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National Identity and Market Freedoms after the Treaty of Lisbon

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Abbreviations

§ - paragraph
§§ - paragraphs
AG – Advocate General
BVerfG – Bundesverfassungsgericht
ECJ – European Court of Justice
EU – European Union
NIL – national identity large
NIS – national identity small
p. – page
pp. pages
TEU – Treaty on European Union
TFEU – Treaty on Functioning of the Euroepan Union

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Introduction

The aim of this paper is to explore the balance between market freedoms and national regulatory autonomy following entry into force of the Treaty of Lisbon, particularly, in light of the re-phrased national identity guarantee under Article 4(2) TFEU. The paper will discuss whether obligation of the European Union to respect the national identities of its Member States bears any consequence in the case law of the European Court of Justice. Arguably, defining the proper scope of application of the national identity guarantee bears consequence for application of EU law. If defined too broadly, it can undermine uniform application and effectiveness of EU law. If defined to narrowly, it would be void of any useful effect.

With this objective in mind I will **first** clarify the concept of national identity and, more specifically, national constitutional identity. **Second**, I will discuss case law of the ECJ preceding the entry into force of the Treaty of Lisbon. In this part I will suggest that development of national identity law, before the Treaty of Lisbon, went through three evolutionary phases. **Third**, I will explore whether there are significant developments to that effect in the case law of the ECJ after the entry into force of the Treaty of Lisbon and briefly present national constitutional identity construction in France and Germany.

Defining national identity

As noted by Advocate General Maduro, national identity makes part of EU law from the beginning. [1] It is present in the Treaties since adoption of the Treaty of Maastricht where it was introduced as Art. F(1) of the TEU, providing that "The Union shall respect the national identities of its Member States, whose systems of government are based on the principles of democracy". The Article was subsequently re-numerated and re-phrased to become Art. 6(3) of the Treaty of Amsterdam. The Amsterdam provision simply provided that "The Union shall respect the national identities of its Member States." Article I-5 of the Treaty establishing a Constitution for Europe rephrased the provision the identical wording of which was subsequently made section (2) of Article 4 of the TEU.

According to Article 4(2) of the TEU,

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

[1] Opinion of AG Maduro in Case C-213/07, *Michaniki AE v Ethniko Symvoulio Radiotileorasis and Ypourgos Epikrateias*, (2008) ECR I-9999, § 31of the Opinion

> security. In particular, national security remains the sole responsibility of each Member State."

When compared to the earlier utterances, Art. 4(2) speaks about "… fundamental structures, political and constitutional, inclusive of regional and local self-government" while the earlier text just generally referred to national identities. Apparently, an added value of the new wording seems to be explicit reference to national constitutional identity, whatever it may be. In a way, it was semantic force of Art. I-5 of the Constitutional Treaty, already, which narrowed the discourse about national identity into the discourse about national constitutional identity. The Treaty of Lisbon followed the suit.

Definition

Merriam Webster dictionary defines identity as "... sameness in all that constitutes the objective reality of a thing" and "... the condition of being the same with something described or asserted." In brief, identity can be described as a state of being the same to one thing and, at the same time, differentiated from everything else. Word "national" refers to nation Member States of the European Union. Words "shall respect" and "inherent in their fundamental structures" imply a normative claim that, in certain, essential, areas of regulation, defined as "fundamental structures, political and constitutional", regulatory powers of the Member States should enjoy immunity from encroachment of EU law.

Taken together the wording of Article 4(2) TEU apparently protects the right of the Member States to define, independently from EU law, such elements of their constitutional and political order, which makes them unique and at the same time different from any other Member State or, indeed, from the European Union at large. Such essential elements make the specific content of what is referred to as *national constitutional identity*. In a way, from the Lisbon Treaty on, national identity as a technical term under Art. 4(2) TEU largely coincides with national constitutional identity. Therefore, I shall use the two terms conversely.

Article 4(2) Identity and Article 2 Values

Relationship with Art. 2 TEU values

One part of national identity of the Member States is construed as against the rest of the World. Namely, by being a EU Member State, that State is differentiated from all non-EU States. [2] In normative terms, acceptance of certain EU-specific values is what makes national identity of the Member States unique. More precisely, national identities of the Member States are understood to comprise Art. 2 TEU values on which the EU is founded, in particular,

> "...values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities ... in a society in

[2] For importance of otherness in construction of identity see e.g. Wojciech Sadurski, *European Constitutional Identity?* EUI Woriking Papers, LAW No. 2006/33, at p. 7-8. A good example is construction of Slovenian national identity as European, against Balkan identity of other post-Yugoslav States

> which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail."

Respect for those values is a minimum requirement for membership and, as a matter of rebuttable presumption, can be rebutted only subject to procedure laid down by Art. 7 TEU.

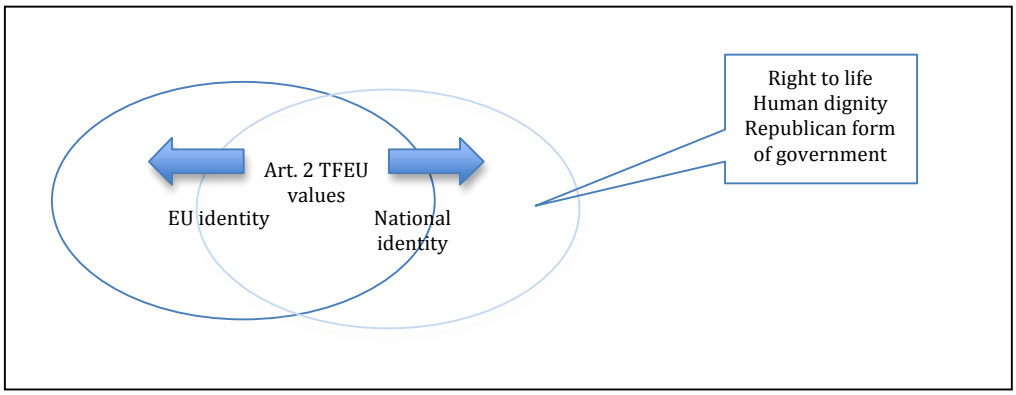
It can be said that Art. 2 TEU defines those elements of national identity that are, at the same time, postulated by their membership of the European union and, without which, neither the Member States nor the European Union itself can claim legitimacy.

National identity restrained by Art 2 TEU

However, the concept of national identity is broader then values enshrined in Art. 2 TEU. Namely, the elements of national identity, (constitutional identity included) such as Member States' fundamental political and constitutional structures, law and order or, national security, are construed independently on national level. Nevertheless, it is a requirement of EU membership that even such independently construed elements of national identity have to comply with Art. 2 TEU values. In absence of this requirement, the history teaches, national "fundamental structures, political and constitutional" would be capable of pursuing a variety of morally problematic ends.

This being said, leads to a conclusion that not any national identity would be tolerated within EU membership, but only those that are in function of promoting values on which the Union is founded. In other words, the constitutional framework of the EU distinguishes between explicit "good" and implied and dormant "bad" national identities, former being worthy of protection, the latter not. This was, after all, implicit in Art. F(1) of the Maastricht Treaty, which linked the respect of national identity to respect for principles of democracy on the side of the Member States.

Figure 1 – overlapping identities



National identity and other Treaty values

Title II TFEU

A separate set of values, applicable horizontally, in all areas of EU regulation, is laid down in Title II TFEU. Function of those provisions is everything but clear. Arguably, those values may create restraints for supranational policy-making.

Advocate General Cruz Villalon argued in his Opinion in *Palhota* [3] that the ECJ should recognize broader discretion to the Member States when pursuing one of the values listed in Art. 9 of the TFEU, such as high level of employment, the guarantee of adequate social protection, the fight against social exclusion, and a high level of education, training and protection of human health.

Accordingly, mandatory requirements justifying departure from market freedoms should not be any more be interpreted narrowly. For example, social protection of workers should be taken into account in performance of proportionality test when assessing whether national measures restricting free movement of services are justified. The result of such reasoning would be that a Member State is allowed to maintain her own understanding of social policy, allegedly providing for e.g. adequate social protection, in which way she could narrow the scope of application of e.g. free movement of workers. This is essentially not different then claiming that a high level of social protection makes part of national identity of certain Member States, what justifies departure from the market freedoms.

In *Palhota*, the issue was raised whether national measure requiring an employer, established in one Member State and posting workers to the territory of another Member State, to send a prior declaration of posting, can be justified in context of free movement of services. After having announced proportionality analysis in § 49, the ECJ went to assess appropriateness and necessity of national measure. The ECJ found that there is a less restrictive measure for the employer, namely, "… to report beforehand to the local authorities on the presence of one or more deployed workers, the anticipated duration of their presence and the provision or provisions of services justifying the deployment." [4] While Advocate General's suggestion may have allowed discretion to the Member State to chose from among equally effective measures and choose one which serves protection of workers better, the ECJ maintained the traditional test of the least restrictive alternative for the free movement of services.

National identity and regulatory competence

EU law restricts regulatory autonomy of the Member States both in area of Union and Member State competence. The same holds for national identity.

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[3] See Opinion of AG Cruz Villalon in C-505/08 *Palhota* §§ 51-53

[4] *Palhota*, § 51

First, being a part of Art. 4 TEU national identity guarantee makes a part of a more general system of cooperation between the Union and the Member States. On a closer look, Article 4 TEU lays down several, different, guarantees that have to be understood in context of Article 5 TEU.

Residual powers

The first paragraph of Article 4 TEU is a competence rule. [5] It stipulates residual powers of the Member States and in that way complements the principle of conferral laid down by Art. 5(1) TEU. The Union is based on the principle of conferred powers, the residue of which rests upon the Member States. In this light it is perfectly clear that, as a matter of competences, national identity guarantee refers but, as I will shortly show, is not limited to, the powers conferred to the EU, and not to those retained by the Member States. In its regulatory dimension, Art. 4(2) TEU can be understood as a rule that delimits exercise of the powers conferred. In other words, it can be interpreted as prohibiting the Union to act even in areas where the regulatory competences have been conferred, if exercise of such competences would affect Member States' national identity. Arguably, the same would hold even in situations where exercise of EU competence would "... genuinely have as its object the improvement of the conditions for the establishment and functioning of the internal market" within meaning of § 84 of the Tobacco Advertising case. [6]

Subsidiarity and proportionality - different

Furthermore, if national identity is to be distinguished from principles of subsidiarity and proportionality enshrined in Art. 5 (3) and (4) TEU, respectively, then it cannot be made part of national parliaments' scrutiny under the Protocol on the application of the principles of subsidiarity and proportionality. A plausible interpretation would be that, national identity guarantee should be applicable even in cases where an act of the EU has already passed the national parliaments' muster, i.e. despite of it being in compliance with principle of subsidiarity.

Alternatively, it could be argued that, since national identity construction pertains to the Member States, it makes an inherent part of subsidiarity principle. A consequence of this approach would be that, once national parliaments have not objected to adoption of a rule on subsidiarity grounds, it is presumed that the rule at issue respects national constitutional identity. There is no support for either interpretation in parliamentary practice of the Member States, so far.

Exclusive competence of Member States

Second, Art. 4(2) TEU also plays role in area of Member State exclusive competence. It is well established in the case law of the ECJ that, even in areas where the Member States have exclusive competence, such as when regulating civil status [7] or higher education, [8] that competence cannot

[5] Art. 4(1) TEU: "In accordance with Article 5, competences not conferred upon the Union in the Treaties remain with the Member States."

[6] Case C-376/98 *Federal Republic of Germany v European Parliament and Council of the European Union* (2000) ECR I-8419

[7] Case C-267/06 *Tadao Maruko v Versorgungsanstalt der deutschen Bühnen* (2007) ECR I-1757, § 55 of the judgment: "... civil status and the benefits flowing

be exercised as against EU law. The most recent been confirmation of this position can be found in *Rottman*, in respect of regulation of national citizenship. [9]

The obligation of the Member States to respect EU law is also present in respect of national procedural law where it is conventionally understood that the Member States enjoy national procedural autonomy, subject to respect for principles of effectiveness and equivalence. However, as Bobek rightly puts it, such national autonomy does not really exist, since even national procedural legislation is subject to scrutiny of the ECJ. [10] Clearly any claims that certain features of national procedural law make part of national constitutional identity are equally doomed to fail. [11]

A number of cases that dealt with national identity values were located in sphere of Member State competence. Such were the right to life, human dignity, nationality of teachers and notaries, republican form of government, use of national language, civic status of citizens or, indeed, regulation of national constitutional procedure. Since national identity claims will typically be more emphasized in areas of Member States exclusive competence, it can be reasonably expected that the fine tuning between the market freedoms and national identity claims will take place along lines sketched by Roman Herzog and Lüder Gerken in their comment published in 2008, following the contentious *Mangold* [12]

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therefrom are matters which fall within the competence of the Member States and Community law does not detract from that competence. However, it must be recalled that in the exercise of that competence the Member States must comply with Community law and, in particular, with the provisions relating to the principle of non-discrimination."; see also Case C-372/04 *Watts* (2006) ECR I-4325, § 92, and Case C-444/05 *Stamatelaki* (2007) ECR I-3185, § 23, Case 120/78 *Rewe-Zentral AG v Bundesmonopolverwaltung für Branntwein* (1979) ECR 649, § 8, Case C-76/05 *Schwarz and Gootjes-Schwarz* (2007) ECR I-6849, § 70, joined cases C-11/06 and C-12/06 *Morgan and Bucher* (2007) ECR I-9161, § 24. Most recently, in context of higher education, Case C-73/08, *Nicolas Bressol and Others and Céline Chaverot and Others v Gouvernement de la Communauté française*, § 28 of the judgment

[8] *Bressol*, *supra* note 7

[9] Case C-135/08, *Janko Rottman v Freistaat Bayern*, not yet reported, § 41: "Nevertheless, the fact that a matter falls within the competence of the Member States does not alter the fact that, in situations covered by European Union law, the national rules concerned must have due regard to the latter…" and § 45: "Thus, the Member States must, when exercising their powers in the sphere of nationality, have due regard to European Union law…". See also case law cited therein

[10] Michal Bobek, *Why There Is No Principle Of "Procedural Autonomy" of the Member States*, forthcoming in Bruno de Witte and Hans Micklitz (eds), THE EUROPEAN COURT OF JUSTICE AND THE AUTONOMY OF THE MEMBER STATES, (Antwerp, Intersentia 2011)

[11] However, the ECJ is prepared to allow an implicit margin of discretion. For a recent example see case C-291/09 *Francesco Guarnieri & Cie* (not yet reported) where the ECJ took position that a national rule is "…purely procedural and its purpose is not to regulate trade in goods." See § 16 of the judgment. Accordingly, impact of the national procedural rule was "too uncertain and indirect." For concept of an implicit margin of discretion see *infra*.

[12] Case C-144/04 *Werner Mangold v Rüdiger Helm*, (2005) ECR I-9981

judgment of the ECJ. [13] The tension can be summarized as follows: either the ECJ will start to exercise self restraint, or national constitutional courts will have to take protection of national constitutional identity more seriously.

National identity before the Treaty of Lisbon

Roughly speaking, national identity jurisprudence before the Treaty of Lisbon went through three evolutionary phases. In the first phase, national identity was not recognized or claimed as such, but in an implicit way, by national insistence on constitutional standards for protection of fundamental rights. The second phase followed in the early '90s and is characterized by development of margin of discretion. The third pre-Lisbon phase resulted in concession that national constitutional identity is not absolute. Nevertheless, this phase heralded subsequent differentiation of national constitutional rules in two classes: fundamental constitutional provisions "worthy" of triggering Art. 4(2) TEU and other constitutional provisions that treated like ordinary justifications.

The "old" national identity law

Judicial reference to national constitutional identity is well discussed in legal scholarship. The two well known references include the early *Solange* dialogue between the German Federal Constitutional Court and the ECJ [14] and the *Frontini* judgment of the Italian Constitutional Court establishing the theory of countervailing power to the supranational transfer of sovereignty, the so-called *controlimiti*. [15] According to the *Frontini* reservation, transfer of sovereignty, which is inherent to the Founding Treaties, cannot include the transfer of powers to the Community institutions to "… to violate the fundamental principles of the Constitution or the inalienable rights of man."

German and Italian reaction were prompted by the evolving doctrine of supremacy, which after its inception in *Costa v. ENEL* [16] became

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[13] Roman Herzog and Lüder Gerken, *Stop the European Court of Justice*, Zentrum für Europäische Politik, Freiburg, 2008.: Published originally in Frankfurter Algemeine Zeitung of September 8, 2008. See also EUObserver, September 11, 2008, at http://euobserver.com/9/26714, visited on August 8, 2011. The core argument is the following: "...both labor market policy and social policy are still core competences of the Member States. However, this case clearly demonstrates to what extent EU regulation and EU jurisdiction nevertheless interfere in the governing of these core competences."

[14] *Solange I*, BVerfGE 37, 271; *Solange II*, BVerfGE 73, 339; *Maastricht*, BVerfGE 89, 155

[15] Italian Constitutional Court Case no. 183/73, *Frontini v. Ministero delle Finanze*, in Andrew Oppenheimer, The Relationship between European Community Law and National Law: The Cases (eds), Cambridge University Press, 2005.; Marta Cartabia, *Nuovi sviluppi nelle 'competenze comunitarie' della Corte costituzionale, nota a sentenza n. 232 del 1989*, in Giurisprudenza costituzionale, 1989, 1012

[16] BVerfGE 37, 271, 2 BvL 52/71

crystallized by the ECJ in *Internationale Handelsgesellschaft* case where the Court boldly observed that "… the validity of a Community measure or its effect within a Member State cannot be affected by allegations that it runs counter to either fundamental rights as formulated by the constitution of that State or the principles of a national constitutional structure." [17]

ECJ's followed the same line of reasoning in its subsequent case law. For example in the Belgian Flemish Government case, [18] the Flemish government attempted to justify discrimination on grounds of lack of regulatory competence in the matter, which, according to the Belgian constitution, belongs to the federal government. The ECJ shunned the argument by reiterating its earlier case law to effect that "… a Member State cannot plead provisions, practices or situations prevailing in its domestic legal order, including those resulting from the constitutional organisation of that State, to justify the failure to observe obligations arising under Community law." [19] Advocate General Sharpston rightly pointed at Article 27 of the 1969 Vienna Convention on the Law of Treaties according to which "[a] party may not invoke the provisions of its internal law as justification for its failure to perform a treaty." [20] It is now widely accepted that the Vienna Convention also refers to national constitutional law. [21] Nevertheless, German insistence on high standards of protection of fundamental rights prompted development of significant fundamental rights case law and, ultimately, to adoption of Charter of Fundamental Rights of the EU.

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[17] Case 11/70 *Internationale Handelsgesellschaft mbH v Einfuhr- und Vorratsstelle für Getreide und Futtermittel* (1970) ECR 1125

[18] Case C-212/06 *Government of Communauté française and Gouvernement wallon v Gouvernement flamand* (2008) ECR I-1683

[19] *Id*. § 58. See also Case C‑87/02 *Commission v Italy* (2004) ECR I‑5975, § 38; Case 69/81 *Commission v Belgium* (1982) ECR 163, § 5; Case C-323/96 *Commission v Belgium* (1998) ECR I-5063, § 42; Case C-236/99 *Commission v Belgium* (2000) ECR I-5657, § 23, and Case C-111/00 *Commission v Austria* (2001) ECR I-7555, § 12

[20] See footnote 57 of the Opinion of AG Sharpston in C-212/06

[21] Concerning national constitutional law André de Hoogh draws attention to the drafting history of article 27 of the Vienna Convention which "… confirms that the reference to internal law comprises the constitution of a State party. In fact, the amendment proposed by Pakistan initially claimed "[e]very treaty in force is binding upon the parties to it and must be performed by them in good faith, and no party may invoke the provisions of its constitution or its laws as an excuse for its failure to perform this duty" (Vienna Conference, Documents, p. 145; adopted: 55 in favor, none against, 30 abstentions (Vienna Conference, First Session, p. 158)). Though certain hesitations may be observed on the part of the participants in the Vienna Conference in 1968-1969 to support the resulting provision (adopted: 73 in favour, 2 against, 24 abstentions; Vienna Conference, Second Session, p. 54), as to this particular point, the provision did find favor and only two States (Venezuela and Iran) expressed their opposition suggesting the primacy of their constitutional law over treaties. Two States (Venezuela and Guatemala) specifically attached reservations on this point, against which objections have been raised by certain other States…" André de Hoogh, The Relationship between National Law and International Law in the Report of the Georgia Fact-Finding Mission, at www.ejiltalk.org

Second phase: Margin of Discretion

Margin of discretion is power exercised by the Member States in areas of regulation falling within scope of EU law. In such areas Member States can justify derogations from EU law by demonstrating a broadly defined legitimate regulatory aim. [22]

To justify the aim as legitimate a Member State can rely on a variety self-defined interests that need not be shared by other Member States. However such interests must not run against values of EU law and must pass proportionality test. Margin of discretion started to play a more significant role in the early '90s, following judgment of the ECJ in *SPUC v. Grogan*. [23]

Two types of discretion

For purposes of the present discussion it is useful to distinguish between two different types of discretion.

The first type is discretion that Member States exercise in implementation of EU law, notably, directives. Such discretion may pertain to the legislative authorities [24] or to the national courts when interpreting national law. [25] The *Van Duyn* situation, where national public authorities had to interpret public policy justification, also falls within this type. This first type of discretion does not give the Member States a license to depart from compliance with EU law but, on the contrary, discretion to interpret national law in line with EU law. [26]

The second type of discretion is of constitutional significance and concerns potentially competing national and European values. In a case where a European and national rule or value do not coincide, either one of the two has to give way to another in such situations both the EU and a Member State have normative claims that certain European or national rule or value should control the other. When the two rules or values are let to co-exist without an imminent resolution one can speak about either an implied or an explicit margin of discretion.

Explicit and implied margin of discretion

The ECJ has so far recognized margin of discretion in explicit and implied way. Examples of explicit margin of discretion are *Schmidberger* [27] and

[22] In areas that fall outside scope of EU law, one cannot speak about discretion, but Member States are still under an obligation to "have a due regard to EU law".

[23] Case C-159/90, *The Society for the Protection of Unborn Children Ireland Ltd v Stephen Grogan and others* (1991) ECR 4685

[24] See e.g. joined cases C-482/01 and C-493/01 *Georgios Orfanopoulos and Others and Raffaele Oliveri v Land Baden-Württemberg*, (2004) ECR 5257, § 114; case C–271/91 *Marshall* (1993) ECR I–4367, § 37, and joined cases C-397/01 to C-403/01 *Bernhard Pfeiffer*, and others § 105

[25] Case C-208/05 *ITC Innovative Technology Center GmbH v Bundesagentur für Arbeit*, (2007) ECR I-181, §§ 68 and 69 of the judgment. The ECJ allowed discretion of national court to interpret national law in line with EU law.

[26] Case 41/74 *Yvonne van Duyn v Home Office*, (1974) ECR 1337, § 18 of the judgment; see also 30/77, *Régina v Pierre Bouchereau*, § 34, (1977) ECR 1999

[27] Case C-112/00, *Eugen Schmidberger, Internationale Transporte und Planzüge v Republik Österreich*, (2003) ECR I-5659

Omega. [28] Implicitly, the ECJ granted the margin of discretion in *SPUC v. Grogan* and *Melki and Abdeli*. [29]

Implied margin of discretion is best illustrated in *SPUC v. Grogan,* [30] where the ECJ had to address the tension between a national constitutional rule defining the right to life and free movement of services. As a matter of common knowledge, the tension was resolved on jurisdictional grounds and Community law was found to be inapplicable. Nevertheless, soon after the case was decided, Ireland was able to introduce a specific protocol to the Maastricht Treaty, granting immunity according to which

> "… Nothing in the Treaty on European Union, or in the Treaties establishing the European Communities, or in the Treaties or Acts modifying or supplementing those Treaties, shall affect the application in Ireland of Article 40.3.3 of the Constitution of Ireland." [31]

The significance of *Grogan* and the subsequent Protocol is in highlighting the fact that national constitutional values may escape EU law scrutiny, as long as they are outside scope of EU law.

Jurisdictional rules may relieve the ECJ from passing its judgment on highly sensitive national constitutional choices, such as, for example, prohibition of public display of communist symbols in *Attila Vajnai* case. [32] While it is easy to agree that prohibition of red star makes part of Hungarian post-communist identity, constructed against negative historic experiences, non-economic nature of the activity brought the case outside scope of the EU law.

Implied margin of discretion is, as one can see, of jurisdictional nature and the ECJ controls it by functional concepts such as *economic activity*, *undertaking*, *official authority* or *internal situation*.

Substantive conflicts

A more complicated situation arises when a conflict cannot be avoided by jurisdictional means. In such situations one value has to prevail over another. The ECJ has already dealt with such situations in *Schmidberger*, *Omega* and *Küçükdeveçı*. [33] In all such situations the following general rule applies: once a case is brought within scope of EU law, either by direct application of a Treaty rule or by a directive, a rule or a general principle of EU law can have exclusionary effects. This is also the instance

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[28] Case C-36/02, *Omega Spielhallen- und Automatenaufstellungs-GmbH v Oberbürgermeisterin der Bundesstadt Bonn*, (2004) ECR I-9609

[29] Joined cases C-188/10 and C-189/10 *Aziz Melki and Sélim Abdeli,* not yet reported.

[30] Case C-159/90, *The Society for the Protection of Unborn Children Ireland Ltd v Stephen Grogan and others* (1991) ECR 4685

[31] Protocol annexed to the Treaty on European Union and to the Treaties establishing the European Communities

[32] Case C-328/04 *Criminal proceedings against Attila Vajnai*, (2005) ECR I-8577

[33] Case C-555/07 *Seda Küçükdeveçi v Swedex GmbH & Co. KG*., not yet reported

where concept of national identity can have a bite and, possibly, restrict exclusionary effects of EU law. *Hic Rhodus, hic salta*!

The three mentioned cases are, however, different as to the nature of protected national value. In *Schmidberger* it was a freedom of assembly as a fundamental right, in Omega – human dignity as a fundamental constitutional value and in *Küçükdeveçı* an instrument of social policy. [34] Moreover, while freedom of assembly is a value endorsed by the EU and all the Member States, human dignity, was at material time, before entry into force of the Charter of Rights of the EU, [35] a specific characteristic of German constitutional order that was compatible with EU values [36] but not necessarily recognized at constitutional level by other Member States. Similar can be said for social policy measures where the Member States, by the very nature and Treaty-entrenched choice, exercise wide discretion. Do these differences bear any significance in respect of breadth of the margin of discretion?

Broader referentıal framework

In all the three cases, the ECJ insists on legitimate aim of national regulation. [37] As long as that aim is juxtaposed to a market freedom, a condition of its legitimacy is compatibility with a broader referential framework of EU Law. In two out of three mentioned cases this was the case, as national measures were found to be compatible with general principles of EU law. [38] In *Küçükdeveçi* the national measure was found in accordance with the aims of a directive, [39] but not in accordance with a broader referential rule – general principle of non-discrimination. In other words, while, in *Schmidberger* and *Omega*, the tension existed between a market freedom and a fundamental right, there was no tension within the broader referential framework of values. Legitimacy of national measures was found to be compatible with general principles of EU law. However, in *Küçükdeveçi*, the situation was different as the way in which national authorities exercised their discretion turned to impinge upon prohibition of discrimination on grounds of age. In other words, there was no compatibility of national law and EU law at the broader referential framework and national law had to be set aside.

Protection of fundamental rights is an important element of identity both of the EU and her Member States. In that respect, neither *Schmidberger* nor *Omega*, represent a test for the national identity guarantee of the Treaty.

Nor does the *Küçükdeveçı*, though for different reasons. Policy is a variable contents of national government, so is social policy. It is at discretion of executive branch to formulate and implement various

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[34] *Id*., § 36 of the judgment

[35] The Charter guarantees human dignity in Art. 1

[36] *Omega*, § 34 of the judgment

[37] *Schmidberger* §§ 79 and 80; *Küçükdeveçi* § 36; *Omega* § 35

[38] *Schmidberger* §§ 71-73; *Omega* § 34

[39] *Küçükdeveçi* § 36

policies, and for that reason there can be no equation mark between policy and national constıtutıonal identity. EU law does not prescrıbe any given direction in which Member States should frame their social policy and does not interfere with Member States' choice to constitute themselves as a welfare state. The true conflict between EU law and natioanal constitutional identity would emerge only if EU law would touch upon the fundamental constitutional choice of a Member State to constitute itself within certain socio-economic framework. [40]

To conclude, the second period in which national identity guarantee was framed did not bring about a meaningful definition of national identity and, accordingly, about resolution of the tension between national identity and freedoms of the internal market.

Third phase: differentiation of constitutional rules

It was only after signature of the failed Constitutional Treaty that national identity guarantee was linked directly not to a vague concept of national identity, but to a somewhat more concrete concept of constitutional identity. It was only after entry into force of the Treaty of Lisbon that this linkage obtained legal significance.

It has to be said that not every national constitutional provision is automatically a constituent part of national identity. While it has been suggested by AG Maduro in *Michaniki* that a contested rule of the Greek constitution should be understood as an element of national identity, [41] the ECJ simply assessed the contested rule according to the usual proportionality test. [42] Its legitimacy depended on the extent it pursued interests of transparency and equal treatment, which are at the same time principles defined by EU law.

Function of Art. 4(2) TEU

Approach of the ECJ in *Michaniki* led Besselink to suggest that "… more trivial provisions of national constitutional law – those which do not form part of the constitutional identity of the Member State – are not granted such priority (over EU law SR), and the normal *Costa* doctrine of the priority of directly effective EU law prevails." [43] If this interpretation is correct, then the function of Art. 4(2) TEU would be to distinguish between essential and non-essential elements of national constitutions and subject them different intensity of judicial scrutiny.

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[40] Arguably, such a conflict would emerge if a Member State would opt to abandon market economy, which is a condition of EU membership

[41] *Michaniki*, *supra*, note 1, § 33 of the Opinion

[42] See Vasiliki Kosta, *Case C-213/07, Michaniki AE v. Ethniko Simvoulio Radiotileorasis*, *Ipourgos Epikratias,* 5 EUR. CONST. L. REV. (2009) 501

[43] This led Besselink to suggest that "… more trivial provisions of national constitutional law – those which do not form part of the constitutional identity of the Member State – are not granted such priority, and the normal Costa doctrine of the priority of directly effective EU law prevails." Leonard F. M. Besselink, *National and constitutional identity before and after Lisbon*, 6 UTRECHT L. REV 3 (2010) 36, 49

In the former instance the ECJ would perform proportionality test under which a national identity claim would not be an automatic justification for departure from economic freedoms. Provided a regulatory aim is legitimate, national measure will still need to be appropriate and necessary, regardless whether it can be characterized as an element of national identity or not. [44] Member States will enjoy a margin of discretion, however, only insofar their measures can be reconciled within the broad referential framework of EU law. [45] In the latter case the ECJ would defer the decision to the national judicial or legislative authorities, with (*Omega*) or without (*SPUC v Grogan*) reserving a proportionality test for itself.

In support of such interpretation witnesses the fact that, so far, the ECJ has been more generous to grant margin of appreciation in cases involving fundamental rights guarantees and national constitutional values then in cases involving ordinary national law, even in case of well established national principles of civil law. [46]

Idea that some constitutional rules are capable of triggering the national identity guarantee under Art. 4(2) TEU while some are not was introduced by Advocate General Maduro in *Michaniki* where, [47] in § 33 of his opinion, he implied that national identity is not absolute. Apparently, in § 33 he distinguishes between national constitutional rules that do justify judicial deference from those which do not. [48] The same thought

[44] *Schmidberger*, §§ 82-87; *Kücükdeveci* § 37; *Omega* § 36

[45] As far as margin of discretion is concerned, in *Küçükdeveçı* (§ 38) the ECJ re-stated its well established position that Member States enjoy a wide margin of discretion in framing their respective social policies. In *Schmidberger* (§ 89) broad margin was allowed to national authorities in striking the balance between a fundamental right and market freedom. In *Omega* (§ 31), again, the margin was decided to be broad.

[46] In *Traghetti del Mediterraneo* the ECJ precluded application of national law excluding State liability for damages for breach of EU law for damage caused to individuals by an infringement attributable to a court adjudicating at last instance, and restricting liability for damages rising from erroneous application of EU law by a national court to cases of intentional fault, serious misconduct and denial of justice is precluded by EU law. In such a case Simmenthal mandate is fully applicable and national court has to set the national legal rule aside.

Case C-173/03, *Traghetti del Mediterraneo SpA v Repubblica italiana* (2006) ECR I-5177, § 46 of the judgment

[47] "It is, nevertheless, necessary to point out that that respect owed to the constitutional identity of the Member States cannot be understood as an absolute obligation to defer to all national constitutional rules. Were that the case, national constitutions could become instruments allowing Member States to avoid Community law in given fields."

[48] See § 33 of the Opinion: "It is, nevertheless, necessary to point out that that respect owed to the constitutional identity of the Member States cannot be understood as an absolute obligation to defer to all national constitutional rules." Wording "all national constitutional rules" implies that there may be some constitutional rules which automatically trigger deference.

was introduced by Advocate General Kokkot in *UGT-Rioja* [49] where she interpreted the ECJ's position concerning the balance between respect for national constitutional principles and observance of EU Law. [50] According to the Advocate General, while the ECJ respects local autonomy as defined by a national constitution, "… the Member States cannot hide behind their constitutional order and circumvent the prohibition on aid under Article 87 EC through a purely formal transfer of legislative powers." [51] Whether that was the case was left to the national court to decide. [52]

As far as the ECJ is concerned, in 1996, in *Commission v. Luxembourg*, [53] the ECJ recognized national identity as a legitimate aim, however, subject to application of proportionality test. [54] Accordingly, a Member State may not invoke national identity in order to derogate from a market freedom as long as there is an alternative less restrictive to freedom of movement.

More recently, the ECJ supported the differentiation thesis in *Rottman*, decided in March 2010, [55] where the referring court suggested that

> "… the effect of assuming that there existed, in European Union law, an obligation to refrain from withdrawing naturalisation obtained by deception would be to strike at the heart of the sovereign power of the Member States." [56]

In his Opinion in *Rottman* AG Maduro suggested that power to deprive a person from a Member State citizenship makes an "essential element" of a Member State's national identity, since it affects the composition of the national body politic. Accordingly, making national citizenship dependent on EU citizenship would contravene Article 6(3) TEU (now 4(2) TFEU). This, however, follows, not from the national identity provision alone, but from the very architecture of Union Citizenship, which is explicitly made secondary to the national. Accordingly, the ECJ played down the Advocate General's argument and decided the case on grounds of exclusionary effects of EU citizenship law, along the *Maruko*-type reasoning.

Even more recently, national identity was claimed as derogation in the notaries' cases, decided in May 2011. [57] The argument introduced by the

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[49] Joined cases C-428/06 to C-434/06 *Unión General de Trabajadores de La Rioja (UGT-Rioja) and Others v Juntas Generales del Territorio Histórico de Vizcaya and Others* (2008) ECR I-6747, §§ 56-57

[50] Advocate General referred to Case C-88/03 *Portuguese Republic v Commission of the European Communities* (2006) ECR I-7115

[51] *Id*., § 57 of the Opinion

[52] *UGT-Rioja* § 144

[53] Case C-473/93 *Commission v Luxembourg* (1996) ECR I-3207, § 35

[54] *Id.*

[55] Case C-135/08, *Janko Rottman v Freistaat Bayern*, not yet reported, § 25 of the Opinion

[56] *Id*., § 32 of the judgment

[57] Cases C-47/08, C-50/08, C-51/08, C-53/08, C-54/08, C-61/08 and C-52/08 *Commission v Belgium, France, Luxembourg, Austria, Germany, Greece and Portugal*

Grand Duchy, was that the use of the Luxemburgish language "... is necessary in the performance of notarial activities, the nationality condition at issue is intended to ensure respect for the history, culture, tradition and national identity of Luxembourg within the meaning of Article 6(3) EU" which was applicable at material time. [58] However, the ECJ was not impressed by the argument, invoking its earlier position according to which national identity can be "... effectively safeguarded otherwise than by a general exclusion of nationals of the other Member States." [59] What is noteworthy is that the ECJ, in § 124 of the judgment, invoked its 2006 judgment speaking about Art. 4(2) TEU under the Treaty of Lisbon, thus, indicating that there was no substantial change between Maastricht, Amsterdam and Lisbon utterances.

On the balance, national identity claims had a limited success in the pre-Lisbon era. On the one side, Member States were successful in what I called implied margin of discretion cases where the ECJ refused to rule on national value choices on jurisdictional grounds. However, on the substantive count, national identity justification has been argued a number of times in order to justify restriction of market freedoms, with a limited success. When it comes to substantive conflicts the ECJ treated national identity as a general justification and balanced it against market freedoms or other values of EU law.

National Identity and the Treaty of Lisbon

Art. 4(2) TFEU added some clarity to the concept of national identity guarantee by defining it as national "fundamental structures, political and constitutional". More interestingly, newly phrased Art 4(3) introduced a more balanced approach into the duty of loyal cooperation. According to the new wording, "[p]ursuant to the principle of sincere cooperation, the Union and the Member States shall, in full mutual respect, assist each other in carrying out tasks which flow from the Treaties." This is not quite the same as former Art. 10 TEC, according to which, addressees of the duty of loyal cooperation were only the Member States. A long line of cases based on Art. 10 TEC concretized that provision into obligations of Member States such as the obligation of EU-friendly interpretation, [60] or the obligation to make good damages for breach of EU law. [61] Now, for the first time the duty of cooperation has become reciprocal, that is, binding on the EU and on the Member States at the same time.

Reading sections (2) and (3) of Art. 4 TFEU together, two questions arise. First to what extent these provisions, taken together, can be interpreted as creating an enforceable obligation for the EU to interpret national law

[58] Case C-52/08 *Commission v Luxembourg*, § 72 of the judgment

[59] Id., § 124 of the judgment

[60] Case 14/83 *Sabine von Colson and Elisabeth Kamann v Land Nordrhein-Westfalen*, (1984) ECR 1891

[61] Joined cases C-6/90 and C-9/90 *Andrea Francovich and Danila Bonifaci and others v Italian Republic* (1991) ECR I-5357

taking into account national identity and, second, to what extent do they authorize the Member States to derogate from EU law on grounds of national identity?

European Court of Justice

There are two recent cases referring to national identity which were decided after entry into force of the Treaty of Lisbon - *Sayn Wittgenstein* decided on December 22, 2010, [62] and *Runevič-Vardyn*, decided on May 12, 2011. [63] In both cases, situation involved a tension between national constitutional identity on one side and freedom of movement under Art. 21 TFEU and right to privacy [64] on the other.

Sayn-Wittgenstein

Sayn-Wittgenstein concerned an Austrian-born-German-adopted women of Austrian citizenship, claiming her right to have her nobility title (Fürstin von Sayn-Wittgenstein), acquired by adoption from her adoptive father, entered into Austrian register of civil status. Being a real estate agent, impossibility to use the title of *Fürstin* would impair her freedom to provide services.

According to Austrian government, allowing registration of a noble title would be incompatible "...with the fundamental values of the Austrian legal order, in particular with the principle of equal treatment enshrined in Article 7 of the Federal Constitutional Law and implemented by the Law on the abolition of the nobility." [65]

While the ECJ recognized that national identity may be taken in consideration in proportionality analysis, it clarified that reliance on national identity should be treated as a public policy justification [66] that, in accordance with earlier case law, [67] has to be interpreted strictly, as a "genuine and sufficiently serious threat to a fundamental interest of society." [68] In addition, the ECJ allowed margin of discretion, in accordance with § 31 of its reasoning in *Omega*. Finally, in § 93, the ECJ performed the balancing test itself and concluded that Austria acted proportionately in pursuance of a legitimate constitutional aim. The ECJ paid attention to right to privacy under the Charter and the Convention, but the issue was not further discussed.

Runevič-Vardyn

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[62] Case C-208/09 *Ilonka Sayn-Wittgenstein v Landeshauptmann von Wien*, not yet reported

[63] Case C-391/09 *Malgožata Runevič-Vardyn and Łukasz Paweł Wardyn v Vilniaus miesto savivaldybės administracija and Others*, not yet reported

[64] As guaranteed by Art. 7 of the Charter of Fundamental Rights of the EU (hereinafter the Charter) and by Art. 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter the Convention).

[65] *Sayn-Wittgenstein* § 76

[66] *Id.* §§ 83-84

[67] Case C-36/02 *Omega* (2004) ECR I-9609, § 30, and Case C-33/07 *Jipa* (2008) ECR I-5157, § 23

[68] *Sayn-Wittgenstein* § 86

Runevič-Vardyn concerned a case of a woman who wanted to have the spelling of her family name amended in birth and marriage certificate in letters of alphabet not existing in Lithuanian alphabet. [69] The ECJ first emphasized in § 66 that "… person's forename and surname are a constituent element of his identity and of his private life…" protected both, under the Charter and the Convention and continued with finding that Art. 21 TEU free movement guarantee applied to the case.

While protection of a State's national language, as a part of national identity protected by Article 4(2) TEU, is a value that European Union must respect (§ 86). Accordingly, national identity had to be balanced with, both, free movement and right to private life.

On the first point, the tension between Article 21 TFEU free movement guarantee and Art. 4(2) TEU national identity provision, the ECJ followed the *Sayn-Wittgenstein* argumentation. If within scope of Art. 21, a national restriction of the freedom of movement can be justified only subject to proportionality test. However, unlike in *Sayn-Wittgenstein* where the ECJ performed balancing itself, in *Runevič-Vardyn*, proportionality test was deferred to the national court. [70]

On the second point the ECJ ruled on the relationship between individual rights and national identity. Again, it is upon national court to establish whether the national rule leading to refusal of amendment of personal name in relevant documents "… causes serious inconvenience to them and/or their family, at administrative, professional and private levels…". Accordingly, the national court will have to decide whether a fair balance between the interests in issue has been struck. [71]

Deferrence in preliminary reference proceedings

As it can be seen, in the both cases, which now appear to be settled case law, national identity guarantee has to be interpreted narrowly, but remains an element of balancing analysis. The question remains why in the former case balancing was performed by the ECJ, while it was left to a national court in the latter? One of the obvious reasons lies in the fact that republican form of government is not a negotiable issue and it would not be reasonable to expect from the national court to set it aside on account of a freedom of movement. On the other hand, while language does indeed represent an element of national identity, it is not unthinkable for

[69] As it follows from § 22 of the judgment, name 'Malgožata Runevič', was to be changed to 'Małgorzata Runiewicz' and on the marriage certificate, from 'Malgožata Runevič-Vardyn', 'Małgorzata Runiewicz-Wardyn'.

[70] *Runevič-Vardyn*, § 83 of the Judgment: "In the event that the national court finds that the refusal to amend the joint surname of the applicants in the main proceedings constitutes a restriction of Article 21 TFEU, it should be noted that, according to settled case-law, a restriction on the freedom of movement of persons can be justified only where it is based on objective considerations and is proportionate to the legitimate objective of the national provisions (see, inter alia, Grunkin and Paul , paragraph 29, and Sayn-Wittgenstein , paragraph 81)." However, in civil law tradition, it is questionable to what extent a national court will be prepared to interpret black-letter law.

[71] *Runevič-Vardyn*, § 91

a national court to allow for exceptions in case of personal names. However, when it came to assessment of a fundamental right against national constitutional identity, the ECJ deferred to the national court.

Infraction proceedings

While in preliminary reference cases the ECJ has a choice, either to balance national identity and a EU freedom itself, or to defer to a national court, in infraction proceedings there is no such choice. Deference in infraction proceedings would entail leaving the final judgment to national legislative authorities and solving the case in favor of a Member State. However, as we have seen from Luxembourg official authority cases [72] the ECJ preferred to do the job on grounds of the least restrictive alternative. [73] In the both cases, just like in *Sayn-Wittgenstein* and *Runevič-Vardyn* national identity was understood as a legitimate aim which, as an exception to a freedom of movement, had to be interpreted restrictively and subject to proportionality test.

Also, it has to be recognized, that both pre-Lisbon Luxembourg cases, discussed above, dealt with exercise of official authority, an area of law in which the ECJ insists on uniform approach. Being an exception from market freedoms, official authority exception not only has to be interpreted narrowly, but has to be given

> "…uniform interpretation and application throughout the Community and cannot therefore be left entirely to the discretion of the Member States." [74]

Apparently, the approach of the ECJ has not changed and still relies on narrow interpretation of official authority, even in face of national identity arguments. Preliminary reference cases dealing with concept of official authority also follow the pattern. [75] Such a position, apparently, confirms Besselink's claim that constitutional identity, even inherently national is, in fact, a concept of EU law. [76]

Admittedly, the ECJ has no jurisdiction to interpret national law, even more so, national constitutional law. [77] Besselink suggests a solution according to which national constitutional courts are first to determine

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[72] Case C-473/93 *Commission v. Luxembourg* (1996) ECR I- 3207 and Case C-51/08 *Commission v. Luxembourg*

[73] Case C-473/93 *Commission v. Luxembourg* (1996) ECR I- 3207, § 35; Case C-51/08 *Commission v. Luxembourg*, § 124

[74] Case C-405/01 *Colegio de Oficiales de la Marina Mercante Española* (2003) ECR I-10391. § 38. See also Case 152/73 *Giovanni Maria Sotgiu v Deutsche Bundespost* (1974) ECR 153, § 5, and Case 149/79 *Commission v Belgium* (1980) ECR 3881, §§ 12 and 18

[75] For recent practice see e.g. Joined Cases C- C-372/09 and C-373/*09 Josep Peñarroja Fa*, judgment of March 17, 2011, not yet reported. For earlier case law see e.g. Case C-42/92 *Adrianus Thijssen v Controledienst voor de verzekeringen* (1993) ECR I-4047

[76] Leonard F. M. Besselink, *National and constitutional identity before and after Lisbon*, 6 UTRECHT L. REV 3 (2010) 36, 37

[77] *Id*, at p. 44

the substance of national constitutional identity, while the ECJ would determine the meaning of the relevant EU law. Indeed, national identity is primarily [78] constructed at national level, not only as a matter of law but, indeed, as a matter of common sense. [79]

However, that being so does not make national identity absolute. If it were the case, application of Art. 4(2) TEU guarantee could be triggered by a mere claim that certain value represents a part of national identity in which case the ECJ would have to exercise self-restraint. In other words, it would provide for immunity of national law from application of EU law, which is, obviously, not the case.

There are only a few hints, so far, that the ECJ is prepared to defer to national authorities. Most recently that was the case in *Runevič-Vardyn*, where the ECJ left to the national court to balance individual rights against national constitutional identity itself. An earlier example can be found in *UGT-Rioja*, which was discussed above. [80]

This may be a signal indicating approach of the ECJ in future cases. Namely, even apart of national identity cases, the ECJ is in habit of leaving to national courts to establish relevant facts and balance the finding with a relevant national regulatory interest. Example of such practice is well illustrated by *Familiapress* [81] where freedom of press and press diversity stood in way of application of national and EU competition rules. Therefore, *Runevič-Vardyn* looks rather as continuance of earlier practice then like a venture into a new one.

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[78] Iris Marion Young has demonstrated how dominant culture can impose identity on minority social groups, thus creating a phenomenon of double identity. See Iris Marion Young, JUSTICE AND POLITICS OF INTEREST, at pp. XXX. Therefore it does not seem unthinkable that national identity can be constructed by external actors.

[79] For the same argument see Opinion of AG Maduro in C-53/04 *Cristiano Marrosu and Gianluca Sardino v Azienda Ospedaliera Ospedale San Martino di Genova e Cliniche Universitarie Convenzionate*, (2006) ECR I-7213, § 40: "Doubtless the national authorities, in particular the constitutional courts, should be given the responsibility to define the nature of the specific national features that could justify such a difference in treatment. Those authorities are best placed to define the constitutional identity of the Member States which the European Union has undertaken to respect." The ECJ, however, ignored the argument.

[80] *Supra*, *note* 49 at § 144: " It is for the national court, which alone has jurisdiction to identify the national law applicable and to interpret it, as well as to apply Community law to the cases before it, to determine whether the Historical Territories and the Autonomous Community of the Basque Country have such autonomy, which, if so, would have the result that the laws adopted within the limits of the areas of competence granted to those infra-State bodies by the Constitution and the other provisions of Spanish law are not of a selective nature within the meaning of the concept of State aid as referred to in Article 87(1) EC."

[81] Case C-368/95 *Vereinigte Familiapress Zeitungsverlags- und vertriebs GmbH v Heinrich Bauer Verlag* (1997) ECR I-03689

National developments

As it can be seen, the ECJ firmly defends the position that national identity guarantee under Art. 4(2) TFEU may not preclude application of EU law, even in cases of conflict with national constitutional rules. The same rule, which is based in Vienna Convention on the Law of Treaties, holds in infraction proceedings [82] and preliminary references cases.

Yet, constitutional identity has become a beloved theme in legal orders of some Member States. Interestingly, the battlefield on which supremacy of EU law over national constitutional rules was challenged took place not on substantive, but on procedural ground. In that way the dilemma has been transformed from question "which rule prevails" to "who decides" or, even better, "who decides last."

France

It is, probably, too simple to ascribe a revival of national constitutional identity awareness to the entry into force of the Treaty of Lisbon. Nevertheless, Michel Troper suggests that French constitutional doctrine was directly triggered by the concept of constitutional identity as introduced by the Constitutional Treaty and, later on, embraced by the Treaty of Lisbon. [83] Apparently, French constitutional reform of March 1, 2010 was motivated by an intention to insulate French constitution from European law having the last say. [84] Again, Troper puts it succinctly. Since EU law prevails over national constitutional law,

> "… a French court wishing to avoid acknowledging the supremacy of European law must use another argument than the fact that some principle of French law is a constitutional norm. This is where “constitutional identity” comes into play." [85]

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[82] For a good example how national Constitution may not justify non-implementation of a directive see Case C-323/*97Commission v Belgium* (1998) ECR I-4281, § 8: " The Court has consistently held that a Member State may not plead provisions, practices or circumstances existing in its internal legal system in order to justify a failure to comply with the obligations and time-limits laid down in a directive (see, in particular, Case C-107/96 Commission v Spain [1997] ECR I-3193, paragraph 10).

[83] Michel Troper, *Sovereignty and Laïcité*, 30 CARDOZO L. REV. 6 (2009) 2561, 2573. This is also confirmed by Josso who wrote that before the Constitutional Council's decision, there were no other statements of any specific elements of national constitutional identity; Selma Josso, *Le caractère social de la République, principe inhérent à l'identité constitutionnelle de la France*, report to the Paris Congress of Association française de droit constitutionnel, at p. 5. See http://www.droitconstitutionnel.org/congresParis/comC1/JossoTXT.pdf, visited on August 14, 2011

[84] See Biljana Kostadinov, Prethodna pitanja ustavnosti u nacionalnom pravu i pravo EU, in Tamara Ćapeta, Iris Goldner Lang and Siniša Rodin (eds.), Prethodni postupak u pravu Europske unije, Narodne novine, Zagreb 2011 (not yet published). Kostadinov refers to Valérie Bernaud, Marthe Fatin-Rouge Stéfanini, La réforme du contrôle de constitutionnalité une nouvelle fois en question? Réflexion autour des articles 61-1 et 62 de la Constitution proposé par le comité Balladur, Revue francaise de Droit constitutionel, no hors-série, 2008., p. 190.

[85] Troper, *supra*, note 83 at p. 2572

The doctrine was also embraced by the *Conseil Constitutionnel* which in 2006 adopted position according to which "… transposition of a directive may not run counter to a rule or principle inherent to the constitutional identity of France, except when the constituting power consents thereto."[86]

In order to avoid repeating the emerging literature on the point, [87] suffice it to summarize that the main effects of the French constitutional reform and, in particular, of the newly established abstract constitutional review and the "priority preliminary reference" to the Constitutional Council, run against well-established supremacy law of the ECJ. First, if a law is declared unconstitutional by the *Conseil Constitutionnel,* for being contrary to EU law, the power of an ordinary court judge to disapply it is preempted. Second, an ordinary judge is instructed not to address a preliminary reference to the EJC before the *Conseil Constitutionnel* has spoken on the matter.

The answer of the ECJ came in *Melki and Abdeli* [88] and, not surprisingly, follows the existing case law. The ECJ took effort to explain in great detail what requirements national interlocutory constitutional review has to meet in order to be compatible with EU law. As the ECJ clarified in § 57 of the judgment, Art. 267 TFEU precludes national legislation establishing interlocutory constitutional review, insofar that procedure prevents

> "… all the other national courts or tribunals from exercising their right or fulfilling their obligation to refer questions to the Court of Justice for a preliminary ruling."

In this way the ECJ maintained the judicial dialogue with ordinary courts and rendered legal opinions of the *Conseil Constitutionnel* adopted in interlocutory constitutional review procedure irrelevant from perspective of supremacy of EU law. [89]

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[86] Constitutional Council decision no. 2006-540DC, July 27, 2006, J.O. "[L]a transposition d'une directive ne saurait aller à l'encontre d'une règle ou d'un principe inhérent à l'identité constitutionnelle de la France, sauf à ce que le constituant y ait consenti." In such a case it would be national law implementing directive that would be held unconstitutional.

[87] See Federico Fabbrini, *Kelsen in Paris: France's Constitutional Reform and the Introduction of A Posteriori Constitutional Review of Legislation*, GERMAN LAW JOURNAL, Vol. 09 No. 10 (2008) 1297; Siniša Rodin, *Back to Square One - the Past, the Present and the Future of the Simmenthal Mandate,* Documento de Trabajo Serie Unión Europea, Fundación Universitaria San Pablo CEU (ur.). Madrid : Instituto Universitario de Estudios Europeos, 2011

[88] Joined cases C-188/10 and C-189/10 *Aziz Melki and Sélim Abdeli,* not yet reported. For a more detailed discussion see Siniša Rodin, *supra note* 87

[89] It should be noted that the judgment in *Melki and Abdeli*, similar to the judgment in *Elchinov*, supports *Rheinmühlen* case law according to which a referring court is not bound by legal interpretation of the national appelate court. This is an important procedural element of supremacy of EU law. See 146/73 *Rheinmühlen-Düsseldorf* (1974) ECR 139. The same follows from of C-210/06 Cartesio Oktató és Szolgáltató bt. (2008) ECR I-09641, §§ 93-98

The main problem of the French approach to constitutional identity is that it sweeps to broadly and fails to provide for its protected core.

Germany

Germany has a long record of dialogue with the ECJ. German Federal Constitutional Court triggered the evolution of protection of fundamental rights in the EU by insisting on standards of protection substantially comparable to ones under the Basic Law.

However, so far, the BVerfG has never addressed a preliminary reference to the ECJ. Instead, its influence was always exerted by its position of the "court of last say" in the European judicial dialogue. Namely, even after the ECJ has spoken on a matter of EU law, the BVerfG is still in position to pass its judgment on issues of national constitutional law and in that way to protect national constitutional identity.

In 1992, in its decision in the *Maastricht* case, [90] the BVerfG recoursed to two powerful devices: the essential contents guarantee, under which the BVerfG acts as a guardian of the core of fundamental rights under Art. 19(2) which are also protected by the constitutional eternity clause under Art. 79(3) of the Basic Law, and the *ultra vires* doctrine, according to which it can review and refuse to apply acts of the Union which are in excess of the transferred powers. [91] According to the BVerfG in *Lisbon* (inferring from the *Maastricht* judgment), constitutional identity is guaranteed by Art. 79(3) of the Basic Law and, "… the constituent power has not granted the representatives and bodies of the people a mandate to dispose of the identity of the constitution." [92] As the BVerfG clarified,

> "The obligation under European law to respect the constituent power of the Member States as the masters of the Treaties corresponds to the non-transferable identity of the constitution (Article 79.3 of the Basic Law), which is not open to integration in this respect. Within the boundaries of its competences, the Federal Constitutional Court must review, where necessary, whether these principles are adhered to." [93]

Accordingly, any act of the Union which would impinge on national constitutional identity would be *ultra vires* and, thus, inapplicable in Germany, [94] and it is for the BVerfG to protect it. [95]

In July 2010, the BVerfG has significantly narrowed the *ultra vires*

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[90] BVerfGE 89, 155

[91] The BVerfG applied this doctrine in BVerfGE 58, 1 (30-31); 75, 223 (235, 242); 89, 155 (188), and notably in the Lisbon judgment, BVerfG, 2 BvE 2/08 of 30.6.2009. See Matthias Mahlmann, *The Politics of Constitutional Identity and its Legal Frame—the Ultra Vires Decision of the German Federal Constitutional Court*, 12 GERMAN L. J. 11 (2010) 1407

[92] *Lisbon*, § 218

[93] *Lisbon*, § 235

[94] *Lisbon*, § 241

[95] *Lisbon*, § 240

doctrine in the *Honeywell* judgment [96] where the it held that, before an act of the EU can be scrutinized on *ultra vires* grounds, the ECJ should have been given an opportunity to rule on the matter, ether in an annulment action or as a matter of preliminary reference. When it comes to constitutional review, the BVerfG can declare an act of the EU *ultra vires*, however:

> "... the act of the authority of the European Union must be manifestly in violation of competences and that the impugned act is highly significant in the structure of competences between the Member States and the Union with regard to the principle of conferral and to the binding nature of the statute under the rule of law." [97]

While the BVerfG has never addressed a preliminary reference to the ECJ, § 60 of the *Honeywell* decision indicates that it is prepared to do so. Not less importantly, national court is under a constitutional obligation to refer to the ECJ, and failure to do so may lead to violation of the constitutional right to a lawful judge under Art. 101(1) of the Basic Law. [98]

Briefly, the BVerfG linked German constitutional identity to the eternal and entrenched status of fundamental rights and the core of their protection under Art. 79(3) of the Constitution. By doing so, it ensured the last say in cases involving fundamental rights but, at the same time, allowed for enough space for the ECJ to rule on interpretation and validity of EU law. Importantly, the BVerfG wrapped its doctrine into the principle of sincere cooperation under Art. 4(3) TFEU and maintained its doctrine of cooperation between the two courts as well as the doctrine friendliness to EU law. [99] Being fully aware of the ECJ's position, according to which national identity can justify departure from market freedoms only if it cannot be safeguarded in any other way, [100] the BVerfG reserved its position as a protector of national constitutional identity to situations in which fundamental political structures "cannot be safeguarded in any other way." [101]

Conclusion

Identities of the Member States are older then the Founding Treaties and exist aside and regardless of EU law. Moreover, just like individual or

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[96] BVerfG, 2 BvR 2661/06 of 6.7.2010. See Christoph Möllers, *Constitutional Ultra Vires Review of European Acts Only Under Exceptional Circumstances; Decision of 6 July 2010, 2 BvR 2661/06, Honeywell*, 7 EUR. CONST. L. REV (2011) 161

[97] *Honeywell*, §§ 60, 61

[98] *Honeywell*, §§ 88-90

[99] *Lisbon* § 240

[100] Case C-473/93 *Commission v Luxembourg* (1996) ECR I-3207, § 35; Case C-52/08 *Commission v Luxembourg*, § 124

[101] *Lisbon* § 240

group identities continue to exist in different settings of governance, national identities of the Member States will continue to exist regardless of what form or substance the EU will take in the future. In that sense, Art. 4(2) TEU reiterates a truism that national identities do exist. Having said so, it begs an answer to the question what is the legal consequence of such a recognized existence of national identities.

National identity: small and large

The Treaty of Lisbon did not significantly affect national identity jurisprudence of the ECJ. Even before its entry into force on December 1, 2009, the ECJ has developed the main interpretative strategy how to address Member States' constitutional claims. As I have demonstrated above, the pre-Lisbon case law can be grouped into three evolutionary phases. As a result, the ECJ developed its doctrine of margin of discretion, implied and explicit and made clear that national identity cannot be absolute. The ECJ also made a distinction between claims that can be called *national identity small*, that are treated like an ordinary public policy justification and claims, which can be called *national identity large*, that trigger some kind of deference to national judicial or regulatory authorities. Accordingly, a viable national identity claim makes a regulatory aim legitimate *per se*, what in NIS cases results in application of a least restrictive alternative test and in NIL cases to deference.

The Treaty of Lisbon added more clarity to the concept of national identity. As far as the Treaties are concerned, the Treaty of Lisbon was the first one to make clear that national identity refers to national constitutional and political structures. In a way, Lisbon accommodated national claims to the Vienna Convention rule that States may not claim its internal law in order to justify a violation of a treaty.

Situation is quite different if a treaty itself allows some discretion to the States and that is exactly what Art. 4(2) TEU did. However, the question remains what counts for a viable national identity claim? Is national constitutional identity, as Besselink puts it, a concept of EU law, or is there a plurality of national concepts, which have to be respected as a matter of law? A plausible first hand answer would be that a viable national constitutional identity claim has to rely on an entrenched constitutional rule, value or a fundamental choice. It must not be a mere policy choice, or grant of jurisdiction to local authorities, but has to be essential for recognition of a national constitutional order, as such, and as differentiated from other constitutional orders.

The ECJ

The post-Lisbon era brought about developments on both, European and national level. While the Treaty did not significantly affect the approach of the ECJ described above, France and Germany started to increasingly rely on constitutional identity, challenging the claim that it is an exclusive concept of EU law.

In the NIS cases, the ECJ maintained its public policy approach, combined with the least restrictive alternative test. Under that approach, national identity cannot justify restriction of market freedoms if there is an alternative, less restrictive, way to protect national identity. This is well illustrated by Commission v. Luxembourg cases, which, although decided

in different stages of European integration, follow the same pattern of analysis.

Situation is different in the NIL cases where the ECJ showed readiness either to recognize a national identity claim out of hand (*Sayn-Wittgenstein*), or to defer to the national court (*Runevič-Vardyn*). What qualified the two last mentioned cases to be treated as NIL cases? In the former case it was, apparently, a fundamental constitutional choice of republican form of government. In the latter case it was recognition of the ECJ that a national court is better equipped to do the balancing test in a sensitive language case. This approach is, however, not prompted by the Lisbon Treaty, but follows the same line of reasoning and deference which the ECJ adopted in *UGT-Rioja*, back in 2008. [102] Arguably, already back in 2008 the same provision was already present in the abort Constitutional Treaty and was an anticipated part of the incoming Treaty of Lisbon. However, it remains unclear whether the deference to the national court is motivated by a wish to defer a value choice, or by a more practical reason, that is, to allow a national court to establish relevant facts, as the ECJ did, for example, in *Familiapress*. [103]

Another tendency that can be seen from the continued line of cases decided by the ECJ is that it will be less ready to concede a national identity claim in cases where there is a well established interpretation and a need for uniform interpretation of EU law. [104]

The Member States

More substantive developments took place on the side of the Member States, notably, in France and Germany. France implemented a constitutional reform that resulted in Kelsen-like system of interlocutory constitutional review. The new mechanism was introduced in an attempt to give the *Conseil Constitutionnel* voice on European level and, possibly, pre-empt conflicts of French and EU law before they reached the ECJ. However, by focusing on a procedural instrument of interlocutory constitutional review the newly introduced system not only set the collision course with well-established preliminary reference case law of the ECJ, [105] but also fell short of defining the substantive core of French constitutional identity that could serve as a countervailing force in Art. 4(2) TEU cases.

German approach appears to be more sober. It is based on principle of cooperation and clearly defined constitutional identity core. Relationship with EU law is understood as one of cooperation, and the role of the BVerfG is complementary and subsidiary one. National constitutional identity is asserted, but dormant, allowing the BVerfG last say in critical cases, but not interfering with NIS situations.

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[102] *UGT-Rioja, supra*, *note* 49

[103] *Familiapress, supra*, *note* 81

[104] Case C-405/01 *Colegio de Oficiales de la Marina Mercante Española Supra*, *note* 74, and case law cited therein

[105] Case 146/73 *Rheinmühlen-Düsseldorf* (1974) ECR 139; more recently, see C-210/06 Cartesio Oktató és Szolgáltató bt. (2008) ECR I-09641, §§ 93-98

Art. 4(2) TEU has arguably created potential for a new balance between national identity and market freedoms and Art. 4(3) TEU has re-defined the duty of loyal (or sincere) cooperation. Under the new provision, the obligation of sincere cooperation has become reciprocal and it is for the Union and for the Member States to assist each other in performance of the Treaties.

In the context of Art. 4(2) TEU, this can mean that Member States are at liberty to define the core of national constitutional identity while the ECJ retains power to interpret the broader normative framework within which national identity operates in the EU. Too extensive interpretation of national identity clause has a potential of blocking or even reversing the course of European integration. On the other hand, too narrow interpretation would devoid Art. 4(2) of its useful effect.

Role of Art. 4(2) TEU is twofold. As a competence rule it imposes limits to EU regulation even in cases where such regulation would otherwise be permissible. As an interpretative rule it provides guidance for the ECJ and national courts how to interpret relationship between EU law and national law.

As the law apparently stands today, Member States are under an Art. 2 TEU obligation not to construe national identity in confrontation to fundamental rules, principles and values of the EU. On the other hand, the ECJ, within limits of its jurisdiction, determines to what extent the Treaties are to be interpreted as to allow a margin of discretion to national identity claims, or as to treat such claims as an ordinary public policy justification. Certainly, national constitutional courts retain the right to rule on application of national constitutional law even after the ECJ has spoken and that can lead to a collision of national constitutional law with EU law. However, we have not witnessed such a development yet.

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