The Potential of Article 4(2) TEU in the Solution of Constitutional Clashes Based on Alleged Violations of National Identity and the Quest for Adequate (Judicial) Standards

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The contribution aims at determining the added value, if any, of Article 4(2) Treaty on European Union (TEU) in the prevention and solution of constitutional conflicts related to the alleged violation of national identity. To that end, the article considers the growing tensions in the dialogue between constitutional courts and the European Court of Justice (ECJ), in particular those emerging from the Gauweiler and M.A.S. and M.B. cases, and examines how the Luxembourg judges have interpreted and applied the identity clause vis à vis challenges based on the need to protect national prerogatives. The contribution thus dwells on the nature and scope of Article 4(2), TEU in light of the principles of conferral, loyal cooperation, subsidiarity and proportionality. Based on the case law following the entry into force of the Lisbon Treaty, and the recent disquietude manifested by the German and Italian constitutional courts, the article finally advocates the elaboration of a more restrictive notion of national identity by the ECJ, as well as the development of clearer rules of conflict when the constitutional specificities of the Member States are (allegedly) on a collision course with EU law.

Keywords: National Identity; Constitutional Identity; Fundamental Rights; EU Values; Effectiveness; Constitutional Courts; Dialogue Between Courts; Primacy; Counter-limits Doctrine.

1 INTRODUCTION

The Lisbon Treaty has significantly modified the structure of the EU legal order, extended the competences of the Union and attributed binding force to the Charter of Fundamental Rights of the European Union (hereafter Charter or CFR), but it has also marked a return to a 'thick' understanding of sovereignty.[1] The obsessive reference to the principle of conferral, the striving

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[1] As pointed out in legal literature 'The authors of CT and TL alike were keen to highlight that the Union is an organization of derived and limited powers, "on which the Member States confer competences to attain objectives they have in common"'. M. Dougan, *The Treaty of Lisbon 2007:*

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towards a clearer separation of powers between the national and supranational level and the increased proceduralization of subsidiarity are quite telling in this regard.[2]

Moreover, the progressive harmonization of sensitive areas of law like criminal law[3] and the need to guarantee the effective and uniform application of EU law comprising twenty-eight countries, with different cultures, languages and legal traditions have greatly contributed to provoke and embitter constitutional conflict.

This state of affairs deeply questions the autonomy of the EU legal order. In such context, the duty to respect the national identities of the Member States affirmed in Article 4(2) TEU, is worthy of particular attention in light of the latest trends in judicial dialogue with particular regard to the references, and to the pertinent final decisions, of the German Federal Constitutional Court (FCC or *Bundesverfassungsgericht*) in *Gauweiler* and of the Italian Constitutional Court (ICC or *Consulta*) in *M.A.S. and M.B.*, as well as to the latest preliminary questions put forward by the FCC in the still pending *Weiss* case (section 2). The formulation and constitutional positioning of Article 4(2) TEU suggest that the provision is autonomous, to be distinguished from other provisions concerning the cultural, linguistic and religious specificities of the Member States, as well as from those relating to the protection of fundamental rights, and should be read jointly with the principles of conferral, sincere cooperation, subsidiarity and proportionality (section 3). The potential of this provision is quietly emerging in the case law of the Court of Justice (ECJ) (section 4) although its notion and scope of application remain unclear (section 5). The optimal use of Article 4(2) TEU in the current stage of constitutional confrontation requires full awareness of the paradigmatic changes brought by the post-Lisbon era and necessarily implies the development of adequate judicial standards (section 6). Preserving the autonomy of the EU legal order conflicting constitutional claims notwithstanding requires, first and foremost, dialogue between the ECJ and the (ordinary and) constitutional courts of the Member States; dialogue, however, can only be constructive if based on mutual understanding and respect (section 7).[4]

Winning Minds, Not Hearts, 45 Common Mkt. L. Rev. 617, at 653 f. (2008). *See also* G. Strozzi, *Limiti e contro limiti nell'applicazione del diritto comunitario*, Studi sull'integrazione europea 23, at 28 (2009), who talks about a revival of sovereignty emerging from the Lisbon Treaty.

2 On the progressive proceduralization of the subsidiarity principle *see* in particular R. Schütze, *Subsidiarity After Lisbon: Reinforcing the Safeguards of Federalism?*, 68 Cambridge L.J. 525 at 527 f. (2009). For further references *see also* the authors quoted n. 92, *infra*.

3 *See* e.g. J. A. E. Vervaele, *European Criminal Justice in the Post-Lisbon Area of Freedom, Security and Justice*, at 11 f. (Università degli Studi di Trento 2014) and V. Mitsilegas, *EU Criminal Law after Lisbon* (Hart Publishing 2016).

4 The term constitutional court is meant herein to include also the supreme courts performing similar functions in the relevant domestic legal order (e.g. UK Supreme Court and Danish Supreme Court).

2 CONSTITUTIONAL CONFLICTS EMERGING FROM *GAUWEILER* AND *M.A.S. AND M.B.*: THE CLASH OF THE TITANS

Since the entry into force of the Lisbon Treaty, the relations between the EU legal order and the legal orders of the Member States have undergone considerable changes. Most notably, judicial dialogue has gained momentum by reason of the increased competences of the EU institutions and the progressive involvement of constitutional courts in the preliminary ruling mechanism.[5] On the one side, the Court of Justice has been called to uphold the *effet utile* doctrine in sensitive areas such as criminal law,[6] economic policy,[7] financial interests,[8] health,[9] welfare[10] and family law.[11] On the other side, and by consequence, the highest domestic courts have progressively accepted to converse with the Luxembourg judges in order to defend their role as guarantors of the national constitutional identity.[12] Indeed, for (too) many years the constitutional courts of many Member States have remained outside the European judicial circuit, operating in splendid isolation. Meanwhile, the ordinary courts have consolidated their cooperation with – and trust in – the ECJ, not only as a means for ensuring the correct application of EU law and avoiding infringement procedures against their country but also as a way to contrast different, more traditional readings of principles and rules enshrined in their national system and even favour the amendment of existing legislation. Once entered into the arena of judicial confrontation the constitutional courts are forced to reconsider their function and status, which is not always an easy and smooth process. In truth, it is often the highly sensitive nature of the case combined with the existence of diverging positions within the national context that create the necessary legal and political tension which determine the involvement of

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5 R. Schütze, From Dual to Cooperative Federalism. The Changing Structure of European Law 129 f. and 241 f. (Oxford University Press 2009).

6 Suffice it here to recall the seminal judgment in the *Melloni* case (ECJ 26 Feb. 2013, Case C-399/11, ECLI:EU:C:2013:107).

7 This was the case in *Gauweiler* (ECJ 16 June 2015, Case C-62/14, ECLI:EU:C:2015:400).

8 Cf. ECJ 5 Dec. 2017, Case 42/17, *M.A.S. and M.B.*, ECLI:EU:C:2017:936 and, more recently, ECJ 5 June 2018, case C-612/15, *Kolev*, ECLI:EU:C:2018:392.

9 Most notably, after the entry into force of the Lisbon Treaty, *see* ECJ 5 Oct. 2010, case C-173/09, ECLI:EU:C:2010:581.

10 A good example is offered by the well-known decision in *Dano* (ECJ 11 Nov. 2014, case 333/13, ECLI:EU:C:2014:2358).

11 *See* e.g. ECJ 5 June 2018, Case 673/16, *Coman*, ECLI:EU:C:2018:385.

12 V. Constantinesco, *La confrontation entre identité constitutionnelle européenne et identités constitutionnelles nationales, convergence ou contradiction? Contrepoint ou hiérarchie?*, in *L'Union européenne: Union de droit, Union des droits* 79 (*Mélanges en l'honneur de Philippe Manin*, Pedone 2010); E. Cloots, *National Identity in EU Law* 160 (Oxford University Press 2015); L. Corrias, *National Identity and European Integration: the Unbearable Lightness of Legal Traditions*, European Papers 383 (2016); G. Martinico, *Constitutionalism, Resistance, and Openness: Comparative Law Reflections on Constitutionalism in Postnational Governance*, 35 Y.B. Eur. L. 318 (2016).

the Court of Justice. This was certainly the case in *Gauweiler*,[13] and *M.A.S. and M.B.*[14]

These cases seem to inaugurate a new trend in the use of Article 4(2) TEU. Both the *Bundesverfassungsgericht* and the *Consulta* expressly invoked the duty to respect the national identities of the Member States in their preliminary references.[15] And although the provision does not appear in the questions, it is quoted in the respective orders. This arguably serves three distinct but highly interrelated purposes. Firstly, it indicates that the issues at stake are particularly sensitive. Secondly, it supports the conclusion that the full application of EU law will depend on the interpretation offered by the ECJ and its compliance with the national constitutional order. Thirdly, it offers the Luxembourg judges a legal ground for accepting the relevant national specificities.

In both cases the Court of Justice reacted to the national identity argument, albeit only indirectly, without mentioning the provision. In *Gauweiler*, it singled out specific safeguards that (partially) responded to the preoccupations formulated by the FCC in relation to the OMT programme and its compatibility with EU law, namely the principle of conferral, thereby enabling the FCC to accept the validity of the pertinent ECB decisions. In *MA.S. and M.B.*, instead, the ECJ clarified the conditions for the application of the *Taricco rule* and its temporal effects in order to allow the national judges to act in compliance with the domestic legal order. The follow-on cases at the national level are revealing exemplifications of the ongoing struggle for judicial primacy and autonomy but also highlight the risk of 'interpretative anarchy' correlated to (the use of) Article 4(2) TEU.[16]

In its judgment of 21 June 2016, taking into account the reply by the Court of Justice in *Gauweiler*, the FCC concluded in favour of the respect of the principle of sovereignty of the people, which requires that the exercise of public authority must be taken by adequately democratically legitimized institutions.[17] The actions

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[13] *Gauweiler*, *supra* n. 7. *See* inter alia G. Martinico, *The 'Polemical' Spirit of European Constitutional Law: On the Importance of Conflicts in EU Law*, 16 Ger. L.J. 1343 at 1350 (2015); J. Snell, *Gauweiler: What Next*, 40 Eur. L. Rev. 473 (2015), T. Tridimas & N. Xanthoulis, *A Legal Analysis of the Gauweiler Case: Between Monetary Policy and Constitutional Conflict*, 23 Maastricht J. Eur. & Comp. L. 17 (2016), P. Craig & M. Markakis, *Gauweiler and the Legality of Outright Monetary Transactions*, 41 Eur. L. Rev. 4 (2016) and T. Tuominen, *Aspects of Constitutional Pluralism in Light of the 'Gauweiler' Saga*, 43 Eur. L. Rev. 186 (2018).

[14] *M.A.S. and M.B.*, *supra* n. 8. Amongst the many contributions on the judgement, *see* M. Bassini & O. Pollicino, *Defusing the Taricco Bomb Through Fostering Constitutional Tolerance: All Roads Lead to Rome*, Verfassungsblog-On Matters Constitutional, 5 Dec. 2017, C. Rauchegger, *National constitutional rights and the primacy of EU law: M.A.S.*, 55 Common Mkt. L. Rev. 1521 (2018) and C. Amalfitano, *La vicenda Taricco e il dialogo (?) tra giudici nazionali e Corte di giustizia*, *Il Diritto dell'Unione europea* 153 (2018).

[15] German Federal Constitutional Court (hereinafter BVerfG), Ord. 14 Jan. 2014, 2 BvE 13/13, *Gauweiler*, and Corte cost. Ord. 26 Jan. 2017, No 24/2017, *Taricco*.

[16] Martinico, *supra* n. 13.

[17] *Ibid.*, para. 82.

brought by the complainants in the main proceedings were dismissed (or rejected), with an instructive account of the distinction between the identity review (Identitätskontrolle) and the *ultra vires* review (Ultra-vires-Kontrolle): the first scenario occurs when the acts of institutions, bodies, offices, and agencies of the European Union impinge on principles belonging to the German constitutional identity; the second scenario, instead, arises when the boundaries Article 23 section 1 sentence 2 Grundgesetz (GG) 'are exceeded by such acts in a manifest and structurally significant manner and thereby violate the principle of the sovereignty of the people'.[18]

Despite the many reservations on the very nature of the Outright Monetary Transactions (OMT) policy decision (monetary or economic) and the scope of judicial review of the relevant European Central Bank (ECB) measures, the Karlsruhe judges opined that the boundaries of EU *ultra vires* actions had not been exceeded pursuant to the *Honeywell* decision.[19] The FCC further held that – provided the conditions formulated by the Court of Justice obtained – there was no apparent threat to the German constitutional identity. Albeit formally independent, these two forms of judicial control can be traced back to Article 79, section 3, GG, according to which amendments to this Basic Law are permitted insofar as they do not impinge on the division of the Federation into Länder, affect their participation on principle in the legislative process, or violate fundamental rights, as well as the constitutional structure of the Federal Republic of Germany. Hence, the *ultra vires* review amounts to a specific manifestation of 'the general protection of the constitutional identity'.[20] However, the applicable legal standards differ. More concretely, while in the former case the FCC will assess whether 'the competence cannot be justified under any legal standpoint',[21] in the latter it assesses the pertinent EU act of the European Union in a substantive way, with a view to verify 'whether the "ultimate limit" of the principles of Arts. 1 (human dignity) and 2 (personal freedoms) GG has been exceeded'.[22]

According to the FCC, the need to uphold the constitutional identity of the Member States upon which the Union is founded – and to disapply of EU law conflicting with the German constitutional identity – does not infringe the principle of sincere cooperation laid down on Article 4(3) TEU precisely because of the duty set out in Article 4(2) TEU. Any attack on the national constitutional identity will be thoroughly reviewed, pursuant to the Identitätskontrolle or the Ultra-vires-Kontrolle, but always 'cautiously and in a way that is open to European

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[18] BVerfG, Judgment 21 June 2016, 2 BvR 2728/13, *Gauweiler*.
[19] BVerfG Judgment 6 July 2010, 2 BvR 2661/06, *Honeywell*.
[20] BVerfG, *Gauweiler*, *supra* n. 18, para. 115.
[21] *Ibid*., para. 149.
[22] *Ibid*., para. 153.

integration (europarechtsfreundlich)',[23] and the intensity of the scrutiny will vary according to the severity of the threat, to be ascertained on a case by case basis.

By contrast, the ICC refused to be cooperative and firmly rejected the admissibility *per se* in the Italian legal order of the *Taricco* rule, independently of the concessions granted by the ECJ 'in light of the questions raised by the referring court … which were not drawn to its attention in (that) case …'.[24] The stance adopted by the *Consulta* is grounded in the Italian Constitution as well as in EU law, and more precisely in Articles 4(2) and (3) TEU,[25] the latter provision this time being invoked to support a deferential reading of the *Taricco* rule. The actions pending before it were dismissed because unfounded since, pursuant to the judgement in *M.A.S. and M.B.*, the rule could not be applied retroactively. Notwithstanding, the ICC considered that the questions raised by the referring courts (namely the *Corte di Cassazione* and the *Corte di Appello di Milano*) were worthy of consideration insofar as they related to the requirement of determination in substantive criminal law prescribed by Article 25(2) of the Constitution (Cost.).[26] Independently of the comforting reply in *M.A.S. and M.B.*, the Italian constitutional identity – or, better said, the principle of legality laid down in Article 25 Cost, as traditionally interpreted by the ICC – prevents the *Taricco* rule from entering the domestic legal order.[27]

Thus, formally speaking, the ICC did not activate its counter-limits doctrine. It did not once make reference to the seminal *Granital* precedent, nor to Article 11 Cost., which proclaims the openness of the Italian legal order to international cooperation.[28] In the Court's view the foreseeability of criminal sanctions can only be guaranteed by the legislator ('*lex scripta*'),[29] thereby acknowledging that what is at stake is the domestic understanding of the rule of law and the separation of powers.

The similarities and dissimilarities between the German and Italian cases, as well as the instrumental – and ultimately mistaken – use made by the FCC and the ICC of Article 4(2) TEU, will be resumed at the end of this contribution. For the time being, we should focus on the origins and constitutional status of the identity clause and its use by the Luxembourg judges in the post-Lisbon era. Only subsequently will it be possible to determine the added value that Article 4(2) TEU can play in the solution of constitutional conflicts such as (but not limited to) those arising from the *Gauweiler* and *M.A.S. and M.B.* cases.

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[23] *Ibid.*, para. 121.
[24] *M.A.S. and M.B.*, *supra* n. 8, para. 28.
[25] Corte cost Judgment 10 Apr. 2018, No 115, para. 14.
[26] *Ibid.*, para. 10.
[27] *Ibid.*, para. 12.
[28] R. Mastroianni, *L'art. 11 Cost. preso sul serio*, Diritto pubblico comparato ed europeo (2018), I, at XI.
[29] *Ibid.*, para 12.

Before proceeding, however, reference should be made to the more recent decision of the FCC to activate once again Article 267 TFEU in relation to the possible breach of the German constitutional identity and more precisely of the principle of democracy laid down by the GG.[30] In *Weiss*, the *Bundesverfassungsgericht* contested the validity of the decision of the European Central Bank relating to Public Sector Purchase Programme (PSPP) for the purchase of public sector securities.[31] As anticipated, the case is still pending, and at the time of writing Advocate General Wathelet has still to deliver his Opinion. Notwithstanding, it is important to underline that in the fifth question submitted to the Court of Justice – which was essentially aimed at knowing whether an unlimited distribution of risks between the national central banks of the Eurosystem regarding bonds in default where such bonds were issued by central governments (or by issuers of equivalent status) conflicted with the treaties – the FCC, mentioned Article 4(2) TEU together with Articles 123 and 125 TFEU. As a matter of fact, should it become necessary 'to provide recapitalisation for the national central banks through budgetary resources to such extent that approval by the German Bundestag would be required', the decision could result in a violation of Article 79(3) GG and, thus, of Article 4(2) TEU. And, indeed, the two provisions are read jointly by the FCC[32] with a somewhat provocative *nonchalance*. The risks hiding behind this use of the identity clause will emerge in the following pages.

3 THE CONSTITUTIONAL POSITIONING OF ARTICLE 4(2) TEU: ORIGINS AND NATURE OF THE IDENTITY CLAUSE

An exhaustive reconstruction of the origins of the identity clause and the reasons that led to its current formulation and constitutional positioning, of course, fall outside the remit of this contribution. Nonetheless, for present purposes it is worth noting, firstly, that the respect for the national identities of the Member States, 'whose systems of government are founded on the principles of democracy', can be found in primary law since the Maastricht Treaty, when it was mentioned in Article F, which also affirmed the duty to respect fundamental rights, 'as they result from the constitutional traditions common to the Member States'. At the same time, it cannot be overlooked that when the identity clause was included in the treaties the subsidiarity principle, regulating the

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30 Request for a preliminary ruling from the Bundesverfassungsgericht ((accessed 28 Aug. 2018) Germany) lodged on 15 Aug. 2017, *Heinrich Weiss and Others*, Case C-493/17, www.curia.europa.eu (accessed 28 Aug 2018).

31 Decision 2015/774, OJ [2015] L 121/20, as amended by Decision 2017/100 of the European Central Bank of 11 Jan. 2017, OJ [2017] L 16/51.

32 Order of 18 July 2017, 2 BvR 859/15, 2 BvR 980/16, 2 BvR 2006/15, 2 BvR 1651/15. Press Release in English (No. 70/2017 of 15 Aug. 2017), www.bundesverfassungsgericht.de (accessed 30 Aug. 2018), at pt. 4 b.

exercise of shared competences, was also codified in Article 5 European Economic Community (EEC).

Secondly, since its 'constitutionalization', the identity clause has undergone extensive changes. With the Amsterdam Treaty Article F became Article 6 TEU. In addition, democracy and national identities were decoupled; the former being recognized (in paragraph 1) as a founding principle of the Union, shared by all the Member States, together the principles of liberty, respect for human rights, and the rule of law.

The multiple arrangements elaborated within the competent Working Group of the Giscard d'Estaing Convention leading to the adoption of the Treaty Establishing a Constitution for Europe (CT) testify to the difficulties experienced by the members in reaching an agreement on the scope of the identity clause. The list of potential candidates for inclusion was truly impressive: above and beyond the fundamental structures, political and constitutional, and the essential functions of the state, including the regional and local autonomies, it mentioned the choices relating to language, citizenship, territory, the status of confessions and churches and religious associations, national defence and the armed forces, social security and social benefits, fiscality, education and health. The final version, however, of what would become Article I-5 CT was significantly more concise.

The Lisbon Treaty basically confirmed the provision, with some minor but not irrelevant amendments.[33] Article 4(2) TEU now reads:

> 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

If compared to Article I-5 CT, Article 4(1) TEU opens by recalling the principle of conferral. This means that the duty set out in Article 4(2) TEU presupposes that the EU institutions (including the ECJ) have acted within the scope of their competences. Moreover, the provision ends with an explicit reference to national security as an exclusive competence of the Member States. This last sentence, strongly wanted by the UK for political reasons, lacks legal bite as it restates what is already obvious from the opening part of the provision – i.e. that competences not conferred upon the Union in the treaties remain with the Member States.[34]

Thirdly, the identity clause appears amongst the constitutional (federal) operational principles of the EU legal order. And this is not accidental. Whereas Article I-5

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[33] For a thorough review of the process that led to the current formulation of the provision the reader is referred to B. Guastaferro, *Beyond Exceptionalism of Constitutional Conflicts*, The Jean Monnet Working Paper Series (2013).

[34] F-X.Priollaud & D. Siritzky, *Le traité de Lisbonne. Texte et commentaire article par article des nouveaux traités européens (TUE-TFUE)* 39 (La documentation française 2008).

CT appeared in the Title on the definition and the objective of the Union, the duty to respect the national identity of the Member States is included in the Common Provisions (as it was in the past), together with the principles of conferral, loyal cooperation, subsidiarity and proportionality. This indicates that these principles, and the principle of primacy – enshrined in Article I-6 CT and expunged from the treaties for mainly political reasons[35] – are to be read jointly as setting the boundaries of EU action.

Fourthly, and perhaps more importantly in practical terms, with the Lisbon Treaty the identity clause is fully justiciable. Article 4(2) TEU is meant to operate as a parameter of validity (in the context of actions for annulment and preliminary rulings) or as hermeneutical criterion (in the context of infringements procedures and preliminary rulings) to scrutinize the acts adopted by the EU institutions, bodies, offices and agencies *vis à vis* exceptions invoked by the Member States to resist the full application of EU primary and secondary law. By contrast, considering the final wording and the constitutional positioning, it cannot be construed as indicating a list of areas excluded from the scope of EU law.

The activation of Article 4(2) TEU is potentially disruptive inasmuch as it can – if taken seriously – lead to the differentiated application of EU law throughout the Union. Most notably, when it is relied upon to challenge the validity of a provision of secondary law under Article 263 TFEU the ECJ will have to determine whether the legislator has overstepped the boundaries of its wide discretionary power unduly impinging on the fundamental structure or the essential functions of a given Member State. The violation of the duty set forth in the provision would entail the annulment (total or partial) of the relevant measure with *erga omnes*, and – at least in principle – *ex tunc* effects.[36]

On the other hand, when the validity of the measure is contested under Article 267 TFEU, the breach of Article 4(2) TEU could have less traumatic consequences. In such cases there is no reason for limiting the (full) application of EU law elsewhere and the effects can be circumscribed to the interested Member State. The same applies, *mutatis mutandis* where, in the context of infringement procedures and interpretative preliminary rulings, the ECJ is called upon – *de iure* and de facto, respectively – to determine the compatibility of a national law or practice covered by Article 4(2) TEU with primary and/or secondary law. Failure to respect the national identity of a Member State would entitle the national authorities to apply the national law or practice otherwise incompatible with EU law without necessarily impinging on the operativity of the relevant provision or rule in the other countries.

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[35] As is well known, the principle of primacy, codified in Article I-6 CT, is now affirmed in Declaration No 17.

[36] Elke Cloots, by contrast, favours disapplication over nullity with *erga omnes* effects (*supra* n. 12, 326).

This exception to the principle of uniform application unveils the physiological tension within the EU legal order between the need to protect the diversity of the Member States and their equality before the treaties and highlights a constitutional conundrum: how to combine the *effet utile* doctrine (and the traditional functionalist approach) with the pluralistic vocation of the Union?[37]

4 THE USE OF ARTICLE 4, PARAGRAPH 2, TEU IN CONSTITUTIONAL DISCOURSE: THE FUNCTIONS OF THE IDENTITY CLAUSE

Since the entry into force of the Lisbon Treaty, Article 4(2) TEU has been invoked before the Court of Justice in a number of cases. The provision has been referred to by national governments, referring judges, advocates general, and also the ECJ has mentioned it in at least fifteen cases.

The justiciability of the identity clause has undoubtedly boosted its use in judicial proceedings. Above and beyond statistics, it appears that Article 4(2) TEU is most likely to play a role in the context of preliminary references, although it is also invoked in actions for annulment and, albeit more seldom, in infringement proceedings. However, regardless of the judicial context, as well as the pertinence and strength of the argument put forward, it seems that the constitutional status of the referring judge and/or the direct reference to the jurisprudence of the relevant constitutional courts do play a role in activating the use of Article 4(2) TEU.

To date, the Member States have relied on the duty to respect their specificities for a triple purpose: firstly, to contest the validity of EU law legislation (section 4.1); secondly, to derogate from the (full) application of treaty provisions and EU acts (section 4.2); thirdly, to exclude certain situations from the scope of EU law (section 4.3).

4.1. Article 4(2) TEU as a parameter for assessing the validity of EU secondary law

The first scenario is well captured by the *Torresi* case, where the Italian Bar Council questioned the compatibility of Article 3 of Directive 98/5/EC on the freedom of

[37] In this regard Toniatti points out that the equality referred to in Art. 4(2) TEU is intended to protect the diversity and the specificities of the Member States and 'further strengthens the preservation of the status quo according to each Member State's normative record'. R. Toniatti, *Sovereignty Lost, Constitutional Identity Regained*, in *National Constitutional Identity and European Integration* 49 (A. Saiz Arnaiz, C. Alcoberro Llivina eds, Cambridge University Press 2013). *See also* more generally L. S. Rossi, *The Principle of Equality Among Member States of the European Union*, in *The Principle of Equality in EU Law* 3 (L. S. Rossi & F. Casolari eds, Springer 2017).

establishment of lawyers with Article 4(2) TEU insofar as it forced local bar councils to enrol the applicants in the special register of established lawyers upon presentation of the sole certificate of registration with the competent authorities of the Member State where they obtained their professional qualification. According to the referring Court this effectively allowed the bypassing of national legislation implementing Article 33 Cost., which requires candidates to pass a state exam in order to have access to the legal profession.[38] The ECJ, however, considered that Article 3 of Directive 98/5/EC 'does not regulate access to the profession of lawyer nor the practice of that profession under the professional title issued in the host Member State'.[39] As a result, there could be no breach of the identity clause, as recognized by the Italian Government itself at the hearing.[40]

Another more recent case, however, is also worth mentioning. *Izsák and Dabis v. Commission* concerns the action for annulment brought by two individuals against the refusal to register the initiative entitled 'Cohesion policy for the equality of the regions and sustainability of the regional cultures'.[41] The proposal advocated more attention by the Union to 'regions with ethnic, cultural, religious or linguistic characteristics that are different from those of the surrounding regions'.[42] What is interesting about this case is that the General Court, in dismissing the action, claimed that independently of the absence of an adequate legal basis in the treaties (nor in the Charter) the EU legislator could not adopt a measure within the framework of EU cohesion policy defining national minority regions without infringing Article 4(2) TEU.[43] The adoption of such act would unduly impinge on the internal structure of a Member State and thus be invalid.[44]

4.2. Article 4(2) TEU as a derogation from the (full) application of EU primary and secondary law

The second scenario is more complex and variegated. In truth, the identity clause has been invoked in the context of interpretative preliminary rulings and infringement actions as an autonomous ground for restricting EU citizens' rights and as an interpretative canon in the application of treaty derogations. To be sure, the duty set out in Article 4(2) TEU has been construed to uphold a variety of national prerogatives capable, in principle, of justifying an exception to the full application

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38 Directive 98/5/EC to facilitate practice of the profession of lawyer on a permanent basis in a Member State other than that in which the qualification was obtained [1998] OJ L77/36.
39 ECJ 17 July 2014, Joined Cases C-58 and 59/13, *Torresi*, ECLI:EU:C:2014:2088, para. 56.
40 *Ibid.*, para. 58.
41 GC 10 May 2016, Case T-529/13, *Izsák and Dabis v. Commission*, ECLI:EU:T:2016:282.
42 *Ibid.*, para. 3.
43 *Ibid.*, paras 70, 75 and 76.
44 The judgment of the GC was not challenged before the ECJ by the applicants.

of EU (primary and secondary) law; most notably: the form of government of the Member States; the national choices related to the use of the official language(s); the domestic understanding of fundamental rights; the internal allocation of competences at the regional or local level. More recently, public policy concerns have also been linked to Article 4(2) TEU.

4.2[a] *Form of government*

In the celebrated *Sayn-Wittgenstein*[45] and *Bogendorff von Wolffersdorff*[46] cases the Second Chamber recognized that the status of the State as a Republic is part of the national identity of certain Member States protected by Article 4(2) TEU and may, subject to the respect of the principle of proportionality, justify departing from EU law. However, it is the principle of equality (a general principle now codified in Title III of the Charter) – as understood in the Austrian and German legal orders, respectively – that justifies for reasons relating to public order the restriction to the citizen's free movement rights determined by the refusal to register the nobility titles included in their names, as they appeared in official documents of another Member State.[47] Indeed, it can be assumed that such form of government postulates a strict understanding of the principle of equality, which does not necessarily correspond to that pertaining to a Monarchy. Quite tellingly, both decisions mention the *Omega* precedent, where – as is well known – the ECJ accepted that as a matter of public policy the concept of human dignity may vary 'from one country to another and from one era to another'.[48]

4.2[b] *Official National Language(s)*

In *Runevič-Vardyn*, [49] and *Las*,[50] instead, the Court of Justice was confronted with the defence based on the need to protect and promote the official national languages. In these instances, the judges of the Hirschberg Plateau took note of the arguments advanced by the intervening governments – Lithuanian and Belgian, respectively – and admitted that the national identity of the Member States includes the official national language(s).[51] The protection of the national identities of the Member States is a legitimate aim respected by the legal order of the

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45 ECJ 22 Dec. 2010, Case C-208/09, *Sayn-Wittgenstein*, ECLI:EU:C:2010:608.
46 ECJ 2 June 2016, Case C-438/14, *Bogendorff von Wolffersdorff*, ECLI:EU:C:2016:401.
47 Cf. *Sayn-Wittgenstein*, *supra* n. 45, para. 92 and *Bogendorff von Wolffersdorff*, *supra* n. 46, para. 84.
48 ECJ 14 Oct. 2004, Case C-36/02, *Omega*, ECLI:EU:C:2004:614, para. 31.
49 ECJ 12 May 2011, Case C-391/09, *Runevič-Vardyn*, ECLI:EU:C:2011:291.
50 ECJ 16 Apr. 2016, Case C-202/11, *Las*, ECLI:EU:C:2013:239.
51 Cf. *Runevič-Vardyn and Wardyn*, *supra* n. 49, para. 85; *Las*, *supra* n. 50, para. 25.

European Union and restrictions to free movement law can be tolerated if the relevant national measures or practices are adequate and proportionate.[52] This assessment, however, was left to the national judge only in *Runevič-Vardyn* where, although it could be doubted that the Lithuanian rules forbidding the use of other languages in certificates of civil status would not comply with said requirements, the ECJ did recognize a (limited) margin of appreciation to the national court. By contrast, in *Las* the obligation for businesses established in the Flanders to conclude cross-border employment contracts in Dutch regardless of the effective knowledge of that language by the parties involved (and under sanction of nullity) was considered by the Luxembourg judges to go beyond what was strictly necessary to attain the objectives pursued by the domestic legislator.[53]

4.2[c] *Fundamental Rights*

The Court of Justice was also confronted with the national standards of fundamental rights protection invoked to oppose the full application of EU law in connection with Article 4(2) TEU. This was notoriously the case in *Melloni*,[54] and more recently in *M.A.S. and M.B.* In both instances, AG Bot underlined the necessity to distinguish between 'a concept demanding protection for a fundamental right' and 'an attack on the national identity'[55]; the ECJ, on its part, decided not to use the national identity argument.

Analogies, however, stop here: in the former instance – perhaps because of the constitutional status of the referring Court (the *Tribunal Constitucional*) – it was the Advocate General who raised the issue. In the latter instance it was the Italian Constitutional Court to threaten the activation of the counter-limits since in *Taricco* the Grand Chamber had not taken into consideration the specificities of the domestic statute of limitations. More importantly, whilst in the former case harmonization led the Court to deny any relevance to the standard resulting from (the constitutional interpretation of) Article 24(2) of the Spanish Constitution (CE),[56] in the latter case, the ECJ insisted on the circumstance that the principle of legality belongs to the constitutional traditions common to the Member States and allowed the national judge a sufficiently broad discretion to accommodate – at least until the entry into force of the directive on the fight against fraud to the Union's financial interests – the substantive nature of the limitation period

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52 Cf. *Runevič-Vardyn and Wardyn*, *supra* n. 49, paras 87–88; *Las*, *supra* n. 50, paras 27–29.
53 *Las*, *supra* n. 50, paras 29–33.
54 *Melloni*, *supra* n. 6.
55 Cf. Opinions of AG Bot delivered on 2 Oct. 2012 in Case C-399/11, *Melloni*, ECLI:EU:C:2012:600, para. 142 and on 18 July 2017 in Case 42/17, *M.A.S. e M.B.*, ECLI:EU:C:2017:564, para. 179.
56 *Melloni*, *supra* n. 6, paras 41–46.

resulting from (the constitutional interpretation of) Article 25 of the Italian Constitution and the effectiveness of Article 325 TFEU.[57]

4.2[d] *Rules on the Allocation of Competences Within the Member States*

As anticipated, Article 4(2) TEU has been invoked to defend the national (constitutional) rules on the allocation of competences, legislative and administrative, to the regional level, and the Court has decided to use the identity clause in its reasoning even *de motu proprio*. In truth, this seems to be the most appropriate use of the provision in judicial proceedings.

In *Commission v. Spain*,[58] the ECJ found that the defendant Member State had failed to adopt all the measures necessary to transpose the EU Water Framework Directive.[59] In particular, while the provisions on intracommunal basins had been transposed into the Spanish legal order, there had been no implementation of the rules on intercommunal basins, the latter being a competence reserved to the single Autonomous Communities. Insisting on the supplementing clause foreseen in Article 149(3) CE – whose effectiveness could be doubted in that instance[60] – the Spanish government argued that by activating Article 258 TFEU 'the Commission, disregarding Article 4(2) TEU and the third paragraph of Article 288 TFEU, sought to stipulate the manner in which the transposition was to be achieved in that Member State'.[61] According to the ECJ, however, such constitutional specificities were not relevant as the argument rests on a 'misreading' of the Commission's allegations. In fact, the Commission never tried to 'impose, in breach of Article 4(2) TEU and the third paragraph of Article 288 TFEU, the manner in which the transposition of the provisions at issue was to be achieved'.[62]

Subsequently, in *Digibet and Albers* the Third Chamber of the ECJ accepted that: 'the division of competences between the *Länder* cannot be called into question, since it benefits from the protection conferred by Article 4(2) TEU' and found that Article 56 TFEU did not preclude the majority of the *Länder* from prohibiting the organization of games of chance online where a *Land* has

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57 *M.A.S. and M.B.*, *supra* n. 8, paras 53–62.

58 ECJ 24 Oct. 2013, Case C-151/12, *Commission v. Spain*, ECLI:EU:C:2013:690.

59 Directive 2000/60/EC establishing a framework for Community action in the field of water policy [2000] OJ L327/1.

60 Opinion of AG Kokott delivered on 30 May 2013 in Case C-151/12, ECLI:EU:C:2013:354, para. 34.

61 *Commission v. Spain*, *supra* n. 58, para. 23.

62 *Ibid.*, para. 37. Quite interestingly, the Luxembourg judges refrain from referring to the consolidate jurisprudence according to which 'a Member State cannot plead provisions prevailing in its domestic legal system, even its constitutional system, to justify failure to observe obligations arising under EU law' (*see* e.g. ECJ 8 Apr. 2014, Case C-288/12, *Commission v. Hungary*, ECLI:EU:C:2014:237, para. 35 and the case law quoted therein).

concomitantly opted for a more liberal legislation, provided the measures were proportionate – a determination that was left to the national judge.[63]

Building upon *Digibet and Albers*, in *Remondis* the Court of Justice clarified that Article 4(2) TEU also covers the 'internal reorganisations of powers within a Member State' and accepted that the transfer by the Region of Hannover of waste treatment tasks that were its responsibility to a public body (a special-purpose association) created within the Region Hannover did constitute a 'public contract' within the meaning of the otherwise applicable Public Procurement Directive.[64]

4.2[e] *Public policy concerns*

Finally, in the controversial *Coman* case – originating from a reference of the Romanian Constitutional Court – the Latvian Government declared that even assuming that 'a refusal … to recognize marriages between persons of the same sex concluded in another Member State constitutes a restriction of Article 21 TFEU, such a restriction is justified on grounds of public policy and national identity, as referred to in Article 4(2) TEU'.

The ECJ recalls the duty to 'respect the national identity of the Member States, inherent in their fundamental structures, both political and constitutional' and accepts that the institution of marriage is defined by national law but ultimately opines that an obligation to recognize same-sex marriages lawfully contracted in another Member State 'for the sole purpose of granting a derived right of residence to a third-country national does not undermine the national identity *or* pose a threat to the public policy of the Member State concerned'.[65] Although the Court does recall (in parenthesis) the *Bogendorff von Wolffersdorff* precedent, the justification can hardly be traced back to the Rumanian form of government; rather, it is public morality, as an expression of public policy, that seems to comes into play, just like in *Omega* – which, however, is not quoted in the decision.

4.3 Article 4(2) TEU as a legal basis to exclude certain situations from the scope of EU law

The third scenario is perhaps the most straightforward. Here, the need to safeguard the national identity of the Member States is invoked to deny the very applicability

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[63] ECJ 12 June 2014, Case C-156/13, *Digibet e Albers,* ECLI:EU:C:2014:1756, paras 24, 32 and 37.

[64] Directive 2004/18/EC, on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts [2004] OJ L134/114, repealed and substituted by Directive 2014/24/EU [2014] OJ L 94/65.

[65] *See Coman*, *supra* n. 11, para. 46.

of EU law. Until now, this use of Article 4(2) TEU has been firmly rejected by the Court of Justice.

In *Affatato*, the referring judge had doubts as to the very applicability, in accordance with Article 4(2) TEU of clause No 5 of the Framework Agreement on fixed-term work to the Italian Republic, at least insofar as it prescribed the conversion, also in the public sector, of such contracts into contracts of indefinite duration. In fact, according to the Italian Constitutional Court Article 97 Cost. demands that public employees be recruited through public competitions in order to guarantee impartiality and the right to sound administration.[66] The Sixth Chamber underlined that Member States continue to enjoy a certain margin of discretion in determining when and under what conditions fixed-term employment contracts are to be deemed to be contracts of indefinite duration[67] and consequently found that clause No 5 of the Framework Agreement, in itself, is not capable of hampering the fundamental structures, political and constitutional, nor the essential functions of the Italian Republic within the meaning of Article 4(2) TEU.[68]

Moreover, in *O'Brien*,[69] the UK Supreme Court evoked the independence of the judiciary to know whether judges could be included in the scope of application of the Framework Agreement on part-time work and Directive 97/81.[70] In its observations the Latvian Government contended that the application of European Union law to the judiciary violated Article 4(2) TEU. The Second Chamber firmly dismissed the argument. Although the definition of 'workers' is left to the national judge, an exclusion from the protection afforded under the Directive is allowed only insofar as the distinctive features of the relationship between judges and the Ministry of Justice are established. Otherwise, the application of Directive 97/81 and the Framework Agreement on part-time work cannot affect national identity.

Lastly, in national security (*ZZ*) the Court rejected the submission of inadmissibility advanced by the Italian government in relation to the questions put forward by the Court of Appeal of England and Wales on the grounds that 'it is clear from Article 4(2) TEU and Article 346(1)(a) TFEU that State security remains the responsibility of solely the Member States'. Without explicitly quoting the identity clause, the Court underlined that: 'although it is for Member States to take the appropriate measures to ensure their internal and external security, the

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66 Corte Cost., Judgment 27 Mar. 2003, No 89.
67 ECJ 1 Oct. 2010, Case C-3/10, *Affatato*, ECLI:EU:C: 2010:574, para. 39.
68 *Ibid*., para. 41.
69 ECJ 1 Mar. 2012, Case C-393/10, *O'Brien*, ECLI:EU:C: 2012:110.
70 Council Directive 97/81/EC of 15 Dec. 1997 concerning the Framework Agreement on part-time work concluded by UNICE, CEEP and the ETUC [1998] OJ L14/9.

mere fact that a decision concerns State security cannot result in European Union law being inapplicable.'[71]

5 THE NOTION OF NATIONAL IDENTITY EMERGING FROM THE CASE LAW OF THE COURT OF JUSTICE

With this in mind, it appears useful to (try to) extrapolate from the existing case law a notion of national identity capable of triggering the use of Article 4(2) TEU. This exercise is particularly important considering that for the first time since its inception, the identity clause is subject to the ECJ's exclusive jurisdiction. In this regard, it should be noted from the outset that the concepts of national identity and constitutional identity must be distinguished.[72] Although juxtapositions cannot be excluded *a priori*, the assimilation of the two is legally flawed and dangerously misleading, as demonstrated by the references in *Gauweiler* and *M.A.S. and M.B.* – not to mention the Order of the FCC in *Weiss*. And yet, even Advocates General have claimed that the former concept includes the later. In *Michaniki* (decided in the pre-Lisbon Treaty era), relying expressly on Article 4(2) TEU, AG Maduro held that '[T]he national identity … clearly includes the constitutional identity of the Member State'.[73] This passage was not quoted in the Opinion delivered in *M.A.S. and M.B.*, but the words used therein are equally assertive; according to AG Bot, in fact, 'constitutional identity certainly forms a part' of the national identity of the Member States.[74]

Regardless of the final outcome – in both cases the ECJ did not react to the argument – this understanding of duty to respect national identities suggests that whatever is included in the concept of constitutional identity is automatically covered by Article 4(2) TEU. However, this openly conflicts with the assumption that determination of the former is ultimately left to the constitutional courts, the interpretation and application of the latter is reserved to the ECJ.

With this important caveat – and although it will be conceded that the duty affirmed in Article 4(2) TEU cannot be defined in objective terms – the notion of national identities of the Member States resulting from the case law analysed above seems excessively broad and generic. At first glance, the expression could be said to

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71 ECJ 4 June 2013, Case C-300/11, *ZZ*, ECLI:EU:C:2013:363, para. 38.

72 Similarly E. Cloots, *National Identity, Constitutional Identity, and Sovereignty in the EU*, Neth. J. Legal Phil. (2016), but *see contra* L. Besselink, *National and Constitutional Identity Before and After Lisbon*, 6 Utrecht L. Rev. 36 (2010) and M. Claes, *Negotiating Constitutional Identity or Whose Identity Is It Anyway?*, in *Constitutional Conversations in Europe* 205 f. (M. Claes, M. De Visser, P. Popelier, C. Van de Heyning eds, Intersentia 2012).

73 Opinion of AG Maduro delivered on 16 Dec. 2008, in Case C-213/07, ECLI:EU:C:2008:544, para. 31.

74 Opinion of AG Bot in *M.A.S. and M.B.*, *supra* n. 55, para. 172.

comprise: the sound administration of justice (*Torresi*), the Republican form of government (*Sayn-Wittgenstein* and *Bogendorff von Wolffersdorff*); the protection of national languages (*Runevic-Vardyn* and *Las*); the allocation of competences within the Member States, at the central and regional and local level (*Commission v. Spain, Digibet and Albers, Remondis* and *Izsák and Dabis v. Commission*); the principle of impartiality of the public administration (*Affattato*); the independence of the judiciary (*O'Brien*); *ZZ* and public policy and morality (*Coman*).

However, the truth is that in practice the use of Article 4(2) TEU is often unsubstantiated. On the one side, the Luxembourg judges fail to elucidate the nature and intensity of the link between the relevant domestic measure and the identity element necessary to bring the situation within the realm of Article 4(2) TEU. On the other hand, the distinction between the fundamental structures and the essential functions of the Member States was acknowledged in *Affatato*, but never investigated by the Luxembourg judges.

Why does the official language fall within the scope of the identity clause when they already enjoy protection in accordance with Article 3(3) TEU and Article 22 CFR? Is it because, as suggested by AG Jääskinen in the Opinion delivered in *Las*, '[T]he concept of "national identity" […] concerns the choices made as to the languages used at national or regional level'? And if we agree with AG Wahl that not every rule enshrined in a national constitution can be considered to be caught by Article 4(2) TEU, how can the national bar exam foreseen in Article 33 Cost. be traced back to the national identity?[75] How to distinguish fundamental rights cases from cases concerning the national identity of the Member States? Can *Coman* be interpreted as setting a distinction between public policy (or public morality) and national identity? And if so, what is the difference? Unfortunately, these (and many other) questions, remain unanswered.

The autonomous character of Article 4(2) TEU resulting from the Lisbon Treaty posits the need to distinguish the situations where the fundamental structure and essential functions of the Member States are at stake from those instances concerning the defence of the official language, guaranteed by Article3(3) TEU and Article 22 CFR, the status of Churches and religious confessions, regulated in Article 17 TFEU, the protection of fundamental rights enshrined in Article 6(1) and (3) TEU and the relevant Charter provisions, the derogations based on public order, public policy, public morality and public health and public safety foreseen in specific primary (and secondary) law provisions[76] or on other recognized as

[75] Cf. Opinion of AG Wahl, delivered on 10 Apr. 2014, Joined cases C-58 e 59/13, ECLI:EU:C:2014:265, paras 100 and 101 and the judgement of the Court of Justice in that case paras 56–59.

[76] Arts 36, 45(3), 51(1), 52(1), 65(1) let. b and (4) TFUE.

mandatory requirements,[77] as well as, more generally, from the traditional discretionary power left to the Member States when EU action touches upon aspects related to the history, culture, national traditions,[78] education,[79] healthcare,[80] the supply of services of general economic interest,[81] the distribution of audio-visual services[82] and the protection of national security.[83]

That being said, one of the few certainties concerning the notion of Article 4 (2) TEU is that it would be impossible to invoke the provision in relation to national laws and practices in breach of Article 2 TEU: 'human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities'.[84] It would be inconceivable, and in any event paradoxical, to allow a country, whose EU membership is inextricably tied to the respect of these values (and whose conduct can be scrutinized according to the procedure laid down in Article 7 TEU) to contest the validity of secondary law or to oppose the full application of EU law with a view to uphold domestic rules conflicting with such values.[85]

6 GOVERNING CONFLICT THROUGH THE DEVELOPMENT OF ADEQUATE CONSTITUTIONAL STANDARDS

The Court of Justice follows a casuistic and rather opportunistic approach when quoting the identity clause. The legal uncertainty stemming therefrom is disquieting considering the risk that an improper use of the norm can determine on the constitutional balances within the Union.

In the references of the *Bundesverfassungsgericht* in *Gauweiler* – and, *a fortiori*, in *Weiss* – and of the ICC in *M.A.S. and M.B.*, Article 4(2) TEU seems to be

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77 On the doctrine of mandatory requirements, *see* R. Schütze, *European Union Law* 534 f. (Cambridge University Press 2018); *European Law* 54 (D. Cahill, V. Power, N. Connery, R. O'Loughlin eds, Oxford University Press 2011) and P. Craig & G. De Búrca, *EU Law: Text, Cases and Materials* 705 f. (Oxford University Press 2008).

78 Art. 167(1) and (4) TFEU.

79 Art. 165(1) and (4) TFEU.

80 Art. 168(7) TFEU.

81 Protocol No 26 on services of general interests [2016] OJ C202/307.

82 Protocol No 29 on the system of public broadcasting in the Member States [2016] OJ C202/311.

83 Art. 346(1)(b) TFEU.

84 *See* further S. Weatherill, *Law and Values in the European Union* 393 (Oxford University Press 2016) and, with specific reference to the relation between EU values, the identity clause and the protection of fundamental rights, L. S. Rossi, *2,4,6 (TUE) … L'interpretazione dell' 'Identity Clause' alla luce dei principi fondamentali dell'UE*, in *Liber Amicorum Antonio Tizzano* 859 (Giappichelli 2018).

85 In this regard Art. 4(2) TEU could also be used to indirectly scrutinize compliance with Art. 2 TEU. As noted by Cloots 'the national identity clause cannot legitimize national measures which discriminate on ethnic grounds, or are moralistic or paternalistic' (*National identity in EU Law*, *supra* n. 12, 144). This conclusion is supported (*a contrario*) by the recent *Coman* judgement (*supra* n. 11), where the ECJ made it clear that Art. 4(2) TEU cannot be used to limit the free movement of persons for reasons connected to their ethnic origins, religious beliefs and sexual orientation.

construed as a formal warning, a reminder of the limits of EU action. As previously seen this warning was taken seriously by the ECJ, which tried to accommodate the interpretation to the national sensitivities, and the referring constitutional courts, which, in turn, are ready – in principle, the former; in practice, the latter – to defend their role and claim the last say on certain matters.

This new stage of judicial dialogue is reminiscent of the nineteen-seventies and eighties battle over the protection of fundamental rights (e.g. *Stauder, Internationale Handelsgeselshaft, ICIC*, *Frontini, Solange I*); except back then the ECJ, the FCC and the ICC were engaged in alternating monologues; now they should be involved in a proper dialogue. And this is not the case, trivial as it may be, simply because they do not speak the same language. The solution endorsed by the Court of Justice in *Melloni* – most notably its interpretation of Article 53 CFR – testifies to the progressive federalization of fundamental rights. The same, however, cannot be said for those structural elements covered by Article 4(2) TEU.

The superimposition of these two interrelated yet distinct aspects of constitutional confrontation mirrors the domestic categorization of counter-limits: basic principles and fundamental rights represent the core of the (*intra vires*) constitutional review performed by the constitutional courts with regard to the admissibility of EU law in the national legal order.[86] And where resistance is not supported by solid argumentation it becomes difficult to decipher the real use made of Article 4(2) TEU. In *M.A.S. and M.B.*, however, it can be argued that the identity clause was merely instrumental to the defence of the national standard of protection of fundamental rights, namely the substantive nature of the principle of legality.[87] And that is precisely what allowed the ECJ to recur to the constitutional traditions common to the Member States and accommodate. No use, instead, was made of Article 4(2) TEU.

Governing the clash of the titans postulates a sound understanding of the meaning and scope of the identity clause, which requires an intervention on two distinct but interrelated and equally important levels: on the one hand, the conceptual adjustments imposed on the ECJ and the national constitutional courts by

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[86] Amongst the many contributions, *see* M. Payandeh, *Constitutional Review of EU Law After Honeywell: Contextualizing the Relationship Between the German Constitutional Court and the EU Court of Justice*, 48 Common Mkt. L. Rev. 9 (2011), J. Komarek, *The Place of Constitutional Courts in the EU*, 9 Eur. Const. L. Rev. 420 (2013), M. de Visser, *Constitutional Review in Europe A Comparative Analysis* (Hart 2013), D. Paris, *Constitutional courts as European Union courts: The Current and Potential Use of EU Law as a Yardstick for Constitutional Review*, 24 Maastricht J.Eur. & Comp. L. 792 (2017), and F. Vigano, *Supremacy of EU Law Vs. (Constitutional) National Identity: A New Challenge for the Court of Justice from the Italian Constitutional Court*, Eur. Crim. L. Rev. 103 (2017).

[87] *See* further C. Amalfitano & O. Pollicino, *Two Courts, Two Languages? The Taricco Saga Ends on a Worrying Note*, Verfassungsblog (2018) and C. Rauchegger, *National Constitutional Rights and the Primacy of EU Law: M.A.S.*, 55 Common Mkt. L. Rev. 1521 at 1523 f. (2018).

the judicially enforceable identity clause (section 6.1); on the other hand, the constitutional standards to be used when the national identity is raised to contest the validity or oppose the application of EU law (section 6.2).

6.1 The conceptual adjustments in(tro)duced by article 4(2) TEU

The duty to respect the specificities of the Member States can be found in many sources: primary law, including the Charter, secondary law and even in the case law of the ECJ preceding the entry into force of the Lisbon Treaty. In accordance with Article 19 TEU, in the context of direct actions and preliminary rulings, the ECJ is the final arbiter of constitutional clashes between EU law and national identities. As is clear from the reasoning of the FCC and the ICC, the latter constitute the legal foundations of their participation in the European integration process and will be defended strenuously.

The vast majority of the judgments referring to Article 4(2) TEU concern citizenship and the internal market and the Court of Justice decided to recur to the traditional balancing operations conducted when appraising restrictions to free movement of persons (*Sayn-Wittgenstein* and *Bogendorff von Wolffersdorff*) and to the exercise of fundamental economic freedoms (Digibet and Remondis). Although the invocation of the identity clause signals critical antinomies, and thus calls for an accommodating approach by the ECJ, any condescending stance is abandoned – and the margin of appreciation left to the national authorities decreases or disappears – when the relevant measure is openly discriminatory and/or disproportionate (Las). This is certainly in line with the classical jurisprudence concerning the Internal market, but relegates Article 4(2) TEU to a boilerplate provision with scarce practical relevance and no added value.

The legal literature on the function of Article 4(2) is abundant and cannot be analysed herein. Notwithstanding, it is worth noting that while some authors join the constitutional courts in seeing in the identity clause a codification of the counter-limits doctrine(s), enabling the national judges to suspend the primacy of EU law when certain fundamental elements – namely, the structural constitutional principles and the standard of protection of fundamental rights – are perceived as violated,[88] others insist on the exclusive competence of the ECJ in interpreting EU law, and view the identity as an expression of primacy.[89] By contrast, it is believed

[88] Most notably, with regard to the Italian legal doctrine, *see* A. Ruggeri, *Trattato costituzionale, europeizzazione dei controlimiti e tecniche di risoluzione delle antinomie tra diritto comunitario e diritto interno (profili problematici)*, Forum di Quaderni Costituzionali (2006) and M. Cartabia, *Art. 4, par. 2, TUE*, in *Trattati dell'Unione Europea* 26 (A. Tizzano ed., Giuffrè 2014).

[89] T. Konstadinides, *Constitutional Identity as a Shield and as a Sword: The European Legal Order Within the Framework of the National Constitutional Settlement*, 13 Cambridge Y.B. Eur. Legal Stud. 195 (2011); M.

that having due regard to its origins, nature and scope, Article 4(2) is meant to serve the general principle of subsidiarity,[90] which – if taken seriously – comprises more than what is regulated in Article 5(3) TEU and in Protocol No 2.[91] Indeed, if conducted in light of the principle now recalled in Declaration No 17, the admissibility of a derogation to EU law based on Article 4(2) TEU is ontologically oriented towards full effectiveness and is thus incapable of adequately protecting the interests included therein.[92]

As previously seen, the function of Article 4(2) TEU is not to list a number of exclusive competences of the Member States.[93] The Lisbon Treaty mentions the regional and local dimension,[94] provides for mechanisms that allow governments to oppose proposals pertaining to criminal law[95] and social welfare[96] and national parliaments to demand that the proposal be reconsidered if judged incompatible with the principle of subsidiarity.[97] And in the case of measures concerning family law with cross-border implications the disagreement of one single national parliament is enough to stop the legislative process.[98] There is plenty of space to raise the

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Claes, *National Constitutional Identity and European Integration*, in *National Constitutional Identity and European Integration* 109 (A. Saiz Arnaiz, C. Alcoberro Llivina eds, Cambridge University Press 2013).

90 *See* further K. Lenaerts, *The Principle of Subsidiarity and the Environment in the European Union: Keeping the Balance of Federalism*, 17 Fordham Int'l L.J. 875 (1994); G. Davies, *Subsidiarity: The Wrong Idea, in the Wrong Place, at the Wrong Time*, 43 Common Mkt. L. Rev. 83 (2006); T. Konstadinides, *Dealing with Parallel Universes: Antinomies of Sovereignty and the Protection of National Identity European Judicial Discourse*, Y.B. Eur. L. 144 (2015), signalling, however, that 'the proportionality stricto sensu model is not always functional for the assessment of national identity claims under Article 4(2) TEU'.

91 G. Bermann, *Taking Subsidiarity Seriously: Federalism in the European Community and the United States*, 94 Colum. L. Rev. 339 (1994); P. D. Marquardt, *Subsidiarity and Sovereignty in the European Union*, 18 Fordham Int'l L. J. 627 (1994); Cloots, *supra* n. 12, at 189.

92 *See also* Floris de Witte, who argues that the traditional proportionality test applied by the ECJ to determine the admissibility of a restriction to EU law (suitability, necessity and proportionality *stricto sensu*) is by its very nature inadequate insofar as it inevitably favours the solution that ensure primacy (*Sex, Drugs & EU Law: The Recognition of Moral and Ethical Diversity in EU Law*, 50 Common Mkt. L. Rev. 1570 (2013)).

93 While von Bogdandi e Schill claim that Art. 4(2) TEU singles out the essential elements of the federal structure, De Witte sees in this provision a confirmation of the non –federal nature of the Union. Cf. A. von Bogdandi & S. Schill, *Article 4 EUV*, in *Das Recht der Europäischer Union, Kommentar I* § 38 (E. Grabitz, M. Hilf, M. Ruffert eds, CH Beck 2011) and B. De Witte, *The Lisbon Treaty and the National Constitutions. More or less Europeanisation?*, in *The Lisbon Treaty and National Constitutions* 35 (C. Closa ed., ARENA 2009).

94 Cf. Art. 5(2) TEC and Art. 5(3) TEU, and Protocol No 30 to the Amsterdam Treaty [1997] OJ C340/1, pt. 5.

95 Arts 82(2) and 83(3) TFEU.

96 Art. 48 TFEU.

97 Protocol No 2 on the application of the principles of subsidiarity and proportionality [2016] OJ C202/206, Art. 2. The national perspective on the function of the principle of subsidiarity can be appreciated in a document released by the Dutch government (with the support of the UK government) entitled *European When Necessary, National When Possible*, of 21 June 2013 (https://www.government.nl/documents/policy-notes/2013/06/21/nl-subsidiarity-review-explanatory-note) (accessed 28 Aug. 2018).

98 Art. 81(3) TFEU.

national identity argument *ex ante* but the Member States do not appear to take advantage of their increased monitoring role.

The principle of subsidiarity, however, is not limited to the exercise of the normative function; it extends to the interpretative and enforcing activity of the ECJ.[99] Together, the two *volets* contribute to define the limits to the exercise of EU competence[100]; nonetheless, they remain independent. Unlike what happens in the legislative context, the subsidiarity test demanded by the identity clause also applies to exclusive competences, like the regulation of the Eurozone.[101] On the one side, Article 4(2) TEU introduces a clear *favor nationis* for cases coming within its reach and its effectiveness does not, in principle, depend on harmonization. On the other side, the standard used to determine a breach of the identity clause is individual, as opposed to collective, since the hindrance to one single identity is sufficient.[102]

The control exercised by the Court of Justice is an *intra vires review*, but the concrete application of Article 4(2) TEU is not conditioned to the relativization of primacy; rather, it is subject to the prior (simple) determination of a possible violation of the national identity of a Member State.[103] Once the situation is considered by the ECJ – in actions under Articles 263 and 258 TFEU or in the context of preliminary references pursuant to Article 267 TFEU – to fall within the scope of application of Article 4(2) EU, the Court will have to establish whether EU action is justified or, by contrast, unduly impinges on the national identities of the Member States.

This kind of reversed balancing exercise will only occur in very limited cases where subsidiarity intervenes to lower the intensity of the conflict and impose on the Union a particular self-restraint in the name and for the sake of effectiveness – as

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99 Bermann, *supra* n. 91, at 400 and G. De Búrca, *The Principle of Subsidiarity and the Court of Justice as an Institutional Actor,* 36 J. Common Mkt. Stud. 234 (1998).

100 *See also* Cloots, *supra* n. 12, at 175.

101 This would perhaps also respond to the (formally correct) objections raised by Nicholas Barber as to the coexistence of the principle enshrined in Art. 5(3) TEU with the duty affirmed in Art. 4(2) TEU. N. Barber, *The Limited Modesty of Subsidiarity*, Eur. L. J. 311 (2005). *See also* Marquardt, *supra* n. 91, at 618.

102 *See* to that effect *Estonia v. European Parliament and Council*, concerning the annulment of Directive 2013/34/UE on the annual financial statements of certain types of undertakings [2013] OJ L182/19. According to the Luxembourg judges, '[T]he subsidiarity principle … requires only that the proposed action can, by reason of its scale or effects, be better achieved at EU level' (para. 53). Thus, inverting the perspective, it seems appropriate to conclude that the respect for national identities 'is intended to limit the EU's competence on the basis of the situation of any particular Member State taken individually'. ECJ 18 June 2015, Case C-508/13, ECLI:EU:C:2015:403, paras 48 e 53. Similarly, ECJ 4 May 2016, Case C-358/14, *Poland v. European Parliament and Council*, ECLI:EU:C:2016:323, paras 114–21 and Case C-547/14, *Philip Morris*, ECLI:EU:C:2016:325, paras 219–24.

103 A. von Bogdandy & S. Schill, *Overcoming Absolute Primacy*: *Respect for National Identity Under the Lisbon Treaty*, 48 Common Mkt. L. Rev. 1417 (2011), who claim that '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' (at 1420).

to do otherwise would most probably trigger the activation of the national counter-limits, especially in cases like *Gauweiler* and *M.A.S. and M.B.*. Hence the importance of a clear and restrictive notion of national identity and the elaboration of a sound conceptual framework for the use of Article 4(2) TEU in judicial proceedings.

The Union, on the other hand, maintains its autonomy and, hence, its counter-limits: firstly, respect for the values set out in Article 2 TEU[104]; secondly, compliance with the Charter of fundamental rights[105]; thirdly, non-interference with the ECJ's monopoly in interpreting EU law and assessing the validity of secondary law[106] and, finally, the full and direct involvement of the domestic ordinary courts in guaranteeing the effectiveness of EU law pursuant to the *Van Gend en Loos*,[107] *Costa v. Enel*[108] and *Simmenthal* precedents.[109]

This is the battle ground for the clash of the titans where 'competing constitutional claims of final authority among different legal orders (belonging to the same legal system) …' collide.[110] If the ECJ considers that the supranational imperatives must prevail, the national specificities will have to succumb. If, on the contrary, the autonomy of the EU legal order is not jeopardized, following the logics of subsidiarity the ECJ will have to step back and leave the competent national authorities sufficient space to uphold their national identity.[111] More concretely, provided the relevant domestic measure or rule is not blatantly disproportionate, the Court of Justice will have to seek an interpretation capable of admitting the national specificity. Save exceptional cases, the final choice concerning the proportionality of the measure could and should by and large be left to the competent national authorities, be it the judge or the legislator, depending on the factual and legal context.

In this sense, the identity clause operates as a leverage, constantly striving towards the perfect equilibrium in terms of action and legitimation. From the ECJ's perspective, the activation of the European counter-limits entails disregarding the national identity at stake in the superior supranational common interests,

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[104] Cf. Opinion 2/13 of 18 Dec. 2014, ECLI:EU:C:2014:2454, para. 168 and ECJ 27 Feb. 2018, Case C-64/16, *Associação Sindical dos Juízes Portugueses*, ECLI:EU:C:2018:117, para. 30.

[105] Opinion 2/13, *supra* n. 104, para. 169.

[106] *See* to that effect ECJ 22 Oct. 1987, Case 314/85 *Foto-Frost* ECLI:EU:C:1987:452, paras 54–55.

[107] ECJ 5 Feb. 1963, Case 26/62, *van Gend & Loos*, ECLI:EU:C:1963:1.

[108] ECJ 15 July 1964, Costa, 6/64, ECLI:EU:C:1964:66.

[109] Cf. ECJ 9 Mar. 1978, Case 106/77, ECLI:EU:C:1978:49 and Opinion 2/13, *supra* n. 104, paras 174–75.

[110] M. Poiares Maduro, *Three Claims of Constitutional Pluralism*, in *Constitutional Pluralism in the European Union and Beyond* 70 (M. Avbelj and J. Komárek eds, Hart Publishing 2012).

[111] On the case law relating to subsidiarity, *see* A. Biondi, *Subsidiarity in the Courtroom*, in *EU Law After Lisbon* 213 (A. Biondi, P. Eeckhout, S. Ripley eds, Oxford University Press 2012); T. Horsley, *Subsidiarity and the European Court of Justice: Missing Pieces in the Subsidiarity Jigsaw?*, 50 J. Common Mkt. Stud. 267 (2012).

which ultimately tend to coincide with the reasons for its very existence. From the constitutional courts' standpoint, the reviews – in their various forms – carried out to determine the constitutionality of a piece of legislation or of the interpretation and solution advanced by the Luxembourg judges in a given case imply the disapplication of EU law and – certainly according to the FCC and the ICC – are essential to perform their constitutional mission.

These nuclear options should be discarded having recourse to the principle of loyal cooperation which imposes self-restraint on the titans[112] but also presupposes mutual understanding. In this regard, however, it appears that the conflictual dimension emerging from the *Gauweiler* and *M.A.S. and M.B.* cases and their national progeny, where Article 4(2) TEU is used – together with the principle of sincere cooperation – as a shield and as a sword[113] depending on the political sensitivity of the matter at stake, and the judicial context (direct action or preliminary ruling), is the result of an axiomatic, conceptual and lexical, misalignment between the various actors involved in the interpretation and application of Article 4(2) TEU, governments, referring judges and the ECJ.

6.2 The development of appropriate constitutional standards

As anticipated, besides these conceptual adjustments, Article 4(2) TEU requires the development of adequate judicial standards. A casual or spurious use of the provision hinders legal certainty (and foreseeability) without necessarily contributing to the solution of constitutional clashes. In this regard, clarity, coherence and methodological rigor are paramount for the legitimacy and authoritativeness of the ECJ's decisions, as well as for the promotion (as opposed to the discouragement) of judicial dialogue with the constitutional courts of the Member States. There are of course no miraculous formulas to ensure an optimal use of the identity clause. Notwithstanding, the presence of a number of logical passages when applying Article 4(2) TEU in light of the subsidiarity principle can remedy the current criticalities and avoid a banalization of the provision.[114]

Firstly, can the argument put forward by the referring judge, or the government (in the context of preliminary references and direct actions) be considered to fall within the scope of application of Article 4(2) TEU? The national measure or

[112] The link between this principle and the duty to respect the national identities of the Member States resulting from the text of Art. 4(2) TEU reinforces the bidirectional character of the former, affirmed by the ECJ in the seminal *Zwartveld* order of 6 Dec. 1990 (Case C-2/88, ECLI:EU:C:1990:440).

[113] P. Faraguna, *Constitutional Identity in the EU – A Shield or a Sword?*, 18 Ger. L.J. (2017) and Konstadinides, *supra* n. 90.

[114] Cloots also highlights the importance of a 'rule-based approach', and insists on the necessary distinction between standards and rules (*supra* n. 12, at 210 f.).

rule shall be traceable to a structural constitutional principle or to the essential functions of the State, must be compatible with the values enshrined in Article 2 TEU and cannot hamper the autonomy of the EU legal order. The internal allocation of competences between the central and regional or local level can certainly be comprised in the former category (*Commission v. Spain, Digibet*, *Remondis, Izsák and Dabis v. Commission*) but the extension of the latter is far from clear. The Luxembourg judges should insist on the reasons that led them to consider the justification covered by the identity clause. In this way it will be possible to distinguish the situations caught by Article 4(2) TEU from those governed by other primary law provisions dealing with culture, language, fundamental rights, healthcare, education, national security and other sensitive topics for the Member States.

Secondly, when the claim is grounded: is there a sufficiently intense link between the constitutional structural principle or essential function invoked by the State and the concrete measure or rule that opposes the application of EU law in the domestic legal order? A more structured approach by the ECJ would allow us to understand why the abolition of nobility titles in Austria (*Sayn-Wittgenstein*) and Germany (*Bogendorff von Wolffersdorff*), or the access to the legal profession in Italy (*Torresi*) trigger the applicability – as opposed to the mere citation – of Article 4(2) TEU.[115] In this regard, if AG Wahl claims that not every rule enshrined in a national constitution is capable of limiting the uniform application of EU provisions or act as a parameter of legality,[116] AG Bot underlines that the fundamental constitutional principles which can be invoked to resist the application of EU law do not extend to cover the multiple institutes and rights in which they manifest themselves and shape themselves 'throughout history and the requirements of history'.[117]

Thirdly, should the nexus be proven, is there a sufficiently serious prejudice for the national identity? To that effect, the ECJ should assess, on the one side, the absolute or relative character of the restriction to EU law resulting from the defence of the national identity (*Bogendorff von Wolffersdorff* and *Las*) and, on the other side, the coherence of the national legislation and practice as to the implementation of the principle or rule prima facie covered by Article 4(2) TEU (*Commission v. Spain* and *Torresi*). Both criteria entail the analysis of the legal and

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[115] The importance of nexus has been stressed by AG Wahl in *Torresi* (*supra* n. 75) but also by AG Wathelet in *Bogendorff von Wolffersdorff*, where the latter pointed out that German law allowed the registration of titles of nobility after the first name of the person concerned and considered 'paradoxical' the argument put forward by the government according to which the restriction could be justified on the basis of the principles of democracy and equality, aimed at protecting the 'Republican order' (Opinion delivered on 14 Jan. 2016, Case C-438/14, ECLI:EU:C:2016:11, para. 107).

[116] Opinion of AG Wahl in *Torresi*, *supra* n. 75, para. 100.

[117] Opinion of AG Bot in *M.A.S. and M.B.*, *supra* n. 55, para. 183.

factual domestic context but are decisive to avoid a generic and reductive use of the identity clause. Although national identity is certainly an autonomous EU law notion, it cannot be defined in a vacuum. And in fact, as already suggested, Article 4(2) TEU must be understood as an expression of subsidiarity, to be applied in accordance with the principles of sincere cooperation and proportionality.

The solidity and consistency of the arguments adduced by the referring judges, also having regard to precedents coming from the same country, and by the governments, during the legislative process and in the context of direct actions and preliminary rulings (whether directly involved or intervenors), should be attentively scrutinized. This exercise was conducted by the Court of Justice in *Estonia v. European Parliament and Council* and by the Advocate General in *M.A.S. and M.B.* In the former instance, the Luxembourg judges considered that Directive 2013/34/EU on financial statements had been adequately motivated and in reaching that conclusion they reminded the applicant that having participated in the legislative process, it could not ignore the reasons for the choices operated and expressed therein.[118] In the latter case, after noting that in its reference the ICC had not explained why the immediate application of a longer limitation period is capable of 'compromising the constitutional identity of the Italian Republic',[119] Yves Bot refused to consider the principle that offences and penalties must be defined by law a fundamental principle because it is not listed in Articles 1 to 12 of the Italian Constitution (Fundamental Principles). Moreover, in his view this status cannot be derived from the constitutional case law.[120] Confirmation of this can actually be found in the observations lodged by the Italian government in *Gauweiler*, where it was clarified that the initiation of the so-called 'counter-limits' procedure is conditioned to the infringement of the 'overriding or fundamental principles' of the domestic constitutional order, which correspond to the 'essential constitutional guarantees', most notably, the democratic nature of the Italian Republic (Article 1 Cost.), the principle of equality between men (Article 3 Cost.), to the exclusion of 'procedural guarantees, no matter how important they may be'.[121]

With higher expectations and a new and more structured approach to the use of Article 4(2) TEU, *de motu poprio* or upon request, it is suggested that the ECJ would activate a virtuous circle, whereby the ordinary and constitutional courts

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[118] Directive 2013/34/UE of 26 June 2013, on the annual financial statements, consolidated financial statements and related reports of certain types of undertakings [2013] OJ L182/19. Similarly, in *Melloni* AG Bot reminded the Spanish government that according to Art. 82(3) TFEU, should draft directive be considered to affect fundamental aspects of the criminal justice system, a member of the Council can request that the question be referred to the European Council (para. 144).

[119] AG Bot Opinion in *M.A.S. e M.B.*, *supra* n. 55, para. 180.

[120] *Ibid.*, para. 181.

[121] *Ibid.*, para. 185.

would be encouraged to attentively construe and substantiate their national identity defence allowing the ECJ to justify the restriction under EU law without having to enter the meanderings of domestic constitutional law, or discharging on the Advocate General this awesome task.

7 THE DUTY TO RESPECT THE NATIONAL IDENTITY OF THE MEMBER STATES AND THE AUTONOMY OF THE EU LEGAL ORDER

The respect of national identities is at the very core of the European integration process; the Union drawing legitimation from the legal orders of the Member States, whose basic structure and essential functions cannot be called into question. On the other hand, the autonomy of the EU legal order must be respected. Managing the multi-level constitutionalism characterizing the European Union[122] requires tolerance and flexibility on the part of the institutions, including the ECJ, and of the Member States, to begin with the national judges, and most notably the constitutional courts. Indeed, the complex, dynamic coexistence of the national and supranational dimensions rests to a great extent on open and constructive dialogue between judges; but in order to work constitutional confrontation must be supported by adequate judicial standards.

The composite nature of the EU legal order justifies and perhaps posits a provision such as Article 4(2) TEU, that not only gives account of its multi-layered structure, but also encapsulates the essence of the delicate equilibria that need to be found to ensure its existence (as we know it today). It allows the ECJ to take into account, without internalizing them, the positions adopted by a number of constitutional courts in relation to the limits to primacy and justify differentiated integration on the basis of EU law.[123]

When confronted with sensitive legal issues various constitutional courts have often decided without involving the ECJ, as it happened with the EAW[124] and

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[122] I. Pernice, *Multi-level Constitutionalism and the Treaty of Amsterdam: European Constitution-Making Revisited*, 36 Common L. Mkt. Rev. 703 (1999). More generally, on constitutional pluralism and judicial dialogue, *European Constitutionalism Beyond the State* (J. H. H. Weiler, M. Wind eds, Cambridge University Press 2003); M. Poiares Maduro, *Contrapunctual Law: Europe's Constitutional Pluralism in Action*, in *Sovereignty in Transition* 501 f. (N. Walker ed., Oxford University Press 2003); N. Barber, *Legal Pluralism and the European Union*, 12 Eur. L.J. 306 (2006); J. Baquero Cruz, *The Legacy of the Maastricht-Urteil and the Pluralist Movement*, 14 Eur. L.J. 389 (2008); *Constitutional Pluralism in the European Union and Beyond* (M. Avbelj, J. Komarék eds, Hart Publishing 2012); K. Jaklic, *Constitutional Pluralism in the EU* (Oxford University Press 2014).

[123] *See also* M. Dobbs, *The Shifting Battleground of Article 4(2) TEU: Evolving National Identities and the Corresponding Need for EU Management?*, 21 Eur. J. Current Legal Issues (2015).

[124] Cf. BvR 2236/04, 18 July 2005 and BvR 2735/14, 15 Dec. 2015 and Czech Constitutional Court, Pl. ÚS 66/0, 3 May 2006. *See* further O. Pollicino, *European Arrest Warrant and Constitutional Principles of the Member States: A Case Law-Based Outline in the Attempt to Strike the Right Balance Between Interacting*

Directive 2006/24/CE on data protection.[125] This approach is certainly questionable under Article 4(3) TEU, but – outside the (very) limited scope of the *CILFIT* doctrine – the choice not to refer may also violate Article 267(3) Treaty on the Functioning of the European Union (TFUE) and trigger the extra-contractual liability of the Member State, as recognized by the ECJ in *Ferreira da Silva*.[126] Moreover, it follows from the decision in *Dhahbi v. Italy* handed down by the European Court of Human Rights (ECtHR) that the refusal to refer by last instance courts can also result in a breach of Article 6 ECHR if not duly motivated.[127]

In *Gauweiler* and *M.A.S. and M.B.*, by contrast, the FCC and the ICC decided only after making it clear to the ECJ that effectiveness would be conditioned to the respect for the constitutional identity, and thus the acceptance of their interpretation of EU law; most notably Article 4(2) TEU. This stance is also hardly compatible with the principle of sincere cooperation. Notwithstanding their remarkable differences, these two cases reveal a rather clear terminological mismatch in constitutional dialogue. The two constitutional courts use Article 4(2) TEU in their references – and the same can be said for the Order of the FCC in *Weiss* – to argue that it is (also) the EU's duty to retreat and avoid mingling with national sovereignty.[128] They both revendicate the vital nature of the rights and principles at stake (i.e. the right to vote and the principle of legality, respectively) and assimilate the expressions 'constitutional identity' and 'national identity', whose notions tend to perfectly overlap. By doing so, the *Bundesverfassungsgericht* and the *Consulta* effectively claim competence over the interpretation EU law, the common premise being that should their reading of the domestic constitution, in light of Article 4(2) TEU, be disregarded, the natural order will inevitably be

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Legal Systems, 9 Ger. L. Rev. 1313 (2008); M. Bobek (2012), *The Impact of the European Mandate of Ordinary Courts on the Position of Constitutional Courts*, in *Constitutional Conversations in Europe* 287 and M. Hong, *Human Dignity and Constitutional Identity: The Solange-III: Decision of the German Constitutional Court* (Verfassungsblog, 18 Feb. 2016).

125 Rumanian Constitutional Court, No 1258/09, 8 Oct. 2009 and BvR 2 Mar. 2010, 1 BvR 256/08.

126 ECJ 9 Sept. 2015, Case C-160/14, *Ferreira da Silvia*, ECLI:EU:C:2015:565 and Joined cases, C-72/14 and C-197/14 *X*, ECLI:EU:C:2015:564. But *see also* ECJ 30 Sept. 2003, Case C-224/01, *Köbler* ECLI:EU:C:2003:513; 13 June 2006, Case C-173/03, *Traghetti del Mediterraneo*, ECLI:EU:C:2006:391; 24 Nov. 2011, Case C-379/10, *Commission v. Italy*, ECLI:EU:C:2011:775. *See ex multis* M. Broberg, *National Courts of Last Instance Failing to Make a Preliminary Reference: The (Possible) Consequences Flowing Therefrom*, 22 Eur. Pub. L. 243 (2016) and A. Kornezov, *The New Format of the Acte Clair Doctrine and Its Consequences*, 53 Common Mkt. L. Rev. 1317 (2016).

127 ECtHR 8 Apr. 2014, *Dhahbi v. Italy*, Appl. No 17120/09 and 21 July 2015, *Schipani v. Italy*, Appl. No 38369/09; 8 Sept. 2015, *Wind Telecomunicazioni S.p.a. v. Italy*, Appl. No 5159/14. According to Protocol No 16 (entered into force 1 Aug. 2018) the highest courts of the Member States of the Council of Europe will be entitled to refer questions to the Strasburg Court concerning the interpretation of the ECHR.

128 In this regard, quite interestingly, unlike the FCC, the *Consulta* does not expressly mention Art. 4(2) TEU. However, the national (constitutional) identity argument is deeply embedded in the referring order, which is quoted in three specific passages of the judgment (paras 8, 10 and 14).

subverted and national law shall prevail. It is in other words the identity clause that sets the boundaries of normative (*Gauweiler*) and judicial (*M.A.S. and M.B.*) action, which ultimately justifies and imposes the disapplication of EU law.

Although it will be conceded that *in concreto* there might be some overlapping, to assume that the concepts of constitutional identity and national identity are interchangeable or juxtaposed betrays the very nature of Article 4(2) TEU, notwithstanding the Opinions delivered by AG Maduro in *Mickaniki* and AG Bot in *M.A.S. and M.B.* The Court of Justice should promptly remove the ambiguity and draw a clear line between the two concepts and competences so to avoid further misunderstandings with the ordinary and constitutional courts of the Member States. In doing so, it should – pursuant to the principle of sincere cooperation[129] – develop and rely on the judicial standards outlined above maintaining an open dialogue with national judges, especially the constitutional courts[130] via an accurate, coherent and exceptional use of Article 4(2) TEU, striving to find the correct balance between the effectiveness and autonomy of the EU legal order, on the one side, and the duty to respect the national identity of the Member States, on the other side.[131]

Just like in *Melki and Abdeli*, the ECJ should define and defend its role in the EU integration process without unnecessarily impinging on choices pertaining to the constitutional structure of a Member States (such as the interlocutory procedure for the review of constitutionality), and in principle discharge on the national judge the final assessment.[132] Once compliance with the *Foto-Frost* and *Simmenthal* doctrines is possible *in concreto* there is no need to strike down the debated law on the *question prioritaire de constitutionnalité*.[133] Taking in due consideration the

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[129] P. Mengozzi, *La Corte di giustizia dell'Unione e il diritto nazionale degli Stati membri*, Il Diritto dell'Unione europea 167 at 186 (2016).

[130] On the dialogue between the Constitutional courts of the Member States and the ECJ, *see* G. Martinico & O. Pollicino, *The Interaction Between Europe's Legal Systems: Judicial Dialogue and the Creation of Supranational Laws* (Cheltenham 2012).

[131] As effectively argued by Martin, '*[T]rop forte, l'obligation nuirait à l'effet utile du droit de l'Union mais trop légère, elle n'aurait pas grand sens, ce n'est celui d'une déclaration d'intention*'. S. Martin, *L'identité de l'Etat dans l'Union européenne entre 'identité nationale' et 'identité constitutionnelle'*, Revue française de droit constitutionnel 13 at 29 (2012).

[132] ECJ 22 June 2010, Joined cases C-188/10 e C-189/10, *Melki and Abdeli*, ECLI:EU:C:2010:363. *See* further J. Dutheil de la Rochère, *La question prioritaire de constitutionnalité et le droit européen*, Revue trimestrielle de droit européen 577 (2010); D. Sarmiento, *Cuestión prejudicial y control previo de constitucionalidad. Comentario a la sentencia Melki del Tribunal de Justicia de la UE*, Revista española de Derecho Europeo 97 (2011). *See also* ECJ 11 Sept. 2014, Case C-112/13, *A.* c. *B. e altri*, EU:C:2014:2195, para. 38 concerning the interlocutory procedure for the review of constitutionality in Austria.

[133] Most notably, in this instance, after restating that national courts or tribunals must remain free to refer any 'question they consider necessary', at 'whatever stage of the proceedings they consider appropriate', as well as to adopt interim measures for the purpose of ensuring the effective judicial protection of the individual rights guaranteed under EU law (paras 52–57). The fact that the ordinary courts cannot be restricted by constitutional review procedures in their right or obligation to refer a case to the ECJ under Art. 267 TFEU has been confirmed more recently in *Global Starnet*

observations submitted by the French and Belgian governments in *Melki and Abdeli* the Luxembourg judges admitted that the duty to disapply the relevant national legislation conflicting with EU law could be deferred to the end of the relevant interlocutory procedure.[134] In line with what has been argued throughout this contribution, the underlying delicate balancing operation appears to be conducted in light of the principle of subsidiarity (read jointly with the principles of sincere cooperation and proportionality), not pursuant to the bias logics of primacy.[135]

On their part, the constitutional courts of the Member States should fully accept their renewed role in the European integration process and limit the threat of activating the counter-limits doctrine to those cases where there is a sufficiently serious breach of the principle of conferral (*ultra vires* review) or of the constitutional identity, which also includes the review of the national standard for the protection of fundamental rights, but is profoundly different, in nature and scope, from the national identity covered by Article 4(2) TEU.

This process of informal constitutional empathy[136] is complicated by the fact that only recently have the constitutional courts of various Member States accepted the dialogue with the ECJ; once in the circuit they are struggling to win back their pivotal role and are actively contributing to (re)shape the relations with the supranational level.[137] The ongoing arm wrestling with the ECJ on the interpretation of EU law, and the corresponding, or otherwise pertinent constitutional provisions, is certainly the result of the post-Lisbon settlement with the introduction of new normative and judicial competences, especially in the field of criminal law, but – as demonstrated by *M.A.S. and M.B.* – it is also to some extent tied to the growing internal tensions between the ordinary courts and the constitutional courts of the Member States.[138]

(Case C-322/16, EU:C:2017:985, para. 25) and in *Kernkraftwerke Lippe-Ems* (Case C-5/14, EU:C:2015:354, paras 34–36).

134 The judgment is hardly reconcilable with the logics of primacy so much so that some commentators have suggested that it effectively revisited the *Simmenthal* doctrine. R. Mastroianni, *La Corte di giustizia e il controllo di costituzionalità: Simmenthal revisited?*, Giurisprudenza costituzionale 4089 (2015).

135 Similarly, Schütze, *supra* n. 2, at 533.

136 L. Arroyo Jiménez, *Constitutional Empathy and Judicial Dialogue in the European Union*, 24 Eur. Pub. L. 57 at 61 (2018).

137 M. Claes, *Luxemburg, Here We Come? Constitutional Courts and the Preliminary Reference Procedure*, 16 Ger. L.J. 1340 (2015).

138 As argued in more detail elsewhere (*La saga 'Taricco' alla prova dei controlimiti (e viceversa)*, in *Federalismi* 2018), it appears that what really troubles the ICC is the possibility for the ordinary judges to bypass the central constitutionality review by assuming, on the basis of the *Granital* precedent, that EU law is endowed with direct effect, which entitles them to turn directly to the ECJ for clarifications that can have a notable impact on the application of fundamental constitutional principles and individual rights. *See also* A. Barbera, *Corte costituzionale e giudici di fronte ai vincoli comunitari: una ridefinizione dei confini?*, Quaderni costituzionali 335 f. (2007) and, more recently, C. Amalfitano, O. Pollicino, *Two Courts, Two Languages? The Taricco Saga Ends on a Worrying Note*, Verfassungsbolg, 5 June 2018. For a thorough, multi-disciplinary study on the so-called *Taricco* saga and the legal turmoil it determined

Defending the autonomy of the EU legal order and guaranteeing the full and effective application of EU law *vis à vis* conflicting constitutional claims demands a thorough understanding of the basic, fundamental principles of the interested legal orders, national and supranational. In other words, it is of the utmost importance for the ECJ and the constitutional courts to be well aware of the respective counter-limits and handle them with care. In this sense, the identity clause, coupled with the European clauses included in the constitutions of the Member States (which postulate loyal cooperation towards the Union),[139] offers a legal arena for constitutional confrontation and appeasement.

Of course, the approach of the constitutional courts will largely depend on the stance taken towards international law in the relevant domestic legal order: while adhesion to the integration model (monism) allows for a 'formalized judicial dialogue' concerning fundamental rights and national identities, allegiance to the separatist approach (dualism) demands a greater accommodating effort on the part of the constitutional courts.[140] This endeavour is what the FCC calls europarechtsfreundlich and should be applied by the constitutional courts of the Member States – including the ICC – entering into a dialogue with the ECJ.

8 CONCLUSION

This article has argued that a sound conceptual framework is needed to handle Article 4(2) TEU and the constitutional clashes that are characterizing (and will in the future characterize) the interactions between the EU legal order and the legal orders of the Member States. As a matter of fact, the pursuance of a functionalist approach in the financial and criminal spheres is more easily adverted, especially by constitutional courts, as an intrusion into purely national choices, justifying application of the incompatible national rule or practice in spite of primacy.

Repositioning and rephrasing notwithstanding, the identity clause survived numerous treaty revisions and is now fully justiciable. However, to date the Court of Justice has failed to assign to Article 4(2) TEU an autonomous function in the managing of constitutional conflicts. In particular, it has not clarified the reasons for recurring to the identity clause, nor has it insisted on the dichotomy fundamental structure/essential functions resulting therefrom. With the notable exception of

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in the Italian system, the reader is referred to *Primato del diritto dell'Unione europea e controlimiti alla prova della 'saga Taricco'* (C. Amalfitano ed., Giuffrè 2018).

[139] An exhaustive overview of the European clauses present in the constituions of the Member States can be found in L. Besselink, M. Claes, Š Imamovi & J. Reestman, *National Constitutional Avenues for Further EU Integration* (Directorate General for Internal Policies, Brussels 2014).

[140] Arroyo Jiménez, *supra* n. 136, at 64.

Bogendorff von Wolffersdorff – where the provision was invoked *ex officio* – the ECJ did not adequately examine the relevant constitutional context limiting itself to accepting the position expressed by the interested government or referring judge in relation to the existence of a possible violation of Article 4(2) TEU. Moreover, the Luxembourg judges have not insisted on the scope of national identity *vis à vis* that of constitutional identity.

This approach may be read as a sign of deference towards the Member States: Article 4(2) TEU is a pacifier, a reassuring provision invoked to let the governments know that their specificities are duly considered. In some cases, cultural and linguistic specificities (*Runevič-Vardyn*) were taken into account without clarifying the relationship between Article 4(2) TEU, Article 3(3) TEU and Article 22 CFR (Las), nor the link – if any – between the protection of fundamental rights in accordance with the common constitutional traditions of the Member States mentioned in Article 6(3) TEU and in the Charter, and the respect for national identities (Melloni and M.A.S. and M.B.).

The current use of Article 4(2) TEU appears overtly limitative insofar as it considers the carefully selected traits of national identity contained therein as possible general justifications to the full application of EU primary and secondary law; as opposed to pivotal constitutive elements of the European Union stated in a primary law provision. The legal adjustments brought by the Lisbon Treaty confirm the intimate link with the exercise of EU competences, both normative and judicial. Together with the principles of loyal cooperation, subsidiarity and proportionality, Article 4(2) TEU (de)signs the limits to (*intra vires*) EU action. And yet, the duty affirmed therein has been understood – at least by some governments and national judges – as a watershed in defining what is lawful and what is, effectively, *ultra vires*, which also explains the potential constitutional drama hiding behind its activation.

The constitutional courts should rapidly adjust to their new interlocutor, be cooperative and try not to carve out new 'spaces of sovereignty' through an improper use of Article 4(2) TEU. In this regard, the paramount distinction between national identities and constitutional identities cannot be overstated (*Weiss*), nor can one ignore from a more political viewpoint the ongoing process of judicial networking and the sprouting of judicial fora. These are all factors undoubtedly limit the risk of crisscrossed monologues.

Article 4(2) TEU acts as constitutional device to defuse constitutional clashes generated by the real or apparent collision between, on the one side, the need to ensure the autonomy and the *effet utile* of EU law and, on the other side, the need to protect the fundamental structures and essential functions of the Member States, provided they are compatible with Article 2 TEU. The duty to avoid tensions rests on the governments and the national parliaments during the legislative process, and

to the ECJ in the interpretation and application of the law. However, in carrying out its mission under Article 19 TEU[141] the latter must be supported by the national courts, especially the constitutional courts.

Although formally equated to ordinary and supreme courts under Article 267 TFEU, the latter enjoy a special status in the domestic legal order. In particular, as ultimate guarantors of the constitutional identity they claim the power and obligation to disapply EU law, as interpreted by the ECJ, if it exceeds the limits set out in the treaties, or conflicts with their understanding of the basic structural principles or with the standard of protection of fundamental rights. As the final gatekeepers of the relations between the national and supranational level, however, they should feel and take on this responsibility. As expressed remarkably well by the Court of Justice already in *Commission v. Italy* of 1973:

for a State unilaterally to break, according to its own conception of national interest, the equilibrium between advantages and obligations flowing from its adherence to the community brings into question the equality of Member States before community law and creates discriminations at the expense of their nationals, and above all of the nationals of the state itself which places itself outside the community rules[142]

[141] Which effectively also allows the Court of Justice to review the law of the Member States, at least insofar as a link is established between the relevant national measures and EU law. *See* further K. Lenaerts & J. Gutierrez-Fons, *The Constitutional Allocation of Powers and General Principles of EU Law*, 47 Common Mkt. L. Rev. 1629 at 1650 (2010) and C. Amalfitano, *General Principles of EU Law and the Protection of Fundamental Rights* 199 (Edward Elgar 2018). This reading of Art. 19 TEU has recently been confirmed by the ECJ in *Associação Sindical dos Juízes Portugueses* (27 Feb. 2018, Case C-64/16, ECLI:EU:C:2018:117), the ECJ has interpreted it (read jointly with Arts 2 and 4(3) TEU) as a self-standing provision which enables the ECJ to scrutinize the duty of Member States to guarantee effective judicial protection and, thus, judicial independence. *See also* L. Pech & S. Platon, *Rule of Law Backsliding in the EU: The Court of Justice to the Rescue? Some Thoughts on the ECJ Ruling in Associação Sindical dos Juízes Portugueses*, EU Law Analysis (2018).

[142] ECJ 7 Feb. 1973, Case 39/72, *Commission v. Italy*, ECLI:EU:C:1973:13, para. 24.