition, the notion of national identity was mentioned in several opinions of advocates general, for example in the context of the protection of municipal self-government,²¹ the regulatory authority of Member States in the field of citizenship law,²² and in proceedings involving the prohibition in the Greek Constitution on construction companies associated with media companies participating in public procurement.²³ Yet, these opinions did not clarify the notion of national identity, nor did the Court make reference to the concept of national identity in these proceedings.

After Article 4(2) TEU became subject to the jurisdiction of the ECJ with the Lisbon Treaty, it took hardly more than a year until the Court for the first time elaborated on the notion of national identity in the *Sayn-Wittgenstein* case.²⁴ The case concerned the question of whether the decision of Austrian authorities to change the surname of an Austrian citizen residing in Germany, which, following an adoption by a German citizen of noble descent in Germany, had been entered in the civil registry in Austria for 15 years as “Fürstin von Sayn-Wittgenstein” (“Princess of Sayn-Wittgenstein”), into simply “Sayn-Wittgenstein” was in breach of Article 21 TFEU. While the name as originally entered in the civil registry was recognized by German law, Austrian authorities changed the surname in reliance on the Austrian “Law on the abolition of the nobility”, which prohibited Austrian citizens from using designations of noble status, including that of “Fürstin”.²⁵ In the proceedings before the Court, Austria had pointed out that the legislation in question “intended to protect the constitutional identity of the Republic of Austria [and] constituted a fundamental decision in favour of the formal equality of treatment of all citizens before the law.”²⁶

While the ECJ found that the refusal “to recognize all the elements of the surname of a national of that State as determined in another Member State, in

19. *Commission v. Luxembourg*, cited *supra* note 4, para 35. Similarly already Case 379/87, *Groener*, [1989] ECR 3967, paras. 18 et seq. (concerning the protection and promotion of Irish as Ireland’s first official language).

20. *Commission v. Luxembourg*, cited *supra* note 4, paras. 35 et seq.

21. Opinion of A.G. Trstenjak, Case C-324/07, *Coditel Brabant*, [2008] ECR I-8457, paras. 85 et seq.

22. A.G. Maduro in Case C-135/08, *Rottmann*, judgment of 30 Sept. 2009, nyr, Opinion at paras. 23 et seq.

23. Opinion of A.G. Maduro in *Michaniki*, cited *supra* note 4, paras. 30 et seq.

24. *Sayn-Wittgenstein*, cited *supra* note 17, paras. 81 et seq.

25. For the factual and legal background of the case see *Sayn-Wittgenstein*, cited *supra* note 17, paras. 3 et seq.

26. *Sayn-Wittgenstein*, cited *supra* note 17, para 74.

which that national resides...is a restriction on the freedoms conferred by Article 21 TFEU,”²⁷ it held that the measure in question could be justified in light of the object and purpose pursued by the Austrian legislation to ensure formal equality of treatment of all citizens before the law, which itself was a general principle of law.²⁸ The ECJ considered, in relying on its general jurisprudence on the relation between fundamental freedoms and fundamental rights, that “the Law on the abolition of the nobility, as an element of national identity, may be taken into consideration when a balance is struck between legitimate interests and the right of free movement of persons recognized under European Union law.”²⁹ In this context, the Court interpreted the constitutional background of the Austrian law in question as an element of Austria’s public policy, which allowed necessary and proportionate restrictions of fundamental freedoms.³⁰ This is in line with a number of other instances in which the Court accepted various principles of national constitutional law, without making reference to the concept of national identity, as justification for the restriction of fundamental freedoms, such as freedom of assembly and expression,³¹ human dignity,³² freedom of coalition,³³ media diversity,³⁴ and the protection of minors.³⁵ Only as a subsidiary point did the ECJ in the *Sayn-Wittgenstein* case point out that “in accordance with Article 4(2) TEU, the European Union is to respect the national identities of its Member States, which include the status of the State as a Republic.”³⁶

Although the concept of national identity only played a role in clarifying the concept of public policy as a justification for restrictions of fundamental freedoms guaranteed in EU law, the decision in *Sayn-Wittgenstein* helps to clarify the understanding of Article 4(2) TEU. First, the ECJ noted the connection between the concept of national identity and the constitutional background of the interest that Austria’s measures protected. Second, the ECJ held that the status of the State as a republic formed part of national identity,

27. *Ibid.*, para 71.

28. *Ibid.*, paras. 81 et seq.

29. *Ibid.*, para 83.

30. *Ibid.*, paras. 84 et seq.

31. Case C-112/00, *Schmidberger*, [2003] ECR I-5659, paras. 71 et seq. For commentary on this decision see Brown, 40 CML Rev. (2003), 1499.

32. Case C36/02, *Omega*, [2004] ECR I-9609, paras. 33 et seq. For commentary on this decision see Ackermann, 42 CML Rev. (2005), 1107.

33. Case C-438/05, *Viking*, [2007] ECR I-10779, paras. 45 et seq., 75 et seq.; Case C-341/05, *Laval un Partneri*, [2007] ECR I-11767, paras. 87 et seq.

34. Case C-368/95, *Familiapress*, [1997] ECR I-3689, para 18; Case C-250/06, *United Pan-Europe Communications Belgium et al.*, [2007] ECR I-11135, paras. 41 et seq.

35. Case C-244/06, *Dynamic Medien*, [2008] ECR I-505, paras. 36 et seq.

36. *Sayn-Wittgenstein*, cited *supra* note 17, para 92.

thus intensifying the nexus between national identity and fundamental constitutional principles. Finally, the Court embedded the respect for national identity in the present proceedings into its general jurisprudence on the relationship between fundamental freedoms and fundamental rights. This not only intensifies the connection between the concept of national identity and the constitutional law of Member States. It also indicates that the resolution of potential tensions between constitutional law and EU law lies in an overarching balancing test. Beyond this, the ECJ in *Sayn-Wittgenstein* leaves most issues open. A fuller explanation of the identity clause needs to consider, above all, the clause's context.

2.2 *The systematic context: Article 4 TEU and the federal structure of the Union*

The identity clause is embedded in Article 4 TEU, which, in its three paragraphs, lays down five principles for the relationship between the EU and its Member States. It lays out the normative cornerstones of a federative, but not hierarchical composite structure consisting of the European Union and its Member States. This composite is based on the dual insight that the Member States are dependent on the EU to pursue common public interests effectively at the supranational level, while the EU, in turn, depends on legitimate and effective Member States to participate in the making and implementation of EU law. Against this background, Article 4(1) TEU lays down the principle of limited attribution of competences. It clarifies that Member States are original and autonomous entities exercising public power. Article 4(3) TEU contains the principle of sincere cooperation between the EU and its Member States, a core requirement of any federative structure. Article 4(2) TEU, finally, lays down three further principles: the respect of national identity, the principle of equality of Member States, and the guarantee of the Member States' essential State functions.

The identity clause has specific significance in this context, because it reflects the determination of Member States to assert themselves as relevant and autonomous political actors in the European political processes and legal procedures.³⁷ At the same time, the fact that the terminology refers to the respect for national identity, rather than State sovereignty, shows the depth achieved in European integration. A fundamental transformation has taken place for those States that are members of the EU.³⁸ In spite of all the ambiguity surrounding the notion of national identity, there is no question that

37. Besselink, *op. cit. supra* note 7, 40–42.

38. Wahl, "Europäisierung: Die miteinander verbundene Entwicklung von Rechtsordnungen als ganzen", in Trute, Groß, Röhl and Möllers (Eds.), *Allgemeines*

it includes far less than the traditional concept of State sovereignty as it is understood in both international and constitutional law.³⁹ Their national identity needs to be construed as that of States that are members of the EU.⁴⁰

Respect for the equality of Member States before the Treaties and respect for the Member States' essential State functions have been newly inserted into the Treaty. These principles, like the identity clause, go back to a proposal, referred to as the "Christophersen clause", that was made during the deliberations in the Constitutional Convention. Its purpose was to ensure that the EU respects certain central competences of the Member States.⁴¹ Yet, out of the fear that listing subject-matter areas that could not be transferred to the EU might lead to *a contrario* conclusions and hence invite "competence creep", the drafters preferred to include the more flexible concept of respect for national identity.⁴² The third sentence of Article 4(2) TEU, finally, which emphasizes that national security remains the responsibility of Member States, is the product of the Intergovernmental Conference of 2007 that adopted the Lisbon Treaty.

In exploring the meaning of the identity clause in light of constitutional pluralism, the relevance of the equality clause in Article 4(2) TEU for this approach must be stressed. The equality clause is a beacon of European constitutional pluralism, considering the diversity of the constitutional arrangements within the different Member States: we find republics and monarchies, parliamentary and semi-presidential systems, strong and weak parliaments, democracies based on competition and those based on consensus, unitary and federal structures of government, strong and weak systems of constitutional adjudication, and considerable differences regarding the scope and impact of fundamental rights.⁴³ These differences are emblematically caught in the European motto "United in diversity."⁴⁴ It is

Verwaltungsrecht – zur Tragfähigkeit eines Konzepts (2008), p. 869; see further Frankenberg, *Staatstechnik* (2010), pp. 61 et seq.

39. See Verdross and Simma, *Universelles Völkerrecht*, 3rd ed. (1984), p. 25 et seq.; Shaw, *International Law*, 6th ed. (2008), p. 21 et seq.; Combacau and Sur, *Droit international public*, 8th ed. (2008), p. 236 et seq.

40. Similarly, Pernice (2011), op. cit. *supra* note 7, 210.

41. CONV 375/02, 10 et seq. For the designation of the clause as "Christophersen-Clause" CONV 251/02, 3.

42. CONV 400/02, 13.

43. For a comprehensive account see Cruz Villalón, in von Bogdandy, Cruz Villalón and Huber, op. cit. *supra* note 4, Vol. I (2007), para 13.

44. See <europa.eu/abc/symbols/motto/index_en.htm> (last visited 19 Jan. 2010); see also Toggenburg, "'United in Diversity': Searching for the Regional Dimension in the Context of a Somewhat Foggy Constitutional Credo", in Toniatti, Dani and Palermo (Eds.), *An Ever More Complex Union*, (2004), p. 27. The motto was mentioned in Art. I-8(3) TCE, O.J. 2004, C 310/1, as one of the "symbols of the Union". 16 Member States have declared this motto as representing for them a symbol of the sense of community of the people in the European Union

against the background of this normatively endorsed diversity that the identity clause has to be understood.⁴⁵

2.3. *The notion of national identity*

The biggest textual difference between the identity clause in the Lisbon Treaty and its predecessor in the treaties of Amsterdam and Maastricht (Art. 6(3) TEU (Amsterdam), Art. F(1) TEU (Maastricht)) is the link between national identity and the “fundamental political and constitutional structures.” This distances the notion of national identity in Article 4(2) TEU from cultural, historical, or linguistic criteria⁴⁶ and turns to the content of domestic constitutional orders.⁴⁷ This corresponds with the understanding of national (respectively constitutional) identity introduced since the 1970s by domestic constitutional courts who use, as explained in more detail in section 3.3 below, national identity as a constitutional, not a cultural concept.

At the same time, there are relevant terminological nuances between the different versions of the Lisbon Treaty. While the German text speaks of national identity as “expressed” in the fundamental political and constitutional structures of Member States, thus implying that national identity might pre-exist the constitution, the English and French versions speak of national identity as “inherent” in the fundamental political and constitutional structures of Member States.⁴⁸ This implies that the domestic constitution itself constitutes national identity.

and their allegiance to it. See Declaration 52 Annexed to the Final Act of the Intergovernmental Conference, O.J. 2008, C 115/355.

45. Pernice (2011) op. cit. *supra* note 7, 193–194, therefore understands Art. 4(2) TEU as a fundamental right to federalism of Member States (“‘föderales Grundrecht’ der Mitgliedstaaten”).

46. These aspects were seen by some as being covered by Art. 6(3) TEU (Amsterdam version). See Uhle, *Freitlicher Verfassungsstaat und kulturelle Identität* (Mohr Siebeck, 2004), 474 et seq.; Bleckmann, “Die Wahrung der ‘nationalen Identität’ im Unions-Vertrag”, 52 JZ (1997), 265, 269; Puttler, in Calliess and Ruffert (Eds.), op. cit. *supra* note 16, Art. 6 EUV, para 44; Pechstein, in Streinz (Ed.), *EUV/EGV* (2003), Art. 6 EUV, para 27. For a similar understanding of constitutional identity from the perspective of German constitutional law see Kirchhof, “Die Identität der Verfassung”, in Isensee and Kirchhof (Eds.), *Handbuch des Staatsrechts*, Vol. II (3rd ed. 2004), § 21 paras. 64 et seq. Meanwhile the duty to respect cultural and linguistic diversity is contained in Art. 3(3)(4) TEU, but not in Art. 4(2) TEU.

47. See also Puttler, in Calliess and Ruffert, *EUV/AEUV*, 4th ed. (2011), Art. 4 EUV, para 14 (changing her former view, see note 46). Differently still Besselink, op. cit. *supra* note 7, 42–44 (including cultural identity as part of national identity).

48. The English version of Art. 4(2) TEU talks about “national identities, inherent in their fundamental structures, political and constitutional”, the French about “identité nationale, inhérente à leurs structures fondamentales politiques et constitutionnelles”.

As a notion of EU law, the notion of national identity, in principle, has to be interpreted autonomously from what the term could mean in the domestic legal orders of Member States.⁴⁹ However, it becomes clear from either linguistic version of the TEU that the content of national identity in Article 4(2) TEU is linked to concepts found within domestic constitutional law. It depends to a certain extent on the potentially diverging self-understanding of Member States. After all, it is notable that Article 4(2) TEU refers to “national identities” in the plural. This is reinforced when focusing on the etymology of the concepts of identity and nation.

In fact, any attempt at interpretation needs to start by the insight that two different meanings branch out from the Latin word “idem”, which is at the root of the word identity.⁵⁰ The older, objectivist understanding focuses on issues of unity or of comparison. In this sense, it is used when the police determines the identity of a person, or to discuss the continuity of the German State after World War II.⁵¹ This concept of identity is also used to focus on the peculiarities or the essence of a person, a people, a legal system, etc., or, in other words, those characteristics that are considered from an external perspective essential.⁵² It is about how a person or a nation are perceived from the outside world. The subjectivist branch, by contrast, has its origins in the writings of Sigmund Freud.⁵³ It focuses on inner attitudes.⁵⁴ Identity here is a product of spiritual and mental processes that express an affiliation, a belonging to something.⁵⁵ “National identity” then refers to a collective mental process of citizens.

In which sense should we understand “identity” in Article 4(2) TEU? First and foremost, it has to be understood in the objectivist tradition: the term refers, as is apparent from the subordinate clause, to elements of identity contained in the Member States’ constitutions. However, since the

49. For a comprehensive discussion on the aspects of autonomy of EU law see Peters, *op cit. supra* note 8, 242–295.

50. Schmidt, “Identität. Gebrauch und Geschichte eines modernen Begriffs”, *Muttersprache* (1976), 333 et seq.; Collins, *English Dictionary*, 4th ed. (1999), p. 767. In more detail von Bogdandy, “Europäische und nationale Identität: Integration durch Verfassungsrecht?”, (2003) *Veröffentlichungen der Vereinigung der Deutschen Staatsrechtslehrer*, 156; von Bogdandy, “The European Constitution and European Identity”, (2005) *I.CON*, 295; see also Weber, *Europäische Verfassungsvergleich* (Beck, 2010), p. 429 et seq.

51. BVerfGE 6, 309, 338, 363 et seq. (1957); 36, 1, 15 et seq. (1973). See also Kunz, “Identity of States under International Law”, 49 *AJIL* (1955), 68.

52. In this sense Häberle, *Europäische Rechtskultur* (1994), p. 9; Kirchhof, *op. cit. supra* note 46.

53. Erikson, “Identity, psychosocial”, in Sills (Eds.), *International Encyclopedia of the Social Sciences*, Vol. 7 (1968), p. 61.

54. Tugendhat, *Selbstbewußtsein und Selbstbestimmung*, 6th ed. (Suhrkamp, 1997), p. 283.

55. Schmidt, *op. cit. supra* note 50, 338.

contemporary democratic State is often seen as deriving its legitimacy from the support of its citizens and their identification with the State, Article 4(2) TEU must also encompass the subjectivist understanding of identity and therefore protect those mechanisms that constitute or further the identification of citizens with their State. Identity in Article 4(2) TEU hence refers to both branches of meaning; the same is true for its use in recital 11 TEU preamble.

Article 4(2) of the TEU requires respect for a certain form of identity, namely “national” identity. The notion of the nation, which has been a key theoretical and ideological concept since the early 19th century, is as difficult and ambiguous as the notion of “identity”.⁵⁶ On the one hand, there is an objectivist understanding of the nation that focuses on common language, common history, common destiny, common ethnicity, or common political institutions.⁵⁷ This understanding comprises both the French tradition, for which nation and State are almost synonymous, as well as traditions that are based on more cultural conceptions of the nation like in Germany, Italy, or Poland. On the other hand, there is a subjective understanding, which concentrates on the will of individuals to belong to a community: the nation is a “*plebiscite de tous les jours*”.⁵⁸ As can be seen, the concepts of the nation and of identity overlap to a large extent, so that the meanings of the two concepts flow together in the notion of “national identity”.

The etymology therefore indicates that the self-understanding of Member States of what constitutes their national constitutional identity has primary relevance for determining the object of protection of Article 4(2) TEU. In other words: Article 4(2) TEU does not determine the national identity of Member States from an outside perspective, but rather covers a broad spectrum of phenomena to which the duty to respect contained in Article 4(2) TEU applies. The content of what constitutes national identity, in other words, is determined by reference to domestic constitutional law.

56. See Dierse and Rath, “Nation, Nationalismus, Nationalität”, in Ritter and Gründer (Eds.), *Historisches Wörterbuch der Philosophie*, Vol. 6 (1984), p. 406; Dellavalle, *Una costituzione senza popolo?* (2002), p. 94 et seq.; von Bogdandy, “Hegel und der Nationalstaat”, (1991) *Der Staat*, 513.

57. Comprehensively from a European constitutional perspective Hanschmann, *Der Begriff der Homogenität in der Verfassungslehre und Europarechtswissenschaft* (2008).

58. Thus the well-known, albeit ambivalent, metaphor of Renan, *Qu'est-ce qu'une nation?* (1882), Chapter 3, available at <www.bmlisieux.com/archives/nation04.htm> (last visited 19 Jan. 2010).

3. National identity and constitutional law of Member States

Although Article 4(2) TEU does not determine the national identity of Member States, it establishes, by referring to “fundamental political and constitutional structures, including regional and local self-government”, criteria for the elements and self-understandings that may be protected under Article 4(2) TEU.⁵⁹ EU law therefore sets up criteria that can be of relevance for the notion of national identity under Article 4(2) TEU.⁶⁰ Thus, only elements somehow enshrined in national constitutions or in domestic constitutional processes can be relevant for Article 4(2) TEU. By contrast, an entirely pre-political or pre-constitutional understanding of national identity is not protected.⁶¹ Article 4(2) TEU is therefore not the operationalization of the 6th recital of the preamble of the TEU, which sets out the desire of the Member States “to deepen the solidarity between their peoples while respecting their history, their culture and their traditions”;⁶² this objective is served by other Treaty provisions such as Article 3(3)(4) TEU. A systematic interpretation of the TEU indicates further limits of what a Member State may qualify as part of its national identity. Thus, reliance on national identity under Article 4(2) TEU will not allow a Member State to diverge from the fundamental values contained in Article 2 TEU. The protection of national identity, in other words, cannot be understood as an exemption from complying with the basic substantive principles of EU constitutional law. Article 4(2) TEU therefore limits what can be protected by the identity clause.⁶³

Furthermore, not every national constitutional peculiarity can be considered as part of the national identity of a Member State within the meaning of Article 4(2) TEU. Instead, as the wording of Article 4(2) TEU expresses, only fundamental structures of the Member States are relevant.⁶⁴

59. Hilf, op. cit. *supra* note 16, p. 163; cf. also Morlok, *Selbstverständnis als Rechtskriterium* (Mohr, 1993), p. 34 et seq.

60. In more detail Wendel, “Lisbon Before the Courts: Comparative Perspective”, 7 *EuConst* (2011), 96, 134–135.

61. This also excludes the topos of “constitutional pre-conditions” (*Verfassungsvoraussetzungen*), which plays an important role in the discussion in Germany, i.e. conditions for the existence of a national constitution that are not directly enshrined in them, as part of national identity. See Kirchhof, op. cit. *supra* note 46, paras. 65 et seq. As here Pernice (2011) op. cit. *supra* note 7, 190.

62. See also Geiger, in Geiger, Khan and Kotzur, *EUV/AEUV Kommentar*, 5th ed. (2010), Art. 4 EUV, para 3. For an inclusion of cultural identity as part of national identity see Besselink (op. cit. *supra* note 7), 42–44.

63. Wendel, op. cit. *supra* note 60, 134–135.

64. Cf. *Sayn-Wittgenstein*, cited *supra* note 17, para 86; similarly Opinion of A.G. Maduro in *Michaniki*, cited *supra* note 4, para 33; Epiney, “Zur Tragweite des Art. 10 EGV im Bereich

Without such a restriction, almost every question of EU law could become a matter of national identity if we consider, for example, that in Germany almost every political question touches upon fundamental constitutional rights. Yet, the evident purpose of the identity clause is to only apply in exceptional cases of conflict between EU law and domestic constitutional law.⁶⁵

At the same time, it is not necessary that a constitutional question that one Member State considers as part of its national identity is viewed as such by other Member States.⁶⁶ After all, it is the very purpose of Article 4(2) TEU to protect constitutional features that are specific to a Member State. Therefore, in a concrete situation of conflict, the notion of national identity in Article 4(2) TEU needs to be interpreted in light of domestic constitutional law.⁶⁷ Yet, domestic constitutional law is not only an aid to concretize the autonomous meaning of national identity in Article 4(2) TEU, but directly embedded in primary EU law. Article 4(2) TEU provides a legal basis in EU law that links national constitutional law and EU law and forms a building block of the composite constitutional structure of the EU.

Accordingly, Article 4(2) TEU can be understood best as a gateway that opens EU law *vis-à-vis* domestic constitutional law, that makes EU law receptive to domestic constitutional law.⁶⁸ Yet, not every provision of domestic constitutional law forms part of a Member State's constitutional identity. Rather, we consider that Article 4(2) TEU only covers basic domestic constitutional features (3.1). These constitutional features coincide with the constitutional limits to the primacy of EU law domestic constitutional courts developed, both conceptually (3.2), and as regards their specific content (3.3).

3.1. *Relevant constitutional provisions*

Of particular importance for determining the content of national identity are constitutional provisions that prevent the legislature from making certain

der Außenbeziehungen", in Bröhmer, Bieber, Calliess, Langenfeld, Weber and Wolf (Eds.), *Internationale Gemeinschaft und Menschenrechte – Festschrift für Georg Ress* (2005), p. 441, 446; Di Salvatore, *L'identità costituzionale dell'Unione europea e degli Stati membri* (Giappichelli, 2008), p. 35 et seq.

65. Puttler, in Calliess and Ruffert, op. cit. *supra* note 47, Art. 4 EUV, para 22.

66. *Omega*, cited *supra* note 32, paras. 37 et seq. (with further references); *Dynamic Medien*, cited *supra* note 35, paras. 44 et seq.; cf. also *Sayn-Wittgenstein*, cited *supra* note 17, para 91.

67. For this argument see Morlok, op. cit. *supra* note 59, p. 34 et seq.

68. See Wendel, op. cit. *supra* note 60, 135. In depth, Wendel, *Permeabilität im europäischen Verfassungsrecht* (forthcoming 2011).

constitutional changes, such as Article 79(3) of the German Constitution,⁶⁹ or that subject constitutional amendments to a specifically difficult procedure, such as Article 168 of the Spanish Constitution.⁷⁰ The depth of the constitutional entrenchment effectuated by these provisions suggests that the protected features are part of the national identity of the respective Member State.

While the content of domestic constitutional law may differ from Member State to Member State, a comparison of the content of provisions enjoying specific constitutional protection shows a high degree of congruence. Certainly, some constitutions specifically protect certain very specific rules. Article 4(7) of the Greek Constitution, for example, forbids the award to Greek citizens of titles of nobility or rank.⁷¹ Yet, in general, the principles that benefit from specific constitutional protection form part of the following categories: the protection of basic principles of State organization (such as federalism, republican form of government, monarchical form of government, etc.); State sovereignty⁷² and the principle of democracy; State symbols (e.g. the flag); State aims; the protection of human dignity, fundamental rights, and the principle of the rule of law (*Rechtsstaat, état de droit*).⁷³ The common core of those provisions can be seen as a commitment to democratic constitutionalism.⁷⁴

This commitment, and the principles enjoying specific constitutional protection, are also reflected in Article 2 TEU. Hence, the EU and its Member States share a common legal and politico-ideological framework that legitimizes and limits the exercise of public power. Although the duty to respect national identity in Article 4(2) TEU enters into a tension with the principle of primacy and uniform application of EU law, any conflict will be

69. Similarly, Art. 197 Belgian Constitution, Art. 89(5) French Constitution, Art. 110(1) Greek Constitution, Art. 139 Italian Constitution, Art. 115 Luxembourgian Constitution, Art. 9(2) Czech Constitution, and Art. 182(1) Cypriot Constitution.

70. See also Art. 162 Estonian Constitution, Art. 77 Latvian Constitution, Art. 148(1) Lithuanian Constitution, Art. 235(6) Polish Constitution Art. 168 Spanish Constitution or Art. 44(3) Austrian Constitution. Pursuant to these provisions, additional procedural steps are necessary in order for certain constitutional amendments to take effect, such as holding a referendum (e.g. Art. 44(3) Austrian Constitution) or holding new elections so that the newly composed parliament can approve the constitutional amendments voted on by the parliament in its prior composition (e.g. Art. 168 Spanish Constitution).

71. Similarly, the Austrian Law on the abolition of nobility that was at issue in *Sayn-Wittgenstein*, cited *supra* note 17, paras. 3–7, 25, 74.

72. State sovereignty in this context is certainly to be read together with the constitutional norm that allows for European integration. Hence it is not to be understood in the traditional sense; see *supra* note 39.

73. Huber, *op. cit. supra* note 5, paras. 38 et seq.

74. Cruz Villalón, *op. cit. supra* note 43, § 13 para 141; in detail Weber, *op. cit. supra* note 50, 45 et seq., 398 et seq., 429 et seq.

exceptional because of the far-reaching convergence between the principles of domestic constitutional law enjoying specific protection and the constitutional principles of the EU.

3.2. *The development of constitutional limits by national courts*

The constitutional provisions, however, only give a first indication of what national identity means for each Member State. What also needs to be looked at is the jurisprudence of national constitutional courts. In this context, decisions on the relationship between EU law and domestic constitutional law play a particularly important role. They illustrate best the areas of actual and potential conflict. After all, it was often the challenge of European integration that brought to the fore the issue of national identity.

Despite some nuances in the jurisprudence of different domestic constitutional courts, one can observe a remarkable overall convergence.⁷⁵ While domestic constitutional courts, with a few exceptions,⁷⁶ recognize the primacy of EU law over national law in principle, most of them have developed certain constitutional limits and claim the final say on the relationship between EU law and domestic constitutional law. Such developments have taken place since the 1970s, first in the constitutional courts in Italy⁷⁷ and Germany,⁷⁸ later in Ireland,⁷⁹ Denmark,⁸⁰ Spain,⁸¹

75. Weber, "Die Europäische Union unter Richtervorbehalt?", 65 JZ (2010), 157; Sadurski, "Solange, chapter 3': Constitutional Courts in Central Europe – Democracy – European Union", 14 ELJ (2008), 1; Huber, op. cit. *supra* note 5, paras. 34 et seq.

76. Primacy of EU law is rejected by the Polish Constitutional Court, Case K 18/04, Judgment of 11 May 2005, 41 EuR (2006), 236, 238 et seq., and the Lithuanian Constitutional Court, joined cases 17/02, 24/02, 06/03, 22/04, Judgment of 14 Mar. 2006, Section III, para 9.4, available at <www.lrkt.lt/dokumentai/2006/r060314.htm> (last visited 19 Jan. 2010). More in depth on the position of the Polish Constitutional Court Kowalik-Bańczyk, "Should we Polish it up? The Polish Constitutional Tribunal and the Idea of Supremacy of EU Law", (2005) GLJ, 1357. The situation with regard to the Greek Council of State is unclear. See Iliopoulos-Strangas, "Offene Staatlichkeit: Griechenland", in von Bogdandy, Cruz Villalón and Huber, op. cit. *supra* note 5, § 16 paras. 37 et seq.; Maganaris, "The Principle of Supremacy of Community Law in Greece", 24 EL Rev. (1999), 426.

77. Italian Constitutional Court, Case 183/1973, Judgment of 18 Dec. 1973, 1/2 EuGRZ (1975), 311, 315 – *Frontini*; Case 170/84, Judgment of 8 June 1984 – *Granital*, in Oppenheimer (Ed.), *The Relationship between European Community Law and National Law*, Vol. I (Cambridge U.P., 1994), p. 643, 651; Case 232/1989, Judgment of 13/21 Apr. 1989 – *Fragd*, in Oppenheimer, *ibid.*, p. 653, 657. On the relationship between constitutional law and EU law from the perspective of Italian courts see La Pergola and Del Duca, "Community Law, International Law and the Italian Constitution", 79 AJIL (1985), 598; Valaguzza, "La teoria dei controlimiti nella giurisprudenza del Consiglio di Stato", (2006) *Rivista trimestrale di diritto processuale amministrativo*, 816; Tizzano, "Der italienische Verfassungsgerichtshof (Corte costituzionale) und der Gerichtshof der Europäischen Union", 37 EuGRZ (2010), 1.

France,⁸² Hungary,⁸³ and the Czech Republic.⁸⁴ Similarly, courts in the United Kingdom have considered, though only in passing, the existence of constitutional limits.⁸⁵ Yet, even in Member States whose constitutional courts consider constitutional law to be generally supreme, such as in Poland, one can observe a trend to construe the control of EU law by the constitutional court in a very limited fashion.⁸⁶ Despite the conceptually different starting points, both approaches ultimately arrive at similar results, that is, the recognition of the primacy of EU law coupled with the invocation of constitutional limits in very limited circumstances.

With regard to terminology, these constitutional limits have been connected to the notion constitutional identity almost since the beginning. It was the German Federal Constitutional Court in its *Solange I* decision of 1974 who

78. BverfGE 37, 271, 277 et seq. (1974) (*Solange I*); 73, 339, 378 et seq. (1986) (*Solange II*); 89, 155, 188 (1993) (*Maastricht/Brunner*); 123, 267, 353 et seq. (2009) (*Lisbon* decision).

79. *Crotty v. An Taoiseach*, [1987] IR 173; *Society for the Protection of Unborn Children (Ireland) Ltd. v. Grogan*, [1989] IR 753; *Attorney General v. X*, [1992] 1 IR 1.

80. Danish Supreme Court, Case I 361/1997 of 6 Apr. 1998, EuGRZ (1999), 49, 52. See further Danielsen, "One of Many National Constraints on European Integration: Section 20 of the Danish Constitution", 16 EPL (2010), 181.

81. On the development of the jurisprudence of the Spanish Constitutional Court see Alonso García, "The Spanish Constitution and the European Constitution: The Script for a Virtual Collision and Other Observations on the Principle of Primacy", (2005) GLJ, 1001; Alonso García, "Constitución española y Constitución europea", (2005) *Revue des Affaires Européennes*, 105; Castillo de la Torre, case note in 42 CML Rev. (2005), 1169; Plaza, "The Constitution for Europe and the Spanish Constitutional Court", 12 EPL (2006), 353; Schutte, "Tribunal Constitucional on the European Constitution. Declaration of 13 Dec. 2004", 1 EuConst (2005), 281.

82. See e.g. French Constitutional Council, Case No. 2006-540 DC, Judgment of 27 July 2006, *Recueil des décisions* (2006), 88, 92. In more detail on the situation in France, see Pinon, "L'effectivité de la primauté du droit communautaire sur la Constitution", 44 RTDE (2008), 263; Hervouët, "Les relations entre ordre juridique communautaire et ordres juridiques nationaux", in Aubin, Blumann, Boiteau and Agostini (Eds.), *Le droit administratif: permanences et convergences – mélanges en l'honneur de Jean-François Lachaume* (2007), p. 649; Richards, "The Supremacy of Community Law before the French Constitutional Court", 31 EL Rev. (2006), 499.

83. See also Sadurski, op. cit. *supra* note 75, 9 et seq.; Sonnevend, "Offene Staatlichkeit: Ungarn", in von Bogdandy, Cruz Villalón and Huber, op. cit. *supra* note 5, § 25 paras. 33 et seq.

84. Czech Constitutional Court, Case Pl. ÚS 50/04, Judgment of 8 Mar. 2006; Case Pl. ÚS 66/04 of 3 May 2006, para 53; Case Pl. ÚS 19/08, Judgment of 22 Nov. 2008, para 120, available at <www.concourt.cz>; Case Pl. ÚS 29/09, Judgment of 3 Nov. 2009, para 150, 37 EuGRZ (2010), 209, 229.

85. Birkinshaw and Künnecke, "Offene Staatlichkeit: Großbritannien", in von Bogdandy, Cruz Villalón and Huber, op. cit. *supra* note 5, § 17 paras. 36 et seq.

86. See Polish Constitutional Court, Case K 18/04, Judgment of 11 May 2005, 41 EuR 2006, 236, 243 et seq.; Case Kp 3/08, Judgment of 18 February 2009, available at <www.trybunal.gov.pl>. The situation in Lithuania is similar. Thus, the Lithuanian Constitutional Court has already submitted a request for a preliminary ruling to the ECJ: see Case C-239/07, *Sabatauskas*, [2008] ECR I-7523.

observed that the transfer of sovereignty from Germany to an international organization could not lead to change “the basic structure of the Constitution, which is the basis of its identity, without a constitutional amendment.”⁸⁷ Subsequently, the Treaty of Maastricht introduced the notion of national identity into EU law. The Constitutional Treaty further developed the identity clause to take the shape we see today in Article 4(2) TEU, which understands national identity mainly in terms of constitutional identity. The terminology of the German Federal Constitutional Court thus made a European career.

This career continued in the decisions of other constitutional courts. The French Constitutional Council started to use the concept of constitutional identity, probably influenced by Article I-5 CT, in a decision in 2006, when it stated: “the implementation of a directive shall not violate a provision or principle that is inherent to France’s constitutional identity, unless the *pouvoir constituant* has consented thereto”.⁸⁸ Even more tellingly, the Spanish Constitutional Court considered the predecessor provision of Article 4(2) TEU, that is, Article I-5 CT, as a response to the “reservations made against the primacy of EU law over the Constitution, which had been formulated earlier on in the relevant decisions of the constitutional courts of some States”.⁸⁹

To focus the constitutional limits on the notion of national constitutional identity is a positive development: it introduces a common vocabulary on this issue. It provides a single language for dialogue between the EU and the domestic constitutional level as well as among the various domestic legal orders. At the same time, the multiplicity of relevant interpreters may lead to different understandings of the very same term.

3.3. *Relevant constitutional limits*

So far, however, the danger of constitutional cacophony in relation to national identity has not materialized. When looking at the values protected by constitutional limits, the jurisprudence of domestic constitutional courts displays considerable convergence. Apart from the requirement that the EU act within the competences conferred upon it, constitutional courts demand, as part of the protection of national constitutional identity, that the EU exercise

87. *Solange I*, cited *supra* note 78, 271, 279 (translation by the authors). See also *Solange II*, cited *supra* note 78, 339, 375; *Maastricht/Brunner*, cited *supra* note 78, 155, 181, 189. BverfGE 58, 1, 40 (1981) (*Eurocontrol*), by contrast, spoke of the “fundamental structure of the constitution”.

88. French Constitutional Council, Case 2006-540 DC, cited *supra* note 82, 88, 92; Case 2010-605 DC, Judgment of 12 May 2010, para 18, available at <www.conseil-constitutionnel.fr> (translation by the authors).

89. Spanish Constitutional Court, Case Rs. 1/2004, Judgment of 13 Dec. 2004, 40 EuR (2005), 339, 344. See also *supra* note 81.

its powers without infringing certain fundamental constitutional principles, particularly the statehood of Member States,⁹⁰ key requirements of the rule of law,⁹¹ the principle of democracy,⁹² the essential core of fundamental rights,⁹³ and, in federal systems, the principle of federalism.⁹⁴ These principles are often subject to constitutional protection with specific constitutional entrenchment.⁹⁵ At the same time, they coincide with the principles enshrined in Article 2 TEU on which the Union itself is founded.

In developing constitutional limits, most constitutional courts have limited themselves to merely indicating that EU acts cannot violate the fundamental constitutional principles, without, however, clearly indicating what might be considered an intolerable violation. A typical example is the jurisprudence of the Italian Constitutional Court. It determines the standard for constitutional limits simply as the “the fundamental principles of our constitutional order or the inalienable human rights”.⁹⁶ Similarly, the Czech Constitutional Court states, in making reference to Articles 1(1) and 9(2) of the Czech Constitution, that it will not recognize the primacy of EU law if the “foundations of state sovereignty...or the essential attributes of democracy and the rule of law are at

90. BverfGE 113, 273, 298 et seq. (2005) (*Arrest Warrant*); *Lisbon* decision, cited *supra* note 2, 267, 343; cf. also Polish Constitutional Court, Case K 18/04, cited *supra* note 86, 236, 238 et seq.; Danish Supreme Court, Case I 361/1997, cited *supra* note 80, 49, 52; Spanish Constitutional Court, Case 1/2004, cited *supra* note 89; Czech Constitutional Court, Case Pl. ÚS 50/04, Judgment of 8 Mar. 2006; Case Pl. ÚS 66/04, Judgment of 3 May 2006, para 53; Case Pl. ÚS 19/08, Judgment of 22 Nov. 2008, para 97; Latvian Constitutional Court, Case 2008-35-01, Judgment of 7 Apr. 2009, para 17, available at <www.satv.tiesa.gov.lv>.

91. *Arrest Warrant* decision, cited *supra* note 90; cf. also *Lisbon* decision, cited *supra* note 2, 267, 341; Czech Constitutional Court, Case Pl. ÚS 50/04, Judgment of 8 Mar. 2006; Latvian Constitutional Court, Case 2008-35-01, Judgment of 7 Apr. 2009, para 17.

92. *Maastricht/Brunner* decision, cited *supra* note 78; *Lisbon* decision, cited *supra* note 2, 267, 343; Czech Constitutional Court, Case Pl. ÚS 50/04, Judgment of 8 Mar. 2006; Latvian Constitutional Court, Case 2008-35-01, Judgment of 7 Apr. 2009, § 17; cf. also Polish Constitutional Court, Case K 18/04, cited *supra* note 86, 236, 238 et seq.

93. *Solange I*, cited *supra* note 78, 271, 280; *Eurocontrol* decision, cited *supra* note 87, 1, 40; *Solange II*, cited *supra* note 78, 339, 376; Polish Constitutional Court, Case K 18/04, cited *supra* note 86, 236, 239 et seq.; Danish Supreme Court, Case I 361/1997, cited *supra* note 80, 49, 50; Spanish Constitutional Court, Case 1/2004, cited *supra* note 89, 339, 343; Italian Constitutional Court, Case 183/1973, cited *supra* note 77; *Granital*, cited *supra* note 77, in Oppenheimer, op. cit. *supra* note 77, p. 651; *Fragd*, cited *supra* note 77, in Oppenheimer, op. cit. *supra* note 77, p. 657; Czech Constitutional Court, Case Pl. ÚS 19/08, Judgment of 22 Nov. 2008, paras. 110 and 196.

94. BverfGE 92, 203, 237 (1995) (*EC-TV Directive*).

95. In this sense explicitly *Lisbon* decision, cited *supra* note 2, 267, 354; Czech Constitutional Court, Case Pl. ÚS 50/04, Judgment of 8 Mar. 2006. See further Huber, op. cit. *supra* note 5, paras. 83 et seq.

96. See *supra* note 77. Similarly abstract French Constitutional Council, 2006-540 DC, cited *supra* note 82, 88, 92.

risk”.⁹⁷ Moreover, several constitutional courts have justified their restraint by emphasizing that it was primarily for the political process in the Member States to determine the limits of European integration, not for the courts.⁹⁸

Despite the general restraint, some details of what falls under the core provisions of national constitutional law can be deduced from that jurisprudence. The Czech Constitutional Court, for example, considered the protection of national minorities and of ethnic groups, the principle of non-discrimination, and free competition among political parties without resorting to violence as part of the core.⁹⁹ As a concretization of the concept of the rule of law, several constitutional courts have mentioned the principle of certainty,¹⁰⁰ access to courts to review measures taken by the government,¹⁰¹ the principle of proportionality,¹⁰² the general prohibition of retroactive laws,¹⁰³ and the obligation to give reasons.¹⁰⁴ The prohibition to extradite nationals, by contrast, has not been considered as forming part of national identity in Germany, Poland, and the Czech Republic.¹⁰⁵

Furthermore, the domestic constitutional courts differentiate the meaning of statehood of Member States into the maintenance of external¹⁰⁶ and internal sovereignty.¹⁰⁷ The latter can be violated if Member States transfer their

97. Czech Constitutional Court, Case Pl. ÚS 50/04, Judgment of 8 March 2006; Case Pl. ÚS 66/04, Judgment of 3 May 2006, para 53.

98. Czech Constitutional Court, Case Pl. ÚS 19/08, Judgment of 22 Nov. 2008, para 109; Case Pl. ÚS 29/09, cited *supra* note 84, 209, 222 et seq.; Danish Supreme Court, Case I 361/1997, cited *supra* note 80, 49, 52.

99. Czech Constitutional Court, Case Pl. ÚS 19/08 of 22 Nov. 2008, para 208.

100. *Eurocontrol* decision, cited *supra* note 87, 1, 37; *Maastricht/Brunner* decision, cited *supra* note 78, 155, 187; Danish Supreme Court, Case I 361/1997, cited *supra* note 80; Latvian Constitutional Court, Case 2008-35-01 of 7 Apr. 2009, para 18.2; Polish Constitutional Court, Case K 18/04 cited *supra* note 86; Czech Constitutional Court, Case Pl. ÚS 19/08 of 22 Nov. 2008, paras. 135, 186; Case Pl. ÚS 29/09 cited *supra* note 84, para 133.

101. *Eurocontrol* decision, cited *supra* note 87, 1, 40 et seq.; *Solange II*, cited *supra* note 78, 339, 372, 376, 381; *Arrest Warrant* decision, cited *supra* note 90, 113, 273, 298, 309 et seq.; *Lisbon* decision, cited *supra* note 2, 267, 416; Italian Constitutional Court, Case 232/1989 of 13/21 Apr. 1989 – *Fragd*, in Oppenheimer (*supra* note 77), 653, 657.

102. *Solange II*, cited *supra* note 78, 339, 380; *Arrest Warrant* decision, cited *supra* note 90, 273, 299.

103. *Solange II*, cited *supra* note 78, 339, 381.

104. *Ibid.*, 339, 380.

105. *Arrest Warrant* decision, cited *supra* note 90, 113, 273, 298 et seq.; Polish Constitutional Court, Case P 1/05 of 27 Apr. 2005, see the summary at <www.trybunal.gov.pl/eng/summaries/documents/P_1_05_DE.pdf>; Czech Constitutional Court, Case Pl. ÚS 66/04 of 3 May 2006, paras. 61 et seq.

106. Czech Constitutional Court, Case Pl. ÚS 19/08 of 22 Nov. 2008, paras. 98 et seq.; *Lisbon* decision, cited *supra* note 2, 267, 347 et seq.; Latvian Constitutional Court, Case 2008-35-01 of 7 Apr. 2009, para 17.

107. Czech Constitutional Court, Case Pl. ÚS 19/08 of 22 Nov. 2008, para 98.

Kompetenz-Kompetenz to the EU,¹⁰⁸ if they transfer all powers of a constitutional organ to the EU,¹⁰⁹ if they transfer so many competences to the EU, that no competences with substantial weight remain with the Member State,¹¹⁰ or if essential State functions are affected by a transfer of competences.¹¹¹ While a transfer of competences in the European treaties as part of the treaty-making power of Member States cannot be measured against Article 4(2) TEU, the respective jurisprudence of domestic constitutional nevertheless is indicative of what is meant by national identity.

The German Federal Constitutional Court has developed the most elaborate jurisprudence on national identity. For some time it has argued that the protection of national identity requires the protection of fundamental rights¹¹² and the safeguard of the democratic foundations of the State.¹¹³ In its 2009 *Lisbon* judgment, the Court then expanded the scope of its respective powers. Explicitly making reference to Article 4(2) TEU, it considered that Germany's national identity was defined by the so-called "eternity clause" in Article 79(3) of the German Constitution.¹¹⁴ This clause prevents the legislature from making certain changes to the German Constitution that affect the principle of democracy, the principle of the rule of law (*Rechtsstaat, état de droit*), the principle of the welfare State, the republican form of government, the federal structure, and respect for human dignity and the essence of basic fundamental rights.¹¹⁵

Unlike other constitutional courts, however, the German Federal Constitutional Court takes an expansive view as to what can fall under these

108. See e.g. *Maastricht/Brunner* decision, cited *supra* note 78, 89, 155, 187, 194 et seq., 198 et seq.; *Lisbon* decision, cited *supra* note 2, 267, 348; Danish Supreme Court, Case I 361/199, cited *supra* note 80, 49, 50; Polish Constitutional Court, Case K 18/04 of 11 May 2005, cited *supra* note 86, 236, 238.

109. Polish Constitutional Court, Case K 18/04 of 11 May 2005, cited *supra* note 86, 236, 238.

110. *Maastricht/Brunner* decision, cited *supra* note 78, 155, 186, 207; *Arrest Warrant* decision, cited *supra* note 90, 113, 273, 298; *Lisbon* decision, cited *supra* note 2, 267, 341, 356; Polish Constitutional Court, Case K 18/04, cited *supra* note 86, 236, 238; see also Danish Supreme Court, Case I 361/1997, cited *supra* note 80, 49, 52.

111. *Arrest Warrant* decision, cited *supra* note 90, 273, 298 et seq.; Latvian Constitutional Court, Case 2008-35-01 of 7 Apr. 2009, para 17; similarly Polish Constitutional Court, Case K 18/04 cited *supra* note 86, 236, 238 (concerning core competence of constitutional institutions). Cf. also *Lisbon* decision, cited *supra* note 2, 267, 330 (concerning the competences of the parliament).

112. See also *Solange I*, cited *supra* note 78, 37, 271, 279 et seq.; *Eurocontrol*, cited *supra* note 87, 58, 1, 40; *Solange II*, cited *supra* note 78, 73, 339, 376; *Maastricht/Brunner*, cited *supra* note 78, 89, 155, 174 et seq..

113. *Maastricht/Brunner* decision, cited *supra* note 78, 89, 155, 182, 213; *Lisbon* decision, cited *supra* note 2, 267, 357 et seq.

114. *Lisbon* decision, cited *supra* note 2, 267, 343, 353 et seq..

115. *Ibid.*, 267, 343.

foundational principles. They require, in its reading, that “sufficient space is left to the Member States for the political formation of economic, cultural and social living conditions.”¹¹⁶ For the German Federal Constitutional Court, the protection of national identity, in particular in respect of the democratic principle, comprises “citizenship, the civil and the military monopoly on the use of force, revenue and expenditure including external financing and all elements of encroachment that are decisive for the realization of fundamental rights, above all in major encroachments on fundamental rights such as deprivation of liberty in the administration of criminal law or placement in an institution...includ[ing] cultural issues such as the disposition of language, the shaping of circumstances concerning the family and education, the ordering of the freedom of opinion, press and of association and the dealing with the profession of faith or ideology.”¹¹⁷ This, the court held, specifically encompasses the principle that criminal punishment needs to attach to personal guilt,¹¹⁸ and, in the context of data retention by the public bodies, the principle that “the actions of citizens may not be totally covered and recorded.”¹¹⁹ The German Court therefore goes further than other constitutional courts by deriving from the abstract principles of State organization and from general constitutional principles rather specific limits for the conduct of the EU.¹²⁰

Overall, however, and despite some differences in emphasis and in the degree of subject-matter differentiation, the constitutional courts of the Member States share similar understandings of national (constitutional) identity. In their joint understanding, national identity requires the protection of the statehood of Member States as such, the protection of the form of government and of the central principles of State organization (e.g., federalism, regional and municipal self-government), the protection of

116. *Ibid.*, 267, 358.

117. *Ibid.*, 267, 358.

118. *Ibid.*, 267, 413.

119. BVerf, Decision of 2 Mar. 2010, 63 NJW (2010), 833, 839 (*Data Retention*). See also Kaiser, “German Data Retention Provisions Unconstitutional in their Present Form; Decision of 2 Mar. 2010, NJW 2010, p. 833”, 6 *EuConst* (2010), 503.

120. Accordingly, the breadth of the control undertaken under the identity control test as well as the fact that the Court deduces the content of constitutional limits from the Constitution’s “eternity clause” are regularly criticized. For critical discussion of the decision see e.g. Halberstam and Möllers, “The German Constitutional Court Says ‘Ja zu Deutschland!’”, 10 *GLJ* (2009), 1241; Kottmann and Wohlfahrt, “Der gespaltene Wächter? – Demokratie, Verfassungsidentität und Integrationsverantwortung im *Lissabon-Urteil*”, 69 *ZaöRV* (2009), 443; Tomuschat, “Lisbon – Terminal of the European Integration Process?”, 70 *ZaöRV* (2010), 251; Everling, “Europas Zukunft unter der Kontrolle der nationalen Verfassungsgerichte”, 45 *EuR* (2010), 91. For a critical, but more reconciliatory reading of the decision see Thym, “In the Name of Sovereign Statehood: A critical Introduction to the Lisbon Judgment of the German Constitutional Court”, 46 *CML Rev.* (2009), 1795.

democracy, of the rule of law, and of the essence of fundamental rights. Most domestic constitutional courts, however, remain rather vague in their jurisprudence on constitutional limits and thereby preserve their flexibility in responding to specific situations of conflict between EU law and domestic constitutional law.

Irrespective of all of these vagaries, it is a crucial achievement that the Lisbon Treaty has succeeded in framing both terminologically as well as conceptually the various discourses in the Member States about the relation between EU law and domestic constitutional law. The relationship between the domestic and the EU legal order can now focus on the interpretation of one provision in EU constitutional law – Article 4(2) TEU. There is now a common European discourse on this most sensitive issue. Having a common discourse will likely lead to a further interpretative and argumentative integration between the constitutional courts in the European legal area. Once the concept of national identity has been laid down in the present form in the TEU, it can be expected that the constitutional courts of the Member States will formulate any future constitutional limits in terms of the respect for national identity. In this context, the German Federal Constitutional Court might have tried to take leadership again when it introduced, in its *Lisbon* decision, the identity control test as a specific category to control the conformity of EU law with domestic constitutional principles.¹²¹ This further constitutionalizes the relationship between EU law and domestic constitutional law and provides a focal point at which the question of primacy of EU law and the invocation of constitutional limits meet.

4. Legal effects and procedural implementation

Determining what constitutes part of national identity in Article 4(2) TEU does not yet resolve the question of the relationship between EU law and domestic constitutional law. Instead of clear rules of hierarchy, Article 4(2) TEU imposes on the EU a duty to respect the national identity of Member States the effects of which may depend on the circumstances of each case. It allows for nuanced solutions for how EU law and domestic constitutional law relate to each other in regard of specific cases (4.1). Moreover, the implementation of the duty to respect national identity has to take account of the relationship between the ECJ and the domestic constitutional courts which should be seen as parts of a composite system of constitutional adjudication (4.2).

121. *Lisbon* decision, cited *supra* note 2, 267, 353 et seq. In this sense also Thym, *op. cit. supra* note 120, 1809.

4.1. *The duty to respect*

The obligation to respect national identity in Article 4(2) TEU does not establish absolute protection for the constitutional values that form part of national identity. Rather, where national identity is at stake, Article 4(2) TEU requires that a proportional balance be found between the uniform application of EU law, a fundamental constitutional principle of the EU,¹²² and the national identity of the Member State in question.¹²³ Thus, Article 4(2) TEU does not accord automatic priority to the constitutional principle of the Member State protected by Article 4(2) TEU, nor does it require domestic constitutional law unconditionally to yield precedence to EU law. Instead, it prevents EU law from interfering in a disproportionate manner with the constitutional identity of Member States. Applying such a proportionality test is warranted because that is what the term “to respect” generally requires in EU law, above all as used by the Charter of Fundamental Rights.¹²⁴

In addition, to further buttress the application of a proportionality test and to operationalize the duty to respect in regard of specific cases, one can draw on the well-established legal technique of the Court of Justice to resolve conflicts between fundamental freedoms under EU law and fundamental rights under domestic constitutional law. In this jurisprudence, the ECJ, in principle, accords primacy to EU law over national constitutional law,¹²⁵ but uses proportionality analysis to find an appropriate balance between the obligations of Member States under EU law and the protection of fundamental rights under domestic constitutional law.¹²⁶ In German doctrinal language, it aims to achieve “*Konkordanz*” between the competing constitutional

122. von Bogdandy, “Founding Principles”, in von Bogdandy and Bast, op. cit. *supra* note 5, p. 11, 28 et seq.

123. Hilf, op. cit. *supra* note 16, p. 164; Pernice (2011) op. cit. *supra* note 7, 196–198; Streinz, in Streinz, op. cit. *supra* note 46, Art. 10 EGV, paras. 49 et seq.; Stumpf, in Schwarze, *EU-Kommentar*, 2nd ed. (2008), Art. 6 EUV, para 40. For a different view, see Puttler, in Callies and Ruffert, op. cit. *supra* note 47, Art. 4 EUV, para 22.

124. The duty to respect in Arts. 7, 11(2), 13(2), 22, 25, 26, 34(1), 34(3), 36, 48(2) Charter of Fundamental Rights (CFR) allows proportional interferences with the protected rights (Art. 52(1) CFR). An exception applies, however, in respect of Art. 1 CFR, Borowsky, in Meyer (Ed.), *Charta der Grundrechte der Europäischen Union*, 2nd ed. (2006), Art. 1, para 40. See also Declaration no. 20 on Art. 16 of the Treaty on the Functioning of the European Union C 115/355, which mentions in connection with the protection of national security that “due account will have to be taken of the specific characteristics of the matter”. A parallel to the respect of human dignity can therefore not be drawn. See in depth Pernice (2011) op. cit. *supra* note 7, 194, 198.

125. See the case law of the ECJ cited *supra* note 4.

126. See *Commission v. Luxembourg*, cited *supra* note 4, paras. 35 et seq.; *Michaniki*, cited *supra* note 4, paras. 61 et seq.; cf. also the case law and literature cited in *supra* notes 31–35.

values.¹²⁷ This use of proportionality analysis now receives with Article 4(2) TEU a new conceptual frame and an explicit legal basis.

Translating the duty to respect national identity into a proportionality test is precisely what the ECJ did in the *Sayn-Wittgenstein* case, when it held that “it must be accepted that, in the context of Austrian constitutional history, the Law on the abolition of the nobility, as an element of national identity, may be taken into consideration when a balance is struck between legitimate interests and the right of free movement of persons recognized under European Union law”.¹²⁸ This permits “[m]easures which restrict a fundamental freedom...if they are necessary for the protection of the interests which they are intended to secure and only in so far as those objectives cannot be attained by less restrictive measures”.¹²⁹

The operationalization of Article 4(2) TEU should distinguish whether the legality of acts of Member States under EU law or the legality of acts of the EU are at stake. Thus, in respect of autonomous measures taken by Member States that interfere with fundamental freedoms granted by EU law, the duty to respect national identity in Article 4(2) TEU will mainly serve to interpret existing justifications to restrict fundamental freedoms, for example to protect public order. This was the situation in *Sayn-Wittgenstein*, where the ECJ pointed out that reliance by Austria on the protection of its national identity to justify an interference with the freedom of movement in Article 21 TFEU had to be understood as part of public policy, which justifies proportional restrictions of the freedom of movement.¹³⁰ In this case, the Court made reference to Article 4(2) TEU merely as an additional argument that the interpretation of fundamental freedoms granted in EU law, and the proportionality test it had traditionally applied in this context, also required respect of the constitutional values that form part of a Member State’s constitutional identity. In this context, Article 4(2) TEU does not constitute an independent justification for restrictions of fundamental freedoms, but feeds into the proportionality test generally applied by the ECJ to balance

127. The term “*Konkordanz*” or “*praktische Konkordanz*” was coined by the German constitutional law scholar Konrad Hesse and refers to a concept or method of reconciliation and balancing of competing fundamental rights. In a case where two fundamental rights collide, “*Konkordanz*” requires that both rights be reconciled without giving up either one of them. What this concept primarily excludes is perceiving one of the fundamental rights as superior to any other such right. Instead both rights have to be reconciled in a differentiated manner, a task that is achieved in the fundamental rights context by balancing the different rights and interests under a comprehensive proportionality methodology while aiming at a solution that gives both rights effective protection to the greatest possible extent. See Hesse, *Grundzüge des Verfassungsrechts der Bundesrepublik Deutschland*, 20th ed., (Müller, 1995), para 72.

128. *Sayn-Wittgenstein*, cited *supra* note 17, para 83.

129. *Ibid.*, para 90.

130. *Ibid.*, cited *supra* note 17, para 84.

fundamental freedoms and conflicting rights.¹³¹ Article 4(2) TEU here serves as an aid to concretizing notions used elsewhere in primary EU law, such as public policy or public order and as a criterion in proportionality balancing.

When it comes to the effect of Article 4(2) TEU on the relation between domestic constitutional law and secondary EU law, by contrast, Article 4(2) TEU arguably assumes independent legal significance. As indicated by its wording (“shall respect”), Article 4(2) TEU is framed as a legal obligation of the EU, and therefore not simply a statement of principle with a mere interpretative function. Furthermore, there are no other provisions in primary EU law that deal with the conflict between secondary EU law and conflicting domestic constitutional law whose interpretation could be concretized by Article 4(2) TEU. Here, two constellations can be distinguished. First, a disproportionate interference of a measure taken by the EU with a domestic constitutional principle protected under Article 4(2) TEU can be a reason for the unlawfulness of the measure as a matter of EU law. Such a measure, in consequence, can be struck down as generally unlawful by the ECJ. A hypothetical case for such a constellation would be if an EU directive, for example, required Member States to create domestic agencies whose institutional set-up is in breach of core principles of constitutional law, such as the principle of democracy.¹³² The breach of the duty to respect under Article 4(2) TEU occasioned by such act would make the directive as such illegal.

In consequence, in order to avoid a breach of Article 4(2) TEU, EU measures may need to be tailored in a way that allows Member States various alternatives to comply with EU law in ways that do not interfere with their national identity.¹³³ Depending on the circumstances, this may require that secondary EU law be framed in ways that allow Member States sufficient flexibility in implementing it in the domestic legal order, or even require that the EU measure in question provide for specific exceptions for non-compliance in cases where national identity is unduly affected. To

131. See the case law of the ECJ cited *supra* note 4.

132. A similar argument was raised by Germany Case C-518/07, *Commission v. Germany*, judgment of 9 March 2010, nyr, paras. 38 et seq., 52 et seq., when it argued that the requirement under Art. 28(1)(2) of Directive 95/46/EC (O.J. 1995, L 281/31) to set up a public authority that exercises monitoring functions in regard of data protection with “complete independence” breached the principle of democracy. In this case, however, Germany did not frame its argument as a question of national identity, but instead as one of respect for the principle of democracy under EU law and respect for well-established national arrangements and the organization and working of Member States’ legal systems. Accordingly, the Court did not need to comment on a potential clash between the directive and the domestic understanding of the principle of democracy, and hence the impact of a duty to respect national identity.

133. Cf. the case law cited *supra* notes 31–35, in which the ECJ emphasized the openness of EU law towards the protection of fundamental rights granted in the constitutional law of Member States.

require, as seemingly done by the German Federal Constitutional Court, that the duty to respect national identity translates into the need to act by unanimity in the Council, regardless of the possibility to take a decision by majority,¹³⁴ by contrast is hardly convincing. For this purpose, the Lisbon Treaty provided for detailed rules and procedures, including the so-called emergency brake mechanisms.¹³⁵

Second, Article 4(2) TEU arguably can be invoked as a justification by a Member State for non-compliance with, or derogation from, an obligation under secondary EU law without affecting the legality of the EU measure. In this function, Article 4(2) TEU could be used to justify a Member State's non-compliance with EU directives that do not explicitly provide for an exception clause.¹³⁶ In that regard, Article 4(2) TEU would constitute a limitation on the general primacy of EU law.¹³⁷ Although the ECJ so far has not recognized that Article 4(2) TEU can have such a function, it has hinted at such an effect in two proceedings.

Thus, in *Michaniki* the Court was faced with the argument by Greece that it was entitled to exclude construction companies connected with media companies from participating in award procedures for public works contracts. Greece supported this with a provision in its Constitution to that effect, even though the applicable EU Directive contained an exclusive list of grounds justifying exclusion of contractors from the award procedure.¹³⁸ Under the text of the Directive, additional requirements such as that provided for by Greece would not be possible. However, the Court conceded that the constitutional provision in question could be invoked as grounds for excluding contractors from participating in public tender procedures in addition to the exhaustive list contained in the EU Directive; yet, in the case at hand, the Court found the exclusion of the bidders in question to be disproportionate.¹³⁹ Notwithstanding, the decision in *Michaniki* illustrates that the ECJ is willing to recognize that domestic constitutional law is not simply overridden by secondary EU law, but has a legitimate scope of application and its own normative weight in the process of implementing a directive. Furthermore, the *Michaniki* case shows that the ECJ uses a balancing approach to reconcile the interest of the EU to implement EU law and that of the Member States to give

134. *Maastricht/Brunner* decision, cited *supra* note 78, 155, 184; *EC-TV Directive* decision, cited *supra* note 94, 203, 237.

135. Art. 48(2), Art. 82(3), Art. 83(3), Art. 86(2)(2) and (3), Art. 87(3)(2) and (3) TFEU. See further on the embeddedness of the respect of national identity in the political process at the EU level Pernice (2011), *op. cit. supra* note 7, 212–213.

136. *Michaniki*, cited *supra* note 4, paras. 12 et seq.

137. Besselink, *op. cit. supra* note 7, 47–48.

138. *Michaniki*, cited *supra* note 4, paras. 61 et seq.

139. *Ibid.*

effect to its domestic constitutional principles. This suggests that proportionally implemented domestic constitutional values can justify derogation of a Member State from the requirements of a directive.

Similarly, in *Commission v. Poland*, Poland raised the argument that a piece of national legislation prohibiting the introduction in the Polish market of genetically modified varieties and seeds was not in breach of an EU Directive relating to the free circulation of genetically modified seeds because the national legislation in question aimed at protecting ethical and religious considerations prevalent in Poland. This justified, in Poland's view, a derogation from the obligations laid down in the EU Directive. Although the Court explicitly reserved to rule on the question of whether moral or ethical considerations could allow a Member State to derogate from an obligation under secondary EU law,¹⁴⁰ it stated that "it is sufficient to hold that the Republic of Poland, upon which the burden of proof lies in such a case, has failed, in any event, to establish that the true purpose of the contested national provisions was in fact to pursue the religious and ethical objectives relied upon."¹⁴¹ This indicates, at the very least, an openness of the Court to consider possibilities for Member States to derogate from secondary EU law if this serves to protect certain fundamental principles affected but not considered by the content of the secondary EU measure in question. If the values invoked by Poland had formed part of Poland's national identity, the duty to respect that national identity under Article 4(2) TEU could in our view have provided a legal basis for Poland to derogate from the obligation to implement the Directive in question, provided that non-compliance with the EU Directive was proportionate in view of the conflicting principles.

Both decisions of the ECJ support our argument that Article 4(2) TEU could be operationalized as a basis for a Member State to derogate from its obligation to implement secondary EU law. This relativizes the doctrine of absolute primacy of EU law. Of course, the effect of Article 4(2) TEU to derogate from secondary EU law can only apply in exceptional circumstances. First, a justification of non-compliance under Article 4(2) TEU requires that the national measure in question is in accordance with the Member State's constitution. Otherwise, a Member State would seek to justify non-compliance with EU law based on acts that are itself unconstitutional. Second, one must consider whether in the absence of an explicit basis for derogation in secondary EU law the effect of a disproportionate burden on the national identity of Member States should be the illegality of the entire EU measure in regard of all Member States, or whether Article 4(2) TEU grants a specific right of derogation to Member States only whose national identity is

140. Case C-165/08, *Commission v. Poland*, [2009] ECR I-6843, paras. 51.

141. *Ibid.*, paras. 52.

disproportionately affected. While it is difficult to provide a general solution to this issue in the abstract, it seems that above all two factors appear relevant to decide this issue. The first is the foreseeability of conflict between EU law and domestic constitutional law, and accordingly the possibility to provide for explicit exceptions in secondary EU law. The other factor is the extent to which an exceptional derogation from secondary EU law negatively impacts on the uniform application of EU law: the legal equality of citizens and equal competition in the internal market are very important principles indeed.

If the effect of certain EU measures on national identity of Member States is foreseeable, a circumspect legislature can be expected to frame the act accordingly *ex ante*, whereas an unforeseeable impact on national identity can only be dealt with *ex post*. Similarly, if the national identity of only one (or a few) Member States is affected, permitting those Member States an exceptional derogation from implementing secondary EU law appears more readily acceptable than reading a general derogation clause based on Article 4(2) TEU into the secondary EU act that could be used by all Member States. Finally, if derogation from secondary EU law has no significant effect beyond a State's borders, and therefore does not significantly impact the equality of citizens and the unity of the EU legal order more generally, an exceptional derogation from secondary EU law is more readily acceptable than in case of significant effects beyond the borders.

These considerations can serve as indicators when determining the proportionality of non-compliance with secondary EU law under the duty to respect national identity. A further controlling consideration should be whether and to which extent exceptional non-compliance with EU law can serve as a symbol of a pluralistic understanding of composite constitutionalism. If understood against this background, one can agree with the German Federal Constitutional Court in its *Lisbon* decision to operationalize the protection of national identity as a separate test for controlling the constitutionality of EU law. It is not convincing, however, to understand national identity as an absolute barrier and to interpret it as broadly as the German Federal Constitutional Court indicated in its *Lisbon* decision.¹⁴² This leads to the next point, namely the question of the relationship between the ECJ and domestic constitutional courts when it comes to interpreting and applying Article 4(2) TEU.

142. *Lisbon* decision, cited *supra* note 2, 267, 353 et seq.; similarly Puttler, in Calliess and Ruffert, op. cit. *supra* note 47, Art. 4 EUV, para 22. In this regard see the criticism of the decision *supra* note 120.

4.2. *Procedural implementation and European composite constitutional adjudication*

Conflicts between EU law and national constitutional law do not only have a substantive, but also a procedural and institutional side. This side is often particularly conflict-prone as it concerns the distribution of power between the ECJ and national constitutional courts. Conflicts occur when the ECJ's competence to interpret EU law under Article 19(1)(1)(2) TEU, which includes determining the scope and effect of Article 4(2) TEU, clashes with the decision of a domestic constitutional court to rely on the protection of national identity to justify non-compliance with EU law. The question therefore arises: who decides whether Article 4(2) TEU has been infringed and what the legal consequence of a possible infringement are? In other words, which institution decides on the illegality (or applicability) of an EU act or on the justification for non-compliance by a Member State?

The German Federal Constitutional Court viewed itself as empowered to determine that issue when it introduced the identity control test as a separate test for the constitutionality of EU law in its *Lisbon* decision.¹⁴³ To justify this test, the Court pointed out that otherwise compliance with Article 4(2) TEU by EU organs could not be controlled effectively.¹⁴⁴ The legal consequence of a breach of Article 4(2) TEU, in its view, is the inapplicability of an EU act in Germany.¹⁴⁵ Similarly, other constitutional courts claim, although more cautiously, “the last word” in determining the protection accorded by the identity clause as part of the constitutional limits to the primacy of EU law.¹⁴⁶

Such absolute positions, however, are difficult to sustain. Rather, the tension between the ECJ and the constitutional courts of the Member States is to be tempered by the principle of sincere cooperation that is enshrined in Article 4(3) TEU. This provision can be seen as the legal basis for coordinating the jurisprudence of domestic constitutional courts with the ECJ's task to interpret EU law and to ensure its uniform application, including the interpretation and application of Article 4(2) TEU.¹⁴⁷ In this sense, the ECJ and the constitutional courts of the Member States can be viewed as complimentary parts of European composite constitutional adjudication.¹⁴⁸

143. *Lisbon* decision, cited *supra* note 2, 267, 354.

144. *Ibid.*

145. *Ibid.*

146. See citations *supra* notes 75–86 and accompanying text.

147. Now explicitly *Honeywell* decision, cited *supra* note 2, 3422, 3424.

148. Voßkuhle, *op. cit. supra* note 11, 184.

This composite structure requires strategies of mutual conflict prevention by both the ECJ and the domestic constitutional courts.¹⁴⁹

The principle of sincere cooperation is adverse to the claim that the constitutional courts of Member States are entirely “sovereign” in deciding on the meaning and effect of Article 4(2) TEU. On the contrary, Article 4(2) TEU, as becomes clear from its wording, is not a “self-judging” provision that grants unfettered discretion to Member States.¹⁵⁰ Instead, as most other provisions of EU law, Article 4(2) TEU is subject to the interpretation and control of the ECJ under Article 19(1) TEU.¹⁵¹ The ECJ’s authority, however, only extends to determining the conceptual framework of what a Member State can determine to form part of its national identity, that is the relevance of national identity under EU law; it cannot determine the content of a Member State’s national identity itself.¹⁵² Instead, the ECJ needs to give adequate room to the different self-understandings of Member States and their domestic constitutional courts. Otherwise, the ECJ would overstep its jurisdictional mandate in Article 19(1) TEU, which limits the Court’s jurisdiction to the interpretation of EU law.¹⁵³

Notwithstanding, in deciding on the relevance of national identity, and the consequences under EU law of the duty to respect laid down in Article 4(2) TEU, the Court needs to ensure that the project of European integration as a whole, of which uniform application of EU law is a foundational element, is not endangered. The Court therefore is not bound by the views of a domestic constitutional court on the effect the invocation of national identity should have. Instead, as regards the operation of EU law, the ECJ is competent to decide on the effect Article 4(2) TEU has on the legality of an act of the EU or a Member State under EU law. Yet, the ECJ itself, as an organ of the EU, is subject to the duty under Article 4(2) TEU to respect the national identities of Member States. Hence, the ECJ cannot determine the content of the notion of national identity in Article 4(2) TEU in an autonomous manner as it is able to with other provisions of EU law.¹⁵⁴ Rather, it has to take into account the specific understanding of the content of national identity by the relevant

149. von Danwitz, *Europäisches Verwaltungsrecht* (Springer, 2008), 153. See also Besselink, *op. cit. supra* note 7, 44–49; Pernice (2011) *op. cit. supra* note 7, 213–219.

150. On the international law concept of “self-judging clauses” see Schill and Briese, “‘If the State considers’: Self-judging clauses in international dispute Settlement”, (2009) *Max Planck UNYB*, 61, 67 et seq.

151. On the concept of public policy see Case 41/74, *van Duyn* [1974] ECR 1337, para 7; *Omega*, cited *supra* note 32, para 30; on public security see Case C-54/99, *Église de scientologie*, [2000] ECR I-1335, para 17.

152. Besselink, *op. cit. supra* note 7, 44–45; Wendel, *op. cit. supra* note 60, 134–135.

153. Besselink, *op. cit. supra* note 7, 45.

154. See Polish Constitutional Court, Case K 18/04, cited *supra* note 86, 236, 243.

domestic constitutional court, and thus accommodate a broad range of different understandings of national identity under Article 4(2) TEU.¹⁵⁵

Since there is no reference procedure from the ECJ to a domestic constitutional court, the ECJ has to ensure that the government of a Member State submits the relevant view of that State's constitutional court to the ECJ on the interpretation of national, respectively constitutional identity.¹⁵⁶ Based on the information it receives, the ECJ then has to balance the interest of the Member State and that of the EU in determining the legal effects of the duty to respect national identity under Article 4(2) TEU, while also taking due account of the view expressed by the Member State's constitutional court on its view of how the uniform application of EU law and the Member State's constitutional identity should be balanced.

At the same time, the ECJ's ruling on a question of national identity does not need to exclude the possibility that domestic constitutional courts themselves apply an identity control test to acts of the EU.¹⁵⁷ It is a defining feature of European constitutional pluralism as it has developed over the past decades that a decision by the ECJ on national identity in a specific situation is not final.¹⁵⁸ Under its domestic constitution, the constitutional court of a Member State can interpret the domestic duty to protect national identity differently, and the revised identity clause in Article 4(2) TEU can be viewed as a European ratification of these constitutional limits. A possible divergence between the ECJ and domestic constitutional courts should be seen as an acceptable price for a heterarchical constitutional structure that is much more suitable for the EU's pluralistic legal architecture than a hierarchical model.¹⁵⁹ Such a structure, however, can only be sustainable if national constitutional courts take the principle of sincere cooperation seriously.¹⁶⁰ This requires domestic courts not only to interpret constitutional limits narrowly,¹⁶¹ but more generally a jurisprudence that is guided by ideas such as the concept of

155. Cf. in the context of defining the concepts of public order and security Case 36/75, *Rutili*, [1975] ECR 1219, paras. 26 et seq.; Case 30/77, *Bouchereau*, [1977] ECR 1999, paras. 33/35; *Église de scientologie*, cited *supra* note 151, para 17; Case C-33/07, *Gheorghe Jipa*, [2008] ECR I-5157, para 23. On the concept of public morality see Case 34/79, *Henn v. Derby*, [1979] ECR 3795, para 15.

156. The ECJ has the necessary powers to ensure that such information is submitted. See Art. 24 of the Statute of the Court.

157. Similarly, Pernice (2011) *op. cit. supra* note 7, 204–205.

158. Kadelbach, *op. cit. supra* note 1, 228 et seq.

159. On the understanding of heterarchy as a central feature of the constitutional legal orders in the EU and the United States. Halberstam, *op. cit. supra* note 6, p. 326 et seq.

160. Huber, *op. cit. supra* note 5, paras. 80 et seq. Similarly Wahl, "Die Schwebelage im Verhältnis von Europäischer Union und Mitgliedstaaten", 48 *Der Staat* (2010), 587, 603 et seq.

161. The situation can be seen similar to the application of the concepts of public order and security; see *Rutili*, cited *supra* note 55, paras. 26/28; *Bouchereau*, cited *supra* note 155, paras. 33 et seq.; *Omega*, cited *supra* note 32, para 30; *Gheorghe Jipa*, cited *supra* note 155, paras. 23;

“friendliness towards EU law” (*Europarechtsfreundlichkeit*), which the German Federal Constitutional Court invented in its *Lisbon* decision.¹⁶²

Furthermore, such a conflict between the ECJ and domestic constitutional courts can be mitigated considerably, when such a test is implemented in accordance with the general procedural instruments governing the relationship between the ECJ and domestic courts, most importantly the preliminary reference procedure in Article 267 TFEU. This procedure is applicable to constitutional courts just as to any other court of the Member States.¹⁶³ Thus, a domestic constitutional court, if it wishes to rely on Article 4(2) TEU to justify non-compliance with EU law, must express its concerns as regards the disproportionate interference with national identity of the relevant measure *vis-à-vis* the ECJ in a request for a preliminary ruling. Such a request then requires the ECJ to rule on the relevance of an invocation of national identity and hence on the effects under EU law of Article 4(2) TEU. A potential conflict between EU law and domestic constitutional law can then be prevented if the ECJ strikes down as unlawful the EU act in question or accepts that a State can invoke an exception from strict compliance with EU law.¹⁶⁴ Moreover, requesting a preliminary ruling also has the effect that the domestic

Case C-319/06, *Commission v. Luxembourg*, [2008] ECR I-4323, para 50. Similarly, in the context of ultra vires review *Honeywell*, cited *supra* note 2, 3422, 3424 et seq.

162. *Lisbon* decision, cited *supra* note 2, 267, 347, 354, 401; BVerf, *Honeywell*, cited *supra* note 2, 3422, 3424; Polish Constitutional Court, Case K 18/04, cited *supra* note 86, 236, 240.

163. Constitutional courts of various Member States have in fact already made use of this possibility. See Opinion of A.G. Kokott, Case C-169/08, *Presidente del Consiglio*, [2009] ECR I-10821, para 21. The duty to make reference to the ECJ is now also accepted by the German Constitutional Court (see *Data Retention* decision, cited *supra* note 119, 833, 835; *Honeywell* decision, cited *supra* note 2, para 60) and the Spanish Constitutional Court, Case No. 6922-2008, Decision, 9 July 2011, available via <www.tribunalconstitucional.es>. The contrary vision, which denies the need to make use of the preliminary reference proceedings by pointing out that a constitutional court only rules on issues of its domestic constitutional law, and accordingly determine only the constitutional limits to the delegation of competences to the EU (*Lisbon* decision cited *supra* note 2, 267, 350, 353 et seq.) is hardly tenable, given that the notion of national identity in Art. 4(2) TEU is clearly a notion of EU law. Problematic remains the position of the French Constitutional Council, which rejects a submission to the ECJ because of the requirement in Art. 61(3) of the French Constitution to render its decision within a short period of time; see French Constitutional Council, 2006-540 DC, cited *supra* note 82, 88, 92; Case 2010-605 DC, cited *supra* note 88, para 18.

164. See also Joined Cases C-188 & 189/10, *Melki and Abdeli*, judgment of 22 June 2010 nyr, para 54 (stressing that “an interlocutory procedure for the review of the constitutionality of a national law, the content of which merely transposes the mandatory provisions of a European Union directive, cannot undermine the jurisdiction of the Court of Justice alone to declare an act of the European Union invalid, and in particular a directive, the purpose of that jurisdiction being to guarantee legal certainty by ensuring that EU law is applied uniformly”).

constitutional court has to submit its reasons for possible non-compliance with EU law to the European public at large.

If the ECJ does not adopt the position expressed by the domestic constitutional court, it will itself need to provide convincing reasons to the European public at large why the duty to respect national identity, contrary to the position of a domestic constitutional court, does not allow the Member State in question to derogate from its obligation to implement EU law. Only upon considering these reasons, and as an *ultima ratio*, is a domestic constitutional court in a procedural position to refuse allegiance to the ECJ, even though from the perspective of EU law such a decision would remain illegal.¹⁶⁵ In doing so, national constitutional courts must be aware of their responsibility not only for the integrity of their domestic constitutional legal order, but also for the constitutional order of the Union: after all, their decisions on constitutional limits will influence the choices of other players and therefore have effects beyond the limits of a specific constitutional order. Domestic courts must be aware of, and take into account, the Union-wide consequences of their jurisprudence.¹⁶⁶

Following an earlier indication to this effect in the *Data Retention* case,¹⁶⁷ the German Federal Constitutional Court recently emphasized in its *Honeywell* decision its willingness to heed the principle of sincere cooperation with the ECJ under Article 4(3) TEU in the context of implementing its *ultra vires* control.¹⁶⁸ In *Honeywell*, the Court decided that, in principle, judicial review of EU measures had to be sought before the ECJ; the German Federal Constitutional Court's own role, by contrast, it held, was limited to controlling whether EU measures were *ultra vires* in a manner that gravely violated the principle of limited attribution of competences. This, in the Court's view, required that the breach of competence by the EU was serious and obvious and shifted competences significantly from the Member States to the EU. Notably, the German Federal Constitutional Court used the

165. Similarly, in relation to the *ultra vires* control test, *Honeywell* decision, cited *supra* note 2, 3422, 3424 et seq.

166. See von Bogdandy, "Prinzipien der Rechtsfortbildung im europäischen Rechtsraum – Überlegungen zum Lissabon-Urteil des BVerfG", 63 NJW (2010), 1; cf. also Pernice, "La Rete Europea di Costituzionalità – Der Europäische Verfassungsverbund und die Netzwerktheorie", 70 ZaöRV (2010), 51, 67–70.

167. *Data Retention* decision, cited *supra* note 119, 833, 835.

168. *Honeywell* decision, cited *supra* note 2, 3422, 3424 et seq. For commentary on this decision see Payandeh, "Constitutional Review of EU Law after *Honeywell*: Contextualizing the Relationship between the German Constitutional Court and the EU Court of Justice", 48 CML Rev. (2011), 9.

principle of “friendliness towards EU law” as an expression of the principle of sincere cooperation in order to coordinate and to harmonize the constitutional limits it propagates against the absolute primacy of EU law with the task of the ECJ to interpret EU law and to implement it in a uniform manner.

Similar considerations should also apply to a domestic identity control test. This would help to reduce conflict between the ECJ and domestic constitutional courts and further the spirit of mutual cooperation in a European system of composite constitutional adjudication. Although it seems rather unlikely that an escalation of conflict between domestic constitutional courts and the ECJ will occur, the importance of the theoretical possibility of domestic courts to invoke constitutional limits as part of an identity control test lies less in a struggle for superiority among the courts involved, or the question of ultimate supremacy, but rather in the dialectic nature of the interaction between domestic constitutional courts and the ECJ in a quest to find an appropriate balance between national constitutional identity and primacy of EU law.

5. Composite constitutional adjudication and separation of powers

The pluralistic conception of the relationship between EU law and national constitutional law gains weight with the identity clause in Article 4(2) TEU. With it, traditional hierarchical ideas that influenced the earlier jurisprudence of both the ECJ and the domestic constitutional courts appear increasingly outdated. Article 4(2) TEU constitutionalizes the relationship by making constitutional limits an issue of the TEU. This overcomes the “blindness” of EU law in respect of the constitutional limits, but also the absolute primacy of EU law as advocated so far by the ECJ.

Also as regards procedure, Article 4(2) TEU indicates a path to overcome the hierarchical model. Although the ECJ has jurisdiction over the interpretation of Article 4(2) TEU, and thus determines the relevance under EU law of domestic constitutional law from an EU law perspective, its interpretation must be coordinated with the interpretations by national constitutional courts and their constitutional limits to protect national identity. At the same time, domestic constitutional courts have to exercise these powers in light of their European responsibility. Under such a pluralistic understanding, the answer to the question of who has the ultimate power to decide on issues of national identity is that there is no definitive answer as there is no final arbiter in a composite system of European constitutional adjudication. The ensuing potential for conflict is tamed by the mutual duty to cooperate. This certainly does not make conflicting decisions between the ECJ

and domestic constitutional courts impossible, but it reduces the likelihood of actual conflict significantly. Moreover, the possibility of conflict can be understood, from the perspective of composite constitutionalism, as a genuine mechanism of separation of powers, which ensures an effective control of the exercise of public authority at both EU and Member States levels and of the commitment of both the EU and the Member States to serve the public interest at large.¹⁶⁹

169. See Pernice (2006) *op. cit. supra* note 7, pp. 53–56; foundational on heterarchy as an ordering paradigm in constitutional orders: Halberstam, *op. cit. supra* note 6, p. 326 et seq.

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