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**Beyond the *Exceptionalism* of Constitutional Conflicts:
The *Ordinary* Functions of the Identity Clause**

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**BEYOND THE *EXCEPTIONALISM* OF CONSTITUTIONAL CONFLICTS:
THE *ORDINARY* FUNCTIONS OF THE IDENTITY CLAUSE**

By Barbara Guastafarro^{*, +}

Abstract

Article 4(2) of the Treaty on the European Union, in its novel formulation provided by the Treaty of Lisbon, requires the Union to “respect Member States’ national identities, inherent in their fundamental structures, political and constitutional, including regional and local self-government”. This work seeks to elucidate the meaning and the legal implications of the identity clause in its current wording. To this end, this work analyzes the working documents of the European Convention to determine the drafter’s intended role of the so-called “Christophersen clause”, the predecessor of Art. 4 (2) TEU. It then focuses on the use of the identity clause by the ECJ in the review of both EU and national measures. This work challenges the conventional assumption that the evident purpose of the clause is that of applying in *exceptional* cases of conflicts between EU law and domestic constitutional law—in an attempt to narrow the scope of application of the supremacy doctrine—and explores the potential use of the clause in the *ordinary* functioning of EU law. Some normative recommendations will be put forward as to the identity clause potential use in safeguarding Member States’ cultural diversity, regulatory autonomy, and margin of appreciation.

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I. Introduction

The tension between the European Union and its Member States is inherent in the composite nature of the European legal order. The “nobility” of the integration process lies in its attempt to pursue integration whilst maintaining the diversity of its States and of its peoples. The Treaty of Lisbon seems to accommodate that diversity by giving a novel formulation to the “identity clause”, which is the subject of this study. Although an express duty to respect national identities had already been introduced by the Treaty of Maastricht¹, the “identity clause” has been extended by the Treaty of Lisbon, in an attempt to clarify the scope of the notion of “national identities”. Art. 4(2) TEU requires the Union to “respect Member States’ national identities, *inherent in their fundamental structures, political and constitutional, including regional and local self-government.*” Moreover, for the first time, the identity clause can be subject to the jurisdiction of the ECJ.

What are the legal implications of Article 4.2 TEU? What is the meaning of the duty to respect national identities now that the clause is justiciable and presents a novel formulation? Many scholars who have attempted to address this question have conflated the concept of “national identities” with that of “constitutional identities”. According to this reading, Art. 4(2) TEU—and its “ancestor”, Art. I-5 of the Constitutional Treaty—codifies the “defensive” concerns of the Constitutional Courts that have opposed explicit constitutional limits to the absolute supremacy of EU law. The identity clause, therefore, would be an express acknowledgment by the TEU of the “relative” rather than “absolute” nature of the primacy of EU law, which should not be allowed to encroach upon national constitutional identities.

The argument that the identity clause could strike a new balance between the two competing claims to sovereign authority endorsed by the ECJ and the domestic Constitutional Courts is persuasive. Whether the evident purpose of the identity clause

¹See Art. F TEU, then Art. 6 par. 3 TEU in the Nice version (now as amended Art. 4 par. 2).

is “to only apply in exceptional cases of conflict between EU law and domestic constitutional law”² is, instead, less obvious.

My argument is that the identity clause could reasonably affect the *ordinary* rather than the *exceptional* understanding of the relationship between the EU and its Member States. In this respect, Art. 4(2) TEU could affect the legal reasoning of the ECJ, the balancing exercise carried out by the EU legislator, as well as the way in which Member States comply with—or derogate from—EU law. This intuition stems from an aspect which has been hitherto neglected in the scholarly literature, namely the history of the clause. Indeed, the current formulation of the identity clause stems from the works of the European Convention drafting the Treaty establishing a Constitution for Europe. In particular, the clause was conceived within working group V on “complementary competence”, which was explicitly set up to avoid the interferences between functional and sectorial competences (i.e. between competences based on aims and competences based on fields).

The history of the clause triggers two reflections. The first is that the clause was meant to solve a problem that had and still has a great relevance in the everyday life of EU law, where Member States’ prerogatives currently belonging to the category of “complementary competences” (e.g. education, culture, and sport)³ have often been encroached upon both by internal market *positive* and *negative* integration provisions.⁴ The second is that the clause was intended to have a legal impact at a stage—that of the delimitation of competences between the Union and its Member States—that is both logically and legally *antecedent* to that of the application of the principle of primacy of EU law over national law.⁵

²A. von Bogdandy and S. Schill, *Overcoming Absolute Supremacy: Respect for National Identity under the Lisbon Treaty*, in *Common Market Law Review* 48, 2011, p. 1431.

³ See Art. 6 TFEU.

⁴ For an insightful analysis of the potential impact of “negative integration” free-movement Treaty articles on protected competences of the Member States see G. de Burca, *The Principle of Subsidiarity and the Court of Justice as Institutional Actor*, *Journal of Common market Studies*, Vol. 36, No. 2, June 2008, in particular pp. 226-229 on the case *Bosman* (on the conflict between national provisions related to sport and the Treaty requirement on the free movement of workers).

⁵ Only EU norms adopted within the competences conferred upon the EU by the Treaties can claim to have primacy *vis-à-vis* conflicting national norms. This was apparent from the wording of Art. I-6 of the Treaty establishing a constitution for Europe, which provided that: “The Constitution and law adopted by

It is thus worth examining whether and to what extent the duty imposed upon the EU to respect national identities could affect the ordinary functioning of the EU legal order, apart from playing a role in the potential application of the primacy doctrine. In this reading the impact of the clause would be broader, because—the two opposite judicial claims on foundations notwithstanding⁶—constitutional conflicts have remained exceptional so far thanks to the attempt to reconcile any dissonance between European and domestic legal orders through hermeneutic instruments.⁷

This paper comprises seven sections. First, it will examine the reading of the identity clause espoused by Member States Constitutional Courts' and by academic commentators (section II). Second, the paper will look into the working documents of the European Convention to determine the drafter's intended role of the so-called Christophersen clause (section III). Third, a comparison will be carried out between the legal context of the identity clause within the European Constitution and within the Treaty of Lisbon (section IV). Fourth, the paper will focus on the use of the identity

the institutions of the Union *in exercising competences conferred on it* shall have primacy over the law of the Member States" (emphasis added). For similar considerations concerning the relationship between the doctrines of primacy and preemption, cf. Samuel Krislov, Claus-Dieter Ehlermann & Joseph Weiler, *The Political Organs and the Decision-Making Process in the United States and the European Community*, in 1 *Integration Through Law: Europe and the American Federal Experience* (Mauro Cappelletti et. al. eds., 1985) 90 ("Supremacy, as we know, provides that once a positive Community measure already exists any conflicting national norm becomes inapplicable. Preemption precedes this situation in the temporal and (legal) spatial sense.")

⁶ On the issue of foundations, related to where the autonomy of EU law relies upon, see the debate between T. Schilling, "The Autonomy of the Community legal order: An Analysis on possible foundations" and the reply by J.H.H. Weiler and U. Haltern, "The Autonomy of the Community legal order" through the looking glass" (1996) 37 *Harvard International Law Journal* 411.

⁷ On the side of national Courts there are many examples of this: see in particular the 2005 Decision of the French Constitutional Council on the striking conflict between Art. 1 of the French Constitution depicting France as a secular republic (entailing the banning of any display of religious symbols) and art.II-70 of the (failed) Constitutional Treaty Decision which allowed this kind of manifestation in public of one's religious identity (now it is Art. 10 of the Charter of fundamental rights on the freedom of thought, conscience and religion). The French Constitutional Council deemed the conflict not to be at stake stating that Art. II-70 should have been interpreted as Art. 9 of the ECHR: notoriously this Article has allowed restrictions on the displays of religious symbols—for example on grounds of public policy—which have been used to solve and to reconcile the contrast between secularism and freedom of religion). See also the Decision n. 232/89 of the Italian Constitutional Court, and more generally the recourse to the hermeneutic technique of the so called *interpretazione conforme*. Also on the side of the European Court of Justice, there has been an attempt to avoid direct conflict. See in particular ECJ 28 November 1989, Case C-379/87, *Groener* on the protection of Gaelic language, and ECJ 4 October 1991, Case C-159/90, *Grogan* on the right to abortion. It has been observed that without retreating from its claims on supremacy the ECJ has sought to escape direct constitutional conflicts with national courts (see P. Craig and G. de Burca, *Eu Law: Text, Cases, and Materials*, p. 260 note 12, quoting Case C-446/98, *Fazenda Publica v. Camara*, 2000, ECR I-11435, par. 35-38).

clause by the ECJ in the context of its jurisprudence on the review of national measures and on its possible impact on Member States' margin of appreciation (section V). Fifth, regard will be given to the role of the clause in the review of EU acts carried out by the ECJ and to its implications on the intensity and the necessity of EU lawmaking (section VI). Finally, the overall significance of the clause at the present stage of evolution of EU law will be assessed and some normative recommendations will be put forward as to the clause potential use in safeguarding Member States' cultural diversity and regulatory autonomy (section VII).

II. National identities as “constitutional identities”: narrowing the scope of application of the supremacy doctrine?

The reason why the scholarly debate has interpreted the identity clause as a sort of European “authorization” to exclude national constitutional law from the scope of application of the supremacy doctrine, is probably due to the systematic interpretation offered by the Treaty establishing a Constitution for Europe (hereinafter European Constitution). The current wording of Art. 4.2 TEU, indeed, largely builds upon Art. I-5 of the “Treaty establishing a Constitution for Europe”. This article was followed by Art. I-6, which for the first time into the history of the treaties codified a sort of “supremacy clause”, stating that Union law shall have primacy over the law of the Member States. The fact that the Treaty introduced the identity clause just before mentioning the supremacy clause, led some scholars to interpret the identity clause as a sort of safeguard clause: it served the purpose of codifying the case-law of those domestic Constitutional Courts opposing certain constitutional limits to the supremacy of EU law.⁸

The constitutional treaty would “open(s) the door to a revised understanding of what the primacy of EU law actually requires. A plausible interpretation of the constitutional treaty suggests that national courts are authorized by EU law to set aside EU secondary law on constitutional grounds in certain cases—cases where the national constitutional

⁸M. Cartabia, “Unità nella diversità”: il rapporto tra la Costituzione europea e le Costituzioni nazionali, in “Il diritto dell’Unione europea”, n. 3/2005.

identity is at stake”.⁹ The same line of reasoning has been shared in a very recent article on Art. 4(2) of the TEU. In this reading, respect for national identity under the Lisbon Treaty should be interpreted as a way to “overcoming absolute primacy” and “can be understood as permitting domestic Constitutional Courts to invoke under certain limited circumstances constitutional limits to the primacy of EU law”.¹⁰ In these readings, the concept of “national identity” is identified with the concept of “constitutional identity”¹¹ and framed within the discourse of ECJ and national constitutional Court’s different claims to sovereign authority.¹²

Also some Constitutional Courts have drawn important conclusions by the possibility offered by the European Constitution to read the primacy clause (Art. I-6) *in conjunction with* the guarantee of the national (constitutional) identities of member states (Art. I-5). Both the Spanish and the French constitutional courts used Art. I-5 to deny to European Union law the highest rank in the domestic legal order and to conclude that, after all, “Article I-6 was compatible with the national constitutional order and did not affect their existing doctrine about the constitutional ‘counter-limits’ to the domestic application of EU law.”¹³

In the view of the Spanish Constitutional Court,

The Treaty which laid down a Constitution for Europe is based on the respect for the identity of the States involved therein and their basic constitutional structures, and it is founded on the values that are to be founded in the base of the constitution of the said states....Said precepts, among others, confirm the guarantee of the existence of the States and their basic structures...which under

⁹ M. Kumm and Victor Ferrer Comella, *The primacy clause of the constitutional treaty and the future of constitutional conflict in the European Union*, in *ICON*, May 2005, 3 (2-3), p. 476.

¹⁰ A. von Bogdandy and S. Schill, *Overcoming absolute supremacy: Respect for National Identity under the Lisbon Treaty*, in *Common Market Law Review* 48, 2011, p. 1419.

¹¹ T. Konstadinidies, *Constitutional Identity as a Shield and as a Sword: The European Legal Order within the framework of National Constitutional Settlement*, in *Cambridge Yearbook of European Legal Studies*, Volume 13. See also L. Besselink, *National and Constitutional Identity before and after Lisbon*, (2010) 6 *Utrecht Law Review*, 36, available at www.utrechtlawreview.org, and J. Dutheil De la Rochere and I. Pernice “European Union Law and National Constitutions”, in M. Andenas and J.Usher (eds.) *The Treaty of Nice and Beyond: Enlargement and Constitutional Reform* (Oxford, Hart Publishing, 2003).

¹² “Interpretations of Art. 4.2 TEU will become the battleground or the meeting point, where the limits of the authority of EU law lies”, in D. Chalmers, G. Davies, G. Monti, *European Union Law: Cases and Materials*, Cambridge University Press, 2010, p. 202.

¹³ B. de Witte, *The Lisbon Treaty and National Constitutions. More or Less Europeanization?*, in C. Closa, *The Lisbon Treaty and National Constitutions, Europeanization and Democratic Implications*, ARENA Report No 3/9, p. 35

no circumstances may become unrecognizable after the phenomenon of the transfer of the exercise of competence to the supra-state organization, a guarantee whose absence or lack of explicit proclamation previously explained the reservation against the primacy of Community legislation with regard to the different constitutions by known decisions of the constitutional jurisdictions of certain states.....*In other words, the limits referred to by the reservations of said constitutional jurisdictions now appear proclaimed unmistakably by the Treaty under examination.*¹⁴

According to the French Constitutional Court,

The close proximity of Article I-5 and I-6 thereof shows that it (the Treaty) in no way modifies the nature of the European Union, or the principle of the primacy of Union law as duly acknowledged by Art. 88-I of the Constitution....that hence Art. I-6 submitted for review by the Constitutional Council does not entail any revision of the Constitution”.¹⁵

After asserting that the treaty under examination retains the nature of an international treaty, the French Constitutional Court states that

the name given to this Treaty does not require any ruling as to its constitutionality; Art. I-5 thereof, pertaining to the relationship between the European Union and the Member States, shows that the title of said Treaty has no effect upon the existence of the French Constitution and the place of the latter at the summit of the domestic legal order.¹⁶

More recently, in its *Lisbon judgment*, the German Constitutional Court has stated that “the duty, under European law, to respect identity... (is) the expression of the foundation of Union authority in the constitutional law of the Member States”¹⁷. Although with different nuances, all the Courts have referred to the identity clause in an

¹⁴ Spanish Constitutional Court, Declaration 1/2004 of 13 December 2004, Case 6603/2004 Treaty establishing a Constitution for Europe, paragraph. 3. English translation of selected extracts available in J. Ziller and G. Amato, *The European Constitution: cases and materials in EU and member states law*, Elgar, pp. 97-102, emphasis added.

¹⁵ French Constitutional Council, Decision no. 2004-505 DC of 19 November 2004 Treaty establishing a Constitution for Europe, paragraph. 13. English translation of selected extracts available in J. Ziller and G. Amato, *The European Constitution: cases and materials in EU and member states law*, Elgar, pp. 102-103.

¹⁶ French Constitutional Council, Decision no. 2004-505 DC of 19 November 2004 Treaty establishing a Constitution for Europe, paragraph. 10. English translation of selected extracts available in J. Ziller and G. Amato, *The European Constitution: cases and materials in EU and member states law*, Elgar, pp. 102-103.

¹⁷ Judgment of 30 June 2009 – 2 BvE 2/08, 2 BvE 5/08, 2 BvR 1010/08, 2 BvR 1022/08, 2 BvR 1259/08 and 2 BvR 182/09, par. 234.

attempt to endorse their claim to sovereign authority within the EU legal order and their narrative on the “relative” rather than “absolute” nature of the primacy of the EU law, with an argument which runs as follows: since the ultimate authority of the EU lies in national constitutions, the supremacy doctrine is accepted as long as it does not encroach upon national constitutional identities. Constitutional identities represent the third frontier of limitation to primacy, after the “fundamental rights” reservation inaugurated with *Solange*, and the “competence” reservation inaugurated with the *Maastricht* judgment.¹⁸ The German Constitutional Court has tried to substantiate this sort of generalized “defensive” attitude of national constitutional Courts¹⁹, theorizing the so-called *identity* review, i.e. the possibility for the Constitutional Court to review EU acts encroaching upon the core content of national constitutional identity. The *identity review* would be based upon paragraph 4.2 TEU²⁰, which, while protecting national constitutional identities, prevents some of the norms of the Treaty to claim primacy upon them.²¹ In its *Honeywell* judgment, the Federal Constitutional Court seems nevertheless to have mitigated its position on both the *identity review* and the *ultra vires review* (the possibility to review EU acts infringing upon the principle of conferral) deeming these control power to be exercised in a manner that is “open towards European law”.²²

¹⁸ For the qualification of this kind of narrative as one of the many reservations that Constitutional Courts have opposed to the supremacy doctrine, similar to the *ultra vires* review inaugurated in *Maastricht* judgment and to the fundamental rights reservation inaugurated with *Solange*, see B. Guastaferrò, *Il Trattato di Lisbona tra il custode della sovranità popolare e il custode della Costituzione. La triplice riserva apposta al Trattato dal Bundesverfassungsgericht*, in *Rassegna di diritto pubblico europeo*, n. 1/2011.

¹⁹ Paving the way to the so called “aggressive pluralism” according to M. Maduro e G. Grasso, *Quale Europa dopo la sentenza della Corte costituzionale tedesca sul Trattato di Lisbona*, in *Il Diritto dell’Unione europea*, n. 3/2009.

²⁰ In the Court’s wording, “with progressing integration, the fundamental political and constitutional structures of sovereign Member States, which are recognized by Article 4.2 first sentence Lisbon TEU, cannot be safeguarded in any other way”, Judgment of 30 June 2009, par. 240.

²¹ “As primacy by virtue of constitutional empowerment is retained, the values codified in Article 2 Lisbon TEU ... may in the case of a conflict of laws not claim primacy over the constitutional identity of the Member States, which is protected by Article 4.2 first sentence Lisbon TEU”, Judgment of 30 June 2009, par. 332.

²² At par. 59 the Court states: “The Union understands itself as a legal community; it is in particular bound by the principle of conferral and by the fundamental rights, and it respects the constitutional identity of the Member States (see in detail Article 4.2 sentence 1, Article 5.1 sentence 1 and Article 5.2 sentence 1, as well as Article 6.1 sentence 1 and Article 6.3 TEU). According to the legal system of the Federal Republic of Germany, the primacy of application of Union law is to be recognized and it is to be guaranteed that the control powers which are constitutionally reserved for the Federal Constitutional Court are only exercised

While there are many similarities between national constitutional courts on the function of constitutional identities (that of narrowing the scope of application of the supremacy doctrine) it is much less clear what is the scope of national constitutional identities. In its *Lisbon judgment*, the German Constitutional Court gave a specific meaning to constitutional identity, identifying it with the so called “eternity clause” of the German Constitution as per Art. 79(3) of the German Constitution²³, which contemplates those principles—such as human dignity and the federal, democratic and social nature of the German state—not amenable to the revision of the Constitution. More recently, in its *Data retention judgment* the GCC has deemed also Art. 10 on the secrecy of telecommunication to be constitutive of German constitutional identity.²⁴

What are the boundaries of the scope of constitutional identity is not clearer from the French case-law. The French Constitutional Court has shifted from a position in which the duty to transpose EU law finds a limit in an express provision of the Constitution²⁵ to a position in which the same duty shall not run counter to a rule or principle *fundamental to the constitutional identity of France, unless the Constituent power has not agreed to the same.*²⁶ While this seems to expand the scope of what can constitute a limit to the supremacy doctrine, because it is not limited to express provisions of the Constitution but to the vaguer notion of constitutional identity, on closer inspection this may also narrow down the scope of such limits. The notion of constitutional identity has been borrowed by the case-law of the Conseil d’Etat. And in its reading what is

in a manner that is reserved and open towards European law” Zitierung: BVerfG, 2 BvR 2661/06 vom 6.7.2010, Absatz-Nr. (1 - 116), http://www.bverfg.de/entscheidungen/rs20100706_2bvr266106en.html Freifür den nichtgewerblichenGebrauch.KommerzielleNutzungnurmitZustimmung des Gerichts.

²³ See par. 240 of the Lisbon judgment: “Furthermore, the Federal Constitutional Court reviews whether the inviolable core content of the constitutional identity of the Basic Law pursuant to Article 23.1 sentence 3 in conjunction with Article 79.3 of the Basic Law is respected (see BVerfGE 113, 273 <296>”).

²⁴ In section 218, the court refers back to the notion of “constitutional identity” theorized in its own Lisbon Judgment: “That the free perception of the citizen may not be completely captured and subjected to registration, belongs to the constitutional identity of the Federal Republic of Germany (cf. on the constitutional proviso with regard to identity, FCC, Judgment of the second senate, 30 June 2009 - 2 BvE 2/08 etc. -, section 240) and the Federal Republic has to devote itself to guarantee this in a European and international context.” *Vorratsdatenspeicherung*, Data retention, BVerfG 2 March 2010, 1 BvR 256/08. Available at: http://www.bundesverfassungsgericht.de/entscheidungen/rs20100302_1bvr025608.html.

²⁵ The *Décision* of 10 June of 2004 refers to a “disposition express et spécifique de notre bloc de constitutionnalité” .

²⁶ *Décision* n. 2006-540 DC du 27 juillet 2006, *Loi relative au droit d’auteur et au droits voisins dans la société de l’information*. More recently the same principle has been expressed in the constitutional review of the gambling sector (*Decision* 2010-605 DC (2010) 3 CMLR 4.

“inherent” in the constitutional identity of a Member State is what is very crucial and distinctive of it, namely the “essential of the Republic”.²⁷ If there is no infringement of what is extremely characterizing the French constitutional identity, national court should refrain from opposing limits to the supremacy of the EU. The conclusion of the Conseil d’Etat in the case *Arcelor*, where a national measure transposing a EU directive was challenged for violating the principle of equality, has been that if in the EU legal order there is an equivalent protection of the principle or rights safeguarded by the Constitution, it should be deferred to the ECJ the task of reviewing the legality of the EU law.²⁸

After reviewing the position of scholars and national Constitutional Courts which attach to the notion of national identities the meaning of “constitutional identities” and conclude that respect for national identities as per Art. 4.2 TEU serve the purpose of narrowing the scope of application of the supremacy doctrine, I now turn to analyze the *travaux préparatoires* which lead to the drafting of the clause, which will show that the intent of the drafters was basically that of assimilating the notion of national identities with that of national competences.

²⁷ “Le critère tiré des dispositions expresses paraît abandonné au profit de celui tiré des règles spécifiques ». Cette rédaction peut être interprétée à la lumière des propos tenus par le président Mazeaud, lors de son discours de vœux au Président de la République en janvier 2005 : « [...] le droit européen, si loin qu’aillent sa primauté et son immédiateté, ne peut remettre en cause ce qui est expressément inscrit dans nos textes constitutionnels et qui nous est propre. Je veux parler ici de tout ce qui inhérent à notre identité constitutionnelle, au double sens du terme inhérent : crucial et distinctif. Autrement dit : l’essentiel de la République ». Elle puise son inspiration dans les termes de l’article I-5 du Traité établissant une Constitution pour l’Europe selon lequel l’Union respecte l’identité nationale des Etats membres « inhérente à leurs structures fondamentales politiques et constitutionnelles ». *Conclusions of the Commissaire du gouvernement : Mattias Guyomar in Société Arcelor Atlantique et Lorraine et autres, lecture du 8 février 2007.*

²⁸ « En second lieu, la décision du 27 juillet 2006 précise l’étendue du contrôle de la loi de transposition à raison du contenu de la directive. Comme en écho aux critiques adressées au critère tiré du caractère exprès des dispositions constitutionnelles, le Conseil Constitutionnel modifie la formulation de la « réserve de constitutionnalité » en énonçant « que la 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 ». En d’autres termes, le Conseil constitutionnel ne se reconnaît compétent pour contrôler la constitutionnalité de la loi de transposition qu’au regard des règles du bloc de constitutionnalité national qui sont sans équivalent dans le catalogue communautaire des droits fondamentaux et principes généraux du droit. *Conclusions of the Commissaire du Gouvernement: Mattias Guyomar in Société Arcelor Atlantique et Lorraine et autres, lecture du 8 février 2007.*

III. The *travaux préparatoires* of the “Christophersen clause”: respect for national identities as respect for Member States’ competences

This section seeks to elucidate the meaning of that clause by analyzing the working documents of the European Convention dealing with the corresponding provision set out in Art. I-5 of the Constitutional Treaty. Indeed, the extension of the identity clause was first proposed by the Chair of working group V on “complementary competence”, Mr. Henning Christophersen – so to be consistently referred to as the “Christophersen clause” in all the working documents of the European Convention.

It is submitted that by expanding the concept of “national identities” so as to include Member States’ “fundamental structures” and by introducing a duty to respect “essential State functions”, the drafters sought to carve out core areas of national sovereignty as no list of Member States’ exclusive powers was eventually included in the Treaties.

The structure of this section is the following. First, the mandate of working group V on complementary competences and the Chair’s proposals will be explored. Second, the positions of the members of the working group will be reviewed drawing a cleavage between Member States’ representatives and European Commission’s ones.²⁹ Third, the meaning of the “Christophersen clause” will be analyzed by emphasizing how the drafting of the clause is embedded into the broader discourse of the delimitation of competences between the EU and its Member States.

1. *The mandate of the working group on Complementary Competencies*

The working group V on Complementary Competencies has significantly contributed to a clearer delimitation of competence between the EU and the Member States. It has

²⁹For the sake of clarity, it must be specified that the composition of the working groups reflect at a smaller scale the composition of the European Convention, which included 15 representatives of the Heads of State or Government of the Member States (one from each Member State), 13 representatives of the Heads of State or Government of the candidate States (one per candidate State), 30 representatives of the national parliaments of the Member States, 26 representative of the national parliaments of the candidate States (two from each Member or candidate State), 16 members of the European Parliament, and 2 representatives of the Commission. The cleavage I draw for the working group V is possible because on issues related to the allocation of powers between the EU and its Member States, both representatives of the national parliaments of the Member States and representatives of national executives seem to speak with the same voice. Accordingly, it would be possible to speak of “Member States’ representatives”.

been clear since from the very beginning of the meetings that the main concern was not that of neutrally “allocating” powers between the EU and its Member States, but rather that of “limiting” EU competences.³⁰ Almost all the members agreed on the need to introduce a new chapter in the Constitutional Treaty dealing with all aspects of Union-competencies.³¹ Working group V was set up with an apparently narrow mandate³²: how should Community complementary competence be defined and regulated in the future Constitutional Treaty?

Complementary competences basically include the policy areas—such as culture, education, employment, customs cooperation, vocational training—added from the Treaty of Maastricht onwards.³³ In those areas, Community’s role is limited to supporting, supplementing, or coordinating the action of the Member States – which are left substantive scope of action. The limited nature of Community power is usually expressed in legal basis which explicitly rule out harmonization measures. This is for example the case of employment, culture, and education where Community can encourage cooperation between Member States, it can—if necessary—support and supplement their action, but at the same time it cannot harmonize the laws and regulations of the Member States.³⁴

Against this backdrop, the members of the group had to cope with the two following issues.

The first was the definition of complementary competence in itself, to be clarified and distinguished from that of concurrent (or shared) competences. In areas belonging to the latter, indeed, competence is shared between the Member States and the EU. In particular, once the Community has legislated in such areas, it has preemptive power in

³⁰ This is clear even from the title of the first paper presented by the Chair to the members of the group, WG V, WD 5, Brussels, 11 July 2002, *Highlighting the limits of EU competence*, paper by Mr. Henning Christophersen.

³¹ WG 5, WD 9, Brussels, 15 July 2002, *Note by Peter Altmaier on “the division of competencies between the Union and the Member States”*, p. 6

³² CONV 75/02, Brussels, 31 May 2002, *Note from Mr. Henning Christophersen to the Convention, Mandate of the working group on Complementary Competencies*.

³³ A full list of the policy areas and of the legal bases subject to discussion in the working group is available in WG V, WD 1, Brussels, 4 July 2002, *First outline of Treaty provisions concerning areas covered by complementary competence*, pp. 1-29.

³⁴ See, respectively, Art. 139 EC, Art. 151(5) EC, and Art. 149 EC.

the sense that Member State may no longer act in the fields covered by legislation. By way of contrast, “this can *never* happen in areas covered by complementary competencies, where the Treaties establish strict limits to Community intervention, which must not interfere with the legislative competencies of Member States”.³⁵ In this respect, the opening of the mandate is really concerned with the “non interference” of Community powers: the distinction between complementary competences and shared competences becomes necessary because the latter—while not being exclusive *by nature*—can easily become exclusive *by exercise*³⁶ thus encroaching upon Member States’ scope of action.

The second issue was the relationship between functional and sectorial competencies—i.e. between competences based on aims and competences based on fields³⁷. As a matter of fact, the Community/EU was set up in order to attain certain predetermined objectives. This is why its powers are usually defined as a function of these objectives, irrespective of the area in which EU measure is taken—thus following a *functional* rather than a *material* criterion of the allocation of powers between the EU and the Member States.³⁸ By way of contrast, the policy areas belonging to the category of Community complementary competences “are examples of the tendency to replace the functional method of attribution of competencies (conferred on the basis of the objective to be attained) by the substantive allocation of competencies”.³⁹ Against this background, the second concern of the members of working group V could be summarized as follows: how to avoid that the EU in exercising a functional power (e.g.

³⁵CONV 75/02, Brussels, 31 May 2002, Note from Mr. Henning Christophersen to the Convention, *Mandate of the working group on Complementary Competencies*, p. 3, emphasis added.

³⁶ E. Bribosia (2005), ‘La répartition des compétences entre l’Union et ses Etats membres’, in M. Dony and E. Bribosia, (eds.), *Commentaire de la Constitution de l’Union européenne*, Bruxelles: Editions de l’Université de Bruxelles, p. 59, recalling the distinction outlined by K. Lenaerts ad P. van Ypersele, ‘Le principe de subsidiarité et son contexte : étude de l’article 3B du traité CE’, *Cahiers de droit européen*, 1994, p. 13 ss.

³⁷ On such a distinction between types of federal competencies, also referred to as *zielbezogene Kompetenzen* (competencies based on aims) and *sachbezogene Kompetenzen* (competencies based on fields) see A. von Bogdandy and J. Bast (2010), ‘The Federal Order of Competencies’, in Id. (eds), *Principles of European Constitutional Law*, 2nd edition, Oxford, München : Hart Publishing, Verlag C.H. Beck, p. 287.

³⁸K. Lenaerts and M. Desormer, 2002, ‘Bricks for a Constitutional Treaty of the European Union: values, objectives and means’, *European Law Review*, 27, p. 386.

³⁹CONV 75/02, Brussels, 31 May 2002, Note from Mr. Henning Christophersen to the Convention, *Mandate of the working group on Complementary Competencies*, p. 3

under the internal market) encroaches upon sectorial areas which explicitly exclude or precisely define Community action (e.g. education, culture, public health etc.).

As it will be showed, the Chair's proposals, the member of the group's suggestions and the drafting of the identity clause itself—analyzed respectively in the following paragraphs—revolved around addressing the main issue at stake in the mandate: how to prevent some “no go areas” to be encroached upon by EU action?

2. The Chair's proposals in addressing the competence creep

In its opening statement, the Chair of the working group, Mr. Henning Christophersen, asserted that “the desire for clarification of EU competences *vis-à-vis* Member States' competence in a way likely to be understood by the citizens may raise the question, whether the essence of these principles might be better understood if expressed also partly by way of *referring to the rights and competences remaining with the Member States*”⁴⁰. How to protect the competences remaining with the Member States? The Chair outlined four possible solutions.

The first suggestion was that of clarifying within the Treaty, policy by policy, the negative delimitation of Community competences (i.e. what the Union cannot do). This suggestion was referred to as the *Community Model* because it recalled the many provisions of the EC Treaty which rules out harmonization⁴¹, define precise actions allowed to the Community⁴², or specify the particular Member States' rights and powers to be protected.⁴³

The second suggestion—referred to as the *Constitutional Model*—was to include in the introductory part of the Treaty a new provision on Member States' reserved areas. This provision could take the form of: a) an explicit generic statement recalling that

⁴⁰ WG V, WD 5, Brussels, 11 July 2002, *Highlighting the limits of EU competence*, paper by Mr. Henning Christophersen, p. 2, emphasis added

⁴¹ See *supra* note 34.

⁴² See for example art. 149 (4) EC, in the field of education, which specifies that in order to achieve its objectives the Community may only adopt incentive measures (by co-decision) and recommendations (by qualified majority in the Council).

⁴³ See for example Art. 135 EC, according to which the Community can take measure in order to strengthen customs cooperation between the Member States but those measures “shall not concern the application of national criminal law or the national administration of justice”.

competences not transferred to the Union remain within the Member States: b) a more narrowly focused statement explaining the most relevant remaining areas of national competence, such as State-Church relations, fiscal policy etc.

The third suggestion—referred to as the *Political Model*—was the drafting of a Charter of Member States’ rights, like the Charter of fundamental rights, aimed at clarifying the scope of national competence and endowed with political value. Since it is usually the lack of clarity which fuels perceptions that national sovereignty is eroded by EU action, this Charter would have been a solemn declaration able to convey to the citizens the limited nature of EU action.

The last proposal—referred to as the *Union Model*—suggested to take as its point of departure art.6, par 3 (now as amended Art. 4, par. 2) TEU, stating that “the Union shall respect the national identities of its Member States”. This clause—called during the following working documents the “Christophersen clause”—could have been expanded by adding all those sensitive areas related to Member States sovereign powers or cultural traditions—such as language, the constitutional and political structure of the Member states, administration and enforcement, policy on the distribution of income etc.

As a matter of fact, this solution came about as the one bearing more advantages than the others. Indeed, the *Political Model* had the advantage to be “rather uncomplicated” but did not represent a legally binding solution— being the Charter of Member State’s Rights to be drafted a mere political declaration.⁴⁴ The *Constitutional Model* faced the problem that any list enumerating Member State’s reserved competences had necessarily to avoid “the wrongful impression that Member States derive their competence from the EU”.⁴⁵ The *Community Model* had the advantage of being “legally impeccable”, but could “hardly be said to be simple and easily understandable to the citizens”.⁴⁶ By way of contrast, in the words of the Chair, the *Union Model* had the

⁴⁴ WG V, WD 5, p. 3

⁴⁵ WG V, WD 5, p. 3

⁴⁶ WG V, WD 5, p. 3

advantage of being at the same time flexible, already rooted in the Treaty, and easy to expand to “focus on the issues which are relevant to citizens”⁴⁷.

The following paragraphs explore the reaction of the Commission’s and of the Member State’s representatives to the topics addressed by the mandate of working group V (relationship between shared and complementary competence; relation between sectorial and functional competencies) and to the proposals suggested by the Chair.

3. The Members States’ view: affecting the delimitation of Union power

In discussing the matters at stake, Member States’ representatives and European Commission’s ones shared a common concern: to contain EU competence creep. Nevertheless, a strong cleavage between the two arose as to how to address this common concern. On the one hand, the Member States’ representatives were extremely focused on the *delimitation* of the Union scope of action vis-à-vis those of the Member States. The idea of drawing up a competence catalogue meant in fact to specify the legal basis upon which the Union is entitled to act. By way of contrast, the Commission was extremely focused on the *exercise* of EU action. Accordingly, it rebuffed the idea of a catalogue affecting the delimitation of competence, but it advocated the introduction of new legal basis related to the exercise of competences, able for example to specify the scale of intervention of EU measures, by requiring an “obligation to give the reasons in each case for opting for a given course of action”⁴⁸, or to improve the monitoring of compliance with the principles of subsidiarity and proportionality.⁴⁹

As to the Member States’ representatives, although the idea of drawing a catalogue of competence was not always referred to as such, many proposals advocated to legally define diverse categories of competences—each one of them allocating different powers to the EU and to the Member States—and then to attribute specific policy areas to the defined categories. Some proposals followed the tripartite classification of competences

⁴⁷WG V, WD 5, p. 3.

⁴⁸WG V, WD 4, p. 11.

⁴⁹ WG V, WD 4, p. 13-14.

suggested by the European Parliament *Lamassoure Report*.⁵⁰ This should have included: a) the competences of the EU; b) the competence which are shared between Union and the Member States; c) the exclusive competence of the Member States, intended as reserved areas untouchable upon by EU action, such as Abortion and Euthanasia.⁵¹

Nevertheless, while accepting the substance of the EP categorization, the definition itself of the competence-categories titles triggered an intense debate between the members of the working group. Just to give an example, while sharing the idea to draw a category of competence entirely allocated to the Union, i.e. excluding intervention of the Member States except if delegated from the Union, some members refused to name this category “the Union *own* competencies”, as the *Lamassoure Report* suggested⁵². This wording “could give the impression that these competences are not derived but genuine EU-competencies”.⁵³ Also the generic term “shared competences” was not suitable to convey the message that in those areas both the Member States and the Union can adopt legally binding acts.⁵⁴ Some would have preferred to call them “The common competencies of the Union *and of the Member States*”.⁵⁵ Along not dissimilar line, the definition of “complementary competences” of the EU—the first task to be addressed by the group according to the mandate—was questioned because it seemed to overestimate the powers of the Union which, in areas such as education, culture etc., could only deal with marginal aspects. “In order to avoid the wrong impression that the Union would enjoy

⁵⁰European Parliament, *Report on the division of competences between the European Union and the Member States* (2001/2024 (INI)), Brussels, 24 April 2002, p. 10. This Report of the Committee on Constitutional Affairs usually borrows the name of the rapporteur, Mr. Alain Lamassoure.

⁵¹WG V, WD 8, Brussels, 15 July 2002, *Note from Michel Frenco on Classification of Competences and Interpretation by the ECJ*, pp. 2-4

⁵² Emphasis added. According to the European Parliament, *Report on the division of competences between the European Union and the Member States* (2001/2024 (INI)), Brussels, 24 April 2002, this area should have covered limited areas, such as custom policy, competition policy, structural and cohesion policies, p. 18.

⁵³WG V, WD 9, p.9

⁵⁴As a matter of fact, the European Parliament, *Report on the division of competences between the European Union and the Member States* (2001/2024 (INI)), Brussels, 24 April 2002 lumped into the category “shared competences” all the different categories that the final constitutional treaty will split (shared competences, complementary competences, open method of coordination etc.). According to the report, the competences shared between the EU and the Member States they covered three types of area: “those in which the Union lays down general rules, those in which it intervenes only in a complementary or a supplementary fashion, and those in which it coordinates national policies”, p. 11.

⁵⁵WG V, WD 9, emphasis added.

substantial competencies in these areas” the following wording was suggested: “the complementary competencies of the *Union in areas of Member States’ competence*”.⁵⁶ One of the proposals endorsed into the final report of Working group V—“Union measures in fields where *member states are fully competent*”⁵⁷, was even more radical and indicative of the fear of encroachment upon Member States’ competences.⁵⁸

Also the second issue raised by the mandate, the merging of both a material and functional criteria in allocating powers to the EU, was a very sensitive one. As pointed out by some members, “it is difficult to understand that the EU-action in the same area can sometimes be based either on sectorial competencies (e.g. education) or on functional competencies (e.g. internal market)”.⁵⁹ Moreover, “a number of treaty articles appear to give precise definition to policy areas in which the EU has only a supporting role (complementary competences). But these articles are either not used at all, or are circumvented by the use of other treaty powers. Key instances of this include article 157 EC, where Industrial Policy has been overridden for single market reasons: art. 135 EC, on Customs cooperation, which has never been used (Article 95 EC has been used instead, despite objections from Governments)”.⁶⁰

The solutions to this problem varied significantly. The most radical one, backed up by the representative of the UK Parliament was to abolish functional powers, and all those provisions empowering the EU to act in order to achieve pre-set objectives irrespective of the area in which the measure is taken. “If we are to achieve a certain distribution of

⁵⁶WG V, WD 9, p.9, emphasis added. Along not dissimilar lines, another suggestion, even more radical, deemed appropriate to describe complementary competences as “measures”, i.e. to avoid the word “competences” itself, so to make clear that those areas basically concerned the competences of the Member States (see for example WG V, WD 24, p. 3, *Paper by M. Joachim Wuermeling, Member of the Convention on the question-paper distributed by Mr. Christophersen in WG V, September 6th 2002*.Brussels, 16 September 2002)

⁵⁷ CONV 375/1/02 REV 1, *Final report of working group V “Complementary Competencies”*, Brussels, 4 November 2002, p. 1, emphasis added.

⁵⁸ The insistence of the members in avoiding the word “competence” itself was admitted in the final version of the Constitutional Treaty. Title III of the Constitutional Treaty, dedicated to Union competencies, included both “areas of exclusive competence” (such as Art. I-13 on customs union, common commercial policy etc.), and “areas of shared competence” (such as Art.I-14 on internal market, transport, environment etc.). Instead, the category-title that should have been named “area of complementary competence”, was called “areas of supporting, coordinating, or complementary action” (see Art. I-17 of the Constitutional Treaty, emphasis added).

⁵⁹WG V, WD 9, p. 12.

⁶⁰WG V, WD14, note by Mr. David Heathcoat-Amory, representative of UK Parliament, member of the Convention, *Complementary Competences – The Way Forward*, Brussels, 7 august 2002, p. 2.

powers, legally certain and understandable by the public, then we must abandon the use of functional powers. Such powers are by their nature open-ended. Defining powers by reference to desirable objectives may be convenient to the legislator but it creates uncertainty and contributes to the widespread view that more and more powers are accumulated at the center despite apparent checks written into the treaties. In this context the “ever closer union” article (A of the TEU) is unhelpful in that it gives only a vague sense of direction and is legally significant without being at all certain in its application”.⁶¹

A softer proposal, advanced by the German parliament’s representative, was to introduce a “priority clause” giving precedence to the sectorial policy field rather than to the functional one when choosing the legal basis of EU action. “Dependent of the drafting of a coherent system of competence-categories and allocated areas and matters, it should be tried to establish a priority clause (according to which) the functional powers conferred upon the Union (esp. with regard to the internal market) shall not apply to sectorial policy-fields and matters”.⁶²

It is against the backdrop of this debate that the “Christophersen clause” arose as a possible solution to the problem of the overlapping of functional and sectorial competences. “The proposal from Mr. Christophersen to expand Art. 6 par. 3 EU-Treaty...would have as effect an additional safeguard for the Member States with regard to the side-effects, the exercise of “functional powers” could have on their internal structures and national competencies. Such a clause would not automatically mean that these powers would have no effect at all in the listed areas, but would limit or even exclude “negative” effects of EU-action in these fields”.⁶³

4. The European Commission’s view: affecting the exercise of Union power

As to the first issue triggered by the mandate, i.e. the definition of EU competences, the representatives of the Commission were at odds with the Member States’

⁶¹WG V, WD14, note by Mr. David Heathcoat-Amory, representative of UK Parliament, member of the Convention, *Complementary Competences – The Way Forward*, Brussels, 7 august 2002, p. 2.

⁶²WG V, WD 9, p. 12.

⁶³ WG V, WD 9, p. 15.

representatives. According to the Commission, any classification of the Union's competence would not in itself be sufficient and appropriate to answer the basic question of "who does what?" By way of contrast, such classification would constitute a potential source of conflict when deciding whether a particular policy is to be assigned to this or that category.⁶⁴ Moreover, the Commission cautioned against the introduction of a competence catalogue, as it would have pursued the needs for simplification and clarification—called for by the Laeken Declaration— at the expense of the necessary degree of flexibility and adaptability of the EU legal order.⁶⁵ In short, the European Commission firmly dismissed the idea of a "hard and fast delimitation, by blocks of subject areas, of the fields of intervention of the European Union and the Member States".⁶⁶

Instead of drawing a distinction between exclusive, shared and complementary powers, the Commission intended to limit EU action by affecting the exercise of EU powers rather than its delimitation. Accordingly, it proposed to classify Union powers as a function of the scale of the action in order to clarify "the way in which the European Union exercises its competencies, with particular reference to the intensity of Community action whilst indicating, for specific areas, the desirable degree of intensity for any such action".⁶⁷ The classification of Union action on the basis of the scale of Union involvement distinguished between two categories: legislative action and non-legislative action (where Member States have in principle legislative action). Both these categories included different measures endowed with a different pre-emptive power upon Member States' scope of action. More precisely, on the one hand, legislative actions included uniform regulation, harmonization, minimum harmonization and mutual recognition of the national legal systems. On the other hand, non-legislative

⁶⁴ WG V, WD 16, Brussels, 3 September 2002, *Comments from the Commission's representative in response to Mr. Altmaier's note on the distribution of competencies*, p. 4.

⁶⁵ « Care must be taken not to pursue paths which would focus exclusively on the need for clarification and simplification and thus ultimately remove all flexibility from the system and introduce imbalance. This would happen, for instance, if the option were taken to incorporate a catalogue of competencies into the Treaty », in *Note from M. Paolo Ponzano, Commission's representative « Combining clarity and flexibility in the European Union's system of competencies »*. Working group V, Working document n. 26, Bruxelles, 24 September 2002, p. 3.

⁶⁶ WG V, WD 4, Brussels, 10 July 2002, *Note from the European Commission on "Delimitation of powers: a matter of scale of intervention"*, p. 2.

⁶⁷ WG V, WD 16, Brussels, 3 September 2002, *Comments from the Commission's representative in response to Mr. Altmaier's note on the distribution of competencies*, p. 5.

actions included joint action, compulsory coordination of national policies, financial supports programs and non-binding coordination of national policies.⁶⁸

Also on the second issue highlighted by the mandate, the potential interference of functional powers of the Union on sectorial policy areas, the Commission held an opposite view with respect to those of the Member States. It firmly rebuffed the “priority clause” proposed by Mr. Altmaier, the representative of the German Parliament, which was indeed no longer upheld in the final draft after the European Commission’s concerns. According to the Commission, a clause giving priority to sectorial competencies rather than to functional ones was inherently at odds with the very dynamic nature of the Community⁶⁹.

In the Commission’s reasoning, existing disparities in internal legislations on safety and health and on environmental and consumer protection often represent obstacles to the free movement of products and services across borders. The Union is able to intervene to remove these obstacles by acting on grounds of legal basis such as Art. 94 or 95 EC. Indeed, since sectorial competences sometimes rule out harmonization of national legislation, their absolute precedence would have rendered void the rules governing freedom of the movement.⁷⁰ Just to give an example, the inability to gain access to a regulated profession (e.g. doctors, lawyers ...) in a given Member State because the regulations of this State does not recognize equivalent qualifications issued by other Member States, constitute an obstacle to the market. In acting to remove these obstacles, the EU could promote directives on the recognition of qualifications, which could affect some areas of power—such as education—which belong to Member States’

⁶⁸WG V, WD 4, Brussels, 10 July 2002, *Note from the European Commission on “Delimitation of powers: a matter of scale of intervention”*, pp. 9-11.

⁶⁹As the Commission stated, “The Union was created to attain specific objectives. As a result, some of its key competencies (for example, to prohibit discrimination (Art. 12 EC), maintain fair competition (Articles 81 to 89 EC) and establish the internal market (Art. 94 and 95 EC) were allocated with a view to achieving these objectives, irrespective of the sectors and often by means of actions extending to several different areas at the same time. The practice of allocating certain strictly defined competencies in specific areas is largely a new development (specifically from the Maastricht Treaty onwards) which has been grafted onto the functional approach and which is in keeping with it [...] *The two approaches, functional and sectorial, are inseparable and any theoretical distinction between the two is artificial*”, in ‘Comments from the Commission’s representative in response to Mr. Altmaier’s note on the distribution of competencies’, Working group V, Working document n. 16, Bruxelles, 3 September 2002, p. 3, emphasis added.

⁷⁰WG V, WD 16, p. 3.

competences and which usually rule out harmonization measures. Nevertheless, the Commission stressed that while Community action “does interfere with the Member States to act in areas covered by the Union’s complementary powers, the Community action in question has nothing to do with the exercise of its complementary powers. The main and dominating purpose of such action –its “center of gravity” ...--concerns the establishment of the internal market and not ... (the harmonization of) national policies on education”.⁷¹ According to the Commission, the right way to choose between functional and sectorial competencies was the one adopted by the Court of Justice which focuses on the “center of gravity”⁷²: “if an action is designed to achieve a number of different objectives, the legal basis to be used is that which corresponds closest to the main purpose, content and objective of this action”.⁷³

It was quite clear that in the Commission’s view—much more defensive of the *status quo*—there was no space for any explicit or more nuanced enumeration of Member States’ reserved powers – what the “Christophersen clause” actually represented for the Member States’ representatives. As expressly stated, any instances to “return” powers to the Member States stemmed from “misunderstandings and even poor understanding of the way in which the Union actually exercises its powers and the way in which this affects Member States’ capacity for action”⁷⁴. The Commission seemed not to be concerned with the risk of encroachment of EU actions upon some sensitive fields to be protected as “no go areas”. By proposing the different scale of intensity of Community actions to be measured “by reference to the limits these actions sets on the feasibility of national action being taken *in the same field*”⁷⁵, the Commission endorsed a view of the competence creep as related to the potential preemptive power of the EU acting within

⁷¹WG V, WD 7, pp. 7-8.

⁷²The expression is common in the case law of the Court of Justice with regard to compliance with the legal basis of the Treaty. The Commission expressly mentions the Titanium dioxide judgment of 11 June 1991, Case C-300/89, and the judgment on the Program to promote linguistic diversity, of 23 February 1999, Case C-42/97, in WG V, WD 7, *Note from the European Commission on the European Union’s complementary powers*, Brussels, 29 July 2002, p. 8.

⁷³*Note from M. Paolo Ponzano, Commission’s representative « Combining clarity and flexibility in the European Union’s system of competencies »*. Working group V, Working document n. 26, Bruxelles, 24 September 2002, p. 6.

⁷⁴WG V, WD 7, p. 2.

⁷⁵WG V, WD 4, Brussels, 10 July 2002, *Note from the European Commission on “Delimitation of powers: a matter of scale of intervention”*, p. 8, emphasis added.

the same fields of the Member States more than to a potential expansion of EU action infringing upon areas “reserved” to the Member States.

Consistently with this view, the Commission refused the idea to interpret the “Christophersen clause” itself as a sort of “competence clause” protecting Member State’s powers under the guise of respect for national identities. The Commission endorsed the idea to introduce a provision “to set out the obligation for the Union to respect the identity of the Member States and their regions, as well as their sovereignty in relation to all powers and areas of responsibility which are not allocated by the Treaty to the Union”.⁷⁶ Nevertheless, it made clear that “This must obviously not lead to the limitation of the scope and exercise of the competencies allocated to the Union to take account of the specific requirements of each Member State, for this would jeopardize the distribution of competencies established by the Treaty”.⁷⁷

Indeed, as it will be shown in the following paragraphs, although the Commission supported the idea of grouping the basic rules governing the distribution of competencies—such as the principle of allocated powers, the principle of subsidiarity and proportionality, and the principle of primacy—in a separate chapter of the constitutional treaty so to improve clarity and transparency of the system⁷⁸, it insisted not to incorporate the identity clause in the chapter dedicated to competences as preferred by the Member State’s representatives. In the Commission’s view, the identity clause set “a general principle of interpretation without restricting the exercise of the competencies allocated to the Union”.⁷⁹

5. The drafting of the “Christophersen clause” and its meaning

As already mentioned, it was the Chair of the working group on complementary competences who for the first time proposed to modify Art. 6, par. 3 (now as amended Art. 4, par. 2) TEU – enshrining a generic requirement upon the Union to respect Member States’ national identities. Clarifying what could be included within the notion

⁷⁶ WG V, WD 26, p. 5.

⁷⁷ WG V, WD 26, p. 5.

⁷⁸ WG V, WD 16, Brussels, 3 September 2002, *Comments from the Commission’s representative in response to Mr. Altmaier’s note on the distribution of competencies*, p. 2.

⁷⁹WD 16, p. 4.

of national identities was just one of the four possible solutions outlined by the Chair to convey that—whatever the scope of EU action—there must be some core areas of national prerogative to be protected.⁸⁰

In order to emphasize how the drafting of the identity clause looms large into the debate on the allocation of powers between the EU and the Member States, it is telling that some of the working documents of the group considered the “Christophersen clause” as a “general provision on the exercise of competencies”, on the same grounds of the principle of subsidiarity, proportionality, the principle of primacy, the obligation to give reasons for choice of instruments etc....⁸¹ Some others even proposed to introduce into the expanded identity clause a provision enshrining that “EU-action in an area of EU-competence does not give any entitlement to also regulate important aspects of policies under the competence of the Member States”.⁸²

As a matter of fact, the narrow connection between the identity clause and the debate on competences is self-evident in looking at the first proposed drafting of the clause, which runs as follows:

*When exercising its competencies, the Union shall respect the national identities of the Member States, their constitutional and political structures including regional and local self-government and the legal status of churches and religious bodies.*⁸³

Although in the final version of Art. I-5 the incipit “when exercising its competencies” disappeared, in the final report of the working group on Complementary competence, the members make clear their recommendation as to the identity clause: the provision requiring the Union to respect Member States’ national identities should be expanded with the purpose “to provide added transparency of what constitutes essential elements of national identity, which the EU must respect in the exercise of its

⁸⁰This solution was called the *Union Model*, while the others, already outlined in paragraph III.2, were called the *Constitutional*, the *Political*, and the *Community Model*. See WG V, WD 5.

⁸¹WG V, WD 9, p. 4-5.

⁸²WG V, WD 9, p. 15.

⁸³WG V, WD 20, *Note by Peter Altmaier “The division of competences between the Union and the Member States (revised version)”*, Brussels, 4 September 2002, p. 20. This should have been Art. 16 of the Constitutional Treaty. Emphasis added.

competence”.⁸⁴ Although the most radical proposal to conceive of the identity clause as a “negative catalogue”⁸⁵ was nuanced, in my reading the clause acted as a substitute for the list of exclusive competences of the Member States which, although brought to the fore, was broadly rejected by the Convention.

In facts, on the one hand, the Commission cautioned against the enumeration of powers which are exclusive to the Member States, emphasizing the risk that “this list would not be exhaustive (it would indeed be very difficult to draw up” and that it would have created a “grey area of fields which would not fall into any category”⁸⁶. On the other, also many of the Member State’s representatives gradually abandoned the idea of introducing a list enumerating Member States’ exclusive powers, because it could wrongly convey the message that it is the Union that grants competence to the Member States.⁸⁷ This would have been at odds with the principle of allocated powers according to which Member States delegate power to the Union and not the other way around. Against the backdrop of this shared—although resting on different reasons—rebuff of the idea of enumerating Member States’ exclusive powers, a consensus emerged on the introduction of an expanded “identity clause”. This would have served the same purpose of the list, i.e. saving core areas which are at the heart of national identity and sovereignty, but in a more nuanced and less impressive way.

This reading is consistent with the demands prompted by the European Parliament in the *Lamassoure Report*. As already mentioned, the European Parliament, in proposing the classification of competences, called for clarifying the “competences exercised as a matter of principle by the State”. It is important to stress that also the EP rejected the idea of a list of the exclusive competences of the Member States “to apply the principle of presumption that the States have jurisdiction where the constitutional text does not stipulate otherwise”.⁸⁸ Nevertheless, besides stating this general principle similar to that

⁸⁴*Final Report of Working Group V*, p. 10.

⁸⁵WG V, WD 24, p. 3, *Paper by M. Joachim Wuermeling, Member of the Convention on the question-paper distributed by Mr. Christophersen in WG V, September 6th 2002*. Brussels, 16 September 2002, p. 4.

⁸⁶WG V, WD 4, p. 3.

⁸⁷WG V, WD 30 REV 1, *Revised Draft Report*, Brussels, 25 October 2002, p. 11.

⁸⁸European Parliament, *Report on the division of competences between the European Union and the Member States (2001/2024 (INI))*, Brussels, 24 April 2002, p. 10.

found in Article 15 of the Austrian federal constitutional law of 1920, Article 70-1 of the German Basic Law and the more sophisticated provision of Article 149-3 of the Spanish Constitution, the EP made clear that certain areas which, “by their very nature”⁸⁹, fall within national jurisdiction, should have been spelled out within the future constitutional treaty. Among these areas the EP explicitly mentioned fiscal policy and the territorial organization of the State.⁹⁰ It is interesting to note that, although the *Lamassoure report* never mentioned the identity clause, in Article 4(2) TEU the concept of “national identities” is exactly expanded and substantiated by including those areas which “by their very nature” seems to fall within national jurisdiction, with a particular and absolutely novel referral to an issue which was strongly emphasized by the report: the regional and territorial self-government. As in Art. 4(2) TEU we read that the fundamental structure of the States “inclusive of their regional and local self-government” is inherent in the concept of national identities, the Lamassoure Report explicitly considered “internal territorial organization and the division of competences within each member States to be matters to be decided upon by the Member States alone”.⁹¹

It is submitted that, as a matter of fact, the “Christophersen clause” represented the solution to the problem already raised by the EP in the *Lamassoure Report*: how to spell out core areas of national sovereignty without recurring to a list enumerating Member States’ exclusive powers. The argument is that the drafters interpreted the clause as a sort of list of Member States’ reserved powers.

⁸⁹*Ibidem*, pp. 22.

⁹⁰*Ibidem*, pp. 22-23. The *Lamassoure Report* gave particular attention to the issue of regional and local self-government. “It is important that there should be no ambiguity about the fact that each Member State is entirely and exclusively competent to define the level, geographical scope, powers and status of its regional and local authorities. Each national Constitution in fact devotes considerable space to this matter, for example, Title VIII of the Spanish Constitution, which has devised a new form of differentiated territorial autonomy; Chapter IV, which is at the heart of the Belgian Constitution; Title V of the Italian Constitution, recently amended by referendum; Chapter VII of the Netherlands Constitution on ‘the provinces, municipalities and water boards’; Sections VII (autonomous regions of the Azores and Madeira) and VIII (‘local authorities’) of Part III of the Portuguese Constitution; Titles XII and XIII of the French Constitution; Article 52(8) of the Finnish constitutional law of 1919 on the historic autonomy of the Åland islands, and Article 105 of the Greek Constitution on the peculiar status of Mount Athos. *These provisions are at the very heart of national identity and sovereignty*” (emphasis added).

⁹¹ European Parliament, Report on the division of competences between the European Union and the Member States (2001/2024 (INI)), Brussels, 24 April 2002, p. 13.

IV. From the European Constitution to the Treaty of Lisbon: some reflections on the clause's changing legal context

This section compares Art. I-5 of the Constitutional Treaty and Art. 4, par. 2 TEU—and their respective systematic contexts—arguing that the Treaty of Lisbon seems to emphasize even more than the Constitutional Treaty the drafters' desire to prevent the EU from encroaching upon Member States' core competences. While respect for national identities in the European Constitution has been interpreted in a “contrapunctual” reading with the supremacy clause⁹², in the Treaty of Lisbon the referral to primacy disappears and the identity clause is embedded into the provisions related to the delimitation and exercise of Union competences. In this respect the identity clause as per Art. I-5 of the Constitutions was enshrined in an article generally dedicated to the “relations between the Union and the Member States”, including the principle of supremacy and the principle of loyal cooperation. By way of contrast, the identity clause as per Art. 4.2 TEU seems much more embedded into the competence discourse (it is located between the “principle of presumed Member States competences” as per Art. 4(1) TEU and the principles governing the delimitation of competences between Member States and the EU as per Art. 5 TEU).

1. The legal context of Art. I-5 of the Treaty establishing a Constitution for Europe

The “Christophersen clause” was envisaged in the first paragraph of Article I-5 of the Constitutional Treaty, devoted to the “Relations between the Union and the Member States”. The second paragraph enshrined the principle of sincere cooperation, according to which the Union and the Member States shall, in full mutual respect, assist each other in carrying out the tasks of the Constitutions.

Art. I-5, par. 1, of the Constitutional Treaty stated:

The union shall respect the equality of Member States before the constitution as well as their national identities, inherent in their fundamental structures,

⁹² It is important to emphasize that the Treaty of Lisbon deliberately dropped the idea to codify the supremacy principle, which was one of the most contested issues during the ratification process of the European Constitution. Declaration no. 17 is nevertheless attached to the Final Act of the IGC to endorse the *acquis jurisprudentiel* on the principle of primacy.

political and constitutional, inclusive of regional and local self-government. It shall respect their essential State functions, including ensuring the territorial integrity of the State, maintaining law and order and safeguarding national security.

In trying to define the scope of the “Christophersen clause” the discussion of the group basically outlined two areas of core national responsibilities. On the one hand the “fundamental structures and essential functions of a Member State” such as political and constitutional structure, including regional and local self-government, the legal status of churches and religious societies, territory; national defense and the organization of armed forces, and choice of languages. On the other hand, “basic public policy choices and social values of a Member State”, such as policy for distribution of income; imposition of taxes; system of social welfare benefits; public health care system, educational system, cultural preservation and development, and compulsory military service.⁹³

It is evident from the final wording of Art. I-5 that the drafters included all the areas belonging to the fundamental structures and essential functions of the State⁹⁴ but excluded all the areas belonging to the basic public policy choices and social values of a Member State. These policies were excluded from the final version of the identity clause not because they did not deserve protection. Put simply, another way of protecting these core areas of national responsibilities was chosen: including some of them (such as education and culture) in the list of areas of supporting, coordinating or complementary action of the EU (as per Art. I-17 of the Constitutional Treaty). As it was clear from the general article defining the different categories of competence, in those certain areas the Union can only carry out supporting measures without thereby superseding Member States competence. Moreover, legally binding acts of the Union related to those areas shall not include harmonization of Member States’ laws and regulations (Art. I-12 of the Constitutional Treaty).

⁹³WG V, WD 30 REV 1, *Revised Draft Report*, Brussels, 25 October 2002, p. 11.

⁹⁴Excluding for example the legal status of churches and religious societies which will be devoted a separate article within the Constitutional Treaty (Art. I-52, in title VI dedicated to the democratic life of the Union).

In this reading, the Constitutional Treaty decided to protect some core areas of national responsibilities in two different ways, both of them suggested by the Chair Mr. Christophersen at the preliminary stage of the meetings of the working groups. Some national prerogatives were protected through what he referred to as the *Union model* (i.e. clarification of what constitute national identities to be respected by the Union through an expansion of Art. 6(3) TEU), and some other national prerogatives through what he referred to as the *Community Model* (i.e. by expressly ruling out harmonization measures).

Accordingly, it is possible to assert that in the drafter's reading the identity clause as expressed by Art. I-5 of the Constitutional Treaty was conceived as an instrument to undermine the creeping encroachment of EU powers upon sensitive areas related to national identity and sovereignty.

Also the discussion as to where to locate the clause itself embeds the drafting of the identity clause in the competence discourse. For some members, it seemed to be "appropriate to move Art. 6 par. 3 EU-Treaty to the new competence-title in order to clarify that it has not just political but also legal importance".⁹⁵ By way of contrast, the Commission insisted not to incorporate the clause in the chapter of competences in order not to restrict or change its legal scope. Setting the clause "a general principle of interpretation without restricting the exercise of the competencies allocated to the Union"⁹⁶, the Commission proposed to include the identity clause in the first part of the Treaty, within the context of a provision establishing the pattern of relations between the Union and the Member States, including the fundamental mutual obligations and the principle of primacy of EU law.⁹⁷

Art. I-5—the final provision envisaged by the Constitutional Treaty—is to a certain extent a compromise between the different views of the members of the working group and of the Commission. On the one hand the "identity clause" envisaged by Art. 6(3) TEU is expanded so to include certain core responsibilities of the Member States to be respected by Union action, as suggested by the Member States' representatives. On the

⁹⁵WG V, WD 20, p. 12.

⁹⁶WD 16, p. 4.

⁹⁷WD 26, p. 5

other hand, the Christophersen clause has not been enumerated among the fundamental principles governing the delimitation of competences between the EU and the Member States (Art. I-11 of the Constitutional Treaty simply refers to the principle of conferral, the principle of subsidiarity and the principle of proportionality). Neither it has been included in title III dedicated to “Union competence”. The “Christophersen clause”, envisaged by Art. I-5 of the Constitutional Treaty, finally figured in title I, dedicated to the “Definition and objective of the Union”, as suggested by the Commission, and was followed by the codification of the supremacy clause.

2. *The legal context of Art. 4(2) of the Lisbon Treaty*

Article 4(2) of the Treaty of Lisbon largely builds on Art. I-5. The wording is exactly the same, with the addition of a last sentence that specifies that national security is the sole responsibility of the Member States. It has been noted that Art. 4(2), in laying down three basic principles—the respect for national identities, the principle of equality of the Member States, and the guarantee of Member States’ essential State functions—“reflects the determination of Member States to assert themselves as relevant and autonomous political actors”⁹⁸. Nevertheless, the terminology refers to national identities rather than State sovereignty, and “in spite of all the ambiguity surrounding the notion of national identity, there is no question that it includes far less than the traditional concept of State sovereignty as it is understood in both international and constitutional law”.⁹⁹

On closer inspection, the systematic interpretation of the Treaty of Lisbon embeds the identity clause in the discourse of Member States’ competences and sovereign powers even more than the Constitutional Treaty did. As I have already pointed out, while conceived as a general provision on the exercise of competences able to protect some national prerogatives, Art. I-5 of the Constitutional Treaty was not included in the competence titles as almost all the members of the working group suggested.

⁹⁸ A. von Bogdandy and S. Schill, *Overcoming Absolute Supremacy: Respect for National Identity under the Lisbon Treaty*, in *Common Market Law Review* 48, 2011, p. 1425.

⁹⁹ A. von Bogdandy and S. Schill, *Overcoming absolute supremacy: Respect for National Identity under the Lisbon Treaty*, in *Common Market Law Review* 48, 2011, p. 1425-26.

By way of contrast, the Treaty of Lisbon strengthens the link between the identity clause and the provisions related to competences.¹⁰⁰ First of all, Art. 4 of the EU Treaty, enshrining the identity clause, is immediately followed by Art. 5 TEU, enshrining the fundamental principles governing the allocation of powers between the EU and the Member States (the principle of conferral, governing the limits of Union powers, and the principles of subsidiarity and proportionality, governing the exercise of Union powers).

Second, Art. 4(2) TEU is preceded by the so-called “principle of presumption of Member States competences” provided by Art. 4(1) TEU. According to Art.4(1) TEU, indeed, “in accordance to Art. 5, competences not conferred upon the Union in the Treaties remain with the Member States”. Also the introduction of this paragraph—which did not exist in Art. I-5 of the Constitutional Treaty¹⁰¹—strengthens the link between the identity clause and the competence issue. In the same article 4 TEU, indeed, you find paragraph 1 limiting EU competence by stating that residual competence not delegated to the Union rests firmly within the competence of the Member States, and paragraph 2 referring to national identities and essential State functions to be protected.

At first glance, the introduction of this generic statement on residual competence to be reserved for the Member States seems to state the obvious, because—in so far as the EU, like all international organizations, is based on the principle of allocated powers—it goes without saying that the EU has no competence other than that explicitly conferred upon it by the treaty. Moreover, the introduction of this new paragraph appears redundant, because the same statement is present in Article 5(2) TEU and in Declaration n. 18 on the delimitation of competencies.

On closer inspection, looking at the amendment occurred with the 2007 IGC through the glasses of the Convention debate, the Treaty of Lisbon strengthens, repeating *ad*

¹⁰⁰ It must be acknowledged that the provisions related to competences into the Treaty of Lisbon are not gathered into a single title. The 2007 IGC split those provisions in two parts: the general principles governing the delimitation and the exercise of Union competences are in Art. 5 TEU, while the categories and areas of Union competence are outlined in Artt. 2-6 TFEU.

¹⁰¹ Art. I-5 of the Constitutional Treaty contained only two paragraphs, one dedicated to the specification of what constitute national identities, and another dedicated to the principle of sincere cooperation. Art. 4 of the Lisbon Treaty reproduces these two paragraphs with almost the same wording, but adds another paragraph at the very beginning of the article concerning the principle of presumption of Member States competences.

nauseam, the proposal advocated by the European Parliament, and by Mr. Farnleitner according to which—beyond the principle of allocated powers—it was necessary to stress the “general presumption that in case of doubt the competence shall lie with the Member States”.¹⁰² The Chair Mr. Christophersen himself, identified the statement now envisaged by Art. 4(1) TEU as one of the four possible solutions to the competence creep problem. According to this reading, Art. 4 of the Lisbon Treaty couples two solutions to the same problem: paragraph 1 endorses Mr. Christophersen’s *Constitutional model*, i.e. the idea to introduce a provision enshrining “the principle of presumed Member States’ competence”: paragraph 2 endorses Mr. Christophersen’s *Union model*, i.e. the idea to expand the identity clause so to clarify what are the core responsibilities of the Member States to be protected.

This systematic context allows giving the identity clause a reading very close to that proposed by the Members of the Convention and rebuffed by the Commission: a general clause on the exercise of Union competences protecting some national core responsibilities. The following sections will be devoted to the use of the clause in the case law of the ECJ.

V. National Identities before the European Court of Justice: the review of national measures

There is a striking difference between the use of the clause by the national Constitutional Courts and by the ECJ, which deserves to be explored.¹⁰³ It has been noted that the German Constitutional Court has used “constitutional identity” as a “sword”, i.e. as a “tool of judicial review of national implementation measures of secondary legislation”¹⁰⁴, which can have much more far-reaching implications of the constitutional identity retention as a “shield”, i.e. as a qualified derogation from EU law obligations invoked by the Member States. When interpreting such derogation, indeed,

¹⁰²WG V, WD 9, p. 10.

¹⁰³ Some preliminary reflections in B. Guastaferrò, *Il rispetto delle identità nazionali nel Trattato di Lisbona tra riserva di competenze statali e “controlimiti europeizzati”*, in *Quaderni Costituzionali*, n. 1/2012.

¹⁰⁴ T. Konstadinidies, *Constitutional Identity as a Shield and as a Sword: The European Legal Order within the framework of National Constitutional Settlement*, in *Cambridge Yearbook of European Legal Studies*, Volume 13, p. 195.

“the ECJ has, through a pragmatic use of the loyalty and proportionality principles, succeeded in reducing its effect to the bare minimum”.¹⁰⁵ Indeed, one of the areas in which the use of the identity clause figures prominently in the case law is the review of national measures constituting a restriction to internal market fundamentals freedoms. Internal market law provides some exceptions to the four freedoms relating to the movement of goods, persons, services and capital, which can be either treaty-based justifications or case law exceptions, the so called “mandatory requirements”. In the course of proceedings before the ECJ, respect for national identities has been invoked both as an autonomous ground of derogation and as a rule of interpretation of existing justifications, such as public policy. These two lines of case law will be analyzed seriatim in the following sections.

1. The identity clause as an autonomous internal market grounds for derogation

Even before the entry into force of the Treaty of Lisbon the ECJ drew certain conclusions from the obligation imposed on the EU by art. 6.3 TEU to respect the national identities of the Member States, including their constitutions. As AG Maduro put it in *Michaniki* case, “It is apparent from a close reading of that case-law that 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 derogation from the application of the fundamental freedoms of movement. It may, first of all, explicitly rely on it as a legitimate and independent ground of derogation”.¹⁰⁶

Accordingly, one of the functions of the identity clause can be that of being invoked by Member States as an autonomous internal market ground of derogation, i.e. as a justification for a national measure that is found to be *prima facie* inconsistent with the fundamental freedoms. For instance in *Commission v. Luxembourg*, the latter Member State sought to rely upon the protection of national identity to justify the exclusion of

¹⁰⁵ T. Konstadinidies, *Constitutional Identity as a Shield and as a Sword: The European Legal Order within the framework of National Constitutional Settlement*, in *Cambridge Yearbook of European Legal Studies*, Volume 13, p. 195.

¹⁰⁶Opinion of Mr Advocate General Poiares Maduro delivered on 8 October 2008. *Michaniki AE v EthnikoSymvoulíoRadiotileorasis and YpourgosEpikrateias*.Case C-213/07. *European Court reports 2008 Page I-09999* , par. 32.

nationals of other Member States from access to posts in the field of public education¹⁰⁷. Also after the entry into force of the Treaty of Lisbon, the Grand Duchy of Luxemburg has invoked respect for national identities as an autonomous ground of derogation in another action for failure to fulfill obligations, in a very similar case to the pre-Lisbon one. The Grand Duchy of Luxemburg asserted that, since the use of the Luxembourgish 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”.¹⁰⁸ The conclusion of the Court was the following: “As to the need relied on by the Grand Duchy of Luxembourg to ensure the use of the Luxembourgish language in the performance of the activities of notaries, it is clear that... While the preservation of the national identities of the Member States is a legitimate aim respected by the legal order of the European Union, as is indeed acknowledged by Article 4(2) TEU, the interest pleaded by the Grand Duchy can, however, be effectively safeguarded otherwise than by a general exclusion of nationals of the other Member States (see, to that effect, Case C-473/93 Commission v Luxembourg [1996] ECR I-3207, paragraph 35)”.¹⁰⁹

In sum, in both cases the Court recognized that the preservation of national identity “is a legitimate aim respected by the Community legal order”, but ruled that the restrictive national measures at issue were disproportionate, since the interest pleaded could be effectively safeguarded by other means.¹¹⁰

In other rulings, respect for national identities was regarded as “a legitimate objective” by itself, although enshrining other values protected by the Treaty, such as cultural and linguistic diversity. For example, in *UTECA*, the Court ruled that the obligation for television operators to finance works produced in one of the official languages of Spain was not contrary to Community law. Although the national measure concerned

¹⁰⁷ See Case C-473/93 Commission v Luxembourg [1996] ECR I-3207, paragraph 35

¹⁰⁸ C-51/08, Commission vs. Luxembourg of May 24 2011, Par. 72.

¹⁰⁹ In case C-51/08, Commission vs. Luxembourg of May 24 2011, par. 124.

¹¹⁰ This is particularly true in Case C-473/93, (par. 35) where the Court mentions the AG Opinion, which emphasized that nationals of other Member States must, like Luxembourg nationals, still fulfill all the conditions required for recruitment, in particular those relating to training, experience and language knowledge. In this respect, if the aim of the restrictive measure was to protect national identity, the demanding conditions required for recruitment where a less restrictive mean than the exclusions of non nationals.

constituted a *prima facie* breach of several internal market fundamental freedoms, the Court held that that measure could be justified by reference to culture, in so far as the objective of defending and promoting one of the several official languages of Spain constituted an overriding reason in the public interest.¹¹¹ As stated by Advocate General Kokott in her opinion in the *UTECA* case, “the Community thus contributes to the flowering of the cultures of the Member States, while respecting their national and regional diversity and at the same time bringing the common cultural heritage to the fore (Article 151(1) EC). It supports the action of Member States in inter alia improvement of the knowledge and dissemination of the culture and history of the European peoples and in the area of artistic and literary creation in the audiovisual sector (Article 151(2) EC). Respect for and promotion of the diversity of its cultures constitutes one of the Community’s main preoccupations in all areas (Article 151(4) EC), including its legislation in the audiovisual services field; it is ultimately an expression of the European Union’s respect for the national identities of its Member States (Article 6(3) EU)”.¹¹²

Also in a very recent case the Court has linked the respect for national identities to the protection of national languages. In a reference for preliminary ruling from a Lithuanian Court¹¹³, Art. 4.2 TEU is intertwined with the Treaty provisions enshrining the promotion of cultural and linguistic diversity, and respect for national identities is expressly supposed to include protection of a State’s national official language¹¹⁴. The ECJ faced the problem of the possible encroachment on the freedom to move and reside of national rules requiring that the surnames and forenames of natural persons must be entered on certificates of civil status in a form which complies with the rules governing

¹¹¹C-227/07, Judgment of the Court (Second Chamber) of 5 March 2009, *Unión de Televisiónes Comerciales Asociadas (UTECA) v Administración General del Estado*. European Court Reports 2009 Page I-01407.

¹¹² Opinion of Advocate General Kokott delivered on 4 September 2008. *Unión de Televisiónes Comerciales Asociadas (UTECA) v Administración General del Estado*, Case C-222/07. European Court Reports 2009 Page I-01407, Paragraph 93

¹¹³ C-391/09, 12 May 2011, *Malgožata Runevič-Vardyn, Łukasz Paweł Wardyn v Vilniaus miestosaivaldybės administracija and Others*, nyr.

¹¹⁴ C-391/09, 12 May 2011, *Malgožata Runevič-Vardyn, Łukasz Paweł Wardyn v Vilniaus miestosaivaldybės administracija and Others*, nyr. See paragraph 86: “According to the fourth subparagraph of Article 3(3) EU and Article 22 of the Charter of Fundamental Rights of the European Union, the Union must respect its rich cultural and linguistic diversity. Article 4(2) EU provides that the Union must also respect the national identity of its Member States, which includes protection of a State’s official national language”.

the spelling of the official national language. In the words of the Court, “According to several of the governments which have submitted observations to the Court, it is legitimate for a Member State to ensure that the official national language is protected in order to safeguard national unity and preserve social cohesion. The Lithuanian Government stresses, in particular, that the Lithuanian language constitutes a constitutional asset which preserves the nation’s identity, contributes to the integration of citizens, and ensures the expression of national sovereignty, the indivisibility of the State, and the proper functioning of the services of the State and the local authorities”.¹¹⁵ Also in this case the Court deems respect for national identities to be a legitimate aim capable to justify restrictions on the rights of freedom of movement and residence provided for in Article 21 TFEU.¹¹⁶

It is interesting to note that while the previous cases are all “outcome cases”, i.e. the Court provide for a solution for the dispute which leaves no margin for maneuver to the referring court, here the Court seems to issue a “guidance case”, i.e. provides some guidelines for the referring court, which is entitled with resolving the dispute.¹¹⁷ The national court is first called to assess if and to what extent the national measures cause serious inconvenience to those concerned at administrative, professional and private levels at the point to represent a restriction on the freedoms conferred by Art. 21 TFEU.¹¹⁸ Second, it is called to assess if and to what extent this restriction can be justified by the legitimate aim of the Member State to protect its official national language and its traditions.¹¹⁹

¹¹⁵ C-391/09, 12 May 2011, *MalgožataRunevič-Vardyn, ŁukaszPawełWardyn v Vilniausmiestosavivaldybėsadministracija and Others*, nyr., par. 84.

¹¹⁶C-391/09, 12 May 2011, paragraph 87.

¹¹⁷ On the difference between “outcome”, “guidance” and “deference” cases see Takis Tridimas, *Constitutional Review of member state action: the virtues and vices of an incomplete jurisdiction*, in *ICON* (2011), Vol. 9, No 3 4, 737-756, p. 737. In answering preliminary questions referred by national Courts, the ECJ enjoys a broad discretion in determining the level of detail of its answers. According to Tridimas’ classification, the Court indeed “may give an answer so specific that it leaves the referring court no margin for maneuver and provides it with a ready-made solution to the dispute (outcome cases); it may, alternatively, provide the referring court with guidelines as to how to resolve the dispute (guidance cases); finally, it may answer the question in such general terms that, in effect, it defers to the national judiciary (deference cases)”.

¹¹⁸ Par. 78, C-391/09, 12 May 2011

¹¹⁹In Paragraph 91. C-391/09, 12 May 2011, the Court states: “If it is established that the refusal to amend the joint surname of the couple in the main proceedings, who are citizens of the Union, causes serious inconvenience to them and/or their family, at administrative, professional and private levels, it will be for the national court to decide whether such refusal reflects a fair balance between the interests in issue, that

2. The identity clause as a rule of interpretation of existing internal market grounds for derogation

In another line of case law, the preservation of national identities has not been regarded as an autonomous ground of derogation but has enabled the Member State concerned to develop its own definition of a legitimate interest capable of justifying an obstacle to a fundamental freedom. In this respect, that Member State does not rely on the protection of national identity itself, but uses national identity, domestic constitutional traditions, cultural values etc. to interpret *other* treaty-based justifications, such as public policy.

The Omega and Dynamic Medien Cases

These cases follow the trend inaugurated in *Omega*, where a national measure prohibiting the commercial exploitation of games simulating acts of homicide was not regarded as one imposing an unjustified restriction on the freedom to provide services. As the Court put it in the *Omega* case “The competent authorities took the view that the activity concerned by the prohibition order was a threat to public policy by reason of the fact that, in accordance with the conception prevailing in public opinion, the commercial exploitation of games involving the simulated killing of human beings infringed a fundamental value enshrined in the national constitution, namely human dignity”.¹²⁰ What is remarkable about the *Omega* ruling is *not* the conflict between fundamental rights as protected by the Member States and the freedom to provide services as protected by the EU: indeed the ECJ held that the “objective of protecting human dignity is compatible with Community law, *it being immaterial in that respect that, in Germany, the principle of respect for human dignity has a particular status as an independent fundamental right*”.¹²¹ What is important is that the Court accords the State a certain margin of discretion in setting the level of protection of the legitimate interest/fundamental right in question. In this respect, according to the Court, in the assessment of the need for, and the proportionality of the national measure which

is to say, on the one hand, the right of the applicants in the main proceedings to respect for their private and family life and, on the other hand, the legitimate protection by the Member State concerned of its official national language and its traditions”.

¹²⁰Case C-36/02. Judgment of the Court (First Chamber) of 14 October 2004. *Omega Spielhallen- und Automatenaufstellungs-GmbH v Oberbürgermeisterin der Bundesstadt Bonn*, European Court reports 2004 Page I-09609, par. 32

¹²¹Case C-36/02., Par. 34, emphasis added.

restricts the exercise of an economic activities, “It is not indispensable for the restrictive measure issued by the authorities of a Member State to correspond to a conception shared by all Member States as regards the precise way in which the fundamental right or legitimate interest in question is to be protected”.¹²²

In *Dynamic Medien*, the Court states that “it is not indispensable that restrictive measures laid down by the authorities of a Member State to protect the rights of the child, correspond to a conception shared by all Member States as regards the level of protection and the detailed rules relating to it”. As that conception may vary from one Member State to another on the basis of, inter alia, moral or cultural views, Member States must be recognized as having a definite margin of discretion.”¹²³

In *Omega* the Court implied that the standard of protection of the fundamental right or of the legitimate interest concerned can vary from one Member State to another. In *Dynamic Medien* the Court confirmed this view by asserting that such a variation could rest upon different “moral and cultural views”.

The Sayn-Wittgenstein Case

One of the first rulings mentioning Art. 4(2) TUE following the entry into force of the Treaty of Lisbon can be framed within the outlined cases, due to some similarities. The identity clause enters the picture in the context of a preliminary ruling procedure referred by Austria, concerning the review of a national measure representing potential obstacle to freedom to move and reside as per Art. 21 TFEU. The ECJ states that the national measure which refuses to recognize the surname of an (adult) adoptee, determined in another Member State, in so far as it contains a title of nobility which is not permissible under Austrian constitutional law is a restriction to the freedom to move and reside in that Member State, in so far as the discrepancy in names could dispel doubts as to the citizen’s identity in a way that can hinder the exercise of the right which flows from Article 21 TFEU.¹²⁴ Nevertheless, the Austrian Government invokes public policy as a ground for justification. According to the Austrian government, “the

¹²²Case C-36/02, par. 37

¹²³Case C-244/06, Judgment of the Court (Third Chamber) of 14 February 2008. *Dynamic Medien Vertriebs GmbH v Avides Media AG*, European Court reports 2008 Page I-00505, par. 44.

¹²⁴Case C-208/09, *Ilonka Sayn-Wittgenstein v Landeshauptmann von Wien*, nyr, paragraph 70.

provisions at issue in the main proceedings are intended to protect the *constitutional identity* of the Republic of Austria. The Law on the abolition of the nobility...constitutes a fundamental decision in favor of the formal equality of treatment of all citizens before the law”¹²⁵. Moreover, “any restrictions on the rights of free movement which would result for Austrian citizens from the application of the provisions at issue in the main proceedings are therefore justified *in the light of the history and fundamental values* of the Republic of Austria”¹²⁶.

In assessing the proportionality of the national measure concerned, the Court, quoting the principle enshrined in *Omega* according to which the level of protection accorded to a legitimate interest may not be uniform in all Member States, and mentioning *ad audiuvandum* respect for national identities as provided for by Art. 4(2) TEU, concludes that “it does not appear disproportionate for a Member State to seek to attain the objective of protecting the principle of equal treatment by prohibiting any acquisition, possession or use, by its nationals, of titles of nobility or noble elements which may create the impression that the bearer of the name is holder of such a rank”.¹²⁷

3. *The potential implications of the identity clause on Member States’ action: towards a “margin of appreciation” ?*

There is not enough case-law on the use of Art. 4.2 TEU to draw significant conclusion. Nevertheless, it is possible to speculate on the possible implication of Art. 4.2 TEU, in the area in which it figures prominently, i.e. the review of national measures infringing upon fundamental market freedoms. First of all, the identity clause could bolster the trend inaugurated by the ECJ in cases such as *Omega*, *Dynamic Medien*, or *Gambelli*¹²⁸ in which the Court has recognized that in the Member States there may be differing views on the extent to which restrictions on fundamental freedoms aimed at protecting

¹²⁵ Case C-208/09, *Ilonka Sayn-Wittgenstein v Landeshauptmann von Wien*, nyr, paragraph 74, emphasis added.

¹²⁶ Case C-208/09, *Ilonka Sayn-Wittgenstein v Landeshauptmann von Wien*, nyr, paragraph 75, emphasis added.

¹²⁷ Case C-208/09, *Ilonka Sayn-Wittgenstein v Landeshauptmann von Wien*, nyr, paragraph 93.

¹²⁸ In the par. 63 of *Gambelli* (Case C-243/01 *Criminal Proceedings against Gambelli*, 2003, ECR I-1577), the Court states that “moral, religious and cultural factors ...could serve to justify the existence on the part of the national authority of a margin of appreciation sufficient to enable them to require what consumer protection and the preservation of public order require”.

legitimate interest or fundamental rights should be assessed. In an attempt to emphasize that the level of protection should not necessarily “correspond to a conception shared by all Member States”¹²⁹, the Court distanced itself from its previous case law. “Although, in paragraph 60 of *Schindler*, the Court referred to moral, religious or cultural considerations which lead all Member States to make the organization of lotteries and other games with money subject to restrictions, *it was not its intention, by mentioning that common conception, to formulate a general criterion for assessing the proportionality of any national measure which restricts the exercise of an economic activity*”.¹³⁰

It has been argued that although Article 151(4) EC (now Art. 167 TFEU)¹³¹ provided “a treaty-based backdrop against which to argue that a margin of appreciation is “genetically coded” into the Community *acquis*”, “this provision has played a negligible role in the judgments of the ECJ on restrictions to the four freedoms”.¹³² Only recently, the ECJ has taken “a rather similar approach to the ECHR by recognizing a “margin of appreciation” when morally and culturally sensitive matters are at issue”¹³³.

Recourse to Art. 4.2 TEU could be particularly significant in endorsing a “margin of discretion”¹³⁴ in the internal market case law on justifications on fundamental freedoms.

¹²⁹ Case *Omega*, par. 37.

¹³⁰ Case *Omega*, par. 37. Emphasis added.

¹³¹ Art. 151 CE (now Art. 167 TFEU) dedicated to culture, after stating at par. 1. that “The Community shall contribute to the flowering of the cultures of the Member States, while respecting their national and regional diversity”, invited the Community to “take cultural aspects into account in its action under other provisions of this Treaty, in particular in order to respect and to promote the diversity of its cultures” (par. 4).

¹³² James A. Sweeney, *A “Margin of Appreciation” in the Internal Market: Lessons from the European Court of Human Rights*, in *Legal Issues of Economic Integration* 34(1): 2007, p. 38. According to the Author, in Case C-415/93 (*Bosman* ECR I-4021 par. 78) the Court appeared to deny the relevance of Art. 151 EC (then Art 128) to determining the scope of the fundamental freedoms, (in note 53 at pag. 38). While art. 151 seemed to be a sort of transversal clause on the promotion of cultural diversity.

¹³³ James A. Sweeney, *A “Margin of Appreciation” in the Internal Market: Lessons from the European Court of Human Rights*, in *Legal Issues of Economic Integration* 34(1): 2007, p. 28. “For both Courts, factors relevant to the width of the margin have included which right is being restricted, the context in which the right is invoked, and which legitimate aim (reason for restriction) is pursued. Both also use some comparative methodology in order to consider the impact of European consensus on the issue” (p. 45). Another study on the margin of appreciation in the internal market is N. Shuibhne, *Margin of appreciation: national values, fundamental rights and EC free movement law*, in *European Law Review*, 2009, pp. 230 ss.

¹³⁴ The expression is expressly contained in par. 87 of Case C-208/09, *Ilonka Sayn-Wittgenstein v Landeshauptmann von Wien*, nyr; The Court seems to use it more frequently than the expression “margin of appreciation”. It is worth noting that already in Case 41/84 *Van Duyn v. Home Office* ECR 1337, par.

The article could be read in conjunction with the provision on culture (Art. 167 TFEU), which confirms respect for cultural diversity as a transversal clause to be taken into account when implementing other policies of the EU, and with Art. 3.4 TEU on the objectives of the EU, concerning respect for the rich cultural and linguistic diversity of the Union (art. 3.4 TEU).¹³⁵

An enhanced “margin of discretion” in interpreting the derogations to fundamental freedoms could have some impact on the ordinary functioning of the EU law in several respects.

The first would be related to the ECJ’s conventional restrictive interpretation of justification for derogating from fundamental freedoms, which, notoriously, the Court has always subject to judicial review. In the case of public policy, for example, the Court has asserted that its scope as a derogation cannot be determined unilaterally by each member state without being subject to control by the institutions of the community.¹³⁶ Moreover, “public policy may be relied on only if there is a genuine and sufficiently serious threat to a fundamental interest of society”.¹³⁷ When issues related to national identities (both belonging to cultural traditions and to constitutional principles) are of relevance to flesh out public policy derogation, Member States’ governments—in infringement proceedings—and national courts¹³⁸—in preliminary references—could spell out the importance of the national cultural value or constitutional principle impaired by the freedoms of the market in order to gain a less stringent ECJ’s review on

18, the Court emphasized that “the particular circumstances justifying recourse to the concept of public policy may vary from one country to another and from one period to another, and it is therefore necessary in this matter to allow the competent national authorities an area of discretion within the limits imposed by the Treaty”.

¹³⁵Article 3(4) TEU, The EU “shall respect its rich cultural and linguistic diversity, and shall ensure that Europe’s cultural heritage is safeguarded and enhanced”.

¹³⁶ As expressed in par. 18 of Judgment of the Court of 4 December 1974. *Yvonne van Duyn v Home Office*, Case 41-74. European Court reports 1974 Page 01337. See also the Case invoking Art. 4.2 TEU analyzed above, *Sayn-Wittgenstein*, par. 83. Indeed, the restrictive interpretation of the derogation is always present in the Case law (see Case C-36/02 *Omega* [2004] ECR I-9609, paragraph 30, and Case C-33/07 *Jipa* [2008] ECR I-5157, paragraph 23).

¹³⁷Par. 86 of the *Sayn-Wittgenstein* case.

¹³⁸ In the field of fundamental rights, for example, preliminary ruling has been invoked as a tool to present diverse point of view before the ECJ. In this respect, the participation of Constitutional Court into the dialogue with the ECJ would be of particular relevance to escape the risk of constitutional homogenization and of the “judicial colonialism” brought to the fore by the ECJ in the case law on fundamental rights. See, M. Cartabia, *Europe and Rights. Taking rights seriously*, *European Constitutional Law Review*, 5: 5-31, 2009, pp. 26-27

the use of the derogation. In this respect, the ECJ could have a more deferential approach¹³⁹ towards a sort of “national court’s right of assessment”, similar to that that AG Kokott has inferred from the caution that the ECJ has adopted in situations of conflicting rights¹⁴⁰ and has been called for by some scholars.¹⁴¹

An enhanced Member States’ margin of discretion could also be supposed to have impact on the proportionality test in the review of Member State action. At risk of simplifying, the principle of proportionality performs two distinct functions in the EU law. When applied as a ground for review of Community acts, it is aimed at protecting individual or Member States from undue interference by the Community institutions and it is subject to the marginal scrutiny of the “manifestly inappropriate test”. When applied to determine the compatibility with the Treaty of national measures compromising fundamental freedoms, the function of the principle of proportionality is the promotion of market integration. It follows that the Court has usually applied a strict degree of scrutiny (a less alternative restrictive test).¹⁴²

¹³⁹ As it has been noted, the outcome approach, in which the ECJ provide for a solution, “used inappropriately, may bring the ECJ close to applying the law on the facts thus exceeding its function under the preliminary reference procedure”. See Takis Tridimas, *Constitutional Review of member state action: the virtues and vices of an incomplete jurisdiction*, in *ICON* (2011), Vol. 9, No 3 4, 737-756, p. 754).

¹⁴⁰ In its opinion in Case C-73/07, AG Kokott has emphasized the cautious attitude of the Court with regard to determining the scope of data protection and weighing up conflicting fundamental rights. This attitude is grounded also in other cases, such as *Promusicae*—in which the Court merely designated the two fundamental rights and left the national court to strike a balance between them—and *Österreichischer Rundfunk and Others*, where the Court took a similar approach, although giving the national court some guidance.(par. 46). In the words of AG, “the Court shows the same caution in other situations of conflicting rights. In *Familiapress*, the issue was the conflict between the free movement of goods and a domestic prohibition of prize competitions in periodicals. In that judgment, the Court made an express decision on the need for certain rules, but in general left the national courts to determine whether that prohibition was proportionate to the maintenance of press diversity and whether that objective could not be achieved by less restrictive means” (par. 47). Opinion of Advocate General Kokott delivered on 8 May 2008. *Tietosuojavaltuutettu v SatakunnanMarkkinapörssiOy and SatamediaOy*. Case C-73/07 *European Court reports 2008 Page I-09831*.

¹⁴¹M. Maduro has for example stressed the importance of the increased discretion left to the national courts by the ECJ when there are possible conflicts of constitutional law. See *Contrapunctual Law*, p. 534. This can be found also in Maduro’s opinions. See for example par. 40 of Opinion in Case C-53/04. “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 fact remains, however, that it is the duty of the Court of Justice to ensure that that assessment is made in accordance with the fundamental rights and objectives with which it must ensure compliance within the Community context”

¹⁴² T. Tridimas, *General Principles of EC Law*, OUP, 1999, p. 193.

Despite the very severe test the Court applies to restrictions on free movement imposed by national measures, the impact that morally sensitive matters may have upon the principle of proportionality in Community law has been taken into account.¹⁴³ One can speculate on the possibility of a less stringent proportionality test in reviewing national measures if a Member States invokes the protection of its (constitutional or cultural) identity as an internal market ground of derogation or as a rule of interpretation of existing justifications. Nevertheless, the ECJ seems to range in a haphazard way from a marginal test to a very strict scrutiny of national measures encroaching upon fundamental freedoms. This is way some scholars have called for a “doctrine of deference” which could also help the predictability of the review.¹⁴⁴

Analyzing the outlined case-law¹⁴⁵ in the light of the possible enhancement of a margin of discretion of the Member States, and of its impact on the ordinary functioning of the EU, we can see that:

- a) In all the cases the Court stresses its conventional strict interpretation of the derogations to fundamental freedoms, which should be subject to its review¹⁴⁶, should be proportionate to the legitimate interest they intend to protect¹⁴⁷, and should not be suitable to be attained by less restrictive measures¹⁴⁸ ;
- b) In almost all the cases the Court adopt an outcome approach, namely it provides a ready-made solution to the cases. There is only one case in which the Court

¹⁴³ J. Jans, *Proportionality Revisited*, in *Legal Issues of Economic Integration*, 2000, 27.

¹⁴⁴ It has been argued that the self-restraint that the Court has adopted in cases in which sensitive fundamental rights of socially contested national values are at stake hints to a European “doctrine of deference”. Nevertheless, “the approach towards the levels of intensity seems to be rather haphazard and random. Both the EU Courts...do not really explain why a certain level of intensity is applied or what the choice for this level entails in terms of burden of proofs or standard of review”, in Janneke Gerards, *Pluralism, Deference, and the Margin of Appreciation Doctrine*, ELJ, Vol. 17, No. 1, January 2011, pp. 80-120, p. 101. By way of contrast, the ECHR has distinguished the various factors that are relevant in determining the scope of the margin of appreciation and the intensity of its review. Among them, there are: the “common ground” factor, according to which the Court generally leaves a wide margin of appreciation if there is no consensus between Member States, the “better placed” argument (according to which if measures are related to particularly sensitive issues of are based on complex economic and social assessment states are supposed to be in a better position to assess the necessity and suitability of limitation of fundamental rights, and the nature of the affected right or interest (according to which the court has deemed the promotion of democracy and human dignity and human freedom to be the underlying concepts of the Convention. (pp. 107-113).

¹⁴⁵ Attention will be limited to the post-Lisbon case (which expressly mention Art. 4.2 TEU).

¹⁴⁶ See par. 83 and par. 86 of the *Syan Wittengesstein* case.

¹⁴⁷C-208/09, par. 81e C-391/09, par. 83.

¹⁴⁸C-391/09, par. 88 e C-51/08, par. 124.

adopts a guideline approach, leaving to the national court some margin of maneuver in solving the case¹⁴⁹;

- c) In the infringement proceeding in which the defense of the State (Luxembourg) does not engage in an accurate analysis of what constitutes national identities and use Art. 4.2 TEU in a merely decorative way, although as an autonomous derogation, the Court dismisses the national measure as disproportionate;
- d) In the preliminary reference procedure in which Austria uses Art. 4.2 TEU to interpret the public policy derogation in light of its historical and constitutional traditions, the ECJ judges the restriction upon the fundamental freedoms as justified and proportionate, without engaging in a particularly stringent proportionality test on the availability of less restrictive alternative measures.¹⁵⁰

VI. National Identities before the European Court of Justice: the review of EU measures

The introduction of Art. 4.2 TEU could also become to a certain extent a constraint on EU legislator. Some institutions have referred to the clause in some of their non-binding acts, either to emphasize the importance of regional and local self-government¹⁵¹ or to express a sort of self-commitment in taking into account respecting for national identities while implementing their policies.¹⁵² Besides entering the discourse of EU

¹⁴⁹ It is worth emphasizing that the seriousness of the interference of on the fundamental freedom is questioned by the Court (but not by the AG), so to be deferred itself to the national court. In other words, the national provision does not infringe upon the freedom of the market in a serious way and this might have led the Court to drop the usual outcome approach which sees her taking the last decision.

¹⁵⁰ Although mentioning its conventional position on the less restrictive alternative test, the Court does not seem to express the reason why it deems the measure to be proportionate (see par. 93). In the *SaynWittengenstein* case, indeed, the proportionality test is even less stringent than its precedent before the Lisbon treaty, i.e., the *Omega* case, where the Court at least tries to explain why the contested order did not go beyond what is necessary in order to attain the objective pursued by the competent national authorities, namely because it prohibited only the variant of the laser game aimed at “play at killing” people thus disrespecting human dignity. See par. 39 of the *Omega* case.

¹⁵¹ Opinion of the Committee of the Regions on the ‘Strategy for the effective implementation of the Charter of Fundamental Rights by the European Union’ OJ C 9, 11.1.2012, p. 61–64 (par. 6). As per Art. 4.2 TEU, regional and local self-government are expressly enshrined in the concept of national identity (and they are also emphasized in the novel formulation of the subsidiarity principle).

¹⁵² COM/2011/0173 final, COMMUNICATION FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT, THE COUNCIL, THE EUROPEAN ECONOMIC AND SOCIAL COMMITTEE AND THE COMMITTEE OF THE REGIONS An EU Framework for National Roma Integration Strategies up to 2020. The duty to respect national identities in putting in place a monitoring system to collect data on the

institutions, respect for national identities has been used as a ground for judicial review of EU acts.¹⁵³ The following paragraph analyses two relevant rulings. The first is a pre-Lisbon case, in which the importance of the principle is emphasized, although it is associated with the respect for linguistic diversity, and in which the ECJ shows a strong deference towards the discretionary power of Community action, despite its possible encroachment upon linguistic diversity. The second is a post-Lisbon case, which hints to the possible use of the identity clause as a way to invite EU legislator to use legal acts whose content and form are less preemptive on Member States' scope of action.

1. Respect for national identities as grounds for judicial review of EU acts

The Spain v. Eurojust Case

As to respect for national identities as a ground against which the legality of EU acts can be reviewed, there is just one case before the entry into force of the Treaty of Lisbon. This suggests that there is a significant quantitative imbalance between the review of EU measures and the review of national measures (where respect for national identities is used as a ground for derogating from fundamental freedoms). The only case concerning the legality of an EU act is *Spain v. Eurojust*.¹⁵⁴ Also here respect for national identities is associated with respect for linguistic diversity¹⁵⁵. The Kingdom of Spain brought an

situations of Roma in the Member States binds not only the Commission, but also the Fundamental Rights Agency and other Union bodies involved (see par. 8).

¹⁵³ This use has been suggested also in the literature, with particular attention to the potential conflict between secondary law and domestic constitutional principles. In this reading, A. von Bogdandy and S. Schill have suggested that "a disproportionate interference of a measure taken by the EU with a domestic constitutional principle protected under Article 4.2 TEU can be a reason for the unlawfulness of the measure as a matter of EU law".

¹⁵⁴ It is worth noting that according to the Court the action brought under Article 230 EC cannot be declared admissible, because the acts contested in the present action are not included in the list of acts the legality of which the Court may review under that article (i.e. acts adopted jointly by the European Parliament and the Council, of acts of the Council, of the Commission and of the ECB, other than recommendations and opinions, and of acts of the European Parliament intended to produce legal effects vis-à-vis third parties'.

¹⁵⁵ Opinion of Mr Advocate General Poiares Maduro delivered on 16 December 2004 (Kingdom of Spain v Eurojust. Case C-160/03, European Court reports 2005 Page I-02077), paragraph 24: "Respect for linguistic diversity is one of the essential aspects of the protection granted to the national identities of the Member States, as is apparent from Article 6(3) EU and Article 149 EC. (32)" – According to Article 6 EU, '[t]he Union shall respect the national identities of its Member States'. Article 149 EC, inserted by the Maastricht Treaty, for its part refers to the Community's duty to respect the cultural and linguistic diversity of the Member States.

action before the ECJ against some calls for applications issued by Eurojust. The obligation to fill in the application not only in the language of publication but also in English, plus the imposition of a language proficiency requirement involving both English and French, were claimed to be contrary to the Community language regime (requiring the use of all the official languages of the European Communities) and to the principle of non-discrimination on grounds of nationality. According to AG Maduro, the Union institutions and bodies have a duty to respect the principle of linguistic diversity.¹⁵⁶ Respect for linguistic diversity is not only “of fundamental importance”, but it “is an aspect of the respect which the Union owes, in the terms of Article 6(3) EU, to the national identities of the Member States”.¹⁵⁷ Accordingly, language requirements imposed by reason of the nature of the post must be strictly linked with the posts to be filled and should not have an adverse impact on the requirement of geographical diversity of the staff of the Union. Despite the emphasis on the language as not merely a “functional means of social communication” but as an “essential attribute of personal identity and, at the same time, a fundamental component of national identity”¹⁵⁸, the AG stated that it is not possible to infer from the principle of linguistic diversity the existence of an absolute principle of equality of languages in the Union.¹⁵⁹ Also the Court concluded that, since the EU bodies enjoy a degree of autonomy in determining the nature of their functional needs and since the Kingdom of Spain did not provide for evidence to cast doubts on the relevance to the performance of the proposed duties of the language knowledge required, the conditions of engagement could not be deemed manifestly inappropriate.

¹⁵⁶Opinion of Mr Advocate General PoiaresMaduro delivered on 16 December 2004 (Kingdom of Spain v Eurojust. Case C-160/03, European Court reports 2005 Page I-02077), paragraph 38.

¹⁵⁷Opinion of Mr Advocate General PoiaresMaduro delivered on 16 December 2004 (Kingdom of Spain v Eurojust. Case C-160/03, European Court reports 2005 Page I-02077), par. 35. In the same paragraph, “the principle of respect for linguistic diversity has also been expressly upheld by the Charter of Fundamental Rights of the European Union (49) and by the Treaty establishing a Constitution for Europe. (50) That principle is a specific expression of the plurality inherent in the European Union”.

¹⁵⁸Opinion of Mr Advocate General Poiares Maduro delivered on 16 December 2004 (Kingdom of Spain v Eurojust. Case C-160/03, European Court reports 2005 Page I-02077), par. 36: “ ‘My motherland is the Portuguese language’. That famous statement by Pessoa, taken up by numerous men of letters, such as Camus, clearly expresses the link which may exist between language and a sense of national identity. Language is not merely a functional means of social communication. It is an essential attribute of personal identity and, at the same time, a fundamental component of national identity”.

¹⁵⁹Opinion of Mr Advocate General Poiares Maduro delivered on 16 December 2004, par. 38.

The Affatato Case

The Trial Court of Rossano (Italy) referred a question for a preliminary ruling¹⁶⁰ concerning the interpretation of clause no. 5 of the framework agreement on fixed-term work, which is annexed to Directive 1999/70. Clause 5 provides for a set of measures aimed at preventing abuse arising from the use of successive fixed-term employment contracts.¹⁶¹ Moreover, it allows Member States, where appropriate, to determine under what conditions fixed-term employment contracts shall be deemed to be contracts or relationships of indefinite duration.¹⁶² The referral is aimed at assessing the compatibility with this clause of Art. 36 of Legislative Decree n. 165/2001, which, even where there is abuse arising from the use of successive fixed-term employment contracts or relationships by a public-sector employer, precludes their being converted into contracts of indeterminate duration. The judge also asks if –should clause 5 preclude this national legislation—the clause itself infringes upon the fundamental political structure of the Member State, as well as their essential functions, thus violating Art. 4, par. 2 TEU.¹⁶³

The second part of the question stems from the fact that the national legislation forbidding the conversion of fixed-term contracts into contracts of indeterminate duration is based on a provision of the Italian Constitution according to which permanent posts in the public service must be filled on the basis of a public competition. In this connection, the Italian Constitutional Court had ruled that public competitions were the most appropriate means of selecting staff for those positions having regard to

¹⁶⁰Case C-3/10.Order of the Court (Sixth Chamber) of 1 October 2010. *Franco Affatato v Azienda Sanitaria Provinciale di Cosenza*. Nyr.

¹⁶¹ Clause 5, par. 1, of the framework agreement provides:

“To prevent abuse arising from the use of successive fixed-term employment contracts or relationships, Member States, after consultation with social partners in accordance with national law, collective agreements or practice, and/or the social partners, shall, where there are no equivalent legal measures to prevent abuse, introduce in a manner which takes account of the needs of specific sectors and/or categories of workers, one or more of the following measures: (a) objective reasons justifying the renewal of such contracts or relationships; (b) the maximum total duration of successive fixed-term employment contracts or relationships; (c) the number of renewals of such contracts or relationships”.

¹⁶²Clause 5. Par. 2 of the framework agreement provides: “Member States after consultation with the social partners and/or the social partners shall, where appropriate, determine under what conditions fixed-term employment contracts or relationships: (a) shall be regarded as “successive”; (b) shall be deemed to be contracts or relationships of indefinite duration.”

¹⁶³Case C-3/10.Order of the Court (Sixth Chamber) of 1 October 2010. *Franco Affatato v Azienda Sanitaria Provinciale di Cosenza*. Nyr, par. 36.

the values of impartiality and efficiency of the public service as enshrined in Art. 97 of the Italian Constitution.¹⁶⁴

The interesting aspect of the order for reference submitted by the Italian court is that, in seeking guidance as to the interpretation of EU law, the Trial Court of Rossano also enquires about the legality of an EU measure which could eventually infringe upon Art. 4.2 TEU, thus impliedly asking the ECJ to use the identity clause as a ground of review of the legality of an EU act. The position of the Court is that the framework agreement neither lays down a general obligation on the Member States to provide for the conversion of fixed-term employment contracts into contracts of indefinite duration nor prescribes the precise conditions under which fixed-term employment contracts may be used. In other words, the agreement gives Member States a significant margin of discretion in the matter.¹⁶⁵ It follows that clause 5 of the framework agreement must be interpreted as not in principle precluding national legislation which, where there is abuse arising from the use of successive fixed-term employment contracts or relationships by a public-sector employer, precludes their being converted into contracts of indeterminate duration, and that—accordingly—clause 5 does not infringe upon the fundamental structures of the State—political and constitutional—and upon the essential State function of the State as per Art. 4.2 TEU.¹⁶⁶

2. The potential implications of the identity clause on EU action

(a) On the *intensity* of EU action: choosing the less preemptive EU measure

What kind of constraints on the EU legislator stem from Art. 4.2 TEU? What does it mean what asserted by the Court in the *Affatato* order, i.e. that since the framework agreement leaves a margin of discretion to the Member State to choose the most suitable instrument to comply with the requirement of the directive, it does not infringe upon Art. 4.2 of the TEU?

¹⁶⁴ Judgment No 89 of 27 March 2003 of the Italian Constitutional Court.

¹⁶⁵ Case C-3/10. Order of the Court (Sixth Chamber) of 1 October 2010. *Franco Affatato v Azienda Sanitaria Provinciale di Cosenza*. Nyr. Paragraph 38 of the order mentions also other rulings on the same issue: (see cases *Adeneler e a.*, par. 91; *Marrosu e Sardino*, par. 47; *Angelidaki e a.*, par. 145 and 183, and the orders *Vassilakis e a.*, par. 121, and *Koukou*, par. 85).

¹⁶⁶ Par. 40 and 41 of the *Affatato* order.

Should the case law follow this trend, respect for national identities might be interpreted as a general constraint on EU legislator, which requires it to favor the measure which less preempts Member State scope of action.

As a matter of fact, the issue of the intensity of Union action has important connection with the possible encroachment upon Member States' scope of action.¹⁶⁷ It is not a case that the working documents of working group V expressly tried to draw a scale of intensity of Community measures, and that one of the aspect of the application of principle of proportionality expressly requires so.¹⁶⁸

Indeed, although the ECJ long time ago rejected the argument—advocated by the German Government—that proportionality amounted to a “principle of minimum intervention”¹⁶⁹ the case law on the review of EU legal acts on grounds of violation of Art. 4.2 TEU recalls the arguments attached to the principle of proportionality by the Amsterdam Protocol on the application of the principles of subsidiarity and proportionality, which have now been replaced by a more vague explanation of the principle of proportionality.¹⁷⁰

According to the Amsterdam Protocol, Community measures should leave as much scope for national decision as possible and care should be taken to respect well-established national arrangements and the organization and working of Member States'

¹⁶⁷For an analysis on the connection between the different types of harmonization measures and the different types of (obstacle, rule, field) preemption see A. Arena, *The Doctrine of Union Preemption in the E.U. Internal Market between Seinand Sollen*, in *The Columbia Journal of European Law*, vol 17, no. 3, Summer 2011.

¹⁶⁸ See section III of the present work, in particular the outlined position of the European Commission.

¹⁶⁹ See paragraph 9 of ECJ, C-28/84, *Commission v. Germany*, 3 October 1985: “From a legal point of view the German Government's arguments may be summarized as follows: (a) According to the principle of proportionality, or, in the form relevant to this case, the principle of minimum intervention, when interpreting measures of secondary Community law which encroach upon the sovereignty of the Member States, preference should be given to the interpretation which keeps the intervention to a minimum”. In par. 22 the Court responded: “With regard to the argument based on the 'principle of minimum intervention' it should be stated that that method of interpretation overlooks the fact that the directives in question form part of the common agricultural policy and are intended to facilitate the free movement of feedingstuffs within the common market. They must therefore be interpreted in the light of their objectives, which are to improve livestock production throughout the Community according to common rules and at the same time to eliminate the obstacles arising from differences in the relevant national legislation”.

¹⁷⁰ The Protocol attached to the Treaty of Lisbon seems to be more focused on procedural issues.

legal systems. Where appropriate, and subject for the need for proper enforcement, Community measures should provide Member States with *alternative ways* to achieve the objective of the measures.¹⁷¹

Which is what happens in the *Affatato* order. To a certain extent, it is as if the Court dismisses the alleged violation of Art. 4.2 TEU by the framework agreement, because it leaves to the State the possibility to choose the best way to prevent abuse arising from the use by public authorities of successive fixed term employment contracts. Within its margin of discretion, then, Italy is free to choose the more “constitution-friendly” way to comply with the directive.¹⁷²

The provision object of the preliminary ruling in the *Affatato* case, had already been considered in other cases. Also in previous cases the Court emphasized that clause 5 of the framework agreement “places on Member States the mandatory requirement of effective adoption of at least one of the measures listed in that provision intended to prevent the abusive use of successive fixed-term employment contracts or relationships, where domestic law does not already include equivalent measures”.¹⁷³ And also in those cases, following the suggestion of AG Maduro the Court concluded that the Directive 1999/70 “does not preclude rules which prevent abuse arising from the use by public authorities of successive fixed-term employment contracts from giving rise to the establishment of an employment relationship of indefinite duration..., where such exclusion is justified by the ...need to safeguard the constitutional principle of access to employment in the public service through competition, and provided provision is made in that sector for effective measures to prevent and penalize abuse arising from the use of fixed-term employment contracts in that sector”.¹⁷⁴In the *Affatato* case, the Court

¹⁷¹ Paragraph 7 of the Protocol on the application of subsidiarity and proportionality (Amsterdam version), emphasis added.

¹⁷²The choice of the Italian legislator, indeed, builds on the principle of impartiality and efficiency of the public service (Article 97 of the Constitution), which allows the situations of employees of public authorities and of private-sector employees can be treated differently. In this respect, penalties of a purely compensatory nature instead of conversion into an employment relation of indefinite duration are deemed appropriate measures to punish the infringement of mandatory rules governing the recruitment and employment of workers by the public authorities.

¹⁷³ Par. 50 of the Judgment of the Court (Second Chamber) of 7 September 2006. *Cristiano Marrosu and Gianluca Sardino v Azienda Ospedaliera Ospedale San Martino di Genova e Cliniche Universitarie Convenzionate*. Case C-53/04, European Court reports 2006 Page I-07213.

¹⁷⁴Par. 50 of the Opinion of Mr. AG Maduro in the Case C-53/04.

makes clear that, since the framework agreement leaves a margin of discretion to the Member State to choose the most suitable instrument to comply with the requirement of the directive, it does not infringe upon Art. 4.2 of the TEU.

Against this backdrop, Art. 4.2 TEU could be interpreted as suggesting the EU legislator a *favor* towards the less preemptive EU measure, also in light of the principle of proportionality, which in its novel formulation expressly makes a reference to the *content* and *form* of Union action.¹⁷⁵

(b) On the *need for EU action: reframing subsidiarity inquiry*

Under Article 5.3 TEU, in areas which do not fall within its exclusive competence, “the Union shall act only if and insofar as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level”.

Although, even in the Commission’s wording, the application of the principle of subsidiarity requires a merely test of “comparative efficiency”¹⁷⁶ (i.e. determining what of the level of government can better achieve the proposed objective), some scholars have opined that “subsidiarity properly understood is federal proportionality”, i.e. that subsidiarity should be interpreted as a requirement to check “*whether* the European legislator has *unnecessarily* restricted national autonomy”.¹⁷⁷

Similarly, Davies argued that subsidiarity “misses the point”, as instead of striking a balance between Member State and EU interests, “it assumes the Community goals, privileges their achievement absolutely and simply asks who should be the one to do the implementing work”.¹⁷⁸ In other words, the subsidiarity inquiry is misplaced because it

¹⁷⁵ See Art. 5.4 TEU Lisbon. This was not the case in Art. 5 TEC.

¹⁷⁶ Quoted in P. Craig and G. de Burca, *EU Law, Cases and Materials*, OUP, 2011, p. 94.

¹⁷⁷ R. Shutze, *Subsidiarity after Lisbon: Reinforcing the Safeguard of Federalism?*, in *Cambridge Law Journal*, 68(3), November 2009, 525-536, p. 533. See also E.T. Swaine, *Subsidiarity and Self-Interest: Federalism at the European Court of Justice*, 41 *Harvard International Law Journal*, 1 2000, and Ernest A. Young, *Protecting Member State Autonomy in the European Union: Some Cautionary Tales from American Federalism*, (2002) 77 *NYULRev.*1612, 1736.

¹⁷⁸ Gareth Davies, *Subsidiarity: the wrong idea, in the wrong place, at the wrong time*, *CMLR*, 43:63-84, 2006, pp. 67-68. Also G. de Burca (in *The Principle of Subsidiarity and the Court of Justice as an Institutional Actor*, *JCMS*, Vol. 36, No. 2, 2008, pp. 223-224) in analyzing the action of annulment

does not focus on whether EU legislation is disproportionate by intruding too far into Member State values in relation to the objectives pursued by the EU.¹⁷⁹ Consequently, Davies suggested that the ECJ should spell out the “competence function of proportionality”, i.e. should ask itself whether the importance of an EU is sufficient to justify its effect on national autonomy.¹⁸⁰

However, Craig moved some convincing criticisms to Davies’ analysis. First, he noted that also Member States play a role in the definition of the “European objective” pursued by EU legislation. Second, he argued that, in Davies’ reasoning, “proportionality fulfills an independent competence role” which is “markedly different from use of proportionality within Article 5.3 TEU as part of the subsidiarity calculus”.¹⁸¹ In Craig’s words “The schema of proportionality in Article 5.3 and the Lisbon Protocol are not framed in terms of the kind of free-standing, competence based proportionality analysis. Nor is there any suggestion of such use of proportionality in the discussion that led to the Constitutional or Lisbon Treaties”.¹⁸²

Since the working documents of the identity clause seem to address this kind of concern, could thus Art. 4.2 TEU helps in coping with what has been referred to as “the absence

brought by the UK against the Working time directive (which laid down a maximum weekly working time), reached similar conclusions. Mentioning par. 189 of AG Leger’s opinion, the author states: “Article 118a specifically confers on the Community a power of harmonization in the field of health and safety. Thus, it could be argued that once the Council had reached the conclusion that “health and safety” included the number of hours worked, and that levels of health protection in relation to the number of working hours should be raised across the Community, the fact that this objective could be better achieved at Community rather than at national level, could hardly be questioned. On the other hand, the Court asked for no demonstration of any of the reasons behind the Council conclusion that level of health and safety in this field should be raised across the Community”.

¹⁷⁹ G. Davies notes that in all the Commission procedure for applying subsidiarity, set out in Commission’s impact assessment guidelines, “nowhere in the entire process is there any explicit consideration of national autonomy,except perhaps for the warning, repeated several times, that impact assessments are not a substitute for political judgment”. Moreover, “whether MS can achieve this outcome sufficiently is considered exclusively in terms of the problem itself and other Community goals...the emphasis is overwhelmingly on impacts on non-public actors such as consumers and industry, and where the impact on public bodies is – briefly – mentioned, the focus is on economic and functional factors. National political and autonomy interests are further marginalized”, in Gareth Davies, *Subsidiarity: the wrong idea, in the wrong place, at the wrong time*, CMLR, 43:63-84, 2006, p. 76.

¹⁸⁰ Gareth Davies, *Subsidiarity: the wrong idea, in the wrong place, at the wrong time*, CMLR, 43:63-84, 2006, p. 83.

¹⁸¹ P. Craig, *Subsidiarity: A Political and Legal Analysis*, JCMS, 2012, Vol. 50, pp. 72-87, p. 83.

¹⁸² P. Craig, *Subsidiarity: A Political and Legal Analysis*, JCMS, 2012, Vol. 50, pp. 72-87, p. 83. According to the Author “The Lisbon Treaty was the culmination of ten years of Treaty reform, with no hint of the kind of competence-based proportionality advocated by Davies”.

of a comfortable place in the legal framework for Member State interest”¹⁸³? Can the identity clause be invoked against EU legislation that, while pursuing a legitimate objective (e.g. the functioning of the internal market), in fact encroaches upon an area in which Member State should enjoy a significant scope of action (e.g. services of general economic interest)?

The debate on the recent Commission Proposal on the award of concession contracts provides an excellent illustration of the role that the identity clause can play in safeguarding national autonomy. In its proposal, the Commission adopted a purely internal market perspective. The proposal was based on Article 114 TFEU, which enables the adoption of harmonization measures to ensure the proper functioning of the internal market. In its explanatory memorandum, under the “subsidiarity” and “proportionality” headings, the Commission merely underlined that a common legal framework is required to ensure effective and equal access to concessions for economic operators across the single market and that the existing soft-law does not provide sufficient legal certainty and does not ensure compliance with the Treaty principles applicable to concessions. The Commission’s memorandum makes hardly any reference to the area of the internal market affected by the proposed regulatory framework, which is to say that of Services of General Economic Interest.

The Austrian Parliament adopted a reasoned opinion on the Commission’s proposal according to the *ex ante* subsidiarity review mechanism introduced by the Treaty of Lisbon.¹⁸⁴ In that opinion, the Austrian Parliament first noted that, contrary to the Commission’s findings, there is no legal vacuum in the area concerned by the proposal, as concession contracts are already governed by primary law principles such as non-discrimination, transparency and competition. Most importantly, the Austrian Parliament emphasized that the service concession contracts covered by the proposal are related to the provision of Services of General Economic Interest, an area where a number of Treaty Provisions (Art. 3 TEU, Art. 14 and 106 TFEU, Protocol 26) grant the Member State “a broad scope of discretionary action” (p.1). The Austrian Parliament

¹⁸³Gareth Davies, *Subsidiarity: the wrong idea, in the wrong place, at the wrong time*, CMLR, 43:63-84, 2006, p. 67.

¹⁸⁴*Reasoned Opinion of the European Affairs Committee of the Federal Council on COM (2011) 897 final*, 1 February 2011.

inferred from such provisions and from Art. 4.2 TEU that “the flexibility granted to the Member States must not be curtailed by an extremely far-reaching act of secondary law” (p. 2). Instead, according to the Austrian Parliament, the proposed directive may have a significant impact on the structure of municipal service provision.¹⁸⁵

The Austrian Parliament’s reasoned opinion thus suggest that the identity clause may be invoked to protect national regulatory autonomy from an EU act that, while pursuing a legitimate objective, significantly constrains Member States’ action in an area where the Treaty itself affords the Member States a broad scope of maneuver.¹⁸⁶ It remains to be seen if and to what extent the Commission will take into account its proposal’s implications on Services of general economic interest, rather than focusing exclusively on the proposal’s expediency *vis-à-vis* its internal market objective. This might be the case because also other Parliaments have expressed the same kind of concerns, asking to preserve the scope of action and negotiation of local authorities and to accommodate the concerns of local services of general economic interest, in light of the duty imposed on the EU by Art. 4.2 TEU to respect fundamental political and constitutional structures of the Member States, “including regional and local self-government”.¹⁸⁷

VII. Concluding remarks

The analysis, carried out in Section II, of the reading of Article 4.2 TEU by Constitutional Courts and academic commentators indicated that the leading interpretation of the identity clause is that of a provision concerning the *exceptional* conflicts between the EU legal order and domestic constitutions thus enshrining the theory of existing constitutional limits to the primacy of the EU advocated by some Constitutional Courts.

¹⁸⁵ This also because the wording of Art. 4.2 TEU emphasizes the role of local self-government.

¹⁸⁶ Particularly relevant in this respect is Protocol no. 26 attached to the Treaty of Lisbon according to which the “essential role and wide discretion of national, regional and local authorities in providing, commissioning and organizing services of general economic interest as closely as possible to the needs of the users”.

¹⁸⁷ See the *Draft Resolution of the Bavarian State Parliament on the Proposal for a Directive on the award of concession contracts COM (2011) 897 – summarized by the subsidiarity team and the Decision of the Bundesrat 874/11 of 2.3.2012.*

The survey of the *travaux préparatoires* of the clause (section III), instead, revealed that the identity clause was drafted with a view of solving a concrete and very pervasive concern: the encroachment of national prerogatives by the action of EU institutions in some sensitive matters (such as culture and education), and, more generally, the so-called Union competence creep.

The textual and systematic interpretation of Art. 4.2 TEU (section IV) suggested that, in line with the intent of the drafters within the European convention, the current wording and context of the clause embed national identities into the general discourse of the allocation of powers between the Union and the Member States even more than the previous Constitutional Treaty did.

The two sections (V and VI) devoted to the ECJ's reading of the identity clause in its rulings revealed that Article 4.2 has so far been relied upon in a limited number of rulings. Nevertheless, this allows speculating on the variety of its potential implications.

In the context of the review by the ECJ of national measures (section V), one of the potential implications of Art. 4.2 TEU could be that of affording the Member State a broader "margin of appreciation" in justifying national measures which constitute an obstacle to the internal market fundamental freedoms. In this respect, when respect for national identities is used as an autonomous ground of derogation¹⁸⁸ or as a rule of interpretation of existing justifications¹⁸⁹, the ECJ could relax its traditionally restrictive interpretation of justifications, could endorse a more deferential approach towards the "national courts' right of assessment", and could drop the strict scrutiny which characterizes its proportionality review of national measures.

As far as the review of EU measures by the ECJ is concerned (section VI), the cases considered suggest that the identity clause can potentially be relied upon to strike down

¹⁸⁸ When invoked as an autonomous ground of derogation respect for national identities has been associated with the protection of national language.

¹⁸⁹ Apparently Art. 4.2 TEU has been used so far only in connection with *one* internal market express derogation, i.e. public policy, so as to flesh out that concept with national specificities (e.g. historical traditions and constitutional principles such as the principle of equality). It is thus a matter a speculation whether the Court could grant greater deference to Member States' specificities and values in applying *other* express derogations and mandatory requirements and in assessing the proportionality of restrictive national measures.

EU measures having excessive preemptive effects on Member States' scope of action. Should this indication be confirmed by subsequent case law, it could entail a duty for the EU legislature to have due regard to the intensity and form of EU legislation. This reading of the identity clause has been advocated by some national parliaments in their reasoned opinions adopted in the context of the monitoring of the compliance of EU law with the principle of subsidiarity. It is submitted that these developments may pave the way for a reframing the subsidiarity inquiry in a way that is more attentive to the possible encroachment of EU action on Member States' regulatory autonomy. Some of the reasoned opinions submitted by national parliaments in the context of the *ex ante* subsidiarity review mechanism, in particular, suggest that that the identity clause can be invoked to cope with the interference between functional and sectorial competences – which is exactly the concern that animated the drafters of the clause within the European Convention.

The empirical evidence on the use of Art. 4.2 TEU is still insufficient to draw definitive conclusions as to the overall significance of the clause at the present stage of evolution of EU law. This study wanted to problematize the mainstream narrative according to which, since Art. 4.2 TEU requires the EU to respect the national identities of its Member States, inherent in their *fundamental structures, political and constitutional*, the only interpretation which can be given to the concept of national identities is that of national “constitutional” identities. This narrative assumes a conceptual identification between the notions of “fundamental structures” provided for by Art. 4.2 TEU and that of “constitutional identities” that many Constitutional Courts oppose to the absolute primacy of EU law. The purpose of Art. 4.2 TEU would be, in this reading, to narrow the scope of application of the doctrine of supremacy: EU law takes precedence upon national law, as long as it does not encroach upon (certain) national constitutional provisions or, in the more recent wording of Member States' constitutional courts, upon “national constitutional identities”.

The claim of a “relative” (i.e. subject to certain constitutional limits) rather than an “absolute” understanding of the supremacy doctrine by national constitutional courts is by all means legitimate. Relying upon Art. 4.2 TEU as the basis of that claims is, instead, rather unpersuasive. Asserting that it would be the Treaty itself, by requiring the EU to

respect the national identities, to impliedly empower national courts to set aside EU provisions encroaching upon Member States' constitutional identities, would mean attach to the identity clause a meaning which is substantially inconsistent with EU law.

First, Declaration no. 17 on primacy, attached to the Treaty of Lisbon, expressly enshrines the concept of *absolute* supremacy as advocated by the case law of the Court of Justice, stating that “the law stemming from the Treaty, an independent source of law, could not, because of its special and original nature, be overridden by domestic legal provisions, *however framed*”.¹⁹⁰ Second, the ECJ and AG have repeatedly stressed, even very recently, the basic principle advocated in *Internationale Handelsgesellschaft*, according to which “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”.¹⁹¹ Third, it has already happened that the ECJ has subjected even constitutional provisions to its balancing exercises. In *Mickaniki*, for example, the circumstance that a national provision (excluding certain undertakings from the participation in public procurement procedures) was designed to implement a provision of the Greek Constitution (establishing the incompatibility between government contractors and undertakings operating in the media sector) did not prevent the ECJ from ruling that, although the national measure pursued a legitimate objective, it disproportionately restricted internal market freedoms.¹⁹² In

¹⁹⁰ This principle has been advocated in *Costa Enel*. Also in Case C-473/93 (*Commission v. Luxembourg* 1996 ECR I-3207 (par. 38) the Court “ruled that the legal status of a conflicting national measures was not relevant to the question whether EU law should take precedence” (quoted in P. Craig and G. de Burca, *EU Law. Text, Cases, Materials*, OUP, 2011, p. 260).

¹⁹¹ Opinion of Mr Advocate General Poiares Maduro delivered on 21 May 2008. *Société Arcelor Atlantique et Lorraine and Others v Premier ministre, Ministre de l'Écologie et du Développement durable and Ministre de l'Économie, des Finances et de l'Industrie*. Case C-127/07. European Court reports 2008 Page I-09895. At par. 16, the AG states: “the effect of being able to rely on national constitutions to require the selective and discriminatory application of Community provisions in the territory of the Union would, paradoxically, be to distort the conformity of the Community legal order with the constitutional traditions common to the Member States. That is why, in *Internationale Handelsgesellschaft*, the Court held 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’. (7) The primacy of Community law is therefore indeed a primordial requirement of the legal order of a community based on the rule of law”.

¹⁹² See the paragraph 3 of the Opinion of AG Maduro on the *Mickaniki* case: “If respect for the constitutional identity of the Member States can thus constitute a legitimate interest which, in principle, justifies a restriction of the obligations imposed by Community law, . . . respect owed to the constitutional

Melki, the Court deemed incompatible with Article 267 TFEU the newly established French interlocutory procedure for the review of the constitutionality of national laws, in so far as the priority of that procedure could prevent all other national courts or tribunals from exercising their right or fulfilling their obligation to refer questions to the ECJ for a preliminary ruling. More tellingly, in *Tanja Kreil*, the ECJ demanded a constitutional revision of the provision of the German Constitution forbidding women to carry out roles in the army that implied the use of arms, in that it infringed upon the principle of non-discrimination on the basis of sex. In other words, that EU law takes precedence over domestic law, *however framed* and independently by its rank, is a dogma of EU law – and one that ECJ is clearly unwilling to abjure. It is unlikely that Art. 4.2 TEU will serve the purpose of excluding national constitutional law from the scope of application of the principle of supremacy.

The descriptive part of this study has showed that Art. 4.2 TEU could be used to construe internal market derogations so as to take into account national cultural and constitutional diversity, or to reframe, thanks to the input of national parliaments, the subsidiarity inquiry as a duty for the EU legislature not to unnecessarily encroach Member States' regulatory autonomy. The normative argument is that these are potential applications of the clause that, arguably, should be favored and developed. Using “respect for national identities” as a tool to flesh out existing EU law concepts, such as the respect for cultural diversity, the protection of national languages, the principle of subsidiarity, and the principle of proportionality bears the following advantages:

1. *If Art. 4.2 TEU is used as a horizontal clause coupled with existing EU law concepts, national identity claims cannot be dismissed by the ECJ as undermining the uniform application of EU law or as an attempt by Member States to rely on national constitutional law to justify the failure to comply with their obligations arising under EU law.*

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”.

Although cases such as *Omega* and *SyanWittengestain* have been celebrated as enabling fundamental rights *as provided by national constitutions* to take precedence over fundamental freedoms *as provided by the Treaties* this is actually not the case. The reasoning of the Court in no way detaches from the conventional one related to internal market. In both cases, the ECJ found that national measures constitute an obstacle to fundamental freedoms, and in both cases the ECJ concluded that they could be justified on grounds of public policy and that they were proportionate to the legitimate aim they meant to protect. The fact that national measures aimed at protecting, in one case, human dignity and, in the other case, the principle of equality seem to play an important role in assessing the proportionality of the national measures. Nevertheless, this kind of accommodation of basic constitutional principles is not at all framed in the wording of *national* fundamental rights or *national* constitutional identities trumping on fundamental freedom. It has not been adequately stressed that in *Omega* the Court deemed the objective of protecting human dignity compatible with Community law, “*it being immaterial in that respect that, in Germany, the principle of respect for human dignity has a particular status as an independent fundamental right*”.¹⁹³ Should these principles not be coupled with “public policy” as an express derogation allowed by EU law itself, they would have been dismissed as an attempt by Member States to rely on national constitutional law to justify the failure to comply with their obligations arising under EU law.

In this respect, the suggestion to national courts when referring a preliminary ruling or to national defenses in the infringement proceedings is to use the identity clause in conjunction with express derogations or mandatory requirements which EU law itself allows and to attach the notion of national identity a broader meaning than that of fundamental rights or principles enshrined in national Constitution. It is telling that in one of the analyzed cases the balancing of the Court finds on the one hand, the right of the applicants to respect for their private and family life and, on the other hand, the legitimate protection by the Member State concerned of its official national language

¹⁹³Case C-36/02., Par. 34, emphasis added.

and its traditions included in Art. 4.2 TEU.¹⁹⁴ Art. 4.2 TEU does not take the side of the fundamental rights in the balancing of interests but is used to protect Lithuanian national language against those rights. This means that respect for national identities could also entail respect for basic public choices, national traditions or respect for cultural diversity, which is an EU law objective itself.

Also the other example provided for in the paper shows that it is problematic to attach to Art. 4.2 TEU the meaning of a clause protecting the essential core of national “constitutional” identities. If this was the case, this would lead to the paradoxical outcome that Art. 4.2 TEU, despite being a provision of primary law, could be rarely used as a ground against which reviewing the legality of secondary law. This because another “dogma” of the EU law is that national constitutions cannot be “used as points of reference for the purpose of reviewing the lawfulness of Community act”.¹⁹⁵ Notoriously, the Court has stated that “the compatibility of Community acts with the constitutional values and principles of the Member States may be carried out only by way of Community law itself and is confined, essentially, to the fundamental values which form part of their *common* constitutional traditions”¹⁹⁶. It is worth recalling that even when fundamental rights are used as a ground of judicial review of EU acts they figure as general principles of EU law, rather than principles belonging to national Constitutions. It is very difficult, then, that Art. 4.2 TEU interpreted as protecting the very fundamental constitutional identity of a Member State—and so what is specific rather than common to the constitutional traditions of the member states—is going to act as a ground of judicial review of EU acts. If what, in the wording of Art. 4.2 TEU, is “inherent in fundamental structures” of the Member States means what is “crucial and distinctive” of a national constitutional identities, as suggested by the French Conseil d’Etat, can an EU act be declared void because it infringes upon the principle of secularism which characterizes French constitutional identity (? I find unlikely that Art. 4.2 TEU when used as a ground of judicial review of EU act can be represented as a sort of Treaty-based “dynamic reference” to whatever constitutes the very essential core of

¹⁹⁴ C-391/09, 12 May 2011, *MalgožataRunevič-Vardyn, ŁukaszPawelWardyn v Vilniausmiestosavivaldybėsadministracija and Others*, nyr., see par. 91 and 86.

¹⁹⁵ See the Opinion of AG Maduro in the *Arcelor* case, par. 16.

¹⁹⁶ See the Opinion of AG Maduro in the *Arcelor* case, par. 17. Emphasis added.

constitutional identities of the Member States. Although there are no cases in which Art. 4.2 TEU has been expressly invoked as a ground of judicial review of EU acts so far¹⁹⁷, there are some hints in the *Affatato* order which trigger a normative suggestion to use Art. 4.2 TEU as a way to bolster one of the original meanings of the principle of proportionality according to which EU measures should provide member states with alternative ways to achieve the objective of the measure. In the *Affatato* order the ECJ ruled out that a framework agreement did not infringe upon Art. 4.2 TEU because it left a certain “margin of discretion” to the Member States in achieving the objective of the agreement. Although the national provision which was allegedly incompatible with the framework agreement meant to protect a basic constitutional principle of the Italian Constitution, the ECJ’s reference to the notion of discretion in the implementation of the EU requirements, and its complete disregard that there was a constitutional provision at stake, might suggest that one of the use of the clause in the review of EU measures—acceptable by the ECJ because not running counter its dogma of the non-heteronomy of the grounds of review of EU legal act—could be that of coupling it with the principle of proportionality as a general principle of EU law.¹⁹⁸

1. *The second advantage that a broader interpretation of the notion of national identities (i.e. not identified with that of “constitutional identities”) bears would be that of having a concrete and ordinary impact on the relationship between the EU and national legal orders, which is not relegated to the exceptionalism of constitutional conflicts.*

The conventional reading of the clause is “too Schmittian”¹⁹⁹ in that it makes of Art. 4.2 TEU a sort of “silent clause”, which wakes up to take the side of domestic constitutional

¹⁹⁷ My intuition is that there will be a double standard but from a quantitative and from a qualitative point of view in using Art. 4.2 TEU in the review of national measures, on the one hand, and in the review of EU measures, on the other. This would be consistent with the interpretation of other general principles of EU law such as the principle of proportionality and the principle of respect for human rights which are applied in a different way.

¹⁹⁸ Challenging the validity of a EU measure because it is too preemptive on member state scope of action in that it does not leave enough discretion in the implementation of the measures has more chances of success than challenging the validity of an EU measures because it encroaches upon a specific national constitutional identity.

¹⁹⁹ I use this adjective in the sense used by J.H.H. Weiler, i.e. as “too concerned with conceptual purity”, in a different context (since the EC system eschewed the pivotal institution of the international legal system,

law in case of conflict with EU law. Indeed, as I have already mentioned in the introduction, the clash between domestic constitutional law and EU law tend to remain *exceptional*.²⁰⁰ Both the ECJ and the national constitutional courts refrain from addressing the question of conflicts between EU law and domestic constitutional law, simply because they have different answers to this conflict, which in their turn, rest on two different narratives on the foundation of the European legal order.²⁰¹ This is way the Courts tend to solve—or to avoid—these conflicts through hermeneutic instruments. The recent ruling of the German Constitutional Court on data retention, dealing with the challenging of a national measure implementing Directive 2006/24/EC, is very interesting for this study on the identity clause because the German Constitutional Court (i.e. the inventor itself of the *identity review* of EU acts in the *Lisbon* judgment²⁰²) has “declined the offer” to assess the compatibility of an EU act with German constitutional identity. The Court asserts that the fact that the citizens’ enjoyment of freedom may not be totally recorded and registered is part of German “constitutional identity”—expressly referring to the *Lisbon* judgment’s wording (pr. 218). Nevertheless, when complainants seek a referral to the ECJ, the German Constitutional Court refused to apply to the ECJ for a preliminary ruling stating that the validity of the Directive and a priority of Community law over German fundamental rights which might possibly result from this was not relevant to the decision. The solution found by the German Court to avoid a direct conflict between EU secondary law and domestic constitutional law was that of stating that the content of the Directive give the Federal Republic of Germany a broad discretion, in the sense that it ruled on the

i.e. state responsibility, the Author finds uninteresting because “too Schmittian” the claim that in exceptional situations Member State may resort to it or to classic international law). See J.H.H. Weiler, *Prologue: global and pluralist constitutionalism – some doubts*, in G. de Burca and J.H.H. Weiler, *The Worlds of European Constitutionalism*, CUP 2011, p. 11, footnote n. 4.

²⁰⁰ As an example on the side of Constitutional Court see the 2005 Decision of the French Constitutional Council on the way to reconcile freedom of religion provided by the Charter of fundamental rights and the principle of secularism provided in the French Constitution. As to the attempts of the ECJ to avoid direct constitutional conflicts see ECJ 28 November 1989, Case C-379/87, *Groener* on the protection of Gaelic language, and ECJ 4 October 1991, Case C-159/90, *Grogan* on the right to abortion and Case C-446/98. For the details and for other examples see *supra* note no. 7.

²⁰¹ At risk of simplifying, In the ECJ’s view, since the EU is an autonomous legal order, EU law can take precedence upon every national provision. In the constitutional court’s view, since the authority of the EU lies in the national constitutions delegating sovereign powers to it, the scope of application of the supremacy principle finds its limits in the principles enshrined in national Constitutions.

²⁰² In the wording of the Court in the *Lisbon* judgment the identity review represent the possibility for the German Constitutional Court to set aside EU law encroaching upon national constitutional identities.

duty of storage and its extent, but not on the modality through which Member States' authority could access the stored data. It followed that it was not the Directive which violated national constitutional identity enshrined in art. 10.1 GG on the secrecy of telecommunications, but the national provision implementing the directive.

The second reason why only exceptionally the Courts are called to solve a normative conflict—and consequently to recur to the supremacy doctrine to establish which norm takes precedence over the other—is that a set of conditions should be fulfilled before the conflicts, in fact, arise²⁰³: both norms must be valid in their respective legal order, the conflict cannot be solve by way of interpretation, etc. It is useful in this respect to look at the practice of national Courts, who are the “guardians” of the concrete application of primacy, in that at the very end, they are entitled to set aside national provisions inconsistent with EU law. In order to assess these inconsistencies, through the preliminary reference, national courts can refer to the ECJ a question on the interpretation of Treaty and assess if and to what extent the correct interpretation of EU law precludes national provisions. They can, moreover, address a question on the validity of EU law. The analyzed empirical evidence has showed that the identity clause could have an impact in both respects, either allowing the ECJ to mitigate its restrictive *interpretation* of express derogations such as public policy or to bolster general principles of EU law (such as the principle of proportionality) when they are used to challenge the *validity* of an EU act. In both cases, the outcome has been to preserve the domestic provisions, which have not been deemed to be incompatible with EU law.

The reading suggested in this study is that the identity clause should enter the picture at a stage which is preliminary to that of the normative conflict to be solved through the supremacy doctrine. The clause can help releasing national provisions from their allegation of inconsistency with EU law and then prevent issues of primacy from coming to the fore altogether.

Besides this, the identity clause could have also an impact into another *ordinary* aspect of the relationship between Member States and the Union: that of the delimitation of competence. The use of the clause in the opinion of national Parliaments monitoring on

²⁰³ I am debtor to Prof. J.H.H. Weiler for this observation.

the issue of subsidiarity shows that Art. 4.2 TEU has been used to question art. 114 TFEU as a legal basis in order to avoid a functional legal basis to restrict the scope of action that Member States could have had in case of choices of the sectorial legal basis on the services of general economic interest. It has also been used to question the disrespect of regional and local self-government that Art. 4.2 TEU expressly protects. These kinds of developments are very interesting insofar as they act into the *ex ante* phase, where the principle of subsidiarity has more chances to be respected. If the Commission will reply taking into account national Parliaments observations, and reframing the legislative proposal in a way that assess the possible encroachment of the proposal both on Member States than of local governments, this shows that the clause can help limiting the competence creep driven by the preemptive power of EU *positive* integration measures.

But also the use of the clause in the interpretation of the width of the fundamental freedoms—and, accordingly, of the scope of the express derogations or mandatory requirements—might have an impact on the competence issue. Notoriously, the Court interpretation of the TFEU articles on fundamental freedoms may have a significant impact on national policies, although it does not constitute a formal exercise of legislative competence. As it has been emphasized, the Court plays a role “not only in determining the existence of the legislative powers which have been conferred by the Treaty, but also in interpreting the scope of Treaty provisions which, although they may be negatively worded rather than expressly power-conferring, are open to a number of interpretations capable of expanding the scope of Community law and correspondingly restricting the scope of action of Member States”.²⁰⁴ In this respect, the *Tanja Kreil* case shows that it has been the extensive interpretation of the principle of nondiscrimination

²⁰⁴ As emphasized by G. de Burca, *The Principle of Subsidiarity and the Court of Justice as Institutional Actor*, *Journal of Common Market Studies*, Vol. 36, No. 2, June 2008, p. 222). As an example the author quotes the Case *Bosman* (Case C-415/93, 1995 ECR I-4921) on the interpretation of the free movement of workers envisaged by the ex Art. 48 TEC. As stated by the Author, “In *Bosman*, the Court made clear that the fact that the Community might not have power under the Treaty to legislate on football club transfer fees (and was required by Article 128 EC to respect the states’ diversity in the field of culture) did not necessarily mean that the scope of Article 48, as interpreted by the Court, would not require national sporting associations to abolish the transfer fee requirement. In other words, the lack of *legislative* authority under Article 128 did not mean that the *Court* did not have interpretative authority to conclude that Article 48 “required” the abolition of such fees” (p. 227). In paragraph 78, the Court “denied any parallel between the possible effect of a broad interpretation of Article 48 and the possible effect of Community legislation on sport” (p. 228).

on the basis of sex—rather than the existence of a EU legal act—to challenge even an express provision of the German Constitution forbidding women to carry out roles in the army. In other words, should the ECJ soften its restrictive interpretation of internal market derogations when Art. 4.2 TEU is invoked to flesh them out, the competence creep driven by *negative* integration could be limited.

To summarize, *the normative suggestion submitted in this study calls for a broader and “EU law dogma-friendly” use of the identity clause. Art. 4.2 TEU should not be interpreted as a European Treaty-based authorization to invoke national constitutional identities against the supremacy of EU law. It should be used as a horizontal clause designed to bolster an interpretation of existing EU law doctrines and principles which is more favorable to the safeguard of Member States’ discretion, regulatory autonomy, constitutional and cultural diversity.* The examples above show that:

1. If the notion of national identities would overlap with that of “constitutional” identities, this interpretation would be inconsistent with many of the dogmas of EU law, from the non-heteronomy of its foundation to the absolute nature of the principle of primacy. In this respect, the clause could be dismissed by the ECJ as an attempt to rely on national constitutional identities to derogate from EU law or to challenge the validity of EU acts. In contrast, when coupled with existing concept of EU law, such as public policy as an express derogation, the principle of respect for cultural diversity, the principle of subsidiarity, the ECJ is obliged to take into account the clause and to try to substantiate this novel (and for the first time justiciable) duty upon the EU to respect national identity of the Member States.
2. The interpretation of the clause as a horizontal one broadens the possibility that Art. 4.2 TEU could have some legal implications. Rather than being a silent clause bound to have a say in cases of *exceptional* conflicts between EU law and domestic constitutional law, Art. 4.2 TEU could have an impact into the *ordinary* functioning of EU law and in the concrete life of the interaction between legal orders. In this respect, the clause could: first, play a role in the discourse of the delimitation of competences limiting the competence creep driven by both

positive and negative integration; second, play a role into the concrete dynamics of primacy, thus preventing normative conflicts between EU law and domestic one from coming to the fore.

Needless to say, the potential legal implications of the identity clause outlined above will depend on how both European and national institutions will use it, and on how the ECJ will interpret the scope of the notion of national identities. If at first glance the wording introduced with the Treaty of Lisbon seems to clarify such a scope when compared with the laconic version of Art. 6.3 TEU in its Nice Version, it could be that this attempt will instead narrow the scope of application of the clause. Art. 4.2 TEU requires a duty to respect only *fundamental* political and constitutional structures of the Member States and only *essential* State functions. In this respect, the ECJ has been quite accurate in subjecting the clause to its conventional balancing exercise, which could—as well as could not—issue into a favor towards Member States’ regulatory autonomy or cultural and constitutional diversity. Using Art. 4.2 TEU in its case law, the ECJ may pretend to afford the Member States a major margin of discretion or to afford to national court a major margin of maneuver but, in fact, may want to have the last say on the interpretation of the clause, to rein idiosyncratic and divergent interpretations of the concept of national identities able to endanger the uniform application of EU law. It could be that the ECJ will adopt what—in the context of the *acte claire* doctrine²⁰⁵—has been referred to as an astute strategy of “give and take”²⁰⁶ so to stifle the potential of the identity clause.²⁰⁷

²⁰⁵ As it has been observed in light of the *CILFIT* ruling, “The Court, recognizing that it could not in any case coerce the national courts into accepting its jurisdiction, concedes something—a great deal in fact, nothing less than the right not to refer if the Community measure is clear—to the professional or national pride of the municipal judge, but then...restricts the circumstances in which the clarity of the provision may legitimately be sustained to cases so rare that the nucleus of its own authority is preserved intact (or rather consolidated because it voluntarily divested itself of its part of its exclusive jurisdiction)”, in G.F. Mancini and DT Keeling, *From CILFIT to ERT: The Constitutional Challenge Facing the European Court*, 1991, 11 Yearbook of European Law 1.

²⁰⁶ H. Rasmussen, *The European Court’s Acte Clair Strategy in CILFIT*, (1984) 9 European Law Review 242.

²⁰⁷ If once brought within the framework of the EU Treaties, the national identity concept is going to be transformed into an EU legal concept shaped by EU institutions and in particular by the jurisprudence of the ECJ, in a more pessimistic fashion the fate of the national identities clause could develop in a manner similar to the human rights saga. Respect for fundamental rights was first invoked *defensively* by national Constitutional Courts as a constraint on the primacy of EU law, which could only take precedence on

national law insofar as it did not infringe national constitutional standards of protection of fundamental rights. Nevertheless, when, as a reaction, the ECJ accorded fundamental rights the status of general principles of Community law and the other EU institutions pledged to respect them as codified by the EU Charter of fundamental rights, human rights have been attached an European standard of protection, bearing both the risk of being balanced against other EU values and the risk of constitutional homogenization triggered by the ECJ's "judicial colonialism". On the last point see M. Cartabia, *Europe and Rights. Taking rights seriously*, *European Constitutional Law Review*, 5: 5-31, 2009, pp. 26-27.