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United In Diversity or Through Diversity?

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National Identity As a Flexibility Clause -
Granting Member States a Margin of Appreciation

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Summary

The relationship between the Union legal order and the national constitutions of its Member States is a complex one, caused mostly due to the *sui generis* nature of the European Union. EU-27 inevitably means that the Union stands on 27 different national constitutions, each with its own constitutional specificities. Article 4.2 TEU, stating that the Union shall respect the national identities of the Member States, nevertheless has the potential to accommodate those specificities within the Union legal order. Article 4.2 TEU, in this paper referred to as the national identity clause, is however covered in a layer of mystery. Its elusive character stems from a range of varying questions. What is the exact definition of a national identity, what is the legal relevance of the national identity clause, and how should it be applied? This paper focuses on the last question. As such, the paper stands on the thesis that *Article 4.2 TEU should be seen as a flexibility clause granting Member States a margin of appreciation*.

In that light, it is argued that Article 4.2 TEU as a flexibility clause finds its legal context within the notion of constitutional pluralism, as well as within the principles of subsidiarity and conferral.

Although the proposition of linking the national identity clause with the margin of appreciation can be interpreted from existing case-law, the legal implication of their coexistence is uncharted territory. Seemingly, Article 4.2 TEU seen as a flexibility clause would imply two things. First, it would alter the proportionality test applicable in cases related to the national identity clause, presumably by creating a more lenient test. Second, the margin of appreciation may manifest itself by inviting the ECJ to preferably give guidance judgments rather than ready-made solutions, giving national courts a sort of “right to assessment”.

Additionally, the connection between the margin of appreciation and the national identity clause begs the question of whether the identity clause is a codified and amplified public policy derogation, or a freestanding clause for derogation. As the two most famous cases on Article 4.2 TEU, *Omega* and *Sayn-Wittgenstein*, primarily are linked to public policy, the legal weight of the identity clause may be questioned. Its legal value might however also be questioned if compared to the principle of primacy. While the significance of national identities cannot be underestimated, the ECJ, in the recent case *Melloni*, nevertheless stressed the importance of not jeopardizing the primacy, unity and effectiveness of EU law.

In conclusion, although Article 4.2 TEU seen as a flexibility clause answers the question on how to reconcile national constitutional specificities with Union law, it primarily generates more questions than answers. Hence, the elusive character of the national identity clause remains.

Sammanfattning

Förhållandet mellan unionens rättsordning och medlemstaternas nationella konstitutioner är komplicerad, främst på grund av EU:s unika karaktär. EU-27 innebär oundvikligen att unionen står på 27 olika nationella konstitutioner, alla med sina egna konstitutionella särdrag. Artikel 4.2 i EU-fördraget (hädanefter ”EUF”), som stadgar att unionen skall respektera medlemstaternas nationella identiteter, har dock potentialen att tillgodose dessa särdrag inom unionens rättsordning. Artikel 4.2 EUF, här kallad den nationella identitetsklausulen, är dock täckt av ett lager av mystik. Dess undflyende karaktär härstammar från en rad olika frågor. Vad är definitionen av en nationell identitet, vad är den rättsliga betydelsen av den nationella identitetsklausulen och hur ska den tillämpas? Detta arbete fokuserar på den sista frågan. Dess tes är att *artikel 4.2 EUF bör ses som en flexibilitetsklausul som ger medlemsstaterna ett utrymme för skönmässig bedömning*.

Mot den bakgrunden, argumenteras här att artikel 4.2 EUF som en flexibilitetsklausul finner sitt rättsliga sammanhang inom begreppet konstitutionell pluralism samt subsidiaritetsprincipen och principen om tilldelade befogenheter.

Även om förslaget att koppla den nationella identitetsklausulen med doktrinen om ett utrymme för skönmässig bedömning kan tolkas från befintlig rättspraxis, är den rättsliga konsekvensen av deras samexistens okänd mark. Till synes skulle artikel 4.2 EUF som en flexibilitetsklausul innebära två saker. För det första skulle den ändra proportionalitetstestet tillämpning på fall som rör den nationella identitetsklausulen, förmodligen genom att skapa ett mildare test. För det andra skulle förslaget bjuda in EU-domstolen till att ge vägledande domar snarare än färdiga lösningar.

Därutöver väcker kopplingen mellan ett utrymme för skönmässig bedömning och den nationella identitetsklausulen frågan om identitetsklausulen är en kodifierad och förstärkt grund för *ordre public* eller en fristående klausul. Eftersom de två mest kända fallen gällande artikel 4.2 EUF, *Omega* och *Sayn-Wittgenstein*, i första hand är kopplade till *ordre public*, kan identitetsklausulens juridiska tyngd ifrågasättas. Dess rättsliga värde kan dock även ifrågasättas om granskad mot principen om EU-rättens företräde. Även om betydelsen av nationella identiteter inte kan underskattas, har EU-domstolen, i det nyligen avgjorda fallet *Melloni*, betonat vikten av att inte äventyra EU-rättens företräde, enhetlighet och verkan.

Sammantaget, även om artikel 4.2 EUF sedd som en flexibilitetsklausul svarar på frågan om hur man kan förena nationella konstitutionella särdrag med unionsrätten, genererar den främst fler frågor än svar. Den nationella identitetsklausulen undflyende karaktär kvarstår således.

Preface

And here I am. Done. Seems strange after six years in Lund.

Thank you to: my supervisor and motivator Xavier Groussot, my loving mother, my devoted father, my precious Jenny Penny and Daniel Bergström, there from the beginning.

Last but not least, a warm hug to all friends I have made in Lund during these years, and to the lovely people in Exjobbsrummet spring 2013.

Abbreviations

CC	Conseil Constitutionnel (Constitutional Council of France)
Charter	Charter of Fundamental Rights of the European Union
ECJ	European Court of Justice
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
EU	European Union
EC	European Community
CMLRev	Common Market Law Review
ELRev	European Law Review
ELJ	European Law Journal
ECLRev	European Constitutional Law Review
FCC	Bundesverfassungsgericht (Federal Constitutional Court of Germany)
HRLJ	Human Rights Law Journal
ICON	International Journal of Constitutional Law
JCMS	Journal of Common Market Studies
TEU	Treaty on the European Union
TEUF	Treaty on the Functioning of the European Union

1 Introduction

1.1 Background

*United In Diversity*¹

In 2004 ten new Member States joined the European Union (EU). Following this, Bulgaria and Romania acceded in 2007, adding up to a total number of 27 Member States.² EU-27³ means 27 legal traditions, 27 cultural heritages, 27 historic backgrounds, 27 constitutions and ultimately 27 national identities. The motto of the EU “United in diversity” accurately illustrates this *sui generis* nature of the Union. It also underlines the potential and importance of Article 4.2 Treaty on the European Union (TEU), in this paper also called the national identity clause.

The identity clause has been given a novel formulation in the Lisbon treaty, raising a lot of debate concerning its legal implications. Article 4.2 TEU states that *the Union shall respect the national identities of the Member States, inherent in their fundamental structures, political and constitutional*. However, although the national identity clause is of central significance in the Union legal order, it is a notion covered by mystery. One of the more debated issues surrounding the clause is its definition. The focus of this paper is however not to elucidate the definition and meaning of national identities. Rather, it goes one step further and examines its application and function, as to determine its legal implications as a tool for judicial review.

Collisions between national constitutional provisions and EU law have appeared in front of the European Court of Justice (ECJ) with regular intervals, and one might guess that, if anything, the prevalence of such collisions will increase. It is against this background that Article 4.2 TEU, stating that the Union must respect the national identities of its Member States, serves its purpose. If understood as a flexibility clause, granting Member States a margin of appreciation as to reunite their constitutional specificities with the objectives of the Union, any future collisions might strengthen the Union rather than weaken it.

1.2 Aim and Research Questions

While this paper will try to cover all the main aspects surrounding the national identity clause, its focus lies in examining the identity clause’s function within the application of the ECJ. As such, the paper is based on the thesis that *Article 4.2 TEU should be seen as a flexibility clause granting Member States a margin of appreciation*. In pursuing this thesis, the paper is

¹ Motto of the European Union.

² Croatia is moreover expected to accede 1 July 2013.

³ The EU has 27 Member States.

faced with a handful of important questions related to the national identity clause and its possible function within the Union legal order. These are, in the order they are discussed under Chapter 5:

- What is the relationship between Article 4.2 TEU seen as a flexibility clause and the notion of constitutional pluralism?
- What is the relationship between Article 4.2 TEU seen as a flexibility clause and the principle of subsidiarity?
- What is the relationship between Article 4.2 TEU seen as a flexibility clause and the principle of conferral?
- How would the margin of appreciation doctrine function within the national identity clause? What would be the effect of such a relationship?
- Is, and if yes how is, the justification of public policy, which often goes hand in hand with a margin of appreciation, linked with the national identity clause?
- What would be the consequences of seeing Article 4.2 TEU as a flexibility clause in relation to the primacy of EU law?

The purpose of the paper is consequently to elucidate the nebulous application of the national identity clause. It thus tries to bring some clarity in how Article 4.2 TEU can be used to ease the tension between Union law and the constitutional specificities of the Member States.

1.3 Method and Materials

First and foremost, it should be noted that this is an argumentative paper, as it stands on a specific thesis. Hence, while chapter 2 to 4 goes through the different aspects of the national identity clause and the issues surrounding it, chapter 5 turns to the argumentative part of the paper. Therefore, chapter 5 is not in its true sense an analysis. Rather, it builds on the factual information given in the previous chapters to support the thesis.

The method used in this paper is that of a traditional legal dogmatic approach. The paper therefore stands on, and is analyzed in light of, recognized legal sources. In particular case-law and academic journals have been used.

Special attention has to be drawn to the fact that while case-law on Article 4.2 TEU is limited, there is a vast amount of doctrine on the subject. Hence, the paper primarily stands on the contribution made by academic scholars in various legal journals. Well renowned journals has consistently been tried to be used. Hence, while some authors might not be well-known, the journal in which their article is published speaks for them. While EU legal doctrine has no formal status as a legal source and is not quoted by the ECJ, it does not have an insignificant role as regards the further development of EU-

law.⁴ It is for instance frequently cited and discussed by Advocates General in their opinions.

The fact that case-law on the national identity clause is scarce is an inevitable weakness, since no general conclusions may be drawn. This does on the other hand not imply that it is futile to examine Article 4.2 TEU. On the contrary, the scarce case-law on Article 4.2 TEU is one of the reasons why it is interesting to analyze.

1.4 Delimitations

As stated, this paper focuses on the application and function of Article 4.2 TEU, and hence only discusses the possible definition of national identities in brief. Academic scholars have since the appearance of the national identity clause been in disagreement as regards the definition of national identities, the main aspect being whether cultural identities also is covered. The diverging opinions have continued even after the entry into force of the Lisbon treaty, although Article 4.2 TEU specifically draws a link to constitutional identities. While the paper under section 3.5 tries to give an overview on the definition of national identities, it does not do justice to all the diverging opinions on the matter.

Article 4.2 TEU states “inherent in their fundamental structures, *political* and constitutional” (emphasis added). The political aspect of national identities has until now been neglected in academic doctrine and the case-law of the ECJ. It is however an interesting aspect of Article 4.2 TEU. Presumably, political identity is not to be considered as interchangeable with constitutional identity as such a reading would make the meaning of having both words in the article void. It might be argued that while constitutional identity focuses on the essential constitutional structures of the state, political identity rather focuses on the essential political characteristics of the state. The Swedish labour market model (*arbetsmarknadsmodellen*), where for instance labour unions have a strong position on the market, might be such an example. This obviously leads one’s thoughts to *Laval*.⁵ The Swedish government did however not explore this possibility. Though an interesting part of the national identity clause, this strain of political identity has regretfully not been included in this paper as the focus is its function and application and not its definition.

The recent Grand Chamber case *Åkerberg* raises an interesting question as regards the connection between national identities and fundamental rights, and their coexistence with the Charter of Fundamental Rights of the European Union (Charter). The ECJ noted that the Member States “remain free to apply national standards of protection of fundamental rights, provided that the level of protection provided for by the Charter, [...], and the primacy, unity and effectiveness of European Union law are not thereby

⁴ Lehrberg, Bert, *Praktisk Juridisk Metod*, 5.ed, IBA, 2006, p. 180.

⁵ Case C-341/05 *Laval un Partneri Ltd* [2007] ECR I-11767.

compromised.”⁶ As this however falls outside the scope of this paper, it has not been addressed.

Article 4.2 TEU has to be seen from two perspectives, that of the Union, and that of the Member States. The paper however focuses on the application and function of the national identity clause by the ECJ. Hence, the Member State perspective of the identity clause is not given the same amount of attention as the Union perspective. The paper for instance only addresses the views of the *Conseil Constitutionnel*, French constitutional court, and the *Bundesverfassungsgericht*, Federal constitutional court of Germany, on the matter.

The wealth of case-law and academic commentary on the margin of appreciation doctrine is as good of an indication as any on the variety of broad connotations existing as regards the doctrine. Consequently, it is beyond the scope of this paper to provide a comprehensive picture of the doctrine. As the focus is on Article 4.2 TEU, the paper only describes the doctrine in more general terms. The same applies as regards the theory of constitutional pluralism.

1.5 Disposition and Terminology

The paper is divided into four different chapters, each building upon the other.

Chapter 2 discusses the relationship between EU law and the legal orders of the Member States. As such, it is devoted to a general overview of the most essential principles of the Union: the principle of conferral, the principle of proportionality, the principle of subsidiarity and the principle of primacy. The chapter also addresses the issue of whether the Union has judicial *Kompetenz-Kompetenz*.

Chapter 3 turns to Article 4.2 TEU, the national identity clause, and gives a thorough examination of the article as regards its legal context, the case-law related to it and its function within the Union legal order.

Chapter 4 describes the margin of appreciation as used both by the European Court of Human Rights (ECtHR) and the ECJ.

Chapter 5 turns to the thesis of the paper and discusses it in light of the previous chapters. In essence, Article 4.2 TEU understood as a flexibility clause is analyzed in relation to the notion of constitutional pluralism, the principle of subsidiarity, the principle of conferral, the margin of appreciation doctrine, public policy and the principle of primacy. The paper then ends with a conclusion on chapter five.

⁶ Case C-617/10 *Åkerberg* [2013] n.y.r., para. 29.

As regards the terminology used in this paper, one thing in particular has to be highlighted. The heart of the paper, Article 4.2 TEU, will interchangeably be referred to as the “national identity clause”, “identity clause”, “clause” and “Article 4.2 TEU” throughout the paper.

The margin of appreciation doctrine, primarily goes under two names. Within the European Convention on Human Rights and international law, it is referred to as the margin of appreciation. Within EU law, it is usually referred to as the margin of discretion. The ECJ has however sometimes also referred to a margin of appreciation. This paper consistently uses the term “margin of appreciation”, except under section 4.3, as the doctrine *per se*, commonly is known under this name. The term margin of appreciation has furthermore been used as to highlight the argued connection between the doctrine and the national identity clause.

2 The Relationship Between EU Law and the Legal Orders of the Member States

2.1 Introduction

Much has changed since the first steps towards a European union were taken in the 1950s. The days when the Union was thought of as a mere economical union are long gone. Fundamental rights, once located in the backseat, have now transformed into one of the central pillars of the Union, as seen by the ratification of the Charter.⁷ Yet, many central issues remain the same, to a large extent due to the *sui generis* nature of the EU. The division of competences between the Union and its Member States has since the beginning caused headaches for policy makers, scholars and ultimately the ECJ and national courts. Where are the boundaries of EU law, and who decides?

The principle of conferral and the principle of primacy both form part of the Union's spine.⁸ Nevertheless, there is an evident tension between the two principles, the former providing the limits for the Union's competences and the latter setting the powers within those limits limitless. It is within this context that the notion of national identities might be understood, standing as the last safe house within the limitless reach of the principle of primacy. As the national autonomy of the Member States narrows, the national individualities of the Member States become more vital.

This chapter will touch upon the principle of conferral and clarify the issues surrounding it (section 2.2). It will then turn to the principle of primacy, and ultimately the vivid debate between the EU and its Member States concerning who the final arbiter over the limits of the Union is (section 2.3).⁹

⁷ See, Cartabia, Marta, "Europe and Rights: Taking Dialogue Seriously", *ECLRev.*, Vol. 5, 2009.

⁸ A sort of EU identity.

⁹ For an in-depth analysis of this debate see; Beck, Gunnar, "The Lisbon Judgment of the German Constitutional Court, the Primacy of EU Law and the Problem of Kompetenz-Kompetenz: A Conflict between Right and Right in Which There is No Praetor", *ELRev* Vol 17, No. 4, 2011, p. 471; Kwiecién, Roman, "The Primacy of European Union Law over National Law Under the Constitutional Treaty", *German Law Journal*, Vol. 6, 2005, pp. 1479 – 1496; Craig, Paul, "The ECJ and Ultra Vires Action: A Conceptual Analysis", *CMLRev.*, Vol. 48, 2011, pp. 395-437 and Kumm, Mattias, Who is The Final Arbiter of Constitutionality in Europe?: "Three Conceptions of the Relationship Between the German Federal Constitutional Court and the European Court of Justice", *CMLRev.*, Vol. 36, 1999, pp. 351 – 386.

2.2 The Competence of the European Union

2.2.1 The Principle of Conferral and *Kompetenz-Kompetenz*

As stated in Article 5.2 Treaty on the Functioning of the European Union (TFEU), the Union shall act only within the limits of the competences conferred upon it by its Member States, otherwise known as the principle of conferral. Hence, the Union has an attributed competence and cannot grant itself new competences. In accordance with the principle of conferral, competences not conferred upon the Union remain with the Member States.¹⁰ All Union action must be founded upon a legal base within the Treaties. Any action outside the limits of the Union's competences is thus considered *ultra vires*. In other words, the principle of conferral stakes out the division of competences between the Union and the Member States and is as such of utter importance, which is also shown by its numerous appearance in the opening articles of the Treaties.¹¹

While the principle of conferral sets up the division of competences between the Union and the Member States, the question of who gets to decide the boundaries for that division is, and has always been, a hot potato discussed by policy makers, numerous scholars, the ECJ and the national constitutional courts of the Member States.¹² In essence, it is a question of whether the ECJ, based on the authority granted to it by the Treaties and the aim to have a uniform application of Union law, or the national constitutional courts, based on the principle of conferral and their national constitutions, has the final word. It is a debate of whether the Union has what the Germans refer to as judicial *Kompetenz-Kompetenz*, i.e. whether the Union has the authority to decide the limits of its own powers.¹³ This should be distinguished from legislative *Kompetenz-Kompetenz*, i.e. whether the Union has the competence to legislate in a certain area.¹⁴

The ECJ has answered the question on judicial *Kompetenz-Kompetenz* in its own favor. In *Foto-Frost* the court claimed the exclusive right to invalidate Union acts and thus, as many perceive it, announced itself as the final arbiter on the limits of EU law.¹⁵ However, the constitutional courts of

¹⁰ Article 4.1 TEU

¹¹ See reference to the principle in Article 3.6, 4:1, 5:1 and 5:2 TEU and Article 7 TFEU.

¹² See note 10.

¹³ Beck, Gunnar, "The Lisbon Judgment of the German Constitutional Court, the Primacy of EU Law and the Problem of Kompetenz-Kompetenz: A Conflict between Right and Right in Which There is No Praetor", *ELRev.*, Vol. 17, No. 4, 2011, p. 472

¹⁴ The Union and ECJ can for instance have the judicial competence but not the legislative competence on a certain matter. See for instance Case C-341/05 *Laval un Partneri Ltd* [2007] ECR I-11767, on the right to strike.

¹⁵ Beck, Gunnar, "The Lisbon Judgment of the German Constitutional Court, the Primacy of EU Law and the Problem of Kompetenz-Kompetenz: A Conflict between Right and Right in Which There is No Praetor", *ELRev.*, Vol. 17, No. 4, 2011, p. 473 and Weiler,

several Member States, most notably the FCC (the *Bundesverfassungsgericht*), have consistently made clear that they do not agree with the view of the ECJ in this matter.¹⁶ A closer look into the principle of primacy and the tension between the ECJ and the national constitutional courts will follow in section 2.3.2.

Alongside the principle of conferral, the principles of proportionality and subsidiarity also govern the exercise of the competences conferred upon the Union.¹⁷

2.2.1.1 The Principle of Proportionality

The principle of proportionality stands out as one of the most important tools of judicial review used by the ECJ. As observed by Advocate General Jacobs “there are few areas of Community law, if any at all, where [it] is not relevant.”¹⁸ The principle has mainly two purposes; controlling the extent to which Union institutions are permitted to act, and limiting the margin Member States are given when derogating from Union law.¹⁹ The former stems directly from Article 5.4 TEU: “Under the principle of proportionality, the content and form of Union action shall not exceed what is necessary to achieve the objectives of the Treaties.”²⁰ Hence, all Union institutions are bound by the principle of proportionality, and any act may be annulled if not in compliance with it.²¹ As a general principle of EU law, the principle of proportionality is also essential in determining whether a Member State derogating from Union law has done so striking a proper balance between the means used and the intended aim.²²

The principle of proportionality under EU law entails two tests. First, the means employed must be suitable for the purpose of achieving the desired objective (test of suitability). Second, the means cannot go beyond what is necessary to achieve that objective (test of necessity).²³ In the words of the ECJ, national measures liable to hinder a fundamental freedom must be “suitable for securing the attainment of the objective which they pursue; and [...] not go beyond what is necessary in order to attain it.”²⁴ It has been argued that the test in reality consists of three steps, the third one being the test of proportionality *strict sensu*, which means that a measure may not

Joseph, *The Constitution of Europe: “Do the new clothes have an emperor?” And other essays on European integration*, 1999, Cambridge University Press, p. 288.

¹⁶ See section 2.3.2.

¹⁷ Article 4:1 TEU

¹⁸ Case C-120/94 *Commission v. Greece (FYROM case)* [1996] ECR I-1513, para. 70.

¹⁹ Dashwood, Alan *et al.*, *Wyatt and Dashwood’s European Union law*, 6th ed., 2011, Hart Publishing, p. 122.

²⁰ Article 5.4 TEU.

²¹ *Eg.* Case C-380/03 *Germany v. Parliament and Council (Tobacco Advertising II)* [2006] ECR I-11573; and Case C-283/11 *Sky Österreich* [2013] n.y.r., where the ECJ however did not find the contested Union acts disproportionate.

²² Lenaerts, Koen and Van Nuffel, Piet, *European Union Law*, 3 ed., 2011, Sweet & Maxwell, p. 141

²³ Dashwood, Alan *et al.* *Wyatt and Dashwood’s European Union law*, 6th ed., 2011, Hart Publishing, p. 123.

²⁴ Case C-55/94 *Gebhard* [1995] ECR I-4165, para. 37.

have an excessive effect on the applicant's interests.²⁵ This is for instance the case in the recent Grand Chamber case *Sky Österreich*.²⁶

2.2.1.2 The Principle of Subsidiarity

The principle of subsidiarity in Article 5.3 TEU requires that the Union, in areas that do not fall within its exclusive competence, only act if the objectives of the proposed action cannot be sufficiently achieved by the Member States. This is for instance the case if a proposed action, by reason of its scale or effects, is better achieved at Union level. The basic idea behind the principle is hence that public decisions should be taken at the lowest tier of government capable of addressing the matter in question. Even if the Union has the competence to act, it may, consequently, only do so if the principle of subsidiarity so allows. The principle was introduced in the Maastricht Treaty as a response to the dissatisfaction in many Member States of the expanding scope of the Union and the way it was exercising its powers.²⁷

The application of the principle falls primarily on the Union institutions that need to comply with the principle when acting under the Treaties. With the Lisbon treaty, the national parliaments were however also given a major responsibility in ensuring compliance with the principle of subsidiarity. The new Protocol on the principles of subsidiarity and proportionality²⁸ introduced a new system under which the parliaments may control Union acts in light of the principle of subsidiarity. The principle is also a tool for judicial review used by the ECJ in examining the validity of Union acts.²⁹ The impact of the principle in case-law has, however, in practice been modest. Though the court on several occasions has reviewed Union acts against the principle, it has yet not annulled any act on that ground. This is because Union actions logically are measured against Union objectives. Hence, it is logical that any Union act will be better achieved at Union level.³⁰

2.2.2 The Functional Competence of the Union

While the Union must act within the powers conferred upon it by the Treaties, the practical significance of the principle of conferral is diminished by several factors. Underpinning these factors is the functional approach of the competences bestowed on the Union. The competences of the Union are namely functional, as opposed to sectorial. Simply put, the competences are

²⁵ Tridimas, Takis, *The General Principles of EC law*, 1999, Oxford, p. 92.

²⁶ Case C-283/11 *Sky Österreich* [2013] n.y.r. para. 63.

²⁷ Lenaerts, Koen and Van Nuffel, Piet, *European Union Law*, 3 ed., 2011, Sweet & Maxwell, p. 131

²⁸ Protocol (No. 2), annexed to the TEU and TFEU, on the application of the principles of subsidiarity and proportionality, 2010, O.J. C83/206.

²⁹ Eg. Case C-491/01 *British American Tobacco* [2001] ECR I-11453, paras 180-183.

³⁰ Lenaerts, Koen and Van Nuffel, Piet, *European Union Law*, 3 ed., 2011, Sweet & Maxwell, p. 137.

not divided up according to subject-matter but functionally in that they are based on aims.³¹

In light of this functional characteristic of Union competences, the principle of conferral has in practice placed few limits on the Union. This is what scholars call the “competence creep” of EU law.³² Commonly, this occurrence is explained by two factors;³³ the teleological interpretation the ECJ has given to various legal bases, as well as the broad and the somewhat vague wording of many Treaty articles. Article 352 TFEU, providing the Union with a supplementary legal basis when the Treaties do not provide the necessary powers to attain the objectives of the Union, is a common example of the latter.³⁴ If the discussion about *Kompetenz-Kompetenz* concerns who gets to decide the limits of the Union’s competences, the issue of competence creep is thus a question on how far those limits have expanded.

The functional character of the Union’s competences and the existence of a competence creep has given rise to a vivid debate over how the attributed competences of the Union should be shaped. A more precise division of competences between the Union and the Member States has thus been called for.³⁵ This debate was not neglected when forming the Lisbon treaty, which in part responded to the call by introducing a clear definition of the Union’s competences in Article 2 TFEU. At the same time it also added a list of the most important areas of competence, divided by category of competence, in Articles 3-6 TFEU.³⁶

³¹ Lenaerts, Koen and Van Nuffel, Piet, *European Union Law*, 3 ed., 2011, Sweet & Maxwell, p. 106.

³² See Prechal, Sacha, “Competence creep and general principles of law”, *Rev. Eur. Adm. L.*, Vol. 3, No 1, 2010, p. 5 and Barnard, Catherine and Odudu, Okeoghene, “The Outer limits of European Law: Introduction”, in Barnard, Catherine and Odudu, Okeoghene, *The outer limits of the European Union*, 2009, Hart Publishing p. 1-16.

³³ See Craig, Paul, “The ECJ and Ultra Vires Action: A Conceptual Analysis”, *CMLRev.*, Vol. 48, 2011, pp. 395-437, arguing that the existence of a competence creep is the result of four interacting variables.

³⁴ Lenaerts, Koen and Van Nuffel, Piet, *European Union Law*, 3 ed. 2011, Sweet & Maxwell, p. 113

³⁵; Lenaerts, Koen and Van Nuffel, Piet, *European Union Law*, 3 ed. 2011, Sweet & Maxwell, p. 114; which in turn has made reference to Declaration (No. 23), annexed to the Treaty of Nice, ([2001] O.J. C80/85) and the “Declaration of Laeken of the European Council of December 14 and 15, 2001.

³⁶ Lenaerts, Koen and Van Nuffel, Piet, *European Union Law*, 3 ed. 2011, Sweet & Maxwell, p. 114 and 125. The list of competences can be found in Article 3 TFEU (exclusive competences), Article 4 TFEU (shared competences) and Article 6 (supporting competences).

2.3 The Principle of Primacy

The principle of primacy, also referred to as the principle of supremacy,³⁷ has evolved through the case-law of the ECJ and is today considered as one of the central pillars in what can be called the constitutional sphere of the Union.³⁸ However, after more than 40 years alive and kicking, the debate over its limits and effects is still ongoing.³⁹ The principle was enshrined in Article I-6 of the rejected Treaty establishing a Constitution for Europe, but was downgraded in the Treaty of Lisbon to the declarations concerning the provisions of the Treaties.⁴⁰

In essence, the principle of supremacy means that Union law takes precedence over national law. In case of conflict between the two legal systems, Union law prevails. And here lies the Gordian knot⁴¹, the obvious tension between the principle of conferral and the principle of primacy. At the same time as Union law precedes all national law due to the principle of primacy, it cannot extend further than the powers granted to the Union by the same national laws that the principle oversteps.⁴²

The Member States and their courts have, although not without some resistance, accepted the principle of primacy. However, the principle is still a cause for debate as regards the question of whether the Union has judicial *Kompetenz-Kompetenz*. The national constitutional courts claim that the principle of supremacy stems from their constitutions. The ECJ on the other hand claims that the principle is inherent in the Union, due to the Union's special and original nature.⁴³

The principle of primacy should be distinguished from the doctrine of pre-emption. The doctrine of pre-emption refers to the situation that Member States cannot act where the Union has exclusive competence, or, within an area of shared competence, already has exercised that competence.⁴⁴ Depending on the extent to which the Union has exercised its competence, the area may thus be seen as an exclusive one.⁴⁵

³⁷ Some scholars argue that there is a conceptual difference between the two notions. Avbelj, Matej, "Supremacy or Primacy of EU law – (Why) Does it Matter?", *ELJ*, Vol. 17, 2011, pp. 744-763. In this paper the two notions are seen as synonyms.

³⁸ See Case C-399/11 *Melloni* [2013] n.y.r. para. 59.

³⁹ Lenaerts, Koen, and Corthout, Tim, "Of birds and hedges: the role of primacy in invoking norms of EU law", *ELRev.*, Vol. 31, No. 3, 2006, pp. 287-315.

⁴⁰ Declaration (No. 17), annexed to the Lisbon Treaty, concerning primacy, [2010] O.J. C/83/344.

⁴¹ Ancient Greek legend of a disentangling knot ultimately solved by Alexander the Great by cutting through it with a sword. Used to describe an unsolvable problem or an unsolvable problem that can only be solved by cheating.

⁴² Beck, Gunnar, "The Lisbon Judgment of the German Constitutional Court, the Primacy of EU Law and the Problem of Kompetenz-Kompetenz: A Conflict between Right and Right in Which There is No Praetor", *ELRev.* Vol. 17, No. 4, 2011, p. 470

⁴³ Case 6/64 *Costa v ENEL* [1964] ECR 585.

⁴⁴ Article 4 TEU.

⁴⁵ See Lenaerts, Koen and Van Nuffel, Piet, *European Union Law*, 3 ed. 2011, Sweet & Maxwell, p. 128 and Schütze, Robert, "Supremacy without pre-emption? The very slowly

2.3.1 Evolution of the Principle of Primacy

The story of the principle of primacy was born in 1964 with the case *Costa v ENEL*⁴⁶, one of the landmark cases of the Union. The ECJ here for the first time articulated the principle that Union law takes precedence over national law. The court justified this decision by drawing inspiration from *Van Gend en Loos*⁴⁷, recalling that the EEC Treaty had created its own legal system which became an integral part of the legal systems of the Member States. It then referred to the danger in allowing Community law to vary from one Member State to another, hence jeopardizing the objectives of the Treaties. The ECJ concluded that:

“the law stemming from the Treaty, [...], could not, because of its special and original nature, be overridden by domestic provisions, however framed, without being deprived of its character as Community law and without the legal basis of the Community itself being called into question.”⁴⁸

Six years later, in 1970, came *Internationale Handelsgesellschaft*,⁴⁹ usually described as the case confirming the ECJ’s claim of absolute supremacy.⁵⁰ Faced with the issue regarding the relationship between Community secondary law and national constitutional law, the ECJ stated that:

“the validity of a Community measure of 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.”⁵¹

The ECJ reasoned that the uniform application and efficiency of Union law would be undermined if a national provision, irrespective of its status under that national legal order, could trump it.⁵²

What happens then to a national rule standing in direct contradiction with a Union act? This question was answered by the ECJ in *Simmenthal II*, where the court held that national rules infringing a Union act would render it automatically inapplicable.⁵³ The ECJ further stated that the Member States are under a duty to both refrain from enacting national provisions contrary

emergent doctrine of Community pre-emption”, *CMLRev.*, Vol. 43, 2006, pp. 1023-1048. It should be noted that this is a simplified explication of the doctrine.

⁴⁶ Case 6/64 *Costa v ENEL* [1964] ECR 585.

⁴⁷ Case 26/62 *Van Gend en Loos* [1963] ECR 1; where the ECJ established the direct effect of Union law.

⁴⁸ Case 6/64 *Costa v ENEL* [1964] ECR 585.

⁴⁹ Case 11/70 *Internationale Handelsgesellschaft* [1970] ECR 1125.

⁵⁰ de Witte, Bruno, “Direct Effect, Primacy and The Nature of The Legal Order”, in Craig, Paul and De Búrca, Gráinne, *The Evolution of EU Law*, 2 ed., 2011, Oxford, p. 342; and Schütze, Robert, “Supremacy without pre-emption? The very slowly emergent doctrine of Community pre-emption”, *CMLRev.* Vol. 43, 2006, p. 1027.

⁵¹ Case 11/70 *Internationale Handelsgesellschaft* [1970] ECR 1125, para.3.

⁵² Case 11/70 *Internationale Handelsgesellschaft* [1970] ECR 1125, para.3.

⁵³ Case 106/77 *Simmenthal* [1978] ECR 629.

to Union law and refrain from applying such laws.⁵⁴ Thus, the principle of primacy does not invalidate inconsistent national rules, but merely requires the non-application of the rule within the context where it is inconsistent. In fully internal situations, or if the EU norm ceases to exist, the rule will be fully applicable.⁵⁵

While the Member States and its courts in general have accepted the principle of primacy, the primacy of EU law over national constitutions is a completely different matter.⁵⁶

2.3.2 The Response of the National Constitutional Courts

The relationship between the ECJ and the national constitutional courts of the Member States is far from an easy one. It has even been compared to the Mutual Assured Destruction (MAD) doctrine used during the Cold War.⁵⁷ Putting names aside, the relationship is in essence a dialogue between the courts where right stands against right⁵⁸.

As regards the issue of judicial *Kompetenz-Kompetenz*, the ECJ asserts that the principle of primacy derives its powers from within the Union legal order and that EU law, because of its special and original nature, trumps the national constitutions of the Member States. If this holds true, the ECJ alone has the authority to set the limits of EU law. However, the national courts see themselves as the guardians of their own constitutional orders.⁵⁹ As such, they consider EU law as rooted in and stemming from their own national constitutions. Consequently, the principle of supremacy derives from their constitutions, and not from an autonomous source of law within the Union legal order.⁶⁰ Most constitutional courts have therefore reserved for themselves, although with different approaches, the residual right to be the final arbiter in reviewing the legality of EU acts.

⁵⁴ Case 106/77 *Simmenthal* [1978] ECR 629, para. 17.

⁵⁵ de Witte, Bruno, "Direct Effect, Primacy and The Nature of The Legal Order", in Craig, Paul and De Búrca, Gráinne, *The Evolution of EU Law*, 2 ed., Oxford, 2011, p. 341

⁵⁶ de Witte, Bruno, "Direct Effect, Primacy and The Nature of The Legal Order", in Craig, Paul and De Búrca, Gráinne, *The Evolution of EU Law*, 2ed, 2011, Oxford, p. 350.

⁵⁷ Weiler, Joseph, *The Constitution of Europe: "Do the new clothes have an emperor?" And other essays on European integration*, 1999, Cambridge University Press, pp. 320-321.

⁵⁸ Term used by Beck, Gunnar, "The Lisbon Judgment of the German Constitutional Court, the Primacy of EU Law and the Problem of Kompetenz-Kompetenz: A Conflict between Right and Right in Which There is No Praetor", *ELRev.*, Vol. 17, No. 4, 2011, pp. 470-494.

⁵⁹ Sweet, Alex Stone, "Constitutional Dialogues in the European Community", in Anne-Marie Slaughter, Alex Stone Sweet and Joseph H. H. Weiler, (eds.), *The European Courts & National Court Doctrine and Jurisprudence*, 1997, Hart Publishing, p. 319.

⁶⁰ de Witte, Bruno, Direct Effect, "Primacy and The Nature of The Legal Order", in Craig, Paul and De Búrca, Gráinne, *The Evolution of EU Law*, 2ed, 2011, p. 351-352. The author however notes that the Netherlands may be an exception. See also: Hartely, *The Foundations of European Union Law*, 7th ed. 2010, Oxford, p. 284

For the sake of space, I will only address the reservations from the French and German constitutional courts.⁶¹

2.3.2.1 The *Conseil Constitutionnel*⁶²

Although Article 55 of the French Constitution states that international treaties stand above any national law, the primacy of EU law over the French legal order is a far more complicated issue than Article 55 suggests. While the *Cour de cassation* acknowledged the primacy of EU law in 1975 in the *Cafés Vabre* case,⁶³ the *Conseil d'Etat* waited until 1989, in the *Nicolo* case, to accept the principle.⁶⁴

As to the *Conseil Constitutionnel* (CC), the court stated in a series of cases in 2004 that it was a constitutional obligation to transpose Community directives into domestic law. The court however added an exception to the obligation in case of an “express contrary provision of the Constitution.”⁶⁵ At the same time it made clear that the French constitution remained at the summit of the domestic legal order, thus standing above the principle of primacy.⁶⁶ As regards the exception of an “express contrary provision”, this term remained ambiguous until 2007 when the court reformulated its reservation, stating that EU law prevails over national law except when in conflict with France’s constitutional identity.⁶⁷ The effect of this reservation is still an open question.

2.3.2.2 The *Bundesverfassungsgericht*

The relationship between the *Bundesverfassungsgericht* (FCC) and ECJ is notorious, and hence stands out among the rest. The tension between the

⁶¹ For a more exhaustive analysis see: Lenaerts, Koen and Van Nuffel, Piet, *European Union Law*, 3 ed. 2011, Sweet & Maxwell, pp 772-809. For an analysis on the Swedish approach to the issue see: Nergelius, Joakim, 2005 - The Year when European Law and its Supremacy was Finally Acknowledged by Swedish Courts., in Cramér and Bull (eds.), *Swedish Studies in European Law*. 2008, s. 145-156.

⁶² The judicial branch in France is divided into three supreme courts, each with its own function. The *Cour de cassation*, which deals with civil and criminal matters, the *Conseil d'Etat*, which deals with administrative matters, and the *Conseil Constitutionnel*, which is the only court with the jurisdiction of judicial constitutional review over French legislation, i.e. the constitutional court of France.

⁶³ Judgment of May 24, 1975, *Administration des Douanes v. Société des Cafés Jacques Vabre & Société Weigel et Cie*, 1975, Rec.Dalloz Jurispr., 497.

⁶⁴ Judgment of October 30, 1989, *Nicolo*, 1989, Rec.C.E. 250.

⁶⁵ Decisions of the *Conseil Constitutionnel*, inter alia, No. 2004-496 DC, June 10, 2004 and No. 2004-498 DC, June 29, 2004. The *Conseil d'Etat* took a similar stance in the judgment on 8 February 2007, *Société Arcelor Atlantique et Lorraine et autres*. See Editorial, “Constitutional Identity and the European Courts”, *ECLRv.*, Vol. 3, 2007 p. 177.

⁶⁶ Decision of the *Conseil Constitutionnel*, No. 2004-505 DC, November 19, 2004. English translation at: http://www.conseil-constitutionnel.fr/conseil-constitutionnel/root/bank/download/2004505DCen2004_505dc.pdf [Accessed December 2012]. See also: Richards, Claudina, “The Supremacy of Community Law Before the French Constitutional Court”, *ELRev.*, Vol. 31, 2006, p. 499-517.

⁶⁷ Decision of the *Conseil Constitutionnel*, No. 2600-540 DC, July 27, 2007. Even if the decision concerns the implementation of directives it is highly plausible that the same is true as regards regulations. See Charpy, Chloé, The Status of (Secondary) Community Law in the French Internal Order, 2007, *ECLRv.*, Vol. 3, p. 446.

courts started with the two famous *Solange* judgments of the FCC. In *Solange I*, the FCC stated it would reserve the right to review Community legislation in light of the fundamental rights guaranteed by the German Basic Law⁶⁸, *as long as* the Community did not contain a catalogue of fundamental rights equivalent to the ones protected by the Basic Law.⁶⁹ In 1986 the FCC delivered *Solange II*, where it confirmed that the protection of fundamental rights within the EU where satisfactorily protected. It hence declared that it would not exercise its competence to review Community legislation *as long as* the EU and ECJ maintained the same level of protection essentially equivalent to the Basic Law.⁷⁰

The *Maastricht* decision of 1993 reaffirmed the FCC's position in *Solange II*, albeit emphasizing more strongly the necessity of reviewing Community legislation if contrary to the level of fundamental rights protection afforded by the Basic law.⁷¹ At the same time it added a second reservation. The FCC stated it also had the competence to review whether Community acts where to be considered as breaching the principle of conferral, and hence declared *ultra vires*.⁷² The decision brought loud reactions among scholars.⁷³ With the *Lisbon* judgment in June 2009 the FCC once again added a dimension to the protection of its constitution. Apart from reaffirming its view that the Union cannot take possession of any judicial *Kompetenz-Kompetenz*,⁷⁴ the FCC introduced a constitutional identity review. The FCC stated that "it must be possible within the German jurisdiction to [...] preserve the inviolable core content of the Basic Law's constitutional identity by means of a identity review."⁷⁵ Even if the FCC emphasized that any review would be exercised in light of the principle of the Basic Law's openness towards European law (*Europarechtsfreundlichkeit*), the practical standard afforded to the identity review by the FCC is still to be seen. Undoubtedly, Article 4.2 TEU, explicitly referred to by the FCC in its decision, will come into play.⁷⁶

⁶⁸ The Constitution of Germany.

⁶⁹ Decision of 29 May 1974, BVerfGE 37, at 271.

⁷⁰ Decision of 22 Oct. 1986, BVerfGE 73, 339, at 339.

⁷¹ Decision of 12 Oct. 1993, BVerfGE 89, 155. *See also* Payandeh, Mehrdad, "Constitutional review of EU law after Honeywell: Contextualizing the relationship between the German Constitutional Court and the EU Court of Justice", *CMLRev.* Vol. 48, 2011, p.13.

⁷² Decision of 12 Oct. 1993, BVerfGE 89, 155, at 188.

⁷³ Herdegen, Matthias, "Maastricht and the German Constitutional Court: Constitutional Restraints for an Ever Closer Union", *CMLRev.*, Vol. 31, 1994, pp. 235-262; and Kokott, Juliane, "Deutschland im Rahmen der Europäischen Union - zum Vertrag von Maastricht", *Archiv des öffentlichen Rechts*, Vol. 119, 1994, pp. 207 - 237

⁷⁴ Decision of 30 June 2009, BVerfGE 123, 267, paras 240-241. In English at: http://www.bundesverfassungsgericht.de/entscheidungen/es20090630_2bve000208en.html [Accessed December 2012].

⁷⁵ Decision of 30 June 2009, BVerfGE 123, 267, para. 240

⁷⁶ Decision of 30 June 2009, BVerfGE 123, 267, para 240.

3 National Identity

3.1 Introduction

The relationship between EU law and national constitutional law is far from simple, as evident from the previous chapter. In the middle of the relationship lives the notion of national identities. The term was for the first time used by the FCC in *Solange I* and later found its way in to Article F.1 of the Treaty of Maastricht.⁷⁷ The article stated that “the Union shall respect the national identities of its Member States, whose systems of government are founded on the principles of democracy.” With the Amsterdam Treaty the clause was stripped down to “the Union shall respect the national identities of its Member States.” It has therefore been clear, for a long time, that the Union has a duty to respect the national identities of its Member States. The practical and theoretical importance of this duty has nevertheless been widely debated. At the forefront of this discussion lies the question of what actually constitutes a national identity, and how Article 4.2 TEU is to be applied within the Union legal order. While many scholars have written about Article 4.2 TEU, case-law on the matter is scarce. Consequently, although the importance of national identities within the Union sphere cannot be underestimated, its definition and legal implications are still clouded.

This chapter will try to clarify the nebulous notion of national identities as enshrined in Article 4.2 TEU by first of all examining its legal context (section 3.2) and its use in the case-law of the ECJ (section 3.3). The notion has been given a novel formulation in the Lisbon Treaty, connecting national identities with constitutional structures of the Member States. This has aroused a lot of speculation on its relationship with the principle of primacy (section 3.4), and particularly with the notion of constitutional pluralism (section 3.5).

3.2 The Legal Context of the National Identity Clause

The national identity clause was introduced in 1992 with the Maastricht Treaty. The wording of the clause, however, left much to desire, laconically stating that the Union shall respect the national identities of its Member States. With the Treaty of Amsterdam in 1997 came no improvement. Moreover, the earlier versions of the clause were not under the jurisdiction of the ECJ.⁷⁸ In the Lisbon treaty, the clause, enshrined under Article 4.2

⁷⁷ Von Bogdandy, Armin and Schill, “Stephan, Overcoming Absolute Primacy: Respect for National Identity Under the Lisbon Treaty”, *CMLRev.*, Vol. 48, 2011, p.1435.

⁷⁸ Von Bogdandy, Armin and Schill, “Stephan, Overcoming Absolute Primacy: Respect for National Identity Under the Lisbon Treaty”, *CMLRev.*, Vol. 48, 2011, p.1422.

TEU, has been given a novel formulation clarifying its scope and definition. Article 4.2 TEU reads:

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

Article 4.2 TEU hence spells out three different principles; the respect for national identities, the equality between Member States, and the guarantee that the Member States’ essential State functions remain their sole responsibility. These three principles echo the determination of the Member States in asserting themselves as autonomous sovereign actors.⁷⁹

The legal context of the Article 4.2 TEU also reflects this position, and strengthens its link with the provisions related to competences.⁸⁰ Firstly, Article 5 TEU enshrines the principle of conferral. Secondly, Article 4.1 TEU establishes the presumption that competences not conferred on the Union stays with the Member States. According to Gustafarro, there is an intertwined relationship between Articles 4.1 and 4.2 TEU, in that they represent two solutions to the same problem of the Union’s competence creep. The former addresses the problem by creating a principle of presumed Member States’ competence. In case of doubt, the competence lies with the Member States. The latter addresses the problem by reminding the Union it has a duty to respect the core responsibilities of the Member States.⁸¹ In sum, the relationship between the principle of conferral in Article 5 TEU and the national identity clause in Article 4.2 TEU can be described as follows; the former reveals what is to be considered as *ultra vires*, while the latter reveals what the Union must respect *intra vires*.

The *travaux préparatoires*⁸² of the Treaty establishing a Constitution for Europe also sheds light on the purpose and meaning of the identity clause. Faced with the problem of how to address the issue of Union competence creep, the working group entrusted with the issue of the complementary competences of the Union sketched out a number of solutions. As any list specifying Member States’ reserved competences might suggest that the Member States’ competences derived from the Union, and any political declaration creating a Charter of Member States’ rights would lack any legal weight, the extension of the identity clause quickly grew as the favourable

⁷⁹ Von Bogdandy, Armin and Schill, “Stephan, Overcoming Absolute Primacy: Respect for National Identity Under the Lisbon Treaty”, *CMLRev.*, Vol. 48, 2011, p.1425.

⁸⁰ Gustafarro, Barbara, “Beyond the Exceptionalism of Constitutional Conflicts: The Ordinary Functions of the Identity Clause”, *Jean Monnet Working Paper 01/02*, 2012, p. 33.

⁸¹ Gustafarro, Barbara, “Beyond the Exceptionalism of Constitutional Conflicts: The Ordinary Functions of the Identity Clause”, *Jean Monnet Working Paper 01/02*, 2012, p. 34.

⁸² The legislative history.

solution.⁸³ It was already rooted in the Treaty, well known and flexible.⁸⁴ Consequently, the *travaux préparatoires* implies that the main purpose of the identity clause is to protect the core responsibilities and areas of the Member States, while “at the same time allowing the necessary margin of flexibility.”⁸⁵ The Member States will remain bound by the provisions in the Treaties. Simultaneously, the Union is nonetheless bound to respect the national identities of the Member States.⁸⁶

3.3 Case Law on the National Identity Clause

The case-law on national identities is scarce. Moreover, the national identity clause did not fall under the jurisdiction of the ECJ until the Lisbon Treaty. This did however not prevent the ECJ from making reference to the notion of national identities on a few occasions,⁸⁷ and has certainly not meant that the ECJ has not been faced with the issue earlier. The leading case on the matter is still the pre-Lisbon case *Omega*, where a constitutional provision of Germany had to be balanced against the free movement of services.⁸⁸ And undeniably, it is notably within the context of the fundamental freedoms, i.e. the internal market, that the identity clause has played its most decisive part.

When analysing the case law of the identity clause, two types of cases may be deciphered.⁸⁹ Firstly, the clause has been used as an autonomous ground for derogation. The Member States have hence directly based their argument on Article 4.2 TEU. Secondly, the clause has been used as an aid in interpreting existing grounds for derogation, such as public policy. In these cases, the clause has therefore been given a supportive function, used as leverage to boost existing derogation grounds. While both types of cases are of interest in unveiling the mysteries concerning the identity clause, it is the

⁸³ Working Group V, working document 5, *Highlighting the limits of the EU competence*, paper by Mr. Henning Christophersen, Brussels, 11 July 2002. As it was Mr. Christophersen that introduced the proposal of extending the identity clause, the clause was consistently referred to as the “Christophersen clause” in all working documents of the European Convention. See Gustafarro, Barbara, “Beyond the Exceptionalism of Constitutional Conflicts: The Ordinary Functions of the Identity Clause”, *Jean Monnet Working Paper 01/02*, 2012, p. 13.

⁸⁴ Working Group V, working document 5, *Highlighting the limits of the EU competence*, paper by Mr. Henning Christophersen, Brussels, 11 July 2002, p. 3.

⁸⁵ Working Group V, *Final Report of Working Group V*, 4 November 2002, CONV 375/1/02 REV 1, p. 11.

⁸⁶ Working Group V, *Final Report of Working Group V*, 4 November 2002, CONV 375/1/02 REV 1, p. 11.

⁸⁷ See Case 379/87 *Groener* [1989] ECR 3967, para. 18, and Case C-473/93 *Commission v. Luxembourg* [1996] ECR I-3207, para. 35.

⁸⁸ Case C-36/02 *Omega* [2004] ECR I-09609.

⁸⁹ See Opinion of Advocate General Maduro on 8 October 2008 in Case C-213/07 *Michaniki* [2008] ECR I-09999, para. 32; and Gustafarro, Barbara, “Beyond the Exceptionalism of Constitutional Conflicts: The Ordinary Functions of the Identity Clause”, *Jean Monnet Working Paper 01/02*, 2012, p. 35.

cases from the latter type that have dominated the discussions surrounding national identities.⁹⁰

3.3.1 The National Identity Clause As an Autonomous Ground for Derogation

The cases where the identity clause has been used as an autonomous ground for derogation have so far concerned national provisions relating to language requirements. In *Commission v. Luxembourg*, Luxembourg sought to rely on the identity clause to justify the exclusion of foreign nationals from applying to posts within the field of public education.⁹¹ The use of the Luxembourgish language within the educational system was, according to Luxembourg, an essential condition for preserving Luxembourg's national identity. In the highly similar case *Commission v. Luxembourg* of 2011, Luxembourg again tried to rely on the identity clause in relation to the field of civil law notaries.⁹² In both cases the ECJ acknowledged the importance of preserving the national identities of Member States. The general exclusion of nationals from other Member States was nevertheless not proportionate, and the national provision was hence not compatible with the free movement of workers.⁹³

Wardyn concerned the refusal of the Lithuanian authorities from changing the surname of a Lithuanian woman married to a Polish national from "Vardyn" to "Wardyn", as Lithuanian characters do not include the letter "W".⁹⁴ According to the Lithuanian government, its language constituted a constitutional asset that preserved the nation's identity. Noting that the Union, according to Article 22 of the Charter, must respect the Union's cultural and linguistic diversity and Article 4.2 TEU includes the protection of a State's official national language, the ECJ concluded that the national rules in question constituted a legitimate objective. The ECJ however stated that it was for the national court to determine whether the national rule was proportionate.⁹⁵ As opposed to the former cases, the ECJ in *Wardyn* gave guidance as to how to solve the dispute, rather than giving a ready-made

⁹⁰ See Besselink, Leonard, "National and constitutional identity before and after Lisbon", *Utrecht Law Review*, Vol. 6, 2010; Konstadinides, Theodore, "Constitutional Identity as a Shield and as a Sword: The European Legal Order within the framework of National Constitutional Settlement", *Cambridge Yearbook of European Legal Studies*, Vol. 13, 2011; and Von Bogdandy, Armin and Schill, "Stephan, Overcoming Absolute Primacy: Respect for National Identity Under the Lisbon Treaty", *CMLRev.* Vol. 48, 2011.

⁹¹ Case C-473/93 *Commission v Luxembourg* [1996] ECR I-3207.

⁹² Case C-51/08 *Commission v Luxembourg* [2011] n.y.r.

⁹³ Case C-473/93 *Commission v Luxembourg* [1996] ECR I-3207, para. 35 and C-51/08/ *Commission v Luxembourg* [2011] n.y.r., para. 124.

⁹⁴ Case C-391/09 *Wardyn* [2011] n.y.r.

⁹⁵ Case C-391/09 *Wardyn* [2011] n.y.r., paras. 86-88.

solution⁹⁶. It hence left the national court with a margin of manoeuvre in deciding the outcome of the case.⁹⁷

Another interesting case in this context is *Spain v. Eurojust*.⁹⁸ Spain brought an action against the fact that Eurojust had issued applications where both English and French were a requirement. Although, as the above, a case on language requirements, it is also one of few cases on national identities where the legality of an EU act has been reviewed. While the ECJ found the case inadmissible, Advocate General Maduro came to the conclusion that the language requirements were not inappropriate.⁹⁹

3.3.2 The National Identity Clause As an Aid in Interpreting Existing Grounds for Derogation

Omega and *Sayn-Wittgenstein* stand out as the cases embodying the national identity clause and the discussions surrounding it. While regarded as the leading cases on national identities, they are at the same time also important cases as regards the discussion between the fundamental freedoms and fundamental rights. And indeed, the two issues are intertwined when it comes to the identity clause as an aid in interpreting existing grounds for derogation.¹⁰⁰

3.3.2.1 Omega

At the outset, it should be noted that neither the Advocate General nor the ECJ referred to the national identity clause in *Omega*. Still, the case is one of the most discussed in that relation.¹⁰¹ *Omega* concerned a national provision prohibiting the importation of articles related to the game

⁹⁶ See Tridimas, Takis, “Constitutional Review of Member State action: the virtues and vices of an incomplete jurisdiction”, in *ICON*, Vol. 9, 2011, p. 737.

⁹⁷ Gustafarro, Barbara, “Beyond the Exceptionalism of Constitutional Conflicts: The Ordinary Functions of the Identity Clause”, *Jean Monnet Working Paper 01/02*, 2012, p. 38.

⁹⁸ Case C- 160/03 *Spain v. Eurojust* [2005] ECR I-2077.

⁹⁹ Opinion of Advocate General Maduro on 16 December 2004 in Case C-160/03 *Spain v. Eurojust* [2005] ECR I-2077.

¹⁰⁰ See Konstadinidies, Theodore, “Constitutional Identity as a Shield and as a Sword: The European Legal Order within the framework of National Constitutional Settlement”, *Cambridge Yearbook of European Legal Studies*, Vol. 13, pp. 201-204; and Opinion of Advocate General Stix-Hackl on 18 March 2004 in Case C-36/02 *Omega* [2004] ECR I-09609, para. 42-44.

¹⁰¹ See Konstadinidies, Theodore, “Constitutional Identity as a Shield and as a Sword: The European Legal Order within the framework of National Constitutional Settlement”, *Cambridge Yearbook of European Legal Studies*, Vol. 13; Gustafarro, Barbara, “Beyond the Exceptionalism of Constitutional Conflicts: The Ordinary Functions of the Identity Clause”, *Jean Monnet Working Paper 01/02*, 2012 and van der Schyffl, Gerard, “The constitutional relationship between the European Union and its Member States: the role of national identity in article 4(2) TEU”, *ELRev*, Vol. 37, No. 5, 2012.

laserdrome¹⁰². Germany claimed that the commercial exploitation of a killing game infringed the human dignity clause in the German Basic law.¹⁰³ Two issues stood out; first, whether a fundamental right restricting the free movement of goods and services could be considered a valid justification, and second, whether the fundamental right in question, in this case human dignity, had to be based on a legal concept common to all Member States.¹⁰⁴

At the outset, the ECJ reminded that Article 55 EC (Article 52 TFEU) allowed restrictions justified for reasons of public policy, which the contested order clearly relied on. According to solid case-law, the derogation however had to be interpreted strictly and not be determined unilaterally by each Member State. Thus, public policy could only be relied on where there was a real and sufficiently serious threat to a fundamental interest of society. As the concept of public policy nevertheless could vary from one state to another, the ECJ acknowledged that the Member States must be allowed a margin of discretion.¹⁰⁵

As regards the first issue, the ECJ noted that Germany enshrined human dignity within the concept of public policy, and that the Union itself, by drawing inspiration from the common constitutional traditions of the Member States, also protected the concept of human dignity as a general principle of EU law. As a result, the ECJ held that the protection of fundamental rights, such as human dignity, in principle was a legitimate interest justifying a restriction on the fundamental freedoms.¹⁰⁶

As always, any derogation from the treaty articles has to be proportionate. The human dignity clause constituted a constitutional rule in Germany, which hence afforded a higher level of protection to the notion than other Member States did. In that regard the ECJ held that nothing precluded a Member State from affording a different level of protection, and that there hence did not exist any “general criterion for assessing the proportionality of any national measure which restricts the exercise of an economic activity”.¹⁰⁷

3.3.2.2 Sayn-Wittgenstein and Public Policy

*Sayn-Wittgenstein*¹⁰⁸ was the first case decided on Article 4.2 TEU. The case concerned an Austrian constitutional rule that prohibited the use of surnames containing a title of nobility. The rule, which restricted the free

¹⁰² A simulated killing game inspired from Star Wars where people play at killing other people with laser pistols. The objective is to score the highest points by hitting the sensory tags placed on your opponents with your laser.

¹⁰³ Human dignity is part of the so called *eternity clause* (Article 79.3) of the German constitution, which means that it cannot be changed by subsequent legal amendments.

¹⁰⁴ Case C-36/02 *Omega* [2004] ECR I-09609, para. 23.

¹⁰⁵ Case C-36/02 *Omega* [2004] ECR I-09609, para 30-31.

¹⁰⁶ Case C-36/02 *Omega* [2004] ECR I-09609, para 32 – 35.

¹⁰⁷ Case C-36/02 *Omega* [2004] ECR I-09609, para 37.

¹⁰⁸ Case C-208/09 *Sayn-Wittgenstein* [2010] ECR I-13693.

movement of persons,¹⁰⁹ could according to the Austrian government be justified since it implemented the principle of equal treatment. Similarly to *Omega*, the ECJ interpreted the relied justification in connection with the notion of public policy. It hence reaffirmed its position in *Omega*, quoting large parts of its previous judgment. In addition, and most significantly, it stated that “in accordance with Article 4(2) TEU, the European Union is to respect the national identities of its Member States, which include the status of the State as a Republic.”¹¹⁰ The court finished by concluding rather vaguely that it could not be disproportionate for a Member State to protect the principle of equal treatment by “prohibiting the use [...], of titles of nobility or noble elements which may create the impression that the bearer of the name is holder of such a rank.”¹¹¹

Particular attention should be given to the fact that the ECJ, both in *Omega* and *Sayn-Wittgenstein*, linked the constitutional specificities of each case with the exception of public policy. As stated by the ECJ in *Omega*, public policy has to be interpreted strictly. A rule can only be characterized as one protecting public policy if it addresses a real and sufficiently serious danger, and protects a fundamental interest of society. The contested rule thus has to be of particular importance in the society to fall under public policy. As such, public policy might be seen as a general clause that can be filled with different values, from fundamental rights (*Omega*) to provisions linked to the basic structure of the state (*Sayn-Wittgenstein*).¹¹² While the exception of public policy is often used and is of high importance, the ECJ has however stated that the purpose of the exception is not to reserve certain matters to the exclusive jurisdiction of the Member States.¹¹³ Hence, the exception of public policy may not be used to alter the allocation of competences between the Union and the Member States.¹¹⁴ The link between the national identity clause and public policy will be further discussed under section 5.4.

¹⁰⁹ The Austrian authorities had removed the noble element “Fürstin von” to the surname Sayn Wittgenstein from an Austrian citizen who had resided in Germany for 15 years.

¹¹⁰ Case C-208/09 *Sayn-Wittgenstein* [2010] ECR I-13693, para. 92.

¹¹¹ Case C-208/09 *Sayn-Wittgenstein* [2010] ECR I-13693, para. 93.

¹¹² For a diverging opinion on this *see*, de Lange, Roel, “The European Public Order, Constitutional Principles and Fundamental Rights” *Erasmus Law Review*, Vol. 1, Issue 1, p. 7, who argues that there is a difference between public order and *ordre public* in that the later refers to rules on the basic structure of the state, while the former does not. The concepts are however for instance used interchangeably *in*: Kessedjian, Catharine, “Public Order In European Law”, *Erasmus Law Review*, Vol. 1, Issue 1, 2007; and by Advocate General Stix-Hackl in his opinion of 18 March 2004 in Case C-36/02 *Omega* [2004] ECR I-09609, para 95.

¹¹³ Case 35/76 *Simmenthal Spa* [1976] ECR 1871, para. 14 and Opinion of Advocate General Jääskinen on 17 December 2009 in Case C-446/08 *Solgar Vitamin's France and Others* [2010] ECR I-3973, para. 54.

¹¹⁴ Kessedjian, Catharine, “Public Order In European Law”, *Erasmus Law Review*, Vol. 1, Issue 1, 2007, p. 7.

3.3.2.3 Michaniki

*Michaniki*¹¹⁵ might not be as (in)-famous as the two previous cases. It is nevertheless of significance as the disputed constitutional rule was found to protect a legitimate interest but nevertheless not considered to be proportionate. The constitutional character of the contested provision was never mentioned in the judgment, and the contested provision hence never examined by the ECJ in light of Article 4.2 TEU. Advocate General Maduro however did examine its application in the case. The case concerned a Greek constitutional provision excluding tenderers involved in the media sector from participating in public procurement contracts, irrespective of whether their involvement in the media sector had a potential negative effect on competition. According to the Greek state, the provision was necessary as to ensure equal treatment and transparency, since undertakings responding to a call for tenders otherwise could use its media power in order to influence the final decision awarding a contract.¹¹⁶

As mentioned, Advocate General Maduro addressed the constitutional aspect of the case by referring to the identity clause. The Advocate General stated that respect for national identities was there from the beginning of the European project in the 1950s, forming part of its very essence “which consists of following the path of integration while maintaining the political existence of the States.”¹¹⁷ More importantly, he stated, with reference to *Omega*, that “the preservation of national constitutional identity can also enable a Member State to develop, within certain limits, its own definition of a legitimate interest capable of justifying an obstacle to a fundamental freedom of movement.”¹¹⁸ The Advocate General hence held that the Greek authorities in the present case had a certain margin in defining the concept of equal treatment and transparency. He nevertheless found the national provision to be disproportionate since the provision created an irrebuttable presumption of a general incompatibility between public procurement sectors and media.¹¹⁹

The ECJ, disregarding the constitutional feature of the contested provision, followed the opinion of the Advocate General and held that Member States were allowed a certain discretion for the purpose of adopting measures intended to safeguard the principles of equal treatment and transparency. Just as the Advocate General, the ECJ however found the provision disproportionate. The fact that the ECJ made no reference to the constitutional feature of the contested provision,¹²⁰ is presumably a simple

¹¹⁵ Case C-213/07 *Michaniki* [2008] ECR I-09999.

¹¹⁶ Opinion of Advocate General Maduro on 8 October 2008 in Case C-213/07 *Michaniki* [2008] ECR I-09999, paras. 10 and 26.

¹¹⁷ Opinion of Advocate General Maduro on 8 October 2008 in Case C-213/07 *Michaniki* [2008] ECR I-09999, para. 32.

¹¹⁸ Opinion of Advocate General Maduro on 8 October 2008 in Case C-213/07 *Michaniki* [2008] ECR I-09999, para. 32.

¹¹⁹ Opinion of Advocate General Maduro on 8 October 2008 in Case C-213/07 *Michaniki* [2008] ECR I-09999, paras. 33-34.

¹²⁰ It only uses the word “constitution” in one single place, namely para. 21.

one. As the principle of primacy stands above all national provisions, including constitutional ones, the ECJ underscored that exact position – the irrelevance of the status of any national provision infringing Union law.¹²¹ The outcome of the case should not necessarily be interpreted as a triumph of EU law over national constitution law. It was not the rule *per se* that was found flawed, but its implementation.

3.4 Primacy and the National Identity Clause

3.4.1 National Identity As the Last Safe House

On October 2, 2012 Advocate General Bot delivered the highly anticipated opinion in the case *Melloni*¹²², with a following judgment by the ECJ in February 26, 2013. The case concerned a preliminary reference made by the Constitutional Court of Spain, the first one of its kind.¹²³ Melloni, an Italian national, was sentenced *in absentia* in Italy to ten years' imprisonment. After being arrested in Spain, Italy issued a European arrest warrant for the execution of his sentence. Melloni however challenged the extradition before the Constitutional Court of Spain on the grounds that the sentence issued *in absentia* infringed his right to a fair trial. While Spanish constitutional law allows such a review, Framework Decision 2002/584 on the European arrest warrant does not. Among other questions, the Constitutional Court asked the ECJ if it could rely on Article 53 of the Charter to uphold the higher protection given to fundamental rights by Spanish Constitutional law than EU secondary law. The core of the issue is consequently the interpretation of Article 53 of the Charter (the level of protection provision).¹²⁴

Advocate General Bot held in a very solid opinion, that it would undermine the principle of primacy if Article 53 of the Charter would be interpreted as allowing Member States the right to afford a higher level of protection than that afforded by the Union. The uniform and effective application of Union law throughout the Member States would likewise be jeopardized. It is therefore essential, within the ambit of Union law, to link the level of protection afforded to a fundamental right with the objectives of the Union

¹²¹ Kosta, Vasiliki, "Case note on Michaniki", *European Constitutional Law Review*, 2009, Vol. 5, p. 507.

¹²² Opinion of Advocate General Bot on 2 October 2012 in Case C-399/11 *Melloni* [2013] n.y.r.

¹²³ So far, only the constitutional courts of Austria, Belgium, Lithuania, Italy, and now Spain, have made such a reference. See Martinico, Giuseppe, "Preliminary Reference and Constitutional Courts. Are You in the Mood for Dialogue?", in Fontanelli et al. (eds.), *Shaping Rule of Law through Dialogue*, Europa Law Publishing, 2010, pp. 224-227.

¹²⁴ For an in-depth analysis of Article 53 of the Charter see: Bering Liisberg, Jonas, "Does the EU Charter of Fundamental Rights Threaten the Supremacy of Community Law? Article 53 of the Charter: a fountain of law or just an inkblot?", *CMLRev.*, Vol. 38, 2001 pp. 1171-1199.

action concerned.¹²⁵ Moreover, the Advocate General noted that the words “in their respective fields of application” in Article 53 of the Charter seeks to reassure the Member States that the Charter does not affect the level of protection given by their constitutions within the application of national law.¹²⁶

The opinion is a sharp reminder that the principle of primacy is limitless within the field of EU law. A secondary Union act hence stands above national constitutional provisions in the hierarchy scale. The Advocate General however concluded, in the last passage of his opinion, that the Union has an obligation to respect the national identities of the Member States, and that this obligation also is enshrined in the preamble of the Charter. Accordingly, “a Member State which considers that a provision of secondary law adversely affects its national identity may [...] challenge it on the basis of Article 4(2) TEU.”¹²⁷ Seen as an isolated statement, the reference to Article 4.2 TEU might slip by as trivial. However, seen within its context – up until the reference to Article 4.2 TEU the whole opinion stands on the importance of the principle of primacy and uniform application of Union law – the reference cannot be undervalued. While being a mere *obiter dictum*, the citation uncovers an significant aspect of the identity clause, namely the fact that it, within the ambit of EU law, represents the last “safe house” for national constitutions against the otherwise limitless reach of the principle of primacy.

As regards the judgment by the ECJ, it basically summarized the Advocate General’s opinion. However, not surprisingly, it did not mention the national identity clause.¹²⁸

3.4.2 National Identity As a Sword and As a Shield

It has been observed that this “safe house” has two characteristics. According to Konstadinidies the national identity clause can be used as either a sword or a shield against the primacy of EU law. As a sword by the national constitutional courts, e.g. the FCC, which uses Article 4.2 TEU as a judicial review mechanism. As a shield when defending a national provision by relying on the identity clause as a valid derogation from the principle of primacy.¹²⁹ This two-fold characteristic of the identity clause clearly

¹²⁵ Opinion of Advocate General Bot on 2 October 2012 in Case C-399/11 *Melloni* [2013] n.y.r., paras. 88-89 and 125.

¹²⁶ Opinion of Advocate General Bot on 2 October 2012 in Case C-399/11 *Melloni* [2013] n.y.r., para. 135.

¹²⁷ Opinion of Advocate General Bot on 2 October 2012 in Case C-399/11 *Melloni* [2013] n.y.r., para. 139. Spain itself did however state during the hearing of the case that the contested provision was not part of its national identity.

¹²⁸ Case C-399/11 *Melloni* [2013] n.y.r.

¹²⁹ Konstadinidies, Theodore, “Constitutional Identity as a Shield and as a Sword: The European Legal Order within the framework of National Constitutional Settlement”, *Cambridge Yearbook of European Legal Studies*, Vol. 13, 2011, p. 195.

represents two sides of the same coin in that Member States see Article 4.2 TEU as a means of excluding EU law from no-go areas. It is not implausible that where a Member State finds that the shield gives no result, it will take up arms instead.

Although seen as a tool overcoming absolute primacy,¹³⁰ this does in no way imply that Member States relying on Article 4.2 TEU as a shield have a *carte blanche* to derogate from the application of Union law. The duty to respect national identities does therefore not create an absolute obligation for EU law to yield against all national constitutional rules.¹³¹ The implication of the national identity clause to the primacy of EU law is somewhat more elaborated. As seen in for instance *Omega* and *Sayn-Wittgenstein*, the application of Article 4.2 TEU requires that a “proportional balance be found between the uniform application of EU law, a fundamental constitutional principle of the EU, and the national identity of the Member State in question.”¹³² The mere fact that a provision is part of the Member States’ national identity, and as such recognized by the ECJ, does therefore not lead to the exclusion of Union law, except where that provision is proportionate to the aim pursued.

While the success of the identity clause as a shield hence lies in the hands and mercy of the ECJ, its potential as a sword lies in the hands of the national constitutional courts. Konstadinides argues that although the implications and effects of the identity clause as a shield have been reduced to a bare minimum by the ECJ through the principle of proportionality and sincere cooperation, its implications as a sword remains a theoretical possibility.¹³³ The interpretation of the possible use of the identity clause by the FCC in its *Lisbon* judgement has on the other hand been criticised as too broad.¹³⁴ It is hence still to be seen how much of a barrier the identity clause creates as a sword.

Irrespective of whether the identity clause is used as a shield or sword, its implications and success will to a large extent depend on how it will be interpreted by the ECJ and the national constitutional courts. This leads us to the next point; what is a national identity and who gets to decide?

¹³⁰ Von Bogdandy, Armin and Schill, Stephan, “Overcoming Absolute Primacy: Respect for National Identity Under the Lisbon Treaty”, *CMLRev.* Vol. 48, 2011.

¹³¹ Opinion of Advocate General Maduro on 8 October 2008 in Case C-213/07 *Michaniki* [2008] ECR I-09999, para. 33; *see also* Konstadinides, Theodore, “Constitutional Identity as a Shield and as a Sword: The European Legal Order within the framework of National Constitutional Settlement”, *Cambridge Yearbook of European Legal Studies*, Vol. 13, 2011, p. 206.

¹³² Von Bogdandy, Armin and Schill, Stephan, “Overcoming Absolute Primacy: Respect for National Identity Under the Lisbon Treaty”, *CMLRev.* Vol. 48, 2011, p.1441.

¹³³ Konstadinides, Theodore, “Constitutional Identity as a Shield and as a Sword: The European Legal Order within the framework of National Constitutional Settlement”, *Cambridge Yearbook of European Legal Studies*, Vol. 13, 2011, p. 195.

¹³⁴ *See* Von Bogdandy, Armin and Schill, Stephan, “Overcoming Absolute Primacy: Respect for National Identity Under the Lisbon Treaty”, *CMLRev.* Vol. 48, 2011, p.1446.

3.5 The Definition of National Identities

3.5.1 What is a National Identity?

Article 4.2 TFEU reads “national identities inherent in their fundamental structures, political and constitutional.” Thus, regardless of the ambiguities surrounding the concept of national identities, the connection between “national identities” and “constitutional identities” is self-evident. It is at the same time safe to say that the notion “includes far less than the traditional concept of State sovereignty as it is understood in both international and constitutional law.”¹³⁵ Consequently, the concept of the identity clause is described as being narrower than constitutional law as a whole.¹³⁶ In *Sayn-Wittgenstein* Advocate General Sharpston and the ECJ referred to a “fundamental constitutional rule” rather than a mere “constitutional rule”.¹³⁷ This might also be deciphered by reading Article 4.2 TEU in itself as it states “fundamental structures”, implying a degree of essentiality. Apart from the constitutional dimension of national identities, the notion also has close ties with the protection of cultural identity, as stated by Advocate General Kokott in *UTECA*.¹³⁸ However, the wording of Article 4.2 TEU suggests that the notion of national identities, within that clause, does not include cultural identity.¹³⁹ Cultural identity might nonetheless be protected as a constitutional identity, as advocated by the Lithuanian government in *Wardyn*.¹⁴⁰

A more concrete definition of national identities is difficult. While the notion, in light of its constitutional character, includes rules protecting Member States’ commitment to democracy, rules governing the organisation of a Member State (e.g. federalism or a republican form of governance) and the principle of rule of law, a more exhaustive list is bound

¹³⁵ Von Bogdandy, Armin and Schill, Stephan, “Overcoming Absolute Primacy: Respect for National Identity Under the Lisbon Treaty”, *CMLRev.* Vol. 48, 2011, p.1426.

¹³⁶ See van der Schyffl, Gerard, “The constitutional relationship between the European Union and its Member States: the role of national identity in article 4(2) TEU”, *ELRev.*, Vol. 37, No. 5, 2012, p. 13.

¹³⁷ Opinion of Advocate General Sharpston on 14 October 2010 in Case C-208/09 *Sayn-Wittgenstein* [2010] ECR I-13693, para. 65; and Case C-208/09 *Sayn-Wittgenstein* [2010] ECR I-13693, para 93. The *Conseil constitutionnel* has developed a similar definition to the notion of national identities. See De Witte, Bruno, “Direct Effect, Primacy and The Nature of The Legal Order”, in Craig, Paul and De Búrca, Gráinne, *The Evolution of EU Law*, 2ed, 2011, p. 355.

¹³⁸ Opinion of Advocate General Kokott on 4 September 2008 in Case C-222/07 *UTECA* [2009] ECR I-1407, para 93.

¹³⁹ van der Schyffl, Gerard, “The constitutional relationship between the European Union and its Member States: the role of national identity in article 4(2) TEU”, *ELRev.*, Vol. 37, No. 5, 2012, p. 5; and Von Bogdandy, Armin and Schill, Stephan, “Overcoming Absolute Primacy: Respect for National Identity Under the Lisbon Treaty”, *CMLRev.*, Vol. 48, 2011, p.1427.

¹⁴⁰ Besselink, Leonard, “National and constitutional identity before and after Lisbon”, *Utrecht Law Review*, Vol. 6, 2010, p. 44.

to fail.¹⁴¹ What might be constitutionally significant to one Member State must necessarily not be significant to another, as for instance seen with human dignity in Germany. The Union consists of 27 Member States, each with its own constitution, and hence national identity.

3.5.2 Who Decides?

It is within each Member State's competence to decide what its national identity is.¹⁴² It would undermine the entire *raison d'être* of national identities if it were to be decided by another entity. Whereas Member States are best placed to express their own national identities, this, however, does not mean they are entirely free to do so. Firstly, they are bound by the frames set by Article 4.2 TEU. Secondly, they are also bound to the principle of sincere cooperation.¹⁴³ In the words of the FCC: "The exercise of this review power, [...] follows the principle of the Basic Law's openness towards European Law (Europarechtsfreundlichkeit), and it therefore also does not contradict the principle of sincere cooperation."¹⁴⁴ It is furthermore not conceivable that the ECJ would accept a national identity that diverges from the fundamental values of the Union enshrined in Article 2 TEU.

The ECJ does not have the formal competence to determine the national identity of a Member State. That would involve an interpretation of national constitutional law, which it has no jurisdiction to do according to Article 19.1 TEU. Article 4.2 TEU is nevertheless a provision of EU law, and is as such subject to the interpretation and control of the ECJ. While the ECJ consequently does not have the jurisdiction to decide whether a provision is part of a Member States national identity, it does have the jurisdiction and the responsibility, as the guardian of the Treaties, to determine the relevance of that provision under EU law. It is therefore the task of the ECJ to resolve the relationship of a national identity, expressed through a domestic constitutional rule, vis-à-vis EU law.¹⁴⁵ If the ECJ for instance were to find a national identity as contrary to the Union's fundamental values enshrined in Article 2 TEU, it would surely not fall under Article 4.2 TEU.

¹⁴¹ Von Bogdandy, Armin and Schill, Stephan, "Overcoming Absolute Primacy: Respect for National Identity Under the Lisbon Treaty", *CMLRev.* Vol. 48, 2011, p.1432.

¹⁴² van der Schyffl, Gerard, "The constitutional relationship between the European Union and its Member States: the role of national identity in article 4(2) TEU", *ELRev.*, Vol. 37, No. 5, 2012, p. 9; and Besselink, Leonard, "National and constitutional identity before and after Lisbon", *Utrecht Law Review*, Vol. 6, 2010, p. 45.

¹⁴³ Von Bogdandy, Armin and Schill, Stephan, "Overcoming Absolute Primacy: Respect for National Identity Under the Lisbon Treaty", *CMLRev.* Vol. 48, 2011, p.1448.

¹⁴⁴ Decision of 30 June 2009, BVerfGE 123, 267, para. 240.

¹⁴⁵ Besselink, Leonard, "National and constitutional identity before and after Lisbon", *Utrecht Law Review*, Vol. 6, 2010, p. 46. *See also* Case C-36/02 *Omega* [2004] ECR I-09609, para. 39, which endorses this view.

3.6 Constitutional Pluralism Through the National Identity Clause

The fact that national identities are determined by reference to domestic constitutional law, although the identity clause is a provision of EU law and as such subject to the jurisdiction of the ECJ, has drawn the attention of many scholars to the link between the identity clause and the theory of constitutional pluralism.¹⁴⁶ Maduro holds that the notion of legal pluralism is that all legal orders, both European and national, need to respect each other. Any national identity must be defined in a manner that does not challenge another Member State's identity or "the pluralist conception of the European legal order itself".¹⁴⁷ In a European Union endorsing the view of constitutional pluralism, the principle of primacy can thus not be regarded as absolute. Pluralism implies that no formal hierarchy exists between the Union and the Member States.¹⁴⁸

In that the national identity clause is adverse to the idea of an absolute primacy of EU law, the clause supports a pluralistic view of the relationship between the legal order of the Union and that of the Member States. This pluralistic relationship can furthermore be seen by the fact that the national constitutional courts view the principle of primacy as existing due to their voluntary acceptance. Consequently, they accept the primacy of EU law as long as it does not violate their fundamental constitutional values.¹⁴⁹ A Union based on constitutional pluralism hence tears down the hierarchical view of the relationship between the Union and the Member States.

As earlier mentioned, all Member States necessarily need to be their own arbiter in defining their national identities. In this regard, the principle of equality enshrined in Article 4.2 TEU is of utter importance. The Union consists of 27 Member States, each different from the other. There are republics and monarchies, parliamentary and semi-parliamentary systems and so on. The Union accommodates these differences through its motto

¹⁴⁶ Von Bogdandy, Armin and Schill, Stephan, "Overcoming Absolute Primacy: Respect for National Identity Under the Lisbon Treaty", *CMLRev.*, Vol. 48, 2011, p.1426; and Besselink, Leonard, "National and constitutional identity before and after Lisbon", *Utrecht Law Review*, Vol. 6, 2010, p. 37.

¹⁴⁷ Maduro, Miguel Poiares, "Contrapunctual Law: Europe's Constitutional Pluralism in Action", in: Walker, Niel (ed), *Sovereignty in Transition*, Hart Publishing 2003, p. 526. See also Maduro Miguel Poiares, "Three Claims of Constitutional Pluralism", in: Avbelj, Matej and Komárek, Jan (eds.), *Constitutional Pluralism in the European Union and Beyond*, Hart Publishing 2012, p. 6

¹⁴⁸ Gerards, Janneke, "Pluralism Deference and the Margin of Appreciation Doctrine", *ELJ* Vol. 17, No. 1, 2011, p. 80; and Komárek, Jan, "European Constitutionalism and the European Arrest Warrant: Contrapunctual Principles in Disharmony", *Jean Monnet Working Paper* 10/05, 2005, p. 19.

¹⁴⁹ Gerards, Janneke, "Pluralism Deference and the Margin of Appreciation Doctrine", *ELJ* Vol. 17, No. 1, 2011, p. 83.

“United in Diversity”, and it is against this axiom that the national identity clause should be examined.¹⁵⁰

The identity clause is however not to be understood as the arch nemesis of the principle of primacy. Neither should the theory of constitutional pluralism be understood as challenging EU law, since the Member States and the Union in essence are grounded on the same fundamental values.¹⁵¹ When defining their national identities, the national constitutional courts have so far, in essence, demanded that the Union exercise its competence with respect to certain essential constitutional principles, such as the statehood of Member States, the rule of law, democracy and the essential core of fundamental rights.¹⁵² These values correspond to Article 2 TEU, stating that the Union is founded on the values of human dignity, freedom, democracy, equality, the rule of law and respect for human rights. As a result, any divergence between an EU act and the national identities of Member States is bound to be exceptional.¹⁵³ The scarce cases on Article 4.2 TEU point to the same conclusion. Accordingly, the principle of primacy would only need to take a step back in those exceptional situations where an essential constitutional provision, expressing the national identity of a Member State, would be acknowledged by the ECJ as protected under Article 4.2 TEU. In other words, the principle of primacy sometimes needs to allow the constitutional specificity of a Member State a certain margin of appreciation as to allow that specificity to shine through in harmony with the Union’s dictum “United in Diversity.” This brings us to the next chapter, which will address the margin of appreciation doctrine.

¹⁵⁰ Von Bogdandy, Armin and Schill, Stephan, “Overcoming Absolute Primacy: Respect for National Identity Under the Lisbon Treaty”, *CMLRev.* Vol. 48, 2011, p.1426

¹⁵¹ Maduro, Miguel Poiares, “Interpreting European Law: Judicial Adjudication in a Context of Constitutional Pluralism”, *EJLS*, Vol. 1, No. 2, 2007, p. 17

¹⁵² See Von Bogdandy, Armin and Schill, Stephan, “Overcoming Absolute Primacy: Respect for National Identity Under the Lisbon Treaty”, *CMLRev.* Vol. 48, 2011, p.1436, and the references there made, in footnotes 90 to 95, on the judgments of the national constitutional courts where these essential constitutional principles have been expressed.

¹⁵³ For an opposing view see: Gustafarro, Barbara, “Beyond the Exceptionalism of Constitutional Conflicts: The Ordinary Functions of the Identity Clause”, *Jean Monnet Working Paper 01/02*, 2012, p. 1.

4 The Margin of Appreciation

4.1 Introduction

The Margin of appreciation doctrine has since the 1950's played a dominant role within the European Convention on Human Rights (ECHR).¹⁵⁴ Though originally stemming from the jurisprudence of the *Conseil d'Etat*, it was the European Court of Human Rights (ECtHR) that introduced the doctrine on an international level.¹⁵⁵ The doctrine arose as a response to the ECtHR's complex position as an international human rights court, in an effort to mediate between the universality and particularism of the Convention structure.¹⁵⁶ Eventually the doctrine also made its way to the ECJ, under the label "margin of discretion", used to mediate between national public interests and EU objectives.

Though both courts are supranational, it is essential to keep in mind that they operate within different frameworks. While the ECJ stands on a more solid basis, carried by the principle of primacy and the fact that its judgments in the preliminary reference procedure has an *erga omnes* effect, the ECtHR lacks both features. Its judgments are binding only in relation to the State that is party to the dispute. Moreover, there is nothing similar to the principle of primacy in the ECHR.¹⁵⁷ Rather, the ECtHR has on more than one occasion stressed that "the machinery of protection established by the Convention is subsidiary to the national systems safeguarding human rights."¹⁵⁸ Gerards observes that this difference, consequently, means that the ECtHR to a lesser extent than the ECJ is faced with conflicts between its own legal order and national constitutional provisions, "since this problematic is the particular result of the existence of two different legal orders that both lay a claim to final authority."¹⁵⁹ She nevertheless adds that the ECtHR has influenced national policy and legislation with an increasing directness. This has for instance forced the FCC to stress, in a similar

¹⁵⁴ See *Greece v. United Kingdom*, App. No. 176/56, 14 December 1959, 2 Yearbook European Commission on Human Rights 174, which is usually seen as the first reference to the doctrine.

¹⁵⁵ Arai-Takahashi, Yutaka, *The Margin of Appreciation Doctrine and the Principle of Proportionality in the Jurisprudence of the ECHR*, Intersentia, Antwerp, 2002, at 2-3; and Bakircioglu, Onder, "The Application of the Margin of Appreciation Doctrine in Freedom of Expression and Public Morality Cases", *German Law Journal*, Vol. 8, 2007, p. 713.

¹⁵⁶ Gerards, Janneke, "Pluralism Deference and the Margin of Appreciation Doctrine", *ELJ* Vol. 17, No. 1, 2011, p. 102; and Sweeney, James, "A Margin of Appreciation" in the Internal Market: Lessons from the European Court of Human Rights", *Legal Issues of Economic Integration*, Vol. 34, 2007, p. 31.

¹⁵⁷ Gerards, Janneke, "Pluralism Deference and the Margin of Appreciation Doctrine", *ELJ* Vol. 17, No. 1, 2011, p. 102

¹⁵⁸ *Handyside v. United Kingdom*, App. No. 5493/72, 7 December 1976, EHRR 737, para. 48.

¹⁵⁹ Gerards, Janneke, "Pluralism Deference and the Margin of Appreciation Doctrine", *ELJ* Vol. 17, No. 1, 2011, p. 102. Gerards is Professor of Constitutional and Administrative Law at the University of Leiden.

decision to that of its *Lisbon judgment*, that the “Basic Law [...] does not waive the sovereignty contained in the last instance in the German Convention”, which hence remains the final test for application of the ECHR.¹⁶⁰ As a result, the position of the ECtHR is “more similar to that of the EU courts than might seem to be the case if the legal situation were taken at face value.”¹⁶¹ Despite the differences between the courts, both are thus exposed to the same fundamental problem, namely that of pluralism.

As mentioned, the ECtHR has primarily approached the problem by reminding that the ECHR’s application is subsidiary to the human rights protection of the Contracting Parties. Since the principle of subsidiarity embraces the view that the task of the ECtHR is to review the decisions delivered by the national courts, and not to take their place as regards the protection of human rights, the principle has been regarded as the underlying inspiration for the development of the margin of appreciation doctrine.¹⁶² As regards EU law, it has similarly been observed that the principle of subsidiarity in many ways is present within the justification assessment of the ECJ.¹⁶³ Consequently, the same link between the principle of subsidiarity and the margin of appreciation might be observed within EU law as well.

Although the margin of appreciation doctrine has a solid base within the jurisprudence of the ECJ, it is still most renowned in relation to the ECHR. It is the sheer wealth of case-law and commentary on its use within ECHR that justifies its usefulness in examining it within the ambit of EU law.¹⁶⁴ Thus, this chapter will first examine the doctrine as used by the ECtHR (section 4.2), and then turn to its use by the ECJ (section 4.3). The relationship between the margin of appreciation doctrine and the principle of proportionality will also be addressed (section 4.4).

4.2 The ECtHR and the Margin of Appreciation

The margin of appreciation doctrine evolved as a means to mediate between the universality and particularism of the ECHR structure. The doctrine is hence used as a tool in allowing the Contracting Parties a certain space of manoeuvre when implementing the ECHR’s standards. Occasionally, the

¹⁶⁰ Decision of 14 October 2004, 2 BVR 1481/04, para. 35. Available in English at: http://www.bverfg.de/entscheidungen/rs20041014_2bvr148104en.html

¹⁶¹ Gerards, Janneke, “Pluralism Deference and the Margin of Appreciation Doctrine”, *ELJ* Vol. 17, No. 1, 2011, p. 102-103.

¹⁶² Gerards, Janneke, “Pluralism Deference and the Margin of Appreciation Doctrine”, *ELJ* Vol. 17, No. 1, 2011, p. 104.

¹⁶³ Horsley, Thomas, “Subsidiarity and the European Court of Justice: Missing Pieces in the Subsidiarity Jigsaw?”, *JCMS*, Vol. 50, 2012, p. 278.

¹⁶⁴ Sweeney, James, “A ‘Margin of Appreciation’ in the Internal Market: Lessons from the European Court of Human Rights”, *Legal Issues of Economic Integration*, Vol. 34, 2007, p. 30.

court will also allow a certain margin in defining the human right at hand.¹⁶⁵ In other words, the doctrine is based on the idea that the Contracting States are permitted a certain latitude in protecting the human rights enshrined in the ECHR.¹⁶⁶ In light of the principle of subsidiarity, the doctrine, is based on the assumption that the Contracting States are in a better position, than the international judge, to evaluate the different interests at stake in a given case.¹⁶⁷

When the ECtHR examines interferences upon a right protected under the Convention, it usually does this in a three-stage process.¹⁶⁸ First, it examines the lawfulness of the restriction. Second, it examines whether the restriction serves a legitimate purpose. Third, it examines whether the restriction is proportionate or necessary in a democratic society.¹⁶⁹ The expression “necessary” has, by the court, been interpreted as implying the existence of a “pressing social need”.¹⁷⁰ It is within this last stage that the margin of appreciation is used. Although it is difficult to predict the exact application and effect of the doctrine, some guidance can be found in the case-law of the ECtHR. Its scope will sometimes be broad and other times narrow depending on the nature of the rights in issue, or on the balancing of competing rights.¹⁷¹ The typical example of where the margin will be broad is in moral areas where there is no common consensus regarding the subject at hand between the Contracting States. Such were the facts in the landmark case *Handyside v. United Kingdom*.¹⁷² On the other hand, the margin of appreciation will for instance be narrow if the core of a Convention right is affected.¹⁷³ The doctrine hence regulates the intensity of review of the ECtHR. The court will only superficially examine the choices made by the competent national authority when the margin is broad, and, by contrast, closely consider the facts of the case if the margin is narrow.¹⁷⁴

¹⁶⁵ *Eg, Vo v. France*, App. No. 53924/00, 8 July 2004, 40 EHRR 12.

¹⁶⁶ Arai-Takahashi, Yutaka, *The Margin of Appreciation Doctrine and the Principle of Proportionality in the Jurisprudence of the ECHR*, Intersentia, Antwerp, 2002, at 2.

¹⁶⁷ *Handyside v. United Kingdom*, App. No. 5493:72, 7 December 1976, EHRR 737, para. 48.

¹⁶⁸ Sweeney, James, *A “Margin of Appreciation” in the Internal Market: Lessons from the European Court of Human Rights*, *Legal Issues of Economic Integration*, Vol. 34, 2007, p. 30.

¹⁶⁹ *eg, Sunday Times v. United Kingdom*, App. No. 6538/74, 26 April 1979, 2 EHRR 245.

¹⁷⁰ *Handyside v. United Kingdom*, App. No. 5493:72, 7 December 1976, EHRR 737, para. 48.

¹⁷¹ White, Robin and Ovey, Clare, *The European Convention on Human Rights*, 5th ed. Oxford 2010, p. 326.

¹⁷² *Handyside v. United Kingdom*, App. No. 5493:72, 7 December 1976, EHRR 737. The case concerned the conviction of a man that had published the book “Little Red Schoolbook”, which had been seized and confiscated as obscene as it contained information on sexual matters for adolescents.

¹⁷³ Gerards, Janneke, “Pluralism Deference and the Margin of Appreciation Doctrine”, *ELJ* Vol. 17, No. 1, 2011, p. 104; and *eg Evans v. United Kingdom*, App. No. 6339/05, 10 April 2007, 46 EHRR 728, para. 77.

¹⁷⁴ Gerards, Janneke, “Pluralism Deference and the Margin of Appreciation Doctrine”, *ELJ* Vol. 17, No. 1, 2011, p. 104

The margin of appreciation doctrine is not without criticism. Apart from the underlying reality that the doctrine undermines the universality of human rights, it is often criticised for the difficulty in predicting its application and the fact that it lacks clear standards. It has for instance been observed that “the margin of appreciation varies not only in relation to different exceptions, but in relation to the same exceptions in different contexts.”¹⁷⁵ Against this background Letsas has, in an effort to clarify the ambiguity surrounding the doctrine, noted that the ECtHR uses the margin of appreciation in two different ways. As regards the first method, which he calls the *substantive* concept of the doctrine, the margin of appreciation serves as a tool in interpreting the tension between individual rights and collective goals. Most notably, this is the case with national security, where the ECtHR has allowed a broad margin of appreciation to the Contracting states.¹⁷⁶ The second method, which he calls the *structural* concept, is based on the idea that the ECHR is an international convention, and not a national bill of rights. As such, the Contracting States are better placed to evaluate certain situations. This is for instance the case where there exists no common consensus among the Contracting States.¹⁷⁷

Irrespective of the ambiguities surrounding the margin of appreciation its importance cannot be underestimated in examining whether a restriction is necessary in a democratic society.¹⁷⁸ It is one of the most important safeguards developed within the jurisprudence of the ECtHR in reconciling “the effective operation of the ECHR with the sovereign powers and responsibilities of governments in a democracy.”¹⁷⁹

4.3 The ECJ and the Margin of Discretion

The fact that both the ECtHR and the ECJ employs the margin of discretion doctrine is based on the link between the courts in their endeavour to reconcile universality with particularism. Within the ambit of EU law, it is however not the universality as much as the uniform application of EU law that has to be balanced against the national values and individualities of the Member States. Looking specifically at the internal market, it is instead the economic freedoms that have to be balanced against national public

¹⁷⁵ McHarg, Aileen, “Reconciling Human Rights and the Public Interest: Conceptual Problems and Doctrinal Uncertainty in the Jurisprudence of the European Court of Human Rights”, *The Modern Law Review*, Vol. 62, 1999, p. 688.

¹⁷⁶ See *inter alia*: *Klass v. Germany*, App. No. 5029/71, 6 September 1978, 2 EHRR 214.

¹⁷⁷ Letsas, George, “Two Concepts of Margin of Appreciation”, *Oxford Journal of Legal Studies*, Vol. 26, 2006, pp. 705-732. Letsas is Lecturer in Law at the University College London. See also White, Robin and Ovey, Clare, *The European Convention on Human Rights*, 5th ed. Oxford 2010, p. 79.

¹⁷⁸ White, Robin and Ovey, Clare, *The European Convention on Human Rights*, 5th ed. Oxford 2010, p. 332.

¹⁷⁹ Waldock, Humphrey, Sir, “The Effectiveness of the System Set Up by the European Convention of Human Rights”, *HRLJ*, Vol. 1, 1980, p. 9.

interests.¹⁸⁰ It is also within the context of the internal market where the margin of discretion prominently has figured.

It is naturally so that when goods, persons and services cross borders, they are likely to cross value borders as well. Consequently, the ECJ is often faced with cases where either fundamental rights stand against each other, or fundamental rights stand against the objectives of the economic freedoms.¹⁸¹

The *Omega* case might be seen as a combination of both, in that the case involved both the conflict between human dignity and the free movement of services, as well as the conflict between different understandings of the right of human dignity.¹⁸² The *Omega* case is also a good example of a situation where the ECJ relied on a margin of discretion, reiterating its frequently used words that “the specific circumstances which may justify recourse to the concept of public policy may vary from one country to another and from one era to another. The competent national authorities must therefore be allowed a margin of discretion within the limits imposed by the Treaty.”¹⁸³

The margin of discretion also played an important part in the *Schmidberger* case, where the ECJ had to balance the free movement of goods against the freedom of expression. The ECJ concluded that the competent authorities, in determining whether a fair balance had been struck between the competing rights, enjoyed a wide margin of discretion, subject to the principle of proportionality.¹⁸⁴

The margin of discretion also shines through in other aspects of Union law. It figures both within the context of the Member States’ responsibility to enforce Union law¹⁸⁵ and their obligation to implement it.¹⁸⁶ Indeed, the doctrine is well embraced within the design of directives, since the rationale behind directives is to leave the choice of form and method for implementing EU objectives open to the Member States. However, it has been observed that this discretion rather should be labelled as an “implementing discretion” than a “margin of discretion”.¹⁸⁷

¹⁸⁰ Sweeney, James, *A “Margin of Appreciation” in the Internal Market: Lessons from the European Court of Human Rights*, *Legal Issues of Economic Integration*, Vol. 34, 2007, p. 38.

¹⁸¹ Shuibhne, Niamh, “Margins of appreciation: national values, fundamental rights and EC free movement law”, *ELRev.*, Vol. 34, 2009, p. 2.

¹⁸² Shuibhne, Niamh, “Margins of appreciation: national values, fundamental rights and EC free movement law”, *ELRev.*, Vol. 34, 2009, p. 11.

¹⁸³ Case C-36/02 *Omega* [2004] ECR I-09609, para. 31. *See also*: Case 41/74 *Van Duyn v. Home Office* [1974] ECR 1337, para 15.

¹⁸⁴ Case C-112/00 *Schmidberger* [2003] ECR I-5659, para. 82.

¹⁸⁵ *E.g.* Joined Cases C-46/93 and C-48/93 *Brasserie du Pêcheur and Factortame* [1996] ECR I-1029, para. 74.

¹⁸⁶ *E.g.* Case 8/81 *Becker* [1981] ECR 00053, para.28

¹⁸⁷ Shuibhne, Niamh, “Margins of appreciation: national values, fundamental rights and EC free movement law”, *ELRev.*, Vol. 34, 2009, p. 35.

4.4 The Margin of Appreciation and the Principle of Proportionality

The margin of appreciation does not equal an absolute power for the state to act as it sees fit. While a narrow or wide margin will indicate that the ECJ or ECtHR will perform either a thorough or a superficial examination, the exercise of the discretion left to the national authority must always remain within certain limits, most notably set by the principle of proportionality as seen in *Michaniki*. There are however no general criteria or guidelines for assessing how the principle of proportionality will be applied in a case where the state has been granted a certain margin of appreciation.

While the coexistence of the principle of proportionality and the margin of appreciation is far from easy to decipher, it is important to note that the two notions function on different levels. The margin of appreciation deals with the relationship between the state actor and the international judge. It is a tool used to reconcile the views from a national perspective with views from an international perspective. The principle of proportionality is on the other hand only relevant at the national level. The principle of proportionality consequently reflects a balance of facts within the national legal system, i.e. by determining whether the national actor acted in a manner which was both suitable and necessary as regards the objectives pursued.¹⁸⁸ As a result, the margin of appreciation doctrine does not exclude the application of the proportionality principle. It is never a question of whether the principle of proportionality should be applied at all, but rather which proportionality test to apply.¹⁸⁹

Despite the fact that the margin of appreciation has limits, its usage by the ECtHR and the ECJ has allowed their Member States a certain flexibility when acting under their supranational obligations. The doctrine could in the same way serve as a valuable instrument as regards national identities. It is only then, as a flexibility clause, that Article 4.2 TEU might serve its *raison d'être*.

¹⁸⁸ Barak, Aharon, *Proportionality: Constitutional Rights and Their Limitations*, Cambridge University Press, Cambridge, 2012, p.420.

¹⁸⁹ Sweeney, James, A "Margin of Appreciation" in the Internal Market: Lessons from the European Court of Human Rights", *Legal Issues of Economic Integration*, Vol. 34, 2007, p. 44.

5 National Identity As a Flexibility Clause

5.1 Introduction

Despite the novel formulation given to the national identity clause in Article 4.2 TEU, there are still substantial ambiguities surrounding it. The national identity clause is often understood as standing in contrast to the principle of primacy, yet their exact relationship is far from certain. National identities are furthermore primarily described as a constitutional identity, nevertheless, no precise definition exists. The national identity clause is also said to be of importance within the debate of the Union's competences, however, no one knows its impact in that regard. In sum, although much can be deduced from the case-law of the ECJ, the exact function of Article 4.2 TEU within the Union legal order remains to be seen.

The fact that not only the exact definition but also the exact function of the national identity clause remains clouded weakens the Union as the tension between the Union legal order and the national constitutions remains unsolved. Seeing Article 4.2 TEU seen as a flexibility clause in order to reconcile Member States' national identities with the objectives of the Union, might be a viable solution in easing that tension. As such, the function of the identity clause would primarily be that of giving the constitutional specificities of the Member States the ability to shine through in harmony with the Union's dictum "United in Diversity".

The purpose of this chapter is to unite the national identity clause with the margin of appreciation doctrine. That connection will be addressed under four different chapters. First, the notion of constitutional pluralism, the principle of subsidiarity and the principle of conferral, will be examined in relation to Article 4.2 TEU seen as a flexibility clause. As such, it is argued that all three notions create the legal context whereupon Article 4.2 TEU seen as a flexibility clause may be placed. Second, it will turn to how Article 4.2 TEU as a flexibility clause can impact the future application of the national identity clause. In that regard, it is argued that it can be applied in two different ways; *a*) by providing a more lenient test of proportionality, and, *b*) by inviting the ECJ to give guidance judgments rather than ready-made solutions. (section 5.3). Third, the close relationship between national constitutional identities and the concept of public policy will be addressed, (section 5.4). Finally, any analysis on the function of the national identity clause inevitably needs a thorough assessment on its impact on the principle of primacy. Hence, the last section will address how Article 4.2 TEU as a flexibility clause affects the principle of primacy and how these can coexist (section 5.5).

5.2 Finding the Legal Context of National Identities As a Flexibility Clause

Seeing Article 4.2 TEU as a flexibility clause granting Member States a margin of appreciation is but one of many views on its potential function.¹⁹⁰ It is however not without substantial support if viewed together with the theory of constitutional pluralism and the principles of subsidiarity and conferral. All three notions create the legal context for Article 4.2 TEU as a flexibility clause.

5.2.1 Constitutional Pluralism and the Margin of Appreciation

The concept of constitutional pluralism implies that there formally does not exist any hierarchical division between EU law and the national constitutions. As previously stated, the link between the national identity clause and constitutional pluralism might easily be made. If the Union is to respect the national identities of the Member States, constitutional pluralism certainly seems as the foundation whereupon Article 4.2 TEU should rest. It might however also be understood the other way around, that is, the national identity clause seen as the legal remedy available in the Treaties whereupon constitutional pluralism can rest.

The theory of constitutional pluralism should not be regarded as challenging the Union legal order. In that the essential constitutional principles of the Member States are part of EU law as well, any divergence between the latter and national constitutions will be exceptional. When such conflicts however do arise, there has to be a better solution than absolute primacy. Neither the CC, the FCC, or any other constitutional court would allow for such an outcome. It is however a difficult tightrope. How much constitutional pluralism can the Union embrace without losing the uniform application of EU law? It boils down to the paradox that EU law necessarily needs the principle of primacy in order to have a uniform and efficient application of Union law, while at the same time allowing national constitutional individualities the possibility to exist and manoeuvre within its sphere. In this regard, constitutional pluralism implies two things. Firstly, and as already mentioned, it implies the coexistence between Union provisions and national constitutions. Secondly, and consequently, it also implies a coexistence between pluralism and unity.¹⁹¹ Article 4.2 TEU seen together with the margin of appreciation doctrine might serve as a plausible answer in how to accommodate both these aspects.

¹⁹⁰ See e.g. Gustafarro, Barbara, “Beyond the Exceptionalism of Constitutional Conflicts: The Ordinary Functions of the Identity Clause”, *Jean Monnet Working Paper 01/02*, 2012, p. 38.

¹⁹¹ See, for a similar view, Maduro Miguel Poiars, “Three Claims of Constitutional Pluralism”, in: Avbelj, Matej and Komárek, Jan (eds.), *Constitutional Pluralism in the European Union and Beyond*, Hart Publishing 2012, p. 28.

The margin of appreciation fits particularly well together with constitutional pluralism. The coexistence of two opposite legal orders is only plausible in a space where both are allowed a certain room of manoeuvre, where neither will encroach upon the other. Additionally, the margin of appreciation allows for a view of Union law and national constitutions where they do not necessarily stand in contrast. Pluralism and unity would visibly interact without fully defeating each other.¹⁹² Any Member State with a core constitutional rule interfering with Union law should, in line with the principle of sincere cooperation, as far as possible try to adjust the contested rule to the Union standard. The Union should at the same time allow Member States the sufficient amount of space needed to safeguard their individual specificities.

5.2.2 The National Identity Clause and the Principles of Subsidiarity and Conferral

The abovementioned solution is additionally consolidated by the fact that the margin of appreciation doctrine stems from the principle of subsidiarity. If the margin of appreciation within the theory of constitutional pluralism has the function of giving Member States the sufficient amount of space needed to safeguard their individual specificities, the principle of subsidiarity answers the question why Member States should be given that space to begin with. In sum, the reasoning goes as follows. Constitutional pluralism needs the margin of appreciation as to grease the friction between the Union legal order and national constitutions. The principle of subsidiarity in turn provides the legal platform to why the margin of appreciation should be used. Where then does the national identity clause enter the picture? The answer would be at both stages of the reasoning.

Firstly, and as already stated, Article 4.2 TEU reflects a pluralistic view of the Union legal order as it is tied to the core constitutional specificities of the Member States. Secondly, Article 4.2 TEU however also in itself reflects, irrespective of whether one links it with the margin of appreciation, the Union's commitment to the principle of subsidiarity.¹⁹³ This is because Article 4.2 TEU decisively separates the Union from the core constitutional provisions of its Member States, letting those provisions instead be defined and protected by the lowest tier of government capable of addressing the question, i.e. the Member States themselves. "Lowest" in this regard, means closest to the people. Thus, democracy is an essential feature behind the principle of subsidiarity. The first identity clause, Article F.1 in the Maastricht Treaty, made this connection, stating the Union shall respect the national identities of its Member States, *whose systems of government are founded on the principles of democracy*. Consequently, Article F.1 of the

¹⁹² See Sweeney, James, "A "Margin of Appreciation" in the Internal Market: Lessons from the European Court of Human Rights", *Legal Issues of Economic Integration*, Vol. 34, 2007, p. 41.

¹⁹³ The same observation has been made in Dashwood, Alan *et al.*, *Wyatt and Dashwood's European Union law*, 6th ed. 2011, Hart Publishing, p. 115.

Maastricht Treaty said more than meets the eye, effectively connecting the national identity clause to the principle of subsidiarity, and ultimately democracy. In sum, both the theory of constitutional pluralism and the principle of subsidiarity provide the legal context for seeing Article 4.2 TEU as a flexibility clause.

A third connection must nonetheless be made. As stated in section 3.2, Article 4.2 TEU is placed next to the provisions related to the competences of the Union. It is both surrounded by Article 5 and 4.1 TEU, the former enshrining the principle of conferral and the latter creating the presumption that competences not conferred on the Union stays with the Member States. As a result, the national identity clause does not only reiterate a commitment to the principle of subsidiarity, but also the principle of conferral. Article 4.2 TEU clearly reflects the determination of the Member States in not transferring their core constitutional specificities to the Union. It has previously been stated that the relationship between Article 5 TEU and Article 4.2 TEU is that the former reveals what is to be considered as *ultra vires*, while the latter reveals what the Union must respect *intra vires*. Following the logic of the argument to its limit, Article 4.2 TEU would hence reveal what the Union must respect *intra vires*, as to not become *ultra vires*. In sum, neglecting Article 4.2 TEU would equal neglecting the principle of conferral. This is further supported by the fact that Article 4.2 TEU in itself, apart from the identity clause, also enshrines the guarantee that the Member States' essential State functions remain their sole responsibility.

“[The Union] shall respect their essential State functions, including ensuring the territorial integrity of the State, maintaining law and order and safeguarding national security. In particular, national security remains the sole responsibility of each Member State.”

Examined independently, Article 4.2 TEU, in itself, therefore has strong ties with the division of competences between the Union and its Member States, and the principle of conferral.

5.3 National Identity and the Margin of Appreciation

The application of the margin of appreciation to the national identity clause is not a revolutionary concept in itself. As seen in *Omega* and *Sayn-Wittgenstein* the doctrine is applied and used by the ECJ in both cases.¹⁹⁴ As previously stated *Omega* and *Sayn-Wittgenstein* fall under the line of case-law where the identity clause has been used as an aid in interpreting existing grounds for derogation, i.e. public policy in the cases mentioned. Considering that public policy derogations usually lead to the application of a margin of appreciation, it is up to debate how much the national identity

¹⁹⁴ Case C-36/02 *Omega* [2004] ECR I-09609, para 31 and Case C-208/09 *Sayn-Wittgenstein* [2010] ECR I-13693, para. 92.

aspect of the two cases actually influenced its use. The margin of appreciation doctrine would presumably have been applied irrespective of whether the contested national provisions were of a constitutional character. While the connection between the margin of appreciation and the national identity clause thus is apparent in *Omega* and *Sayn-Wittgenstein*, their relationship and mutual effect on each other is, on the other hand, yet not deciphered. In this regard, this paper proposes two different ways in which the margin of appreciation may materialize itself within national identity cases, both possible to deduce from existing case-law. First, it is suggested that the doctrine can have a *possible impact on the principle of proportionality*. Second, as a doctrine stemming from the principle of subsidiarity, it is suggested that the ECJ as far as possible should *try to give guidance judgments*, rather than giving ready-made solutions.

5.3.1 Less Restrictive Proportionality Test

The entire reason for connecting the margin of appreciation to the national identity clause is as argued to give Member States the possibility to incorporate their own constitutional specificities to the European integration project. By allowing them a certain *margin of flexibility*, as stated in the *travaux préparatoires* of the Treaty establishing a Constitution for Europe, they would be able to grow together with the Union rather than besides it.

Konstadinides argues that the implications of the identity clause as a shield so far have been reduced to a bare minimum by the ECJ through the principle of proportionality.¹⁹⁵ The margin of appreciation doctrine could however offer another solution by altering the proportionality test applicable in cases related to the national identity clause. The underlying argument would hence be the possible application of a less stringent proportionality test in reviewing national measures that according to the Member State are part of their national identity.¹⁹⁶ While the principle of proportionality cuts corners, the margin of appreciation sets frames. Simplifying, the national identities of the Member States, within the frames set by the margin of appreciation, would be given a space to breath, rather than being shaped and adjusted by the principle of proportionality.

The argument does not fall far from the ECJ's reasoning in *Sayn-Wittgenstein*. The ECJ rather laconically noted the following in paragraph 93:

“[...] By refusing to recognise the noble elements of a name such as that of the applicant in the main proceedings, the Austrian authorities responsible for civil

¹⁹⁵ Konstadinides, Theodore, “Constitutional Identity as a Shield and as a Sword: The European Legal Order within the framework of National Constitutional Settlement”, *Cambridge Yearbook of European Legal Studies*, Vol. 13, 2011, p. 195.

¹⁹⁶ See Gustafsson, Barbara, “Beyond the Exceptionalism of Constitutional Conflicts: The Ordinary Functions of the Identity Clause”, *Jean Monnet Working Paper 01/02*, 2012, p. 45.

status matters do not appear to have gone further than is necessary in order to ensure the attainment of the fundamental constitutional objective pursued by them.”¹⁹⁷

Thus, the ECJ only superficially examined whether the national provision was proportionate, giving the Member State a broad margin of appreciation. The proportionality test used in *Sayn-Wittgenstein* hence differs significantly from the recent *Sky Österreich* case where, though not a national identity case, national constitutional provisions did come into play. As mentioned, the ECJ went through all three stages of the proportionality test, including proportionality *strictu sensu*.¹⁹⁸

Although no significant conclusion can be drawn from merely two cases, both *Sayn-Wittgenstein* and *Sky Österreich* offer a possible suggestion to how the margin of appreciation could affect the proportionality test in national identity cases. First, as regards *Sky Österreich* and the fact that the ECJ applied all three stages of the proportionality test, it should be stressed that the case was one within the harmonized field of EU law. A national identity would seemingly not fall into that category.¹⁹⁹ As a result, the last step of the principle of proportionality would presumably not apply to a provision falling under Article 4.2 TEU. Recalling that the national identity has strong ties with the principle of subsidiarity, it would furthermore seem almost ill suited for the ECJ to perform an actual weighing of the interests at stake in a national identity case.

As to *Sayn-Wittgenstein*, although the ECJ stated that the Austrian authorities did not appear to have gone further than *necessary*, it is hard to find an examination of the necessity test in the court’s reasoning. This seemingly leads to the conclusion that while the test of suitability will always be present, the margin of appreciation particularly strikes at the second test of the principle of proportionality, i.e. the test of necessity. The test of necessity states that a state action cannot go beyond what is necessary in order to attain the objective pursued. It is precisely here that national identities might cause a problem. In *Omega*, the national identity manifested itself by banning all articles related to the game *Laserdrome*. In *Michaniki*, it manifested itself by placing a bar on all tenderers involved in the media sector from participating in public procurement contracts. While the ECJ found the provision proportionate in *Omega* – the provision prohibited only the variant of the laser game with the object to fire on human targets – it did not find the provision proportionate in *Michaniki*. The provision bared all tenderers irrespective of whether their connection to the media sector was only marginal. The provision in *Michaniki* was thus manifestly disproportionate. The possibility of applying a proportionality test with a higher threshold as regards the test of necessity would therefore be a plausible suggestion on how the margin of appreciation would influence the principle of proportionality within cases on national identity. Such a test would allow the Member States the sufficient space to adjust their

¹⁹⁷ Case C-208/09 *Sayn-Wittgenstein* [2010] ECR I-13693, para. 93.

¹⁹⁸ Case C-283/11 *Sky Österreich* [2013] n.y.r. para. 63.

¹⁹⁹ See section 5.2.2.

constitutional specificities with the objectives of the Union. Alas, as stated by the ECJ in *Omega* “it was not its intention, [...], to formulate a general criterion for assessing the proportionality of any national measure which restricts the exercise of an economic activity.”²⁰⁰ It would thus be highly surprising to see the ECJ actually clarifying how the test of proportionality should be applied in relation to the margin of appreciation.

Although the margin of appreciation, as discussed, may influence the test of proportionality within cases on national identities, one cannot deviate from the fact that the national identity clause is not an absolute right. As stated by Maduro in *Michaniki* the preservation of national identities can only be allowed within certain limits. It is therefore a discussion on which proportionality test should be applied, and never one of whether a proportionality test should be applied at all.

5.3.2 Guidance Judgments Rather than Ready-Made Solutions

The second suggestion follows the ECJ’s approach in *Wardyn*. As opposed to all other national identity cases the ECJ in *Wardyn* did not give a ready-made solution, but left it up to the national court to “decide whether such refusal reflects a fair balance between the interests in issue.”²⁰¹ While the ECJ hence set the frames, it left a margin of flexibility for the national court, committing to a sort of “national court’s right to assessment”²⁰².

A national court’s right to assessment fits well with a national identity clause granting Member States a margin of appreciation, if recalling that the margin of appreciation doctrine stems from the principle of subsidiarity. The close connection between the national identity clause and the principle of subsidiarity itself further strengthens the argument. While the ECJ necessarily needs to set the frames of any action brought within the ambit of Article 4.2 TEU as a provision of EU law, the national courts are best suited to examine the facts of the case in light of their constitutional provisions. Maduro has similarly stressed the importance of allowing Member States an increased discretion when there are possible conflicts of constitutional law.²⁰³ “Those authorities [constitutional courts] are best placed to define the constitutional identity of the Member States which the European Union has undertaken to respect.”²⁰⁴ Furthermore, as noted in recent case-law, the

²⁰⁰ Case C-36/02 *Omega* [2004] ECR I-09609, para. 37.

²⁰¹ Case C-391/09 *Wardyn* [2011] n.y.r., para. 91.

²⁰² Gustafarro, Barbara, “Beyond the Exceptionalism of Constitutional Conflicts: The Ordinary Functions of the Identity Clause”, *Jean Monnet Working Paper 01/02*, 2012, p. 44.

²⁰³ Maduro, Miguel Poyares, “Contrapunctual Law: Europe’s Constitutional Pluralism in Action”, in: Walker, Niel (ed), *Sovereignty in Transition*, Hart Publishing 2003, p. 534

²⁰⁴ Opinion of Advocate General Maduro on 20 September 2005 in Case C-53/04 [2006] ECR I-7213, para. 40.

ECJ is not adverse to the possibility of merely giving guidance judgments, even if ready-made solutions are much more frequent.²⁰⁵

5.4 National Identity and Public Policy

The concept of public policy is, as mentioned, wide and can be filled with many different values. Nevertheless, any public policy derogation needs to address a real and sufficient serious danger and protect a fundamental interest of society. What is then the protection of a Member States national identity if not one addressing those precise circumstances? It is perhaps no coincident that the two most famous cases on national identity also happen to be cases on public policy. While not all provisions falling under the derogation of public policy will constitute a national identity, most provisions that are part of the Member State's national identity will however constitute a public policy derogation. This is further supported by reading Article 4.2 TEU as a whole. The last part of Article 4.2 TEU mentions that the Union shall respect the essential state functions of the Member States maintaining law and order and safeguarding national security. In that regard, one might view the national identity clause simply as a codified expression of public policy.

The public policy aspect is even present within the line of cases where the identity clause has been relied on as an autonomous ground for derogation. In *Wardyn*, Advocate General Jääskinen recalls that case-law with regard to language requirements holds that the possible justifications for such obstacles “implies [...] the existence of legitimate aims relating to considerations of public policy”²⁰⁶.

Public policy often comes hand in hand with a margin of appreciation for the Member State. As such, there is a triangular relationship between the national identity clause, public policy and the margin of appreciation doctrine. They are all linked to each other. This begs the question of whether the national identity clause primarily is a political tool rather than a legal one. If national identities already are well protected under the derogation of public policy, what is then the contribution of Article 4.2 TEU? Considering the fact that the ECJ, in all cases where the identity clause has been used as an aid in interpreting existing grounds for derogation, has been brief and laconic in its reference to Article 4.2 TEU the answer could well be that its contribution is primarily of a political nature. In light of the fact that the clause also has been used as an autonomous ground for derogation, that answer can however not be acceptable. While it is the former line of case-law that has attracted the most attention from scholars, it is nevertheless the latter that confirms the legal character of the national identity clause.

²⁰⁵ See Case C-617/10 *Åkerberg* [2013] n.y.r.

²⁰⁶ Opinion of Advocate General Jääskinen on 16 December 2010 in Case C-391/09 *Wardyn* [2011] n.y.r., para. 89.

Another interesting facet of the discussion is the fact that the ECJ has stated that the purpose of the public policy exception is not to reserve certain matters to the exclusive jurisdiction of the Member States. This might suggest that the national identity clause brings something new to the equation and in theory is wider than the concept of public policy. The fact that public policy primarily is present as regards the fundamental freedoms, while the national identity clause is present within the entire spectrum of EU law, points in the same direction.

5.5 National Identity and the Principle of Primacy

Both the CC and the FCC have firmly stated that they hold the ultimate say in issues on the compatibility of EU law with their respective constitutions. The latest step in their perseverance is the identity review introduced by both courts. This has further eroded the rationale established by the ECJ in *Internationale Handelsgesellschaft*, where the ECJ confirmed the primacy of EU law over national constitutional provisions. And as reason stands, it would render the national identity clause void of any judicial relevance if *Internationale Handelsgesellschaft* would be seen as an absolute bar to the prevalence of national constitutional rules over EU law. How are national identities to be respected if EU law automatically prevails over national constitutions? As noted, the ECJ is today, however, far beyond the position it took in *Internationale Handelsgesellschaft*. The court has on several occasions referred to the relevance of national constitutional aspects in order to justify exceptions from EU law.²⁰⁷ Still, *Melloni* is a sharp reminder of the fact that the primacy of EU law permeates the entire national legal system, including national constitutions. This is obviously necessary as the uniform and effective application of Union law otherwise would be jeopardized. As argued, and as noted by Advocate General Bot in *Melloni*, Article 4.2 TEU nevertheless offers the last safe house for the constitutional specificities of the Member States. The difficulty hence lies in finding the right balance between the primacy of EU law and national identities.

5.5.1 Striking the Right Balance

5.5.1.1 The Peculiarities of the National Identity Clause

One of the most interesting aspects of Advocate General Bot's opinion in *Melloni*, is the fact that he states that the national identity clause may be relied upon against a provision of secondary law. It is interesting since the ECJ so far never has held that Member States can derogate from secondary law on the basis of Article 4.2 TEU.²⁰⁸ It is however a logical conclusion. If

²⁰⁷ Besselink, Leonard, *National and constitutional identity before and after Lisbon*, Utrecht Law Review, Vol. 6, 2010, p. 45, who in turn makes reference to: Case C-88/03 *Portugal v Commission "Azores"* [2006] ECR I-7115 and Case C-145/04 *Spain v United Kingdom "EP electoral rights in Gibraltar"* [2006] ECR I-7917.

²⁰⁸ De Boer, Nik, "Uniformity or deference to national constitutional traditions in the protection of fundamental rights? Opinion AG Bot in Case C-399/11 *Melloni*" from

Article 4.2 TEU can be used against a treaty based obligation, why should it then not be applicable to an obligation stemming from secondary EU law? If one understands the national identity clause as the last safe house for the national constitutional specificities of the Member States, there is no reason why the respect for national identities should be narrowed to Treaty based provisions only.

Another interesting aspect *Melloni* raises is the difference Article 4.2 TEU creates between *normal* constitutional provisions and constitutional provisions considered to be part of a Member State's national identity. As noted by Besselink, only constitutional provisions which are part of the Member States' national identity will have a privileged position *vis-à-vis* EU-law.²⁰⁹ The ECJ never acknowledged *Michaniki* as a national identity case, and perhaps this is the reason why, though finding the contested provision justified, the outcome differed from *Omega* and *Sayn-Wittgenstein*.²¹⁰

Taking it one step further, might there then be a difference between constitutional provisions considered as national identities *per se*? Is there heavier and lighter national identities, which in return offer a different degree of protection? Some argue, "it stands to reason that the greater the infringement of national identity might be, the greater the justification on the part of the European Union should be for not respecting the expression of such constitutional individuality."²¹¹ This is necessarily not so for three reasons.

First, Article 4.2 TEU speaks of fundamental structures, implying that, as already argued, national identities are narrower than constitutional law as a whole. It would undermine the essence of national identities as fundamental constitutional rules if those fundamental rules could be divided into less fundamental and more fundamental. Consequently, the thought that there are different levels of national identities implies a conception of what constitutes a national identity that is too wide to begin with.

Second, the argument necessarily leads to the suggestion that there are some national identities so fundamental and essential that no proportionality test at all should be applied, an outcome which does not go hand in hand with EU law.

European Law Blog, <http://europeanlawblog.eu/?p=1168>, Accessed 2013-02-23. The identity clause was however briefly examined against a provision of secondary law in Case C-3/10 *Affatato* [2010] ECR I-121.

²⁰⁹ Besselink, Leonard, "National and constitutional identity before and after Lisbon", *Utrecht Law Review*, Vol. 6, 2010, p. 48.

²¹⁰ Besselink, Leonard, "National and constitutional identity before and after Lisbon", *Utrecht Law Review*, Vol. 6, 2010, p. 48.

²¹¹ van der Schyffl, Gerard, "The constitutional relationship between the European Union and its Member States: the role of national identity in article 4(2) TEU", *ELRev*, Vol. 37, No. 5, 2012, p. 17.

Third, the question addresses the inherent paradox in the national identity clause. While Article 4.2 TEU cannot be interpreted by itself, it at the same needs to be examined in its own light. In other words, national identities are always linked with a particular interest, be it human dignity, the right to a fair trial, language requirements etc. While these might require a greater justification on the part of the Union, Article 4.2 TEU should preferably not be divided into national identities and national identities. This would infringe the principle of equality between the Member States in Article 4.2 TEU.

One last aspect *Melloni* raises is whether there should be a difference in the application of the national identity clause depending on whether it appears within an exclusive or non-exclusive area of EU law. That is, should there in cases on national identity that appear, no matter how unlikely, within the exclusive competence of the Union be a more stringent proportionality test *vis-à-vis* that national identity? Reading Advocate General Bot's opinion in *Melloni*, stating Article 4.2 TEU can be used to derogate from secondary law, suggests that the answer is yes. In line with the doctrine of pre-emption, an area harmonized through for instance a directive, may be considered as becoming an exclusive area of EU law. Bot's opinion may therefore be interpreted as implying that the national identity clause should have the same effect within exclusive areas of EU law, as within non-exclusive areas of EU law. This interpretation is supported if recalling that the rationale behind the national identity clause is to bar Union law from encroaching upon Member States' core constitutional rules, and that the identity clause as such signifies a commitment to the principle of conferral.²¹² One must however observe the difference between a provision falling within the scope of a harmonized area, and one addressing a particular interest harmonized in that area. An interest harmonized within EU law means the Union has set both the floor and ceiling on how that interest should be understood, and it would hence presumably be difficult to apply the national identity clause to that particular interest.²¹³ This can be seen in *Melloni* since the ECJ in paragraphs 60 and 61 noted that Article 53 of the Charter could not apply as the European Arrest Warrant particularly states that it does "not allow Member States to refuse to execute a European arrest warrant when the person concerned is in one of the situations provided for therein".²¹⁴ As that interest hence was harmonized, the primacy of EU law prevailed.

5.5.1.2 A Balanced Relationship

In respect of the above mentioned, it should be kept in mind that any conflict between the national identities of the Member States and the Union in general would be exceptional as both the Union as the Member States in essence stand on the same principles, e.g. Article 2 TEU. The same

²¹² See the discussion under section 5.1.2.

²¹³ To that regard *see* Opinion Advocate General Jacobs on 17 September 1996 in Joined Cases C-34/95, C-35/95 and C-36/96 *De Agostini* [1997] ECR I-3843, paras. 60-62.

²¹⁴ Case C-399/11 *Melloni* [2013] n.y.r. para. 61.

conclusion can also be derived from the *Solange* judgments of the FCC. The FCC there stated that Union law, in general, offers the same protection to fundamental rights as the German basic law. Thus, it will only review EU law *as long as* the Union and ECJ maintain the same level of protection essentially equivalent to the Basic Law. As a result, when conflicts do rise, a balanced relationship between the national identity clause and the principle of primacy must be sought. As argued throughout this paper, the national identity clause stands in contrast to an absolute principle of primacy. At the same time, national identities are not absolute in themselves either. A margin of appreciation within the context of national identities might help in striking the right balance between the two. Two comments should be made in this regard.

First, the two notions do not need to be seen as opposites. They can be understood as running parallel to each other, neither encroaching upon the other. Incorporating the margin of appreciation doctrine into the national identity clause allows the national specificities of the Member States a margin of flexibility within the overarching principle of primacy.

Second, it would be an oxymoron to see the principle of primacy absolute. If it would overcome even the national identities of the Member States, it chops of the branch it sits on. This is at least the outcome if understood from a Member State perspective, since the Member States see the principle of primacy as stemming from their national constitutions.

5.5.2 The Primacy, Unity and Effectiveness of EU Law

Though the importance of national identities and the national identity clause cannot be underestimated, one should at the same time be careful with overvaluing them. The Union needs to find a solution to the tension between national constitutions and Union law, and Article 4.2 TEU seen as a flexibility clause offers that solution. In that regard, the national identity clause is the pillar on which a Union embracing the notion of constitutional pluralism can be built upon. Again, the right balance however needs to be struck. Unravelling the potential of the national identity clause unavoidably weakens the effective and uniform application of EU law. As seen in *Melloni*, regarding Article 53 of the Charter, there exists, and with good reason, an underlying fear with interpreting articles jeopardizing the principle of primacy too far. As stated by the ECJ “national authorities and courts remain free to apply national standards of protection of fundamental rights, provided that [...] the primacy, unity and effectiveness of EU law are not thereby compromised.”²¹⁵ Hence, while the national identity clause offers the last safe house for national constitutional specificities, it is not without good reason the ECJ so far has been scarce in applying it.

²¹⁵ Case C-399/11 *Melloni* [2013] n.y.r. para. 60, and Case C-617/10 *Åkerberg* [2013] n.y.r., para. 29.

Even if the application of Article 4.2 TEU is exceptional, it will still find ways to express itself in EU-27. 27 national constitutions under one Union law will inevitably trigger the application of the identity clause irrespective of how careful the ECJ is with referring to it. Consequently, while the application of Article 4.2 TEU will weaken the uniform application of EU law, the ECJ will need to shape the national identity clause as to address the tension between national constitutions and Union law.

6 Conclusion

The ECJ has so far been modest in applying and making reference to the national identity clause. Its latent potential would presumably be the reason for this. At the same time, its elusive character might be another explanation. The ECJ has so far mainly used it in two different ways, as an autonomous ground for derogation and as an aid in interpreting existing grounds for derogation. However, its political nature cannot be excluded all together. One might also suggest that the national identity clause is a general principle of EU law. This paper stands on the thesis that the national identity clause should be understood as a flexibility clause granting Member States a margin of appreciation. As such, the national constitutional specificities of the Member States will be able to shine through in harmony with the Union's dictum *United in Diversity*. Borrowing the quote by Sir. Waldock Humphrey, Article 4.2 TEU might have the potential to reconcile the "effective operation of the [European Union] with the sovereign powers and responsibilities of governments in a democracy."²¹⁶

Two points will seemingly always remain ambiguous as regards Article 4.2 TEU. The first one concerns its relationship with the principle of primacy. Is the primary purpose of the national identity clause to function as the counterweight to the absolute primacy of EU law, or do they run parallel to each other? While the question presumably never will be answered, the ECJ needs to clarify the purpose and legal implications of the national identity clause, as it weakens the Union to have such a significant article covered in mystery.

The second point concerns the principle of proportionality. Notwithstanding the fact that it is hard to pinpoint its application as used in case-law in relation to Article 4.2 TEU, its application to Article 4.2 TEU as a flexibility clause offers additional challenges. If anything, the proportionality test suggested in section 5.3.1 precisely highlights those difficulties.

EU-27 means 27 constitutions and hence 27 different national identities. These will all need to find their place within the Union context. Article 4.2 TEU seen as a flexibility clause granting Member States a margin of appreciation is one suggestion on how that can be accomplished. Article 4.2 TEU might however never fully rise to the latent potential it inherently has. Seen as a flexibility clause, easing the friction between the Union legal order and national constitutional provisions, it might nonetheless lead to a Union not only *United in Diversity*, but *United through Diversity*.

²¹⁶ Waldock, Humphrey, Sir, "The Effectiveness of the System Set Up by the European Convention of Human Rights", *HRLJ*, Vol. 1, 1980, p. 9.

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