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National identity: setting boundaries to European integration

Abstract

The European Union law, a new order of international law, permeates the legal orders of the Member States, binding not only states but also citizens. Permeation of the European Union law into the constitutional orders of the Member States is not unconditional. One of the limits is the national identity, understood as the constitutional identity. In legal terms, the concept of national identity is narrower than the one, characteristic for the national tradition. It is the constitutional identity that shapes the relationships between the European Union and the Member States.

The purpose of this presentation is to show what is the relationship between the European Union legal order and legal (constitutional) orders of the Member States. It will focus on such aspects as: national and constitutional identity since national identity does not match the constitutional identity to which the constitutional courts refer, the meaning of national identity in the European Union law shaped by the case law of the Court of Justice as well as the meaning and the significance of constitutional identity in the jurisprudence of constitutional courts. It must be underlined that now the respect for national identities is an obligation under the European Union law.

The main thesis is the following: the broad meaning of national identity makes it a useful formula, enabling the Member States an effective protection of their constitutional values.

Keywords: national identity, constitutional identity, constitutional courts, Court of Justice

Introductory remarks

The European Union (hereinafter: EU) is an international organization of a special and a unique character. It is characterized by its own legal order followed by the case law of the Court of Justice (hereinafter: ECJ/Court), common institutions and a well established value system. It guarantees fundamental freedoms and rights of individuals, but first and foremost it is a new and an autonomous legal order whose subjects are not only states but also citizens. However, an ever deeper integration does not change the fact that these are the Member States that are masters of the treaties. States – the high contracting parties, not only established the Communities (and then the Union), but they also advance integration processes by reforming the constituting treaties. Thus, these are the Member States that play a key role in deepening integration processes, along with political systems, institutions, values, legal traditions and political cultures, as well as constitutions and constitutional courts whose task is to guarantee the constitutional orders of the states.

Principles underlying the EU, along with the principles developed by the ECJ, enable the permeation of EU law into the legal orders of the Member States, thus making EU law a part of

national legal orders. According to the ECJ Community law (now UE law) is supreme, it is not confined to the very primacy, what in turn can lead to collisions between EU law and laws of the Member States, respectively between the ECJ and the constitutional courts of the Member States. The ECJ justifies its decisions by referring to the necessity to ensure the uniform application of EU law, whereas the constitutional courts claim that national constitutions enjoy the highest status and their task is to guarantee proper implementation of constitutional provisions, thus setting limits to an uncontrolled permeation of EU law into national legal orders. Initially, constitutional courts referred to the need to maintain the standard of protection of fundamental rights in the Communities (then in the EU), corresponding to the level of protection inherent to the Member States, while later the constitutional courts challenged *ultra vires* acts of the EU institutions, and recently they more and more often refer to national identities, in the meaning of constitutional identities.

National identity on the EU ground has a slightly different meaning than the one, national traditions prescribe. It is understood as a constitutional identity and shapes the relationships between the EU and the Member States. However, what makes national identity so emphasised by the Member States is the fact that national identity, in the meaning of an inviolate core of the Member States' constitutions, is a commitment the EU has taken on itself[1].

For the purpose of this study the following theses have been adopted: firstly, respect for national identities, in the meaning of constitutional identities, is a commitment under the EU law; secondly, recourse to constitutional identities by constitutional courts shapes the relationships between the EU and the Member States; thirdly, the broad meaning of national identity makes it a useful formula, which enables the Member States to effectively protect their constitutional values, setting limits for an uncontrolled permeation of EU law into national legal orders; fourthly, the constitutional core (constitutional identity), i.e. inalienable sovereign rights of the Member States, define the limits for integration processes.

Anchors of protection of state's constitutional foundations

States participating in integration processes, on the one hand, agree on joint exercise of competencies and authority (even transfer or 'renunciation' of some sovereign rights), whereas on the

[1] Cf. opinion of Mr Advocate General Poiares Maduro delivered on 8 October 2008 in *Michaniki AE v Ethniko Symvoulio Radiotileorasis and Ypourgos Epikrateias*, case C-213/07 (2008) ECR I-09999, where in par. 31 we read: „(…) European Union is obliged to respect the constitutional identity of the Member States. That obligation has existed from the outset. It indeed forms part of the very essence of the European project initiated at the beginning of the 1950s, which consists of following the path of integration whilst maintaining the political existence of the States" and in par. 32 we read: „(…) from that obligation imposed on the European Union by the founding instruments to respect the national identity of the Member States, including at the level of their constitutions (…) a Member State may, in certain cases and subject, evidently, to review by the Court, assert the protection of its national identity in order to justify a derogation from the application of the fundamental freedoms of movement (…) The Court has, indeed, expressly recognised that the preservation of national identity 'is a legitimate aim respected by the Community legal order' (…) The preservation of national constitutional identity can also enable a Member State to develop, within certain limits, its own definition of a legitimate interest capable of justifying an obstacle to a fundamental freedom of movement."

other, they are making efforts to ensure that EU law does not enter an area exclusively reserved for them, in other words, they want to preserve state's constitutional foundations. In one of the monographs on constitutional adjudication, the author – Krzysztof Wójtowicz – refers to the material anchors of judicial protection of state's constitutional foundations[2] to which he counts: sovereignty, fundamental rights and constitutional identity. In turn, the Polish Constitutional Court (hereinafter: CT) in the 2010 ruling referred to the normative anchors for the protection of sovereignty to which belong: art. 8(1) (Constitution as the supreme law of the land), art. 90 (procedure for binding of the Republic of Poland [hereinafter: RP] by an international agreement) and art. 91 (place of a ratified international agreement in the Polish legal order) of the Constitution[3].

As already mentioned, the material anchor of state's constitutional foundations is sovereignty to which the CT referred *inter alia* in the ruling on the constitutionality of the Lisbon Treaty (hereinafter: TL). According to the CT, the concept of sovereignty as the supreme and unlimited power, both as regards the internal relations within the state and its foreign relations is subject to changes corresponding to developments that have been taking place in the world in the last few centuries and as a result of the said changes, sovereignty is no longer perceived as an unlimited possibility of exerting influence on other states or as a manifestation of power that is free from external influences, on the contrary, freedom of state's activity is subject to international law restrictions[4]. Referring to state's obligations under international law, the CT observed that by incurring liabilities the state does not necessarily limit its freedom of activity but at times it extends its activity on the fields where it has not been present before, and the ability to incur international liabilities is what international law implies in the legal character of the state and what constitutes the identity of the state in international law, thus, this is not a factor that limits sovereignty as it originally serves as the proof of sovereignty, and as long as states maintain full ability to specify the forms of conducting state duties, which is concurrent with the competence to "determine competences", they remain – in the light of international law – sovereign subjects[5]. Also in the CT's view, incurring international liabilities and managing them do not lead to the loss or limitation of the state's sovereignty, but it is its confirmation, and the membership in the European structures does not, in fact, constitute a limitation of the state's sovereignty, but it is its manifestation[6]. Thus, the Member States retain their sovereignty due to the fact that their constitutions, which are a manifestation of the state's sovereignty, retain their significance[7]. In the CT's opinion, sovereignty of the RP is expressed in the

[2] Cf. K. Wójtowicz, *Sądy konstytucyjne wobec prawa Unii Europejskiej*, wyd. Trybunału Konstytucyjnego, Warszawa 2012, p. 103.
[3] Par. 2.2 part III of CT judgment of 24 November 2010, Ref. No. K 32/09 (OTK ZU nr 9/A/2010, poz. 108).
[4] Par. 2.1 part III of CT judgment of 24 November 2010, Ref. No. K 32/09 (OTK ZU nr 9/A/2010, poz. 108).
[5] Par. 2.1 part III of CT judgment of 24 November 2010, Ref. No. K 32/09 (OTK ZU nr 9/A/2010, poz. 108).
[6] Par. 2.1 part III of CT judgment of 24 November 2010, Ref. No. K 32/09 (OTK ZU nr 9/A/2010, poz. 108).
[7] Par. 2.1 part III of CT judgment of 24 November 2010, Ref. No. K 32/09 (OTK ZU nr 9/A/2010, poz. 108).

inalienable competences of the state's organs, constituting the constitutional identity of the state[8]. And the accession to the EU and the relevant conferral of competences do not entail surrendering sovereignty to the EU and the limit of conferral of competences is determined in the Preamble of the Constitution by recognizing the state's sovereignty as a national value[9]. Likewise in the opinion of K. Wójtowicz constitutional courts, including the CT, take a stance that maintaining sovereignty requires the Member State to retain a certain scope of competences, which can be defined as an inviolable core of sovereignty[10].

Another material anchor of state's constitutional foundations are fundamental rights. As is well known fundamental rights did not constitute a part of the founding treaties, so the task of introducing them into the Community's legal order fell to the ECJ. The CT in the ruling on the constitutionality of the accession treaty also referred to the issue of the protection of fundamental rights. The CT observed that both the Constitution of RP and the Community law are based on the same set of common values that define the nature of the democratic state based on the rule of law and the catalogue and the content of fundamental rights, and the result of common to all Member States axiology of legal systems is also this that rights guaranteed in the European Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter: ECHR/Convention) and these stemming from the constitutional traditions common to the Member States form the general principles of Community law – the fact that facilitates the co-application and friendly interpretation of national and Community law[11]. In the Court's opinion Community law (now EU law) does not arise in an abstract and free from the influence of the Member States and their communities European space, it is not arbitrarily created by the European institutions but is the result of joint action[12]. In turn, the norms of the Constitution within the field of individual rights and freedoms indicate a minimum and unsurpassable threshold which may not be lowered or questioned as a result of the introduction of Community provisions and the Constitution serves as a guarantee of the rights and freedoms defined therein for all actors active in the sphere of its application, and the principle of interpreting domestic law in a manner "sympathetic to European law" has its limits, in no event may it lead to results contradicting the explicit wording of constitutional norms or irreconcilable with the minimum guarantee functions realized by the Constitution[13]. Similarly, in the 2011 ruling initiated in the way of a constitutional complaint, the CT observed that the constitutional norms in the realm of rights and freedoms of an individual set a threshold which may not be lowered or challenged as a result of an introduction of EU regulation, and interpretation consistent with EU law has its limits, it may not lead to results which contradict the explicit wording of the constitutional norms and which are

[8] Par. 2.1 part III of CT judgment of 24 November 2010, Ref. No. K 32/09 (OTK ZU nr 9/A/2010, poz. 108).
[9] Par. 2.2 part III of CT judgment of 24 November 2010, Ref. No. K 32/09 (OTK ZU nr 9/A/2010, poz. 108).
[10] Cf. K. Wójtowicz, *Sądy*… op. cit., s. 110.
[11] Par. 8.3 part III of CT judgment of 11 May 2005, Ref, No. K 18/04 (OTK ZU nr 5/A/2005, poz. 49).
[12] Par. 6.2 part III of CT judgment of 11 May 2005, Ref, No. K 18/04 (OTK ZU nr 5/A/2005, poz. 49).
[13] Par. 6.4 part III of CT judgment of 11 May 2005, Ref, No. K 18/04 (OTK ZU nr 5/A/2005, poz. 49).

incompatible with the minimum of the guarantees provided by the Constitution, while the scope of the powers of an international organization, a member of which is the RP should be delineated in such a way so that the protection of human rights could be guaranteed to a comparable extent as in the Constitution[14]. In the Court's view the comparability concerns the catalogue of the rights, on the one hand, and the scope of admissible interference with the rights, on the other, and the requirement of appropriate protection of human rights pertains to their general standard, and does not imply the necessity to guarantee identical protection of each of the rights analyzed separately[15].

The issue of sovereignty and the protection of fundamental rights have also been raised by the constitutional courts of other Member States. And as has been already mentioned, the material anchor of state's constitutional foundations defines also national identity, in the meaning of constitutional identity – a commitment addressed as well to the EU legislator. It should be added that the Member States, when challenging EU law, are also referring to the principle of attributed powers, pointing to the *ultra vires* acts of the EU institutions.

National vs. constitutional identity

According to the Advocate General (hereinafter: AG) Miguel Poiares Maduro national identity comprises constitutional identity of the Member States, what has been confirmed in art. I-5 of the Treaty establishing a Constitution for Europe and in art. 4(2) of the Treaty on European Union (hereinafter: TUE) as amended by the TL, where we can read that the Union respects national identities of Member States, inherent in their fundamental structures, political and constitutional. The AG Maduro further states that the EU is obliged to respect constitutional identity of the Member States, an obligation, which has existed from the outset and which forms part of the very essence of the European project initiated at the beginning of the 50., and which consists of following the path of integration whilst maintaining the political existence of the states[16]. Also according to the AG Maduro, if respect for constitutional identity of the Member States can constitute a legitimate interest which, in principle, justifies a restriction of the obligations imposed by Community law (now EU law), it can all the more be relied upon by a Member State to justify its assessment of constitutional measures which must supplement Community legislation in order to ensure observance, on its territory, of the principles and rules laid down by or underlying that legislation, moreover it is 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, and just as

[14] Par. 2.9 part III of CT judgment of 16 November 2011, Ref, No. SK 45/09 (OTK ZU nr 9/A/2011, poz. 97).
[15] Par. 2.9 part III of CT judgment of 16 November 2011, Ref, No. SK 45/09 (OTK ZU nr 9/A/2011, poz. 97).
[16] Cf. opinion of Mr Advocate General Poiares Maduro delivered on 8 October 2008 in *Michaniki AE v Ethniko Symvoulio Radiotileorasis and Ypourgos Epikrateias*, case C-213/07 (2008) ECR I-09999, par. 31.

Community law takes the national constitutional identity of the Member States into consideration, national constitutional law must be adapted to the requirements of the Community legal order[17].

In turn, in the Massimo La Torre's view respect for national constitutional identities implies the assumption that there is a European constitutional law, and that such law is built upon national constitutional laws, *ergo* the beginning of the process of integration is to be found in the national constitutional clauses that opened up and mandated integration[18]. La Torre also states that national constitutional identity offers a shield with which to protect national constitutions against self-generated integrative pressures[19]. Constitutional identity can also be understood as a recognition of cultural and national identity by way of reflection on fundamental rights accepted in a given society[20]. And according to K. Wójtowicz, national identity not only refers to culture, language or customs, but is linked up to the state identity that results from the very existence of the state as a separate entity[21].

National identity under EU law

As has been already mentioned, respect for national identities in the meaning of constitutional identities is a commitment under EU law. For the first time the reference to national identity was included in the Treaty of Maastricht. In art. F(1) TEU we can read that the Union shall respect national identities of its Member States, whose systems of government are founded on the principles of democracy. And now the relevant provision is provided for in art. 4(2) TEU (Lisbon), which states that 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. Similar wording contains the Charter of Fundamental Rights (hereinafter: CFR/Charter), where in the preamble we learn that the Union contributes to the preservation and to the development of common values while respecting the diversity of the cultures and traditions of the peoples of Europe as well as the national identities of the Member States and the organization of their public authorities at national, regional and local levels.

Leonard Besselink draws our attention to the fact that national identity does not necessarily coincide with the identity of the state and the wordy formulation, which can be found in the TL emphasizes the political and constitutional aspects[22]. So, to the extent that the TL focuses on state structures, there is a shift in emphasis from national identity as such to constitutional identity[23].

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[17] Cf. opinion of Mr Advocate General Poiares Maduro delivered on 8 October 2008 in *Michaniki AE v Ethniko Symvoulio Radiotileorasis and Ypourgos Epikrateias*, case C-213/07 (2008) ECR I-09999, par. 33.
[18] Cf. M. La Torre, *A Weberian Moment for Europe? Constitutionalism and the crises of European Integration*, European Public Law, vol. 20, iss. 3, 2014, p. 423.
[19] Ibidem, p. 423-424.
[20] Cf. M. Zirk-Sadowski, *Tożsamość konstytucyjna a prawo europejskie*, Analizy Natolińskie, 1(53)2012, p. 1.
[21] Cf. K. Wójtowicz, *Sądy*… op. cit., p. 118.
[22] Cf. L.F.M. Besselink, *National and constitutional identity before and after Lisbon*, Utrecht Law Review, vol. 6, iss. 3, November 2010, p. 42.
[23] Ibidem, s. 44.

Besselink also draws our attention to the fact that the provision of art. 4(2) TEU forms an important qualification of the primacy rule of EU law and a modification of the case law under *Costa v ENEL*. This exception to the primacy of EU law (or precisely to the supremacy rule) seems to be restricted to issues of constitutional identity, what in turn suggests that constitutional provisions which are not fundamental and hence do not contribute to the very identity of the constitution do not share in that privileged position vis-à-vis EU law[24].

As well as being said, clarification (or rather explanation) of the meaning of the concept of national identity is a task left to the ECJ. In the 1989 ruling the ECJ observed that although Irish is not spoken by the whole Irish population, the policy followed by Irish governments for many years has been designed not only to maintain but also to promote the use of Irish as a means of expressing national identity and culture, hence the obligation imposed on lecturers in public vocational education schools to have certain knowledge of the Irish language is one of the measures adopted by the Irish government in furtherance of that policy[25]. The Court continued that the EEC Treaty does not prohibit the adoption of a policy for the protection and promotion of a language of a Member State which is both the national language and the first official language, however, the implementation of such a policy must not encroach upon a fundamental freedom such as that of the free movement of workers, therefore, the requirements deriving from measures intended to implement such a policy must not in any circumstances be disproportionate in relation to the aim pursued and the manner in which they are applied must not bring about discrimination against nationals of other Member States[26].

As well on the issue of national identity the ECJ has spoken up in the 1996 ruling. In the proceedings before the ECJ the government of the Grand Duchy of Luxembourg maintained that teachers must be Luxembourg nationals in order to transmit traditional values and that, in view of the size of the country and its specific demographic situation, the nationality requirement is an essential condition for preserving Luxembourg's national identity, thus its identity could not be preserved if the majority of teachers came from other states of the Community[27]. In response the ECJ observed that whilst the preservation of the Member States' national identities is a legitimate aim respected by the Community legal order, the interest pleaded by the Grand Duchy can, even in such particularly sensitive areas as education, still be effectively safeguarded otherwise than by a general exclusion of nationals from other Member States[28]. Therefore the protection of national identity cannot justify exclusion of nationals of other Member States from all the posts in an area such as education, with the

[24] Ibidem, p. 48.
[25] Judgment of the Court of 28 November 1989, *Anita Groener v Minister for Education and the City of Dublin Vocational Educational Committee*, case C-379/87, ECR (1989) 03967, par. 18.
[26] Judgment of the Court of 28 November 1989, *Anita Groener v Minister for Education and the City of Dublin Vocational Educational Committee*, case C-379/87, ECR (1989) 03967, par. 19.
[27] Judgment of the Court of 2 July 1996, *Commission of the European Communities v Grand Duchy of Luxemburg*, case C-473/93, ECR (1996) I-03207, par. 32.
[28] Judgment of the Court of 2 July 1996, *Commission of the European Communities v Grand Duchy of Luxemburg*, case C-473/93, ECR (1996) I-03207, par. 35.

exception of those involving direct or indirect participation in the exercise of powers conferred by public law and duties designed to safeguard the general interests of the state or of other public authorities[29].

And also on the issue of national identity the ECJ has commented in the 2010 ruling. This time the Austrian government raised that the provisions at issue in the main proceedings are intended to protect the constitutional identity of the Republic of Austria, hence the law on the abolition of the nobility, even if it is not an element of the republican principle which underlies the federal constitutional law, constitutes a fundamental decision in favour of the formal equality of treatment of all citizens before the law, and no Austrian citizen may be singled out by additional elements of a name in the form of appellations pertaining to nobility, titles or ranks, the only function of which is to distinguish their bearer from other persons, and which have no connection with his profession or education[30]. In turn, the Commission (hereinafter: EC) maintained that the name 'Fürstin von Sayn‑Wittgenstein' was lawfully acquired in Germany, even if it was acquired by mistake, additionally that name has already been recognised by the Austrian authorities, even if that too was the result of an error[31]. In response the ECJ observed that in the context of Austrian constitutional history, the law on the abolition of the nobility, as an element of national identity, may be taken into consideration when a balance is struck between legitimate interests and the right of free movement of persons recognised under EU law[32].

It should be emphasised that national identity does not enjoy absolute protection under EU law but has to be balanced against the principle of uniform application of EU law – the task that rests on both, namely on the ECJ and on the national constitutional courts as parts of a system of composite constitutional adjudication[33].

Constitutional identity in the case law of constitutional courts

As well as being said, the Member States refer to constitutional identity rather than to national identity. For the first time the issue of constitutional identity was taken up by the French Constitutional Council (hereinafter: CC) in the 2006 decision. In its decision the CC stated that the transposition of a directive cannot run counter to a rule or principle inherent to the constitutional

[29] Judgment of the Court of 2 July 1996, *Commission of the European Communities v Grand Duchy of Luxemburg*, case C-473/93, ECR (1996) I-03207, par. 36.
[30] Judgment of the Court of 22 December 2010, *Ilonka Sayn-Wittgenstein v Landeshauptmann von Wien*, case C-208/09, ECR (2010) I-13693, par. 74.
[31] Judgment of the Court of 22 December 2010, *Ilonka Sayn-Wittgenstein v Landeshauptmann von Wien*, case C-208/09, ECR (2010) I-13693, par. 80.
[32] Judgment of the Court of 22 December 2010, *Ilonka Sayn-Wittgenstein v Landeshauptmann von Wien*, case C-208/09, ECR (2010) I-13693, par. 83.
[33] Cf. A. von Bogdandy , S. Schill, *'Overcoming absolute primacy: Respect for national identity under the Lisbon Treaty*', Common Market Law Review, vol. 48, iss. 5, 2011, p. 1420.

identity of France, except when the constituting power consents thereto[34]. Thus, it can be said that there has been a narrowing of the understanding of the concept of constitutional identity to the most salient or the most essential questions that constitute the core of the constitution[35].

To the issue of constitutional identity the French CC has been also referring in some other rulings. For example, in the 2011 decision, the CC quoted a formula already included in the 2006 decision[36], and in the earlier 2010 decision on the priority constitutional question, the CC observed that in the absence of contestation of a rule or principle inherent to the constitutional identity of France, the CC is not competent to control the conformity with the rights and freedoms guaranteed by the Constitution of legislative provisions that are limited to the necessary consequences of unconditional and precise provisions of the EU directive, thus in such a case, only the EU's court to which a preliminary ruling has been referred may control the conformity of the directive with the fundamental rights guaranteed by art. 6 of the TUE[37].

And also on the issues of constitutional identity has spoken up the German Federal Constitutional Court (hereinafter: FCT). In the ruling on the constitutionality of the Lisbon treaty the FCT observed that the Basic Law (hereinafter: BL) grants the legislature powers to engage in a far-reaching transfer of sovereign powers to the EU, however, the powers are granted under the condition that the sovereign statehood of a constitutional state is maintained on the basis of an integration programme according to the principle of conferral and respecting the Member States' constitutional identity, and that at the same time the Member States do not lose their ability to politically and socially shape living conditions on their own responsibility[38].

In the German legal order constitutional identity is closely linked to art. 79(3) BL, which protects the substantive core of the Constitution against any changes made[39]. Relying on this legal basis, the FCT claimed the right to review whether the inviolable core content of the constitutional identity of the BL pursuant to art. 23(1) third sentence in conjunction with art. 79(3) of the BL is respected[40]. The FCT continued that the empowerment to embark on European integration permits a different shaping of political opinion-forming than the one determined by the BL for the German constitutional order and this applies as far as the limit of the inviolable constitutional identity (art.79(3) BL)[41]. And also according to the FCT the safeguarding of state sovereignty is clearly

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[34] Décision n° 2006-540 DC du 27 juillet 2006 (*Loi relative au droit d'auteur et aux droits voisins dans la société de l'information*), 19ème considérant.
[35] Likewise K. Wójtowicz, *Sądy*… op. cit., p. 125.
[36] Décision n° 2011-631 DC du 09 juin 2011 (*Loi relative à l'immigration, à l'intégration et à la nationalité*), 45ème considérant.
[37] Décision n° 2010-79 QPC du 17 décembre 2010 (*M. Kamel D.*), 3ème considérant.
[38] BVerfG, 2 BvE 2/08 vom 30.6.2009 (*Lissabon-Urteil*), Rn 226.
[39] Art. 79(3) BL states: „Amendments to this Basic Law affecting the division of the Federation into Länder, their participation on principle in the legislative process, or the principles laid down in Articles 1 and 20 shall be inadmissible."
[40] BVerfG, 2 BvE 2/08 vom 30.6.2009 (*Lissabon-Urteil*), Rn 240.
[41] BVerfG, 2 BvE 2/08 vom 30.6.2009 (*Lissabon-Urteil*), Rn 219.

expressed in the explicit recognition of the respect of national identity pursuant to art. 4(2) TEU (Lisbon) and in the right to withdraw from the Union pursuant to art. 50 TEU (Lisbon)[42].

And also the FCT has spoken up on the issue of constitutional identity in the *Honeywell* ruling. This time the FCT stated that it is empowered and even obliged to review acts of the European bodies and institutions with regard to whether they take place on the basis of manifest transgressions of competence or on the basis of the exercise of competence in the area of constitutional identity which is not assignable and where appropriate to declare the inapplicability of such acts for the German legal order[43].

It should be mentioned that the FCT has been referring to the issue of constitutional identity in its earlier rulings. Namely in the ruling *Internationale Handelsgesellschaft* (*Solange I*), the FCT referred to constitutional identity stating that art. 24 BL nullifies any treaty amendment that would jeopardize the identity of the existing constitutional structure, and also that art. 24 BL does not cover the transfer of legislative powers to an international organization, which would change the German constitutional identity, because this would require changes to the Constitution[44]. In a similar vein, the FCT has spoken up in the ruling *Wünsche Handelsgesellschaft* (*Solange II*). This time the FCT referred to the limits that define the identity of the German constitutional order. From the judgment we can learn that the authorization under art. 24(1) BL is not free from constitutional restrictions, since this provision does not empower, by granting sovereign rights to intergovernmental organisational entities, to nullify the identity of the existing constitutional order of the Federal Republic of Germany[45].

Referring to the recent financial crisis in the euro area it should be mentioned that the FCT in the rulings concerning the financial aid for Greece[46] and the euro rescue package[47] has qualified the budget autonomy of the German parliament as a fundamental part of the constitutional identity and declared the Bundestag's overall fiscal autonomy as inalienable[48].

And also the Italian Constitutional Court (hereinafter: ICC) in its rulings has referred to the legal order (fundamental constitutional principles) and to the inalienable human rights that set the limits for the interference of Community law (now EU law) into the internal legal order. In the *Frontini* ruling, the ICC reserved for itself jurisdiction to control the Community secondary law with the fundamental principles and values of the Italian constitutional order, which are not ordinary

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[42] Cf. also: K. Wójtowicz, *Poszanowanie tożsamości konstytucyjnej państw członkowskich Unii Europejskiej*, Przegląd Sejmowy, XVIII, 4(99), 2010, p. 19-20.
[43] BVerfG, 2 BvR 2661/06 vom 6.7.2010 (*Honeywell-Beschluss*), Rn 55.
[44] Beschluß des Zweiten Senats vom 29. Mai 1974, BvL 52/71, BVerfGE 37, 271 (*Solange I*), Rn 43.
[45] Beschluß des Zweiten Senats vom 22. Oktober 1986, 2 BvR 197/83, BVerfGE 73, 339 (*Solange II*), Rn 104.
[46] Urteil des Zweiten Senats vom 7. September 2011, 2 BvR 987/10, 2 BvR 1485/10, 2 BvR 1099/10.
[47] Urteil des Zweiten Senats vom 18. März 2014, 2 BvR 1390/12, 2 BvR 1421/12, 2 BvR 1438/12, 2 BvR 1439/12, 2 BvR 1440/12, 2 BvR 1824/12, 2 BvE 6/12.
[48] Cf. also: P.M. Huber, *The Federal Constitutional Court and European Integration*, European Public Law, vol. 21, no. 1, 2015, p. 92.

constitutional norms but are more than constitutional norms, and to which belong among others inalienable human rights[49]. And though EU law may differ from ordinary constitutional provisions, supra-constitutional principles act as controlimites in relation to EU law, and so the EU institutions cannot violate the basic principles of the Italian constitutional order. Likewise in the *Fragd* ruling, the ICC set limits for the application of principle of primacy, which constitute fundamental constitutional principles and inalienable rights of individuals[50].

In turn, the Spanish Constitutional Court (hereinafter: SCC), having spoken up in 2004 on the compatibility of the Constitutional Treaty with the Spanish Constitution, has broadened the meaning of the integration clause materially. According to the SCC, art. 93 of the Constitution includes impliedly also the material limits of integration that cannot be violated, to which belong: state sovereignty, fundamental constitutional structures, fundamental values and principles, and above all fundamental rights[51].

On the issue of national (constitutional) identity has also spoken up the Polish Constitutional Court – the shift from the protection of the entire text of the Constitution to the narrow core. In the ruling on the European Arrest Warrant the CT underlined that constitutional law cannot be ignored even if it is contrary to EU law[52]. In turn, in the ruling relating to the constitutionality of the TL, the CT stated that constitutional identity is a concept which determines the scope of excluding – from the competence to confer competences – the matters which constitute "the heart of the matter", i.e. are fundamental to the basis of the political system of a given state"[53]. And regardless of the difficulties related to setting a detailed catalogue of inalienable competences, the following should be included among the matters under the complete prohibition of conferral, namely: decisions specifying the fundamental principles of the Constitution and decisions concerning the rights of the individual which determine the identity of the state, including, in particular, the requirement of protection of human dignity and constitutional rights, the principle of statehood, the principle of democratic governance, the principle of a state ruled by law, the principle of social justice, the principle of subsidiarity, as well as the requirement of ensuring better implementation of constitutional values and the prohibition to confer the power to amend the Constitution and the competence to determine competences[54]. According to the CT, the guarantee of preserving the constitutional identity of the RP has been art. 90 of the Constitution and the limits of conferral of competences specified therein[55]. And also in the CT's opinion, the interpretation of the treaty provisions aimed at undermining the state's sovereignty or endangering national identity and at taking over sovereignty – in a non-contractual manner – within

[49] Corte Costituzionale, sentenza 183/1973, 18 dicembre 1973, 9° considerato.
[50] Corte Costituzionale, sentenza 232/1989, 13 aprile 1989, 3.1° considerato.
[51] Declaración del Pleno del Tribunal Constitucional 1/2004, de 13 de diciembre de 2004, pkt 2 (BOE núm. 3, de 4 de enero de 2005).
[52] Par. 4.2 and 4.3 part III of CT judgment of 27 April 2005, Ref. No. P 1/05 (OTK ZU nr 4/A/2005, poz. 42).
[53] Par. 2.1 part III of CT judgment of 24 November 2010, Ref. No. K 32/09 (OTK ZU nr 9/A/2010, poz. 108).
[54] Par. 2.1 part III of CT judgment of 24 November 2010, Ref. No. K 32/09 (OTK ZU nr 9/A/2010, poz. 108).
[55] Par. 2.1 part III of CT judgment of 24 November 2010, Ref. No. K 32/09 (OTK ZU nr 9/A/2010, poz. 108).

the scope of the competences which have not been conferred would be inconsistent with the TL, moreover the treaty clearly confirms the significance of the principle of protection of the state's sovereignty in the process of European integration, which fully corresponds with the principles determining the culture of European integration proclaimed in the Constitution[56]. In the CT's view the constitutional courts of the Member States share – as a vital part of European constitutional traditions – the view that the constitution is of fundamental significance as it reflects and guarantees the state's sovereignty at the present stage of European integration, and that the constitutional judiciary plays a unique role as regards the protection of constitutional identity of the Member States, which at the same time determines the treaty identity of the EU[57]. And as well as being said, in the CT's opinion the sovereignty of the RP is expressed in the inalienable competences of the organs of the state constituting the constitutional identity of the state[58].The CT also shares the view expressed in the doctrine that the competences under the prohibition of conferral manifest about a constitutional identity and thus they reflect the values the Constitution is based on[59].

The concept of constitutional identity has also come out in the recent CT's judgments. In the 2013 ruling the CT stated that the conferral of competences should always be assessed from the point of view of principles that shape the constitutional identity[60]. And in the 2015 ruling the CT, while sharing the views expressed in the said 2013 ruling, stated that interpretation sympathetic to European law in any situation cannot lead to results contrary to the clear wording of constitutional norms and impossible to agree with the minimum guarantee functions realized by the Constitution[61].

In turn, the Czech Constitutional Court (hereinafter: CCC) in the first constitutional ruling on the TL stated that respect for the rule of law and the rights and freedoms of the individual is the essence of the republic and are thus beyond the reach of the constitutional legislator. The CCC also observed that the transfer of powers of Czech Republic bodies cannot go so far as to violate the very essence of the republic as a sovereign and democratic state governed by the rule of law, founded on respect for the rights and freedoms of the human being and of citizens or to make a change in the essential requirements for a democratic state governed by the rule of law[62]. The CCC continued by stating that the Czech Republic will have to take back the competences transferred to the EU if the standard of protection of Constitutional rights and freedoms guaranteed by the Union would be unacceptable. And also in the ruling we can read that protection of fundamental rights and freedoms falls in the area of the "material core" of the Constitution, which is beyond the reach of the constitutional legislator, and if from this point of view the standard of protection ensured in the EU

[56] Par. 2.2 part III of CT judgment of 24 November 2010, Ref. No. K 32/09 (OTK ZU nr 9/A/2010, poz. 108).
[57] Par. 3.8 part III of CT judgment of 24 November 2010, Ref. No. K 32/09 (OTK ZU nr 9/A/2010, poz. 108).
[58] Par. 2.1 part III of CT judgment of 24 November 2010, Ref. No. K 32/09 (OTK ZU nr 9/A/2010, poz. 108).
[59] Par. 2.1 part III of CT judgment of 24 November 2010, Ref. No. K 32/09 (OTK ZU nr 9/A/2010, poz. 108).
[60] Par. 6.4.1 part III of CT judgment of 26 June 2013, Ref. No. K 33/12 (OTK ZU nr 5/A/2013, poz. 63).
[61] Par. 4.5 part III of CT judgment of 11 March 2015, Ref. No. P 4/14 (OTK ZU nr 3/A/2015, poz. 30).
[62] Ústavní soud České republiky, 2008/11/26 - Pl. ÚS 19/08 (*Treaty of Lisbon I*), par 97.

were unsuitable, the bodies of the Czech Republic would have to again take over the transferred powers in order to ensure that it was observed[63]. In a similar vein the CCC ruled in the *Slovak Pensions XVII* judgment confirming its earlier stance articulated in the *Treaty of Lisbon I* judgment. The CCC stated that retains the right to control the EU institutions in three cases: the non-functioning of the institutions, the protection of the material core of the Constitution not only in relation to European law but also to the particular application thereof and finally the functioning as *ultima ratio*, i.e. the authority to review whether an act by EU bodies exceeded the powers that the Czech Republic transferred to the EU under art. 10a of the Constitution[64].

It must be said that despite some differences in emphasis and in the degree of the subject-matter differentiation, the constitutional courts of the Member States share similar understanding of national (constitutional) identity. In their common understanding, national identity requires the protection of the statehood of the Member States as such, the protection of the form of government and of the central principles of state organization (e.g., federalism, regional and municipal self-government), the protection of democracy, of the rule of law, and of the essence of fundamental rights[65].

Concluding remarks

According to K. Wójtowicz the constitutional courts of the Member States have seized the opportunity that have given to them the linkage in art. 4(2) TEU of national identities of the Member States with their fundamental political and constitutional structures, and thus not only they fill the content of the concept of constitutional identity but also by transforming the treaty national identity into a constitutional identity they justify their right to control both the extent of the Union's competences transferred and the way of using them[66]. And due to the high content capacity of the category of constitutional identity, it has the greatest chance to become the most general reference principle for constitutional courts allowing them to identify the essence of the political nature of the Member State[67]. And also we can experience the shift in the storytelling, namely, the narrative referring to identity (constitutional identity) replaces the one referring to sovereignty. Moreover, we can speak about europeanisation of the counter limits by art. 4(2) TEU, what in turn implies the recognition by the EU of a constitutional core integrated by the fundamental political and constitutional structures of the Member States that must be preserved[68].

[63] Ústavní soud České republiky, 2008/11/26 - Pl. ÚS 19/08 (*Treaty of Lisbon I*), par 196.
[64] Ústavní soud České republiky, 2012/01/31 - Pl. ÚS 5/12 (*Slovak Pensions XVII*) VII.
[65] Cf. A. von Bogdandy , S. Schill, *'Overcoming* … op. cit., p. 1439-1440.
[66] Cf. K. Wójtowicz, *Sądy*… op. cit., p. 128.
[67] Loc. cit.
[68] Cf. F. Balaguer Callejón, *The dialectic relation between the national and the European constitutional identity in the framework of European Constitutional Law*, UNIO - EU Law Journal. vol. 3, no. 3, May 2017, p. 19.

Referring to the assumptions (thesis) adopted for the purpose of this study, it should be said that firstly, the respect for national identities, in the meaning of constitutional identities of the Member States, is now a commitment under EU law; secondly, referring to constitutional identities by the constitutional courts shapes the relationships between the EU and the Member States; thirdly, the category of national identity modifies (qualifies) the principle of priority (more precisely the principle of supremacy) of EU law and the related case law; fourthly, a broad meaning of the concept of national identity makes it a useful formula, which allows the Member States to effectively protect their constitutional values by setting the limits to the uncontrolled permeation of EU law into the national legal orders; fifthly, the constitutional core (constitutional identity), i.e. inalienable sovereign rights of the Member States set limits for integration processes.