

# **The Constitutionalisation of National Identity in EU Law and its Implications**

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## **Introduction**

The idea of repatriating national powers from the EU is en vogue. The EU Treaty as amended by the Lisbon Treaty gave considerably more weight to the principles of subsidiarity, proportionality and national identity. This paper will look into the potential limiting effect of the Lisbon Treaty's emphasis on national identity upon EU legislative competence. Against constructive approaches regarding the added value of the national identity provision of Article 4 (2) TEU, this paper will attempt to unpack the constitutional lack of utility of the principle through a critical interpretation of new CJEU case law. We will look at cases before the Luxembourg Court where Member States have resorted to national identity as a means of derogating from their EU law obligations. It is argued that these cases have only been successful in rebranding the old CJEU cases on legitimate interests to a new breed of case law bearing the national identity tag. The CJEU seems to have envisaged a form of constitutionalism where although Member States enjoy a monopoly over the definition of national identity (the 'what'), the power to determine the compatibility of those interests with EU obligations (the 'how') is vested in the CJEU. As such, this paper will explore whether this development constitutes a cause for celebration vis-à-vis the repatriation of national powers from the EU.

## **The National identity Clause in the Treaty and its progeny**

The EU is under an obligation to respect the identities of the Member States – political or constitutional. The Treaty makes this obligation explicit. A 'national identity clause' was first inserted in the Treaty of Maastricht. Article F (1) TEU was the first provision to constitutionalise such obligation by plainly stressing that 'the Union shall respect the national identities of its Member States'. Article F (1) TEU of the Maastricht Treaty was later replaced by Article 6 (3) TEU of the Amsterdam Treaty which then gave way to current Article 4 (2) TEU of the Lisbon Treaty. The latter provision is a lot more comprehensive compared to its predecessors. Its origins lie in Article I-5 of the deceased EU Constitutional Treaty. Article 4 (2) TEU provides:

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.

Not only Article 4 (2) TEU is longer and more descriptive than its predecessors but it is also supported by the preamble to the EU Charter of Fundamental Rights which reinforces that in its

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action, the EU must respect the national identities of the Member States. What is more, its legal geography is remarkable. Respect to national identity is packed in Article 4 TEU alongside the principles of conferral and loyalty. Respect to all three principles is therefore fundamental to the good functioning of the EU. But respect by whom? The legislature in the exercise of its functions? the European Council in its executive capacity or rather the CJEU in the exercise of its judicial functions? As a supplementary to the principle of conferral further manifested in Article 5 (1) TEU, one would expect that Article 4 (2) TEU is addressed to the EU legislature meaning that the Commission, the Council and the Parliament shall not go beyond achieving objectives which may impinge on the national identity of the Member States. Yet the wording of Article 4 (2) TEU implies that the obligations stemming from it are binding on the EU as a whole. This all-encompassing reference implies that all EU Institutions are bound by Article 4 (2) TEU during the exercise of their duties.<sup>1</sup>

Accordingly, respect to national identities can be invoked by a Member State as a means of placing under review the legality of EU legislative acts in accordance with Article 263 TFEU. In this respect Article 4 (2) TEU implies that national identity counterweights the principle of EU law primacy. It also keeps any expansionist claims of EU competence at bay. This attribute of Article 4 (2) TEU as a cause of action under Article 263 TFEU is particularly beneficial for the UK and Dutch governments whose general aversion towards making a federation out of the EU is well known. Both governments have recently conducted a balance of competence review to explore how much power has the EU acquired since they joined the EU. But despite the British or Dutch views about European integration, the fact that, for instance, apart from the principle of conferral the Commission needs to be cautious when proposing legislation not to impinge upon national identities is a welcome development for any of the twenty-eight Member States. For instance, an insistence on identity-scrutiny of EU legislative proposals may motivate national parliaments to be more observant in their reading of proposals emanating from the Commission. Indeed, post-Lisbon the Protocol on the application of the principles of Subsidiarity and Proportionality is more focused on the procedural aspects of the application of Article 5 TEU introducing the so-called ‘yellow’ and ‘orange’ card procedures which ensure early in the legislative process, that the principle of subsidiarity is not violated by the EU Institutions. National identity could easily become part and parcel of this new framework for the conduct of subsidiarity. One has to be careful however - under the early warning system introduced by the Treaty of Lisbon, subsidiarity constitutes a mere political judgment and not in itself a ground for judicial review. Therefore, national parliaments, which are primarily concerned with subsidiarity or/and national identity violations, are not entitled to bring a direct action against a Council measure under Article 263 TFEU. The CJEU would have jurisdiction to consider subsidiarity infringements brought by a Member State or notified by them in accordance with their legal order on behalf of their national parliament.

We should add here that outside the CJEU, Article 4 (2) TEU provides national courts with the opportunity to place EU identity-encroaching acts under close judicial scrutiny at home. In theory, national courts can review EU legislation not only when EU Institutions are acting *ultra vires* but also where they are acting *intra-vires* in tune with the principle of conferral. According to the German Constitutional Court (BVerfG), which flagged up this idea during its *Lisbon Urteil*, such constitutional check would enable national actors to monitor how the relationship between national constitutions and the EU legal system develops after the Member States have decided to confer competence to the EU. The BVerfG’s *identitätskontrolle* implies that European integration cannot undermine the fundamentals of the system of majoritarian democratic rule that underpin the German Constitution and are recognized in Article 4 (2) TEU in the form of

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<sup>1</sup> T. Ginsburg and R. Dixon (eds.) *Comparative Constitutional Law* (Cheltenham: Edward Elgar, 2011).

national identities. Hence, EU identity encroaching acts are not only illegal under national law but also as a matter of EU law. Any challenge, however, remains a theoretical possibility and as the BVerfG's past *ultra vires* review *identitätskontrolle* constitutes a power statement of symbolic value. This is because such an insular approach to EU law would result to a subjective and integration-proof interpretation of secondary EU legislation by national courts, therefore promoting an 'absolute theory of relativity'. *identitätskontrolle* is also in principle erratic because it contradicts the authority of the CJEU as the supreme court in determining the scope of EU law.

Alternatively, Article 4 (2) TEU can be employed by a Member State as a means of derogating from its obligations under EU law – claiming that transposing a piece of legislation into national law conflicts with legitimate interests or principles which are deeply entrenched in its national identity. In this fashion, Article 4 (2) TEU provides Member States with an express EU law derogation over the preservation of their national identity. While the use of Article 4 (2) TEU as a means of challenging EU legislation constitutes a novelty, this attribute of Article 4 (2) TEU (a derogation) does not revolutionise current and future CJEU case law. Still, the CJEU will have to ascertain whether the legitimate interest in question forms part of a Member State's national identity. As the present author has argued elsewhere, this attribute of Article 4 (2) TEU merely repackages the old free movement case law of the CJEU on legitimate interests.<sup>2</sup> Any EU lawyer remembers the CJEU's daring judgments in *Schmidberger v. Republic of Austria*<sup>3</sup> and *Omega Spielhallen* managing (rather pragmatically) the conflict between fundamental rights and fundamental market freedoms.<sup>4</sup> Broadly speaking, treating national legitimate interests (e.g. the enhanced protection of fundamental rights in the abovementioned cases) as attributes of 'national identity' is not accidental. Such a reading of Article 4 (2) TEU is related to an interpretation of national identity as synonymous to constitutional autonomy and national self-determination, including concerns over the protection of fundamental constitutional norms or, in other words, legitimate interests.

The above thoughts aside, the most crucial, perhaps, question that arises when reading Article 4 (2) TEU is what kind of respect does it generate. In other words, what does national identity encompass for the purpose of the Treaty? A pan-European (or to be more precise a pan-EU) understanding or definition of identity is important because, as mentioned, similar to conferral and loyalty, national identity has become justiciable with the coming into force of the Treaty of Lisbon. This is further confirmed by, as we will see later on, recent case law on Article 4 (2) TEU. Of course its predecessor in the Treaty of Amsterdam – Article 6 (3) TEU – did not exclude the possibility that disrespect to national identity is a sufficient ground for an action for annulment. It just seems that Member States did not make any use of it and took it for a symbolic reference in the Treaty – a programmatic principle rather than a legal rule. Evidence to support this assumption can be drawn from the lack of case law prior to Lisbon on national identity as a ground for annulment of EU legislation or as derogation to a Member State's obligations under EU law.

So to return to our question, what does national identity really encompass in EU law? In the absence of CJEU case law on former Article 6 (3) TEU, one may only guess that pre-Lisbon this reference to national identities merely suggested respect towards the political and cultural dimension of national identity. Conversely, the post-Lisbon reference to national identity has been enriched with constitutional and legal connotations whilst cultural and linguistic diversity

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<sup>2</sup> T. Konstadinides, 'Constitutional Identity as a Shield and as a Sword: The European Legal Order within the Framework of National Constitutional Settlement' (2011) 13 *Cambridge Yearbook of European Legal Studies* 195.

<sup>3</sup> Case C-112/00, *Schmidberger v. Republic of Austria* [2003] ECR I-5659.

<sup>4</sup> Case C-36/02, *Omega Spielhallen* [2004] ECR I-9609.

have been tucked away in Article 3 TEU. Hence under the Treaty of Lisbon, respect to national identities encompasses respect to national devolution, constitutional structures, and essential state functions. These qualities attributed to the wider notion of national identity under Article 4 (2) TEU have triggered some academic enquiry into the potential use of the concept.<sup>5</sup> National identity has become *ev vogue*. Some academics rushed to conclude that the revision of former Article 6 (3) TEU by the Treaty of Lisbon underscores ‘the continuing importance and vitality of the Member States as sovereign nations whose national identities are manifested in the functions and structures of nationhood.’<sup>6</sup> Others have claimed in hesitation that the interpretation of Article 4 (2) TEU by the CJEU ‘will become the battleground or the meeting point, where the limits of the authority of EU law lie.’<sup>7</sup>

Let us remark here that what really matters is what the CJEU makes of Article 4 (2) TEU, meaning how far it will allow admissibility of annulment claims by Member States and how far it will go ring-fencing national legitimate interests against the obligations that arise from membership to the EU. In other words, national identity is one thing; the obligation of Member States under the principle of sincere cooperation or loyalty is another. First of all EU obligations under Article 4 (2) TEU to respect national identities are subordinate to the Article 3 TEU common values and principles - the components of a workable European identity that Member States have willingly adhered to.<sup>8</sup> As such, the prospect of fundamental interests which defending Member States seek to advance depends upon the classic proportionality test employed by the CJEU. So, for instance, cases concerning the balancing of legitimate interests with free movement rights will be resolved by reference to the CJEU’s established case law on permissible restrictions to free movement balanced through a proportionality assessment and not by citation of the abstract notion of ‘respect to national identities’ enshrined in Article 4 (2) TEU as a general derogation. Having said that, there is a growing tendency between EU and national courts to raise the question of identity and discuss the potential of Article 4 (2) TEU as a side or main issue to a case. Still, however, the full potential of the provision is yet to be explored in the case law of the CJEU. As things currently stand, the present author is rather pessimistic about the added value of the identity clause. He relies on existing case law in order to make his observations.

### **Lessons from the CJEU’s jurisprudence**

So far we may agree that constitutionalising national identity in the Treaty is a welcome development. But what happens in practice when a case is raised before the CJEU? How willing are the judges in Luxembourg to entertain questions about national identity? Although until recently the CJEU treaded carefully not to touch upon the Treaty’s identity clause, Advocate General Maduro was perhaps the first to remark pre-Lisbon in *Spain v Eurojust*<sup>9</sup> and later in in *Michaniki*<sup>10</sup> that the EU’s commitment to national individuality has existed from the outset, albeit within defined circumstances. By recalling the CJEU’s established case law he identified the intrinsic components of national identity (such as linguistic diversity and transparency and

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<sup>5</sup> See L.F.M. Besselink, National and Constitutional Identity before and after Lisbon, (2010) 6 (3) *Utrecht Law Review*. Available at: <[www.utrechtlawreview.org](http://www.utrechtlawreview.org)>.

<sup>6</sup> S.C. Sieberon, *Dividing Lines Between the European Union and its Member States: The Impact of the Treaty of Lisbon* (Cambridge: Cambridge University Press, 2008), p.93. See also W. Van Gerven, *The European Union: A Polity of States and Peoples* (Stanford: Stanford University Press, 2005), p.38.

<sup>7</sup> D. Chalmers et al, *European Union Law: Text and Materials* (Cambridge, Cambridge University Press, 2010), p.202.

<sup>8</sup> L.W. Gormley, ‘Reflections on the Architecture of the European Union after the Treaty of Amsterdam’ in D. O’Keefe and P. Twomey, *Legal Issues of the Amsterdam Treaty* (Oxford: Hart Publishing, 1999), p.60.

<sup>9</sup> Case C-160/03, *Spain v. Eurojust* [2005] ECR I-2077, para 24

<sup>10</sup> Opinion of Advocate General Maduro in Case C-213/07, *Michaniki* [2008] ECR I-0999, para 31.

equal treatment between tenderers) now manifest in Article 4 (2) TEU. What is more, Maduro provided insight with regard to the type of cases that the national identity clause could be raised. In *Spain v. Eurojust*, Maduro informs us that respect to national identity can be employed by Member States as an additional ground for annulment of EU legislation alongside discrimination on grounds of nationality whilst in *Michaniki* as a means of derogating (subject to a rigid proportionality assessment) from EU free movement provisions. It is argued here that we have witnessed more cases of the latter type like *Fürstin von Sayn-Wittgenstein* the first post-Lisbon judgment on Article 4 (2) TEU. For the sake of refreshing the reader's memory it is worth mentioning that the case involved a challenge against Austrian constitutional law on the abolition of titles of nobility irrespective of their origin. The Austrian applicant argued that the correction / alteration of her German surname in the Austrian register of civil status equals to non-recognition of the effects of her adoption by a German citizen and therefore an obstacle to her freedom of movement under Article 21 TFEU. The CJEU held that Article 21 TFEU on EU Citizenship must be interpreted as not precluding national authorities in restricted circumstances from refusing to recognise all the elements of the surname of a national of that State.<sup>11</sup> Equality between citizens and the abolition of privilege forms, therefore, part of national identity according to Article 4 (2) TEU can be utilized as a justification for prohibiting the acquisition of noble titles.

Similarly, in *Malgožata Runevič-Vardyn*<sup>12</sup> regarding rules on identity cards and passports, the CJEU established that the Lithuanian language constitutes 'a constitutional asset which preserves the nation's identity'<sup>13</sup> This 'asset' is further protected by the EU Charter of Fundamental Rights in the form of respect to cultural and linguistic diversity under Articles 3(3) and 22. It therefore arises that a Member States reserves to take measures towards protecting its official national language (including rules which govern the spelling of that language). The CJEU treats such rules as pursuing a legitimate objective capable of justifying restrictions on the rights of freedom of movement and residence as provided in Article 21 TFEU. What is interesting here is that Article 4 (2) TFEU is not used in isolation as a public policy derogation from the Treaty. It is rather used as complementary justification next to a fundamental right enshrined in the Charter. This is an important development because it demonstrates the weaknesses of Article 4 (2) TFEU which is restricted by the requirements laid down by EU law and must always be proportionate to those objectives.

To sum up, with or without the help of the Charter, Article 4(2) EU includes within its open list of identity-related interests abolition of privilege, the protection of a State's official language and respect for linguistic diversity. Both *Wittgenstein* and *Malgožata* demonstrate that Article 4 (2) can be invoked effectively by Member States against Article 21 TFEU in respect of matters of civil status (determination of surnames) which fall within their exclusive competence. Whether Member States will have the same luck in cases regarding Treaty provisions on the free movement of establishment or services where the applicant's economic activity is at peril (as a result of his/her alteration of surname for example) is another question. One shall be reminded of *Konstantinidis* (no relation to the present author), a case decided in favour of the applicant to use for professional purposes a spelling of his name which, contrary to national legislation, did not expose him to a risk of confusion of identity on the part of his clients.<sup>14</sup> What is more, in the context of Article 4 (2) TEU, the recent case of *Anton Las*<sup>15</sup> decided in April 2013 shows that a Belgian decree adopted pursuant to the Constitution which specified which language (Dutch)

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<sup>11</sup> Case C-208/09, *Sayn-Wittgenstein v. Landeshauptmann Von Wien* [2011] E.T.M.R. 12.

<sup>12</sup> Case C-391/09, *Malgožata Runevič-Vardyn* [2011] ECR I-03787.

<sup>13</sup> *Ibid*, para 84, 86

<sup>14</sup> Case C-168/91, *Konstantinides v. Stadt □Altensteig* [1993] ECR I-1191

<sup>15</sup> Case C-202/11, *Anton Las*, 16 April 2013, Unreported.

shall be used in the workplace in a particular municipality did not survive the challenge against the freedom of movement of workers provision of Article 45 TFEU. Likewise, the CJEU established that Member States cannot reserve access to the profession of civil-law notary to their nationals because the derogation provided for in Article 45 TFEU must be interpreted strictly and must be restricted to activities which in themselves are linked with the exercise of official authority.<sup>16</sup>

It arises that although the national identity clause offers a trap door to escape some of the obligations that arise under EU law, Member States enjoy little latitude using Article 4 (2) TEU as a *de facto* derogation from these obligations. As already explained, in all cases taking place within the scope of EU law, the CJEU will use its established case law on express Treaty derogations and legitimate interests (or objective justifications in indirect discrimination cases) to restrict the impact of the identity clause through the application of the principles of loyalty and proportionality. It is argued that this is in order to ‘bind’ Member States and exert influence over their behaviour with regard to their loyalty to European integration. We have already started witnessing this trend with respect to the duties of Member States under secondary legislation on equal treatment of workers. In *O’Brien*, the CJEU precluded Member States from extending the national identity clause to exempt certain public posts (judges) from the application of Directive 97/81 on part-time workers.<sup>17</sup> It held that the UK could not maintain a distinction between full-time judges and part-time judges remunerated on a daily fee-paid basis, unless such a difference in treatment is justified by objective reasons brought in by the national court. The CJEU will probably argue similarly in *Torresi*, a recent preliminary reference from Italy on the validity of Article 3 of Directive 98/5 in light of Article 4 (2) TEU.<sup>18</sup> The question here is whether Member States are allowed to make access to the legal profession (a service under EU law) conditional on passing a State examination. The aspect of national identity or objective reason in this case – i.e. the safeguarding of consumers of legal services and the proper administration of justice is unlikely to succeed the CJEU’s proportionality test.

Let us now turn to the possibility of a Member State utilising Article 4 (2) TEU as a means of challenging EU secondary legislation which violates its national identity. Advocate General Bot raised this possibility in the recent *Melloni* case.<sup>19</sup> He pointed that: ‘a Member State which considers that a provision of secondary law adversely affects its national identity may therefore challenge it on the basis of Article 4 (2) TEU.’<sup>20</sup> However, he argued ‘we are not faced with such a situation in the present case.’<sup>21</sup> *Melloni* was an extradition case regarding an *in absentia* judgment. The CJEU precluded Spain from relying on the indirect violation of the right to fair trial under the Spanish Constitution (also enshrined in Articles 47 and 48 of the EU Charter of Fundamental Rights) in order to derogate from the Framework Decision on the European Arrest Warrant (EAW).<sup>22</sup> In other words the CJEU established that the execution of a EAW is not conditional upon the conviction rendered *in absentia* (fraud) being open to appeal in the issuing State. The CJEU saved the EAW from yet another constitutional challenge in order to preserve the primacy, unity and *effet utile* of EU law. It held that the EAW was in full compliance with the Charter and emphasised that the right to fair trial was not violated because despite the fact that the applicant was not present during the trial, he was represented by two lawyers. It also stressed that the protection of human rights afforded by EU law cannot go further than the EU

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<sup>16</sup> See to that extent Case C-51/08, *Commission v. Luxembourg*, 24 May 2011, Unreported.

<sup>17</sup> Case C-393/10, *O’Brien v. Ministry of Justice*, 1 March 2012, Unreported.

<sup>18</sup> Case C-58/13, *Torresi*, Request for a preliminary ruling lodged on 4 February 2013.

<sup>19</sup> Case C-399/11, *Melloni v. Ministerio Fiscal*, 26 February 2013, Unreported.

<sup>20</sup> *Ibid*, para 139.

<sup>21</sup> *Ibid*, para 140.

<sup>22</sup> Framework Decision 2002/584 as amended by Framework Decision 2009/299.

law standard. The CJEU therefore dismissed the *Solange* presumption of equivalence since the constitutional provision of Spanish law that afforded citizens a greater standard of protection was not taken into account by the judges in Luxembourg. Hence, in the face of it *Melloni* seems to confirm the status quo first established by the CJEU in *Internationale Handelsgesellschaft*<sup>23</sup> namely that national constitutional norms in conflict with secondary legislation should be inapplicable. In reality, however, the judgment goes deeper suggesting that the Charter constitutes a maximum standard and not merely a floor of rights upon which Member States can build up further and guarantee further protection to their citizens. By contrast to what Besselink argues it is highly unlikely that while divergent fundamental rights standards may not be resolved explicitly via Article 53 of the Charter (level of protection saving clause) they will be resolved by reference to Article 4 (2) TEU.<sup>24</sup> It is established practice that when EU secondary legislation is reviewed, a blanket EU standard applies. The CJEU will most likely disagree that unique fundamental rights standards in the Member States will survive conflict with EU legislation if they are presented as part of the constitutional identity of Member States. Had the case been different by virtue of the identity clause a retrial of the infamous *Viking* would have given us a different – non-pragmatic – outcome.<sup>25</sup>

### **Conclusion: Nothing new under the sun**

As it arises from the above analysis the CJEU has been comfortable mentioning national identity in its rulings. Most comfortable with the identity clause, however, are the Advocate Generals who are trying to give legitimate derogations under EU law an ‘identity’ veneer. In the recent *ZZ*, case regarding exclusion of an EU citizen from the UK on grounds of public security, Advocate General Bot remarked that the objective of protecting state security manifested in Article 30 (2) of Directive 2004/38 can be linked to Article 4 (2) TEU. Hence national identity can be employed by a Member State to give more teeth to an expulsion decision drawn from a legitimate derogation available in secondary legislation. In *ZZ*, the CJEU held in favour of the UK stressing that ‘it is clear from Article 4(2) TEU and Article 346(1)(a) TFEU that State security remains the responsibility of solely the Member States. The question referred thus relates to an area governed by national law and, for that reason, does not fall within European Union competence.’ Hence Article 4 (2) TEU serves a means to demarcate national from EU competence. Does this realisation alter what would have happened anyway if, for instance, the UK had brought the public policy / security argument as an objective justification to justify its position? Surely not.

Member States need to be cautious that all future cases employing Article 4 (2) TEU as an EU law qualified derogation will still have to operate within the boundaries established by the CJEU in its case law over the years. Given how prescriptive the CJEU has been about the EU constraints that national legitimate interests have to operate within, there is no much cause for celebration vis-à-vis how much constitutional autonomy can Member States afford by invoking Article 4 (2) TEU as a legitimate derogation. The CJEU has expressly recognized the aptitude of Member States to safeguard the protection of fundamental rights as enshrined in their constitutions (such as human dignity and equality), it has entertained the idea of subordinating national legitimate interests to judicial review in all matters related to the internal market. Yet, the CJEU has stressed that public policy derogations from the Treaty’s fundamental freedoms have to be interpreted strictly so as to be applicable only when the case at hand entails a ‘genuine

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<sup>23</sup> Case 11/70, *Internationale Handelsgesellschaft mbH* [1970] ECR 01125.

<sup>24</sup> L.F.M. Besselink, ‘General Report’, *The Protection of Fundamental Rights Post-Lisbon: The Interaction between the Charter of Fundamental Rights of the European Union, the European Convention on Human Rights and National Constitutions*’.

<sup>25</sup> Case C-438/05, *Viking* ECR [2007] ECR I 10779

and sufficiently serious threat to a fundamental interest of society'.<sup>26</sup> The CJEU also added that the scope of public policy shall not be determined unilaterally by the Member States but shall rather be subject to scrutiny by the EU Institutions.<sup>27</sup>

All in all, the CJEU has recognised that the EU legal system constitutes a 'patchwork of different national regulatory styles'<sup>28</sup> where national authorities are suitable to weigh up the balance between individual and community interests. As such, Member States should be allowed a margin of discretion to nourish the dynamic concept of constitutional identity. This is especially since 'the specific circumstances which may justify recourse to the concept of public policy may vary from one Member State to another and from one era to another.'<sup>29</sup> However abstract this may be, it constitutes an indication that the compatibility of constitutionally entrenched values with EU law has to be ascertained by the CJEU on a case-by-case basis. Second, although the CJEU is not bound by the principle of subsidiarity it has to take into account the constitutional values that it encompasses, of which constitutional identity is one. Third, in doing so, the CJEU has further established that Member States do not – in the name of constitutional identity – enjoy absolute discretion to avoid their EU law obligations in order to safeguard their legitimate interests. In other words if the situation is covered by the material scope of EU law, Member States ought to exercise their competences in accordance with EU law.<sup>30</sup> There is nothing new under the sun.

The CJEU's jurisprudential discord on the Treaty's fundamental freedoms not only suggests that EU membership encompasses an adaptation of national constitutions to the requirements of the EU legal order but also mandates a disposal of national legitimate interests to an CJEU assessment in all cases where there is an identifiable link to the internal market (and occasionally not). Henceforth, evidence from the CJEU's early case law demonstrates that the positive obligation undertaken by the EU to respect the identities of its Member States under Article 4 (2) TEU is not sufficient on its own for determining the outcome of cases before the CJEU in favour of the Member States. It rather has to be balanced against certain variables, such as the uniqueness of the right in question and the potential political implications arising out of the collision between EU law and national law. Indeed such variables have minimised national capacity for autonomous action. Although aggravating at first, ultimately, such limitations serve, according to a commentator, 'the wider purpose of preserving the European Union's constitutional identity on which its success is arguably based.'<sup>31</sup> It is argued that such a collective constitutional identity is unlikely to be projected to the near future, given that Member States differ in the extent to which they are willing to embed their policies within the EU. To be continued.

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<sup>26</sup> Case C-208/09, *Sayn-Wittgenstein*, para 86.

<sup>27</sup> *Ibid.*

<sup>28</sup> A. Héritier, 'The Accommodation of Diversity in European Policy-Making and Its Outcomes: Regulatory Policy as a Patchwork' (1996) 3 (2) *Journal of European Public Policy* 149.

<sup>29</sup> Case C-208/09, *Sayn-Wittgenstein*, para 87.

<sup>30</sup> See Case C-446/03, *Marks & Spencer plc v. David Halsey (Her Majesty's Inspector of Taxes)* [2005] ECR I-10837; Case C-148/02, *Garcia Avello* [2003] ECR I-11613; Case C-192/05, *Tas Hagen and Tas* [2006] ECR I-10451; Case C-135/08 *Janko Rottmann* [2009] OJ C 113, 1.5.2010.

<sup>31</sup> D. Thym, 'The Political Character of Supranational Differentiation' (2006) 31 (6) *European Law Review* 781, p. 795.