THE IDENTIFICATION OF NATIONAL IDENTITY IN EU LAW:

A Venn diagramming exercise

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The internal market comprises an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured in accordance with the provisions of the Treaties. While the Treaty on the Functioning of the European Union contains several grounds, such as public policy and public morality, to justify restrictions to free movement, over the years national identity has been occasionally invoked by Member States as (part of) an overriding reason relating to the public interest capable of justifying a restriction on the principle of non-discrimination on grounds of nationality. In recent years, national identity has occasionally been invoked in front of the Court of Justice outside the classical area of the internal market. By studying the concept of national identity in and outside a free movement setting and by Venn diagramming the case law of the Court of Justice in which the national identity was explicitly at stake, including the most recent cases up until 14 December 2023, and by building upon existing scholarly work, this article aims to answer the question whether national identity is (still) 'one' concept in EU law or whether its meaning and scope can vary depending upon the context.

1. INTRODUCTION

While there are many different definitions of national identity, modernists in the field of nationalist studies indicate that national identity is a type of collective identity that gives allegiance to the nation.[1] A nation is defined as a

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1 R. Cinpoes, 'From National Identity to European Identity', *Journal of Identity and Migration Studies*, Oradea, Vol. 2, nr. 1, 2008, p. 4.

community of equal individuals who share a set of common values.[2] While the objective dimension of a nation is related to aspects such as territory, mass education, common legal rights and duties and a claim to sovereignty, the subjective dimension refers to a common culture, which functions as the cement that unites the member of the community.[3] Based on this definition, the terms 'state' and 'nation' do not have the same meaning. While a state is a legal entity with power and authority that possesses both internal and external sovereignty over its territory and its body of citizens and is constituted in the form of law, a nation is a community of people that share a sense of common history and culture.[4] This perceived sense of common culture provides an emotional bond to the members of the community.[5] It is hence argued that national identity emerges from, takes shape in, and is constantly defined and redefined in individual and collective performances.[6] For this reason it is argued that the political-administrative unity of a state can not exist alone and needs to represent a kind of cultural community.[7]

Article 4(2) of the Treaty on the European Union (TEU) contains an explicit reference to the concept of national identity. It stipulates: '*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*.' The Treaty on the Functioning of the European Union (TFEU) does not contain any reference to the concept. The Charter of Fundamental Rights (Charter) of 2000 stipulates in its preamble that '*the Union is founded on the indivisible, universal values of human dignity, freedom, equality and solidarity*' and that *'it is based on the principles of democracy and the rule of law*.' In addition '*it places the individual at the heart of its activities, by establishing the citizenship of the Union and by creating an area of freedom, security and justice. The Union contributes to the preservation and to the development of these common values while respecting the diversity of the cultures and traditions of the peoples of Europe as well as the national identities of the Member States and the organisation of their public authorities at national, regional and local levels; it seeks to promote balanced and sustainable development and ensures free movement of persons, goods, services and capital, and the freedom of establishment*.'

The content of Article 4(2) TEU was introduced in primary EU law by Article F(1) by the Maastricht Treaty in 1992 which stipulated: '*The Union shall*

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2 R. Cinpoes, op. cit., p. 4.
3 R. Cinpoes, op. cit., p. 4.
4 R. Cinpoes, op. cit., p. 4.
5 R. Cinpoes, op. cit., p. 10.
6 M. Pfister, 'Introduction: Performing National Identity', in: M. Pfister & R. Hertel (eds.), *Performing National Identity – Anglo-Italian Cultural Transactions*', Rodopi, Amsterdam-New York, 2008, p. 9.
7 M. Haller & R. Ressler, National and European identity. A study of their meanings and interrelationships', in *Revue française de sociology*, 47-4, SciencesPo Les Presses, Paris, 2006, p. 817.

respect the national identities of its Member States, whose systems of government are founded on the principles of democracy'.

At the time, this inclusion, which amounts to the anchoring of domestic concerns in EU law, was viewed as a political statement to counterbalance the reinforcement of the supranational character of the European integration process to the (alleged) detriment of national and regional competences.[8] The exact meaning and aim of the provision remained vague however. The current formulation of the identity clause stems from the works of the European Convention drafting the Treaty establishing a Constitution for Europe, more specifically by Working Group V on 'complementary competence'. As the Constitution never saw the light, it was the Lisbon Treaty that added the reference to '*the fundamental structures, political and constitutional*', of the Member States and legal literature often refers to the principle of national 'constitutional' identity ever since.[9] Contrary to the wording of the Maastricht Treaty the national identity clause does not refer to the principles of democracy.

Many scholars have focused on the concept of national identity and many efforts were done to define what is covered by it. This contribution has the same goal. It discusses the case law of the Court of Justice up until 14 December 2023 and builds upon existing scholarly work, but tries to map the meaning of the concept by means of a Venn diagram approach.[10] By using such approach, the author aspires to make the concept and its limitations more 'visible', and hence better understandable.

As national identity was initially (sparingly) invoked in a free movement context[11], this case law will be discussed first in part 2. As of 2016 national identity was more frequently invoked outside a free movement context.[12] This case law will be discussed in part 3. In part 4 it will be verified whether the Court has interpreted national identity consistently and uniformly in different

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8 D. Fromage and B. De Witte, 'National Constitutional Identity Ten Years on: State of Play and Future Perspectives, *European Public Law*, vol. 27, Issue 3, Kluwer Law International, 2021, p. 412–413, referring to J. Sterk, 'Sameness and Selfhood: The Efficiency of Constitutional Identities in EU Law', *European Law Journal*, 2018, 24, p. 282, Elke Cloots, *National identity in EU Law*, Oxford University Press, Oxford, 201, p. 36 and M. Claes, 'National Identity: Trump Card or Up For Negotiation?', in A. Saiz Amaiz & C. Alcobero Llivina (eds.), *National Identity and European Integration*, Intersentia, 2013, p. 116.

9 See for example D. Fromage and B. De Witte, 'National Constitutional Identity Ten Years on: State of Play and Future Perspectives, *European Public Law*, vol. 27, Issue 3, Kluwer Law International, 2021, p. 415.

10 National case law will not be discussed as it is for the EU and the Court of Justice of the EU to decide whether a claim of a Member State based on the national constitution should be sanctioned as a matter of EU law. See in this regard M. Claes, 'National Identity: Trump Card or Up for Negotiation?', in A. Saiz Arnaiz & C. Alcoberro Llivina (eds.), *National Constitutional Identity and European Integration*, Intersentia, 2013, p. 109.

11 This is unsurprising as the clause did not fall under the jurisdiction of the Court of Justice due to the limitations of Article L of the Maastricht Treaty.

12 In 2016 and 2021 it was referred to in 6 cases and in 2022 this occurred 4 times.

fields and it will be verified whether Advocate-General Emiliou's remark in the recent case *Cilevičs*[13] that '*to date, the Court has not elaborated on the concept of 'national identity' or on the nature and scope of the 'national identity clause*' set out in Article 4(2) TEU is valid. Part 4 will end with a final conclusion as to the meaning of the concept 'national identity' in EU law.

2. NATIONAL IDENTITY AND FREE MOVEMENT: CASE LAW

The concept of national identity arose in case law of the Court of Justice before it was included in the TEU. In this section all case law of the Court of Justice in which national identity was explicitly referred to by the Court in its findings (and not just by only (one of) the parties in relation to a free movement issue will be discussed.[14] In section 2.1 national identity will be discussed as a mandatory reason of public interest that may justify a derogation from the Treaty articles on free movement. In section 2.2 emphasis will be placed on national identity and proportionality concerns. Section 2.3 will discuss free movement case law in which national identity was invoked but was not related to a public interest concern or the proportionality principle.

2.1 National identity as a mandatory reason of public interest?

As held by Article 26(2) TFEU, the internal market comprises an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured in accordance with the provisions of the treaties. When it comes to the free movement of goods, Article 36 TFEU holds that prohibitions or restriction in imports, exports or goods in transit can be justified on certain clearly defined grounds, such as public policy or public security. In its landmark case *Cassis de Dijon*[15] the Court of Justice extended the justification grounds that may be invoked with regard to non-directly discriminatory measures. It held that in the absence of EU harmonization, obstacles to free movement resulting from disparities between national laws must be accepted in so far as those provisions may be recognized as being necessary in order to satisfy 'certain mandatory requirements' such as consumer protection or road

[13] Opinion of Advocate-General Emiliou in Case C-391/20, *Cilevičs*, ECLI:EU:C:2022:166, § 82.

[14] By only including cases in which 'national identity' was mentioned explicitly mentioned by the Court, there is no risk that unintended interpretations or explanations are connected to this concept.

[15] Case C-120/78 *Rewe-Zentral AG v Bundesmonopolverwaltung für Branntwein*, ECLI:EU:C:1979:42, § 13.

traffic safety, justification grounds that are not explicitly referred to in Article 36 TFEU. This line of reasoning has also been applied by the Court with regard to the free movement of persons[16], services[17] and capital[18]. Case law in which concerns related to national identity were raised as, or in relation to, mandatory requirements will now be discussed.

2.1.1 Protection and promotion of language

In 1989 national identity was first mentioned in *Groener*[19], a case that dealt with the compatibility of Irish national rules which made appointment to a permanent full-time post as a lecturer in public vocational higher education institutions conditional upon proof on an adequate knowledge of the Irish language. While the Dutch Anita Groener maintained that this was contrary to her right to free movement, the Court considered that the policy followed by Irish governments has been designed not only 'to maintain but also to promote the use of Irish as a means of expressing national identity and culture'.[20] A permanent full-time post of lecturer in vocational education institutions was considered to be a post of such a nature as to justify the requirement of linguistic knowledge. The Court concluded that there would be no restriction of the free movement of workers provided that 'the linguistic requirement is imposed as part of a policy for the promotion of the national language which is, at the same time, the first official language and provided that that requirement is applied in a proportionate and non-discriminatory manner.'[21] In *Groener* the Court did hence not expressly indicate that national identity on itself constitutes a mandatory reason of public interest but established that the promotion of the national language can be considered as a mandatory reason of public interest that can justify a restriction to free movement and that such policy can be a tool to express national identity, or in other words, that the use of a certain language can be *part of* a country's national identity.

The case *Runevič-Vardyn and Wardyn*[22] also dealt with the protection of an official language. The case concerned a Lithuanian Decree providing that forenames and surnames may only be written on certificates of civil status by means of the characters (spelling rules) of the national language. The Court held that Article 21 TFEU does not preclude Member States from refusing to amend the joint surname of a married couple -the wife being Lithuanian and the hus-

16 See for example Case C-204/90 *Bachmann*, ECLI:EU:C:1992: 35, § 16.
17 See for example Case C-205/84 *Commission v Germany*, ECLI:EU:C:1986:462, § 30-33.
18 See for example Case C-370/05 *Festeren*, ECLI:EU:C:2007:59, § 28.
19 Case C-379/87 *Groener*, ECLI:EU:C:1989:599.
20 Case C-379/87 *Groener*, ECLI:EU:C:1989:599, § 18.
21 Case C-379/87 *Groener*, ECLI:EU:C:1989:599, § 24.
22 Case C-391/09 *Runevič-Vardyn and Wardyn*, ECLI:EU:C:2011:291.

band being Polish, both having moved to Belgium – in a form which complies with the Member State of origin of one of them on condition that the refusal does not give rise to serious inconvenience at administrative, professional and private levels.[23] Such inconvenience might arise from the discrepancy in the forms in which the same surname is entered for two persons constituting the same married couple. The Court left it to the national court to decide whether there is in fact a real risk that family members will be obliged to dispel doubts as to their identity and the authenticity of the documents they submit. In the event that the national court would indeed find that the refusal to amend the joint surname constituted a restriction of Article 21 TFEU, the Court held, by referring to *Groener*, that EU law 'does not preclude the adoption of a (public) policy for the protection and promotion of a language of a Member State which is both the national language and the first official language'. The Court did not only point to Article 3(3) TEU and Article 22 of the Charter, which stipulate that the Union shall respect its rich cultural and linguistic diversity, but also to Article 4(2) TEU and held that the respect for national identity includes the protection of a State's official national language.[24] The objective pursued by the national rules, which were designed to protect the official language hence constituted, in principle, a legitimate objective capable of justifying restrictions on the rights of freedom of movement.[25] Just like in *Groener* the Court did hence not rule that national identity as such can be considered as an independent mandatory requirement to justify the restriction of free movement, but stated explicitly and in general terms that national identity *includes* the protection of a State's official language.

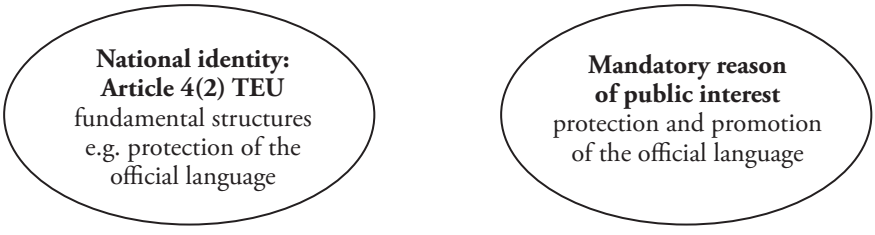
Las[26] concerned the dismissal of Mr. Las, a Dutch national residing in the Netherlands and carrying out most of his work in Belgium, by PSA Antwerp, a company established in Belgium and part of a multinational group operating port terminals with its registered office in Singapore. After Mr. Las' dismissal he received a certain amount of money on the basis of the stipulations in his employment contract. Las claimed more substantial compensation and argued that he was not bound to the contract as it was not drafted in Dutch and was therefore null and void on the basis of the Flemish Decree on the Use of Languages which requires all employers established in that territory to draft cross-border employment contracts exclusively in the official language of that federal entity, failing which the contracts are to be declared null and void. The question was raised whether Article 45 TFEU on the free movement of workers must be interpreted as precluding such legislation. The Court answered in the affirmative and held that such legislation is indeed liable to have a dissuasive effect on

[23] Case C-391/09 *Runevič-Vardyn and Wardyn*, ECLI:EU:C:2011:291, § 78.
[24] Case C-391/09 *Runevič-Vardyn and Wardyn*, ECLI:EU:C:2011:291, § 86.
[25] Case C-391/09 *Runevič-Vardyn and Wardyn*, ECLI:EU:C:2011:291, § 91.
[26] Case C-202/11 *Las*, ECLI:EU:C:2013:329.

non-Dutch speaking employees and employers from other Member States.[27] However, by pointing to *Groener* and *Runevič-Vardyn and Wardyn*, Article 3(3) TEU and article 22 of the Charter, the Court acknowledged the justification ground invoked by the Belgian government, namely that the legislation at issue aims to promote and encourage the use of one of its official languages. The Court referred to Article 4(2) TEU and repeated that national identity includes the protection of the official language(s) of the Member States. Again, in *Las* national identity was not considered to be an independent justification ground.

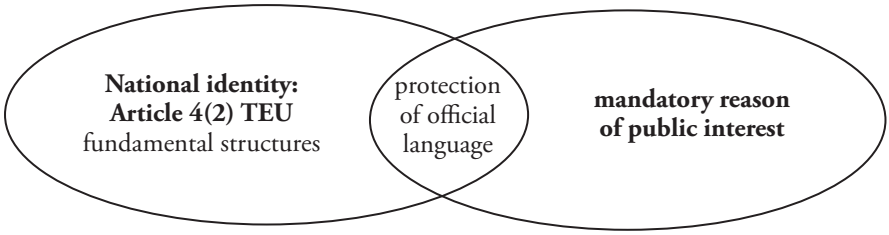
The recent case *Cilevičs*[28] was about the compliance of the revised Latvian Law on higher education institutions, which stipulated that the courses of study in higher education institutions shall in principle be taught in the official language (Latvian), with the free movement of establishment and/or the freedom to provide services. The Court held that the obligation to provide higher education courses in the Latvian language renders the establishment of nationals of other Member States less attractive as such nationals will not be able, when they have an institution in another Member State, to use a large part of their administrative and teaching staff.[29] This was found to be a restriction on the freedom of establishment.[30] When discussing possible justification grounds, the Court referred to its known reasoning and indicated that EU law does not preclude the adoption of a policy for the protection and promotion of one or more official languages of a Member State and repeated that respect for national identity (as provided for in Article 4(2) TEU) includes the protection of the official language of the Member States.

It is clear from the four cases that were discussed above that the Court has never ruled that national identity as such is a mandatory reason that can justify a restriction to free movement, or in other words, to derogate from the principle of free movement. As the protection and promotion of an official language can be such mandatory reason and can be part of a country's national identity, this could be presented as follows:



[27] Case C-202/11 *Las*, ECLI:EU:C:2013:329, § 22.
[28] Case C-391/20 *Cilevičs*, ECLI:EU:C:2022:638.
[29] Case C-391/20 *Cilevičs*, ECLI:EU:C:2022:638, § 63.
[30] Case C-391/20 *Cilevičs*, ECLI:EU:C:2022:638, § 63.

or



While national identity in Article 4(2) TEU refers explicitly to the fundamental structures of the Member States, the Court did not refer to such structures in the above-mentioned judgements. It can be argued that there is indeed no need to refer to national identity through the prism of the fundamental structures clause as the protection of an official language is a public policy ground. In addition, in the latter three cases, the Court explicitly referred to Article 3(3) TEU and Article 22 of the Charter which stipulate that the Union shall respect its cultural and linguistic diversity. Primary EU law hence offers sufficient other constitutional resources to ensure, in principle, respect for cultural diversity among the Member States.[31] Why the protection of the official language of a country is nevertheless considered to be covered by such national fundamental structures has never been clarified. As held by Cloots and De Witte, the argument could be made that in some EU countries such as Belgium or the Baltic states, the regulation of official language is indeed an essential political element of the state's identity.[32]

2.1.2 Equality before the law

National identity was also at stake in *Sayn-Wittgenstein*[33] and *Bogendorff von Wolffersdorff*[34], two cases dealing with the abolition of the nobility and nobility titles. In both cases nationals of Austria (*Sayn-Wittgenstein*) and Germany (*Bogendorff von Wolffersdorff*) initially received the right to use a nobility title in another Member State (Germany[35] resp. United Kingdom) but the use of this

[31] B. De Witte, 'Article 4(2) TEU as a Protection of the *Institutional* Diversity of the Member States', *European Public Law*, vol. 27, Issue 3, Kluwer Law International, 2021, p. 567 and 569.

[32] B. De Witte, 'Article 4(2) TEU as a Protection of the *Institutional* Diversity of the Member States', *European Public Law*, vol. 27, Issue 3, Kluwer Law International, 2021, p. 567 referring to E. Cloots, *National Identity in EU Law*, Oxford University Press, 2015, chapter 9.

[33] Case C-208/09 *Sayn-Wittgenstein*, ECLI:EU:C:2010:806.

[34] Case C-438/14 *Bogendorff von Wolffersdorff*, ECLI:EU:C:2016:401.

[35] In Germany, the conferral of titles nobility was abolished but old titles could still be used, even though public law advantages or disadvantages of birth or rank are abolished. The (Ger-

title was afterwards not recognized by their home State. Ms. Sayn-Wittgenstein, who lived in Germany, argued that the non-recognition of the effects of her adoption amounted to an obstacle to the free movement of persons because she would have to use different surnames in different Member States. The Court of Justice followed that argument[36] and held that while the rules governing a person's surname and the use of titles of nobility are matters coming within the competence of the Member States, Member States must nevertheless, when exercising their competence, comply with EU law.[37] With regard to possible justification grounds, the Court assessed that in the context of Austrian constitutional history, the Law on the abolition of the nobility, as an element of national identity, may be taken into consideration when a balance is struck between legitimate interests and the right of free movement. The Court held that the justification that was relied upon by the Austrian Government – namely the fact that if it were necessary to recognise the surname of the applicant there would be an incompatibility with the fundamental values of the Austrian legal order, in particular with the principle of equal treatment as enshrined in the Constitution and implemented by the Law on the abolition of the nobility – is to be interpreted as a reliance on public policy. The public policy argument hence constitutes the underlying general principle of equality.[38]

In *Bogendorff von Woffersdorff* the Court came to a comparable finding and indicated that the (partial) abolition of title of nobility should be read in the context of the German constitutional choice as an element of the national identity of a Member State, as referred to in Article 4(2) TEU which may be taken into account as an element justifying a restriction to free movement. The Court added in this regard that the justification relating to the equality of German citizens before the law and the constitutional choice to abolish privileges and inequalities and to prohibit the bearing of titles of nobility must be interpreted as 'relating to' a ground of public policy.[39] This does not necessarily mean that the prohibition to bear titles of nobility 'is' in fact a ground of public policy.

While the abolition of the nobility can in any case be *an element* of a country's national identity, both *Sayn-Wittgenstein* and *Bogendorff von Woffersdorff* demonstrate that the Court did not consider national identity as an independent mandatory requirement. Indeed, the actual justification to restrict free

man) nobility title used by s. Sayn-Wittegenstein was initially registered in Austria but was later corrected without any elements of nobility.

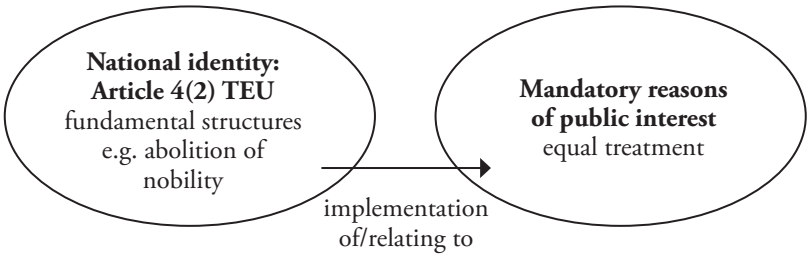
36 The Court stated that the refusal by the authorities of a Member State to recognize all the elements of the surname of a national of that State as determined in another Member State, in which that national resides, is a restriction of Article 21 TFEU which confers on every EU citizen the right to move and reside freely within the territory of the Member States. Case C-208/09 *Sayn-Wittgenstein*, ECLI:EU:C:2010:806, § 71.

37 Case C-208/09 *Sayn-Wittgenstein*, ECLI:EU:C:2010:806, § 38.

38 Case C-208/09 *Sayn-Wittgenstein*, ECLI:EU:C:2010:806, § 83-84.

39 Case C-438/14 *Bogendorff von Woffersdorff*, ECLI:EU:C:2016:401, § 65.

movement was found in the underlying public policy to achieve equality before the law of all citizens of a Member State, which is also enshrined in Article 20 of the Charter of Fundamental Rights. This can be presented as follows:



The fact that equal treatment as such is not mentioned as part of a country's national identity confirms the claim made by M. Claes that national identity in Article 4(2) TEU is not concerned with the protection of fundamental rights.[40] That being said, the contradictory feeling that comes with this cannot be left unnoticed. First it is difficult to explain why the abolition of the nobility falls within the scope of Article 4(2) TEU which limits national identity to the 'fundamental structures' of a Member State as the wording 'fundamental structures' seems to be concerned with a country's internal structure and organisation. Furthermore, the abolition of the nobility is an implementation of the principle of equal treatment and aims to reach equality before the law. This leads to the peculiar situation that the abolition of the nobility is an element of national identity, while the underlying principle of equality before the law is not but is seen as a public policy reason/mandatory reason of public interest.

When comparing this schematic overview to the one under part 2.1.1., it can be noted that while the protection of the official language is both an element of national identity and a mandatory reason of public interest, this cannot be said about the principle of equal treatment. Whether the abolition of the nobility as such could be qualified as an independent public policy ground is not entirely clear as the Court stipulated that the constitutional choice to prohibit the bearing of titles of nobility must be interpreted as 'relating to' a ground of public policy.

2.1.3 Limitations to justification grounds

National identity was also at stake in *Coman*[41], a case which concerned the refusal by Romania to recognise a same sex marriage that was concluded by

[40] M. Claes, 'National Identity and the Protection of Fundamental Rights', *European Public Law* Vol. 27, Issue 3, Kluwer Law International, 2021, p. 521.
[41] Case C-673/16 *Coman*, ECLI:EU:C:2018:385.

a Romanian/American citizen and another American citizen in Brussels. The Court held that Member States cannot be allowed the freedom to grant or refuse entry into and residence in their territory by a third-country national whose marriage to a Union citizen of the same sex was concluded in a Member State, as such refusal may deny a Union citizen the possibility of returning to the Member State of which he is a national together with his spouse, which is contrary to Article 21(1) TFEU.[42] Several governments argued before the Court that such a restriction should nevertheless be justified on grounds of public policy and national identity, as referred to in Article 4(2) TEU, due to the fundamental nature of the institution of marriage and the intention of a number of Member States to maintain a conception of that institution as a Union between a man and a woman, which is protected in some Member States by laws having constitutional status.[43] The Court responded that an obligation to recognise same-sex marriages for the sole purpose of granting a derived right of residence to a third-country national does not undermine the national identity *or* pose a threat to the public policy of the Member State concerned, as such *recognition* does not require that Member State to *provide*, in its national law, for the institution of same-sex marriages so that the obligation to recognise such marriages.[44] Even though it could be argued that the Court's statement that the recognition obligation does not 'undermine' the institution of marriage (the mandatory reason) is in essence a declaration that the recognition refusal was neither proportionate to reach the public policy goal underneath (respect for the institution of marriage) nor to safeguard a country's national identity, I agree with Bonelli that in *Coman* the Court did not check the proportionality as it squarely denied that there was any legitimate public interest at stake. Indeed, public policy may be relied on only if there is a genuine and sufficiently serious threat to a fundamental interest of society.[45] The Court held that such threat was not present.

In *Coman* the Court made again a distinction between the public policy of a Member State on the one hand and national identity on the other hand and referred to national identity only in relation to Article 4(2) TEU. The Court added that Article 4(2) TEU can only be relied on if it is not invoked arbitrarily and that national measures that are liable to obstruct the exercise of free movement may be justified only where such a measure is consistent with the fundamental rights guaranteed by the Charter, such as the right to respect

42 Case C-673/16 *Coman*, ECLI:EU:C:2018:385, § 39-40.

43 Case C-673/16 *Coman*, ECLI:EU:C:2018:385, § 42.

44 Case C-673/16 *Coman*, ECLI:EU:C:2018:385, § 46. This means that in areas where there is no full harmonization, there is room for diversity among Member States.

45 M. Bonelli, 'National Identity and European Integration Beyond "Limited Fields"', *European Public Law* Vol. 27, Issue 3, Kluwer Law International, 2021, p. 550; Case C-673/16 *Coman*, ECLI:EU:C:2018:385, § 45.

for private and family life.[46] This confirms the point raised by M. Claes that particular *national* conceptions of fundamental rights are generally not covered by the concept of national identities under Article 4(2) TEU.[47] Even in areas of retained powers or areas of reserved competence, such as the institution of marriage, Member States are hence not free from EU influence due to the effect of free movement provisions, EU equality and non-discrimination rights, and EU citizenship.[48] That being said, the national identity clause can 'influence' the concrete interpretation and application of EU law in a specific case and puts limits to the scope of EU intervention, guaranteeing the preservation of domestic choices and preferences.[49] Indeed, the compatibility of EU law with the constitutional values and principles of the Member States may be carried out only by way of EU law itself and is confined, essentially, to the fundamental values which form part of their common constitutional traditions. As held by B. Guastaferro, this entails that fundamental rights figure as general principles of EU law, rather than principles belonging to national constitutions.[50] This is confirmed by Article 6(3) TEU which stipulates that 'Fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law.' Article 4(2) TEU can hence not be invoked to enforce national (constitutional) identities against the supremacy of EU law.

In *V.M.A.* the Court used a similar reasoning as in *Coman*.[51]

Building upon the previous Venn diagram, this can be represented as follows:

[46] Case C-673/16 *Coman*, ECLI:EU:C:2018:385, § 47.

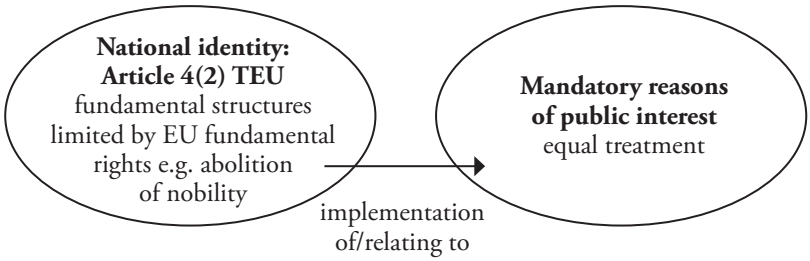
[47] M. Claes, 'National Identity and the Protection of Fundamental Rights', *European Public Law* Vol. 27, Issue 3, Kluwer Law International, 2021, p. 519.

[48] M. Bonelli, 'National Identity and European Integration Beyond "Limited Fields"', *European Public Law* Vol. 27, Issue 3, Kluwer Law International, 2021, p. 542.

[49] M. Bonelli, 'National Identity and European Integration Beyond "Limited Fields"', *European Public Law* Vol. 27, Issue 3, Kluwer Law International, 2021, p. 540.

[50] This is even the case when fundamental rights are used as a ground for judicial review of EU acts. See B. Guastaferro, 'Beyond the *Exceptionalism* of Constitutional Conflicts: The *Ordinary* Functions of the Identity Clause', *Yearbook of European Law*, Vol. 31, NO 1, 2012, p. 312–313.

[51] Case C-490/20 *V.M.A.*, ECLI:EU:C:2021:1008, § 56-57. The case also concerned the recognition of a certain civil status (a parent-child relationship). The Court balanced the constitutional and national identity of the Republic of Bulgaria on the one hand and the interest of the child on the other hand.



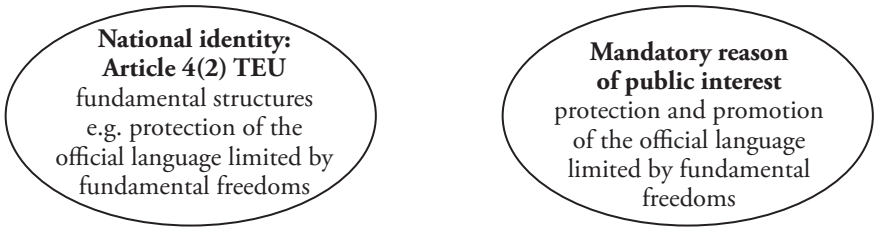
2.2 National identity and proportionality concerns

Measures which restrict fundamental freedoms may only be justified by objective considerations if these are necessary for the protection of the interest(s) they intend to secure and only in so far as those objectives cannot be attained by less restrictive measures. Respect for the principle of proportionality is hence a crucial factor for the outcome of a case. This was also made clear by the Court in all case mentioned above.[52] The proportionality requirement does not require all Member States to protect such grounds in the same manner and the respect the Union needs to have for the identity of the different Member States supports this argument.[53] In its proportionality assessment in *Cilevičs* for example, the Court confirmed the broad discretion that Member States enjoy in the choice of measures to achieve their policy of protecting the official language, since such policy constitutes a manifestation of national identity for the purposes of Article 4(2) TEU. Such discretion can however not justify a serious undermining of the rights which individuals derive from the provisions of the Treaties enshrining their fundamental freedoms. The Court concluded that when national legislation would not allow for any exceptions to the mandatory use of the official language, this would exceed what is necessary and proportionate for defending and promoting that language.[54]

[52] See Case C-379/87 *Groener*, ECLI:EU:C:1989:599, § 19; Case C-202/11 *Las*, ECLI:EU:C:2013:329, § 32; Case *Sayn-Wittgenstein*, ECLI:EU:C:2010:806, § 91; Case C-391/09 *Runevič-Vardyn and Wardyn*, ECLI:EU:C:2011:291, § 91; Case C-438/14 *Bogendorff von Wolffersdorff*, ECLI:EU:C:2016:401, § 73.

[53] The scope of the concept of public policy cannot be determined unilaterally by each Member State without any control of the Union. Such policy may be relied on only if there is a genuine and sufficiently serious threat to a fundamental interest of society. Case C-438/14 *Bogendorff von Wolffersdorff*, ECLI:EU:C:2016:401, § 72-73.

[54] See Case C-391/20 *Cilevičs*, ECLI:EU:C:2022:638, § 83-84.



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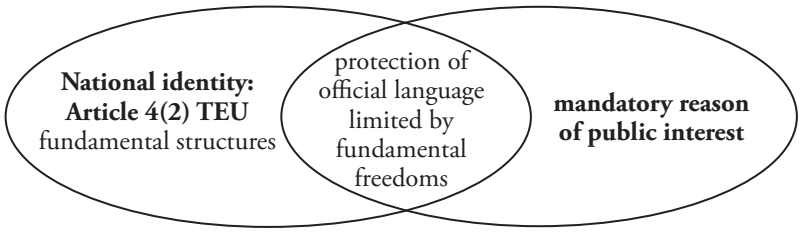


The importance of having exceptions to public policies was already mentioned by the Court several decades earlier, in *Commission v. Luxemburg*[55]. The case concerned a Luxemburgish nationality requirement as regards access to civil servant's or public employees' posts in public sectors such as teaching, health and electricity distribution services. As this nationality requirement involved a direct discrimination based on nationality, which went much further than the indirect language discrimination in *Groener*, the Court held that 'whilst the preservation of the Member States' national identities is a legitimate aim respected by the Community legal order (as is indeed acknowledged in Article F(1) of the Treaty on European Union), the interest can, even in such particularly sensitive areas as education, still be effectively safeguarded otherwise than by a *general* exclusion from other Member States.'[56] In other words, the Court held that the protection of national identity cannot justify exclusion of nationals of other Member States from *all* the posts in an area such as education, with the exception of those involving direct or indirect participation in the exercise of powers conferred by public law and duties designed to safeguard the general interests of the State or of other public authorities.[57] This reasoning was repeated in another case dating from after the entry into force of the Lisbon Treaty, with regard to a Luxemburgish nationality condition for access to the profession of civil-law notary.[58]

[55] Case C-473/93 *Commission v Luxemburg*, ECLI:EU:C:1996:263.
[56] Case C-473/93 *Commission v Luxemburg*, ECLI:EU:C:1996:263, § 35.
[57] Case C-473/93 *Commission v Luxemburg*, ECLI:EU:C:1996:263, § 36.
[58] Case C-51/08 *Commission v Luxemburg*, ECLI:EU:C:2011:336, § 124.

The abovementioned Luxemburg cases are interesting as the Court refers to national identity mainly in the context of the application of the proportionality principle. That being said, the Court refers to national identity as a 'legitimate aim' that is respected by the Community legal order and adds that the protection of national identity cannot *justify* 'all' types of exclusions. Contrary to the cases discussed in part 2.1., in *Commission v Luxemburg* the Court hence seems to imply that national identity cán be considered as a self-standing mandatory reason of public interest. This would mean the following:

As these cases are the only ones in which the Court seems to have implied that national identity can be a self-standing mandatory reason of public interest, it can be questioned whether such conclusion is valid in more general terms. In this sense the remark of Advocate-General in *Cilevičs*[59] that '*to date, the Court has not elaborated on the concept of* '*national identity*' certainly carries truth. It needs to be mentioned that both cases date from prior to the entry into force of the Lisbon Treaty, so that the treaty reference to national identity did not yet refer to the fundamental structures of the Member States.

2.3 National identity in free movement cases outside the context of justification grounds and proportionality concerns: limitation to the fundamental structures of the Member States

Even though the *Toressi* cases[60] deal with the free movement of persons, national identity was not invoked as a justification ground to restrict free movement of nationals but to question the validity of a provision of secondary EU law.[61] *Toressi* concerned the question whether Article 3 of Directive 98/5/EC, which allows lawyers wishing to practice their profession in another Member State under their home title without any additional recognition requirements, is invalid in light of Article 4(2) TEU. It was argued that the Directive may enable

[59] Opinion of Advocate-General Emiliou in Case C-391/20, *Cilevičs*, ECLI:EU:C:2022:166, § 82.

[60] Joined Cases C-58/13 and C-59/13 *Toressi*, ECLI:EU:C:2014:2088.

[61] If the Court would have indicated that Article 3 of the Directive would be invalid, this would have negative consequences for the free movement of Italian citizens as well.

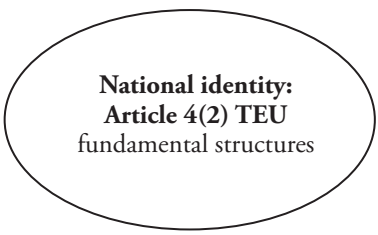
Italian nationals who obtained their professional legal qualification in another Member State to circumvent the Italian Constitution under which access to the profession of lawyer is depending on having successfully passed a State examination. According to the national court this requirement is part of the Italian national identity. The argument was quashed by the Court of Justice, as Article 3 does not regulate access to the profession of lawyer nor the practice of the profession under the professional title issued in the *host* Member State. This means that it is not possible to evade the application of the host Member State's legislation relating to the access to the profession of lawyer.[62] By stipulating that Article 3 is not capable of affecting either the fundamental political and constitutional structures or the essential functions of the host Member States within the meaning of Article 4(2) TEU, the Court indicated that the concept of national identity as referred to in Article 4(2) TEU is only concerned with what is mentioned in the actual wording of Article 4(2) TEU: the fundamental structures or essential functions of the Member States.[63] This implies that the practice by lawyers of their profession under their home title is unrelated to national identity.

The fundamental structures of a Member States were also at issue in *Digibet*[64], *Remondis*[65] and *Porin Kaupunki*[66], three cases about the division of competences within a Member State. *Digibet* concerned a ban on offers of games of chance via the internet by Digibet, a company whose registered office is situated in Gibraltar. It was not disputed that the legislation (by most Länder) prohibiting the advertising and organization of the games constituted a restriction of Article 56 TFEU. The referring court also did not raise any question regarding the justification ground.[67] The issue in the case at hand related to whether the proportionality and consistency of the legislation was called into question given the existence of more liberal legislation in only one German Länd. While in earlier case law such as *Sayn-Wittgenstein*, the Court had already clarified that national authorities must be allowed a margin of discretion when having recourse to the concept of public policy, in *Digibet* the Court held that this is also the case when powers or obligations are imposed upon the Member States for the purposes of the implementation of EU law. Indeed, the question of how the exercise of such powers and the fulfilment of such obligations may be entrusted by Member States to specific national bodies is solely a matter for the constitu-

62 Joined Cases C-58/13 and C-59/13 *Toressi*, ECLI:EU:C:2014:2088, § 49, 56-57.
63 Joined Cases C-58/13 and C-59/13 *Toressi*, ECLI:EU:C:2014:2088, § 58.
64 Case C-156/13 *Digibet*, ECLI:EU:C:2014 :1756.
65 Case C-51/15 *Remondis*, ECLI:EU:C:2016:985.
66 Case C-328/19 *Porin Kaupunki*, ECLI:EU:C:2020:483.
67 On the basis of established case law, the restriction could be justified by overriding requirements in the public interest, such as consumer protection and the prevention of both fraud and incitement to squander money on gambling. See Case C-156/13 *Digibet*, ECLI:EU:C:2014 :1756, § 23.

tional system of each State.[68] This entails that in a State such as Germany, the legislature may take the view that it is for the Länder rather than the Federal authorities to adopt certain legislative measures.[69] The division of competences between the Länder cannot be called into question, since it benefits from the protection conferred by Article 4(2) TEU, according to which the Union must respect national identities, inherent in their fundamental structures, political and constitutional, including regional and local self-government.[70] This was later confirmed in *Remondis*[71]. In these cases national identity was hence not at issue as (part of) a justification ground from a content point of view, but merely concerned the division of competences at national level. In *Porin Kaupunki*[72] the Court added that the division of competences in a Member State is not fixed, so that the protection conferred by Article 4(2) TEU includes internal reorganisations of powers.[73] That being said, the margin of discretion of Member States is limited again. Indeed, as argued by De Witte, due to the explicit reference to the fundamental structures of the Member State, Article 4(2) TEU only protects regional self-government *as recognised by the constitution of each Member State*, and not regional self-government as such, so that independence referenda that are declared unconstitutional by a national judicial organ cannot be supported by the EU.

It can be concluded that outside the justification context in free movement law, national identity does not seem to have any broader 'existence' than the fundamental structures as expressly mentioned in Article 4(2) TEU. This can be depicted as follows:



68 Case C-156/13 *Digibet*, ECLI:EU:C:2014 :1756, § 33.
69 Case C-156/13 *Digibet*, ECLI:EU:C:2014 :1756, § 33.
70 Case C-156/13 *Digibet*, ECLI:EU:C:2014 :1756, § 34 and 36. Even if the consistency of the legislation might be damaged, the Court held that such damage was in the case at hand limited ratione temporis and ratione loci to a single Land so that the appropriateness of the restrictions on games of chance in all the other Länder is not affected.
71 Case C-51/15 *Remondis*, ECLI:EU:C:2016:985, § 40.
72 Case C-328/19 *Porin Kaupunki*, ECLI:EU:C:2020:483.
73 Case C-328/19 *Porin Kaupunki*, ECLI:EU:C:2020:483, § 46. These may in particular take the form of voluntary transfers of competence between public authorities.

3. NATIONAL IDENTITY OUTSIDE A FREE MOVEMENT CONTEXT: CASE LAW

National identity was also at issue in several cases that are not related to free movement. To get a full picture of the concept in an EU law context, it will now be verified whether or not national identity has the same meaning and is interpreted along the same lines outside an internal market context. In this section all case law in which national identity was explicitly referred to by the Court of Justice in its findings (and not just by only (one of) the parties) will be discussed.

3.1 Respect for the fundamental structures of the Member States

Balázs-Árpád[74] concerned the refusal of the European Commission to register a citizens' initiative which aimed to ensure that the cohesion policy of the European Union paid special attention to regions with ethnic, cultural, religious or linguistic characteristics that are different from those of the surrounding regions. The Commission held that it fell outside its powers to submit the proposal for a legal act on the basis of Articles 174 to 178 TFEU as the applicants defined minority regions on the basis of autonomous criteria, and therefore independently of the administrative unites existing in the Member States. The Court held that the concept of a 'region' within the meaning of Articles 174 TFEU to 178 TFEU, must indeed be defined in accordance with the prevailing political, administrative and institutional status quo and that pursuant to Article 4(2) TEU the Union must respect the status quo existing in the Member States.[75] This means that the EU legislature can hence not, without infringing Article 4(2) TEU, adopt an act which defines national minority regions on the basis of autonomous criteria.[76] Just as in *Toressi*, the Court hence underlined that Article 4(2) TEU should always be read in connection with the fundamental structures, political and constitutional, of the Member States and that all claims relating to national identity should respect the current existing structures.[77] The

[74] Case T-529/13 *Balázs-Árpád v. European Commission*, ECLI:EU:T:2016:282.

[75] Case T-529/13 *Balázs-Árpád v. European Commission*, ECLI:EU:T:2016:282, § 70. An analysis of the regional dimension of national identity can be found in D. Fromage, 'National Constitutional Identity and Its Regional Dimension Post-Lisbon as Part of a General Trend Towards Multilevel Governance Within the EU', *European Public Law*, vol. 27, Issue 3, Kluwer Law International, 2021, pp. 497–516.

[76] Case T-529/13 *Balázs-Árpád v. European Commission*, ECLI:EU:T:2016:282, § 76.

[77] A comparable statement was made in *Affatato*, where the Court held: 'Dans ces conditions, la clause 5 de l'accord-cadre, en tant que telle, n'est en rien susceptible d'affecter les structures fondamentales politiques et constitutionnelles, ni les fonctions essentielles de l'État membre concerné au sens de l'article 4, paragraphe 2, TUE.' See Case C-3/10 *Franco Affatato v Azienda Sanitaria Provinciale di Cosenza*, ECLI:EU:C:2010:574, § 41.

remark of De Witte, that Article 4(2) TEU is concerned about political -not cultural- identity and refers to the identity of the states, not of their peoples, nations or citizens, is pertinent in this regard.[78] He provides several examples that fall under the scope of Article 4(2) TEU, such as the role of regional and local self-government, the choice between parliamentary or semi-presidential political regimes, the existence or not of a mechanism for the constitutional review of legislation, the proportional or majoritarian nature of the electoral system, the organization of the judiciary and its position within the *trias politica* of each country etc.[79] However, not all institutional provisions included in a national constitution are an expression of a country's constitutional identity, as this is limited to the *fundamental* provisions.[80]

The most recent case in which national identity was at issue is *Rivière et al. v European Parliament*[81]. This case concerned an oral measure of the president of the European Parliament prohibiting Members of that Parliament from displaying national flags on their lecterns, which was adopted on the basis of Rule 10(3) of the Rules of Procedure.[82] This measure was contested by some Members of the European Parliament who argued that they are elected first by the citizens of their country, on the basis of national lists within a framework set by each Member State, which demonstrates the national character of that vote.[83] In its judgement, the Court referred to the (political) role attributed in the present case to the national flag by the applicants and held that, as Members of the European Parliament represent the citizens of the Union, the display of the flags of the Member States conflicts with their representative function.[84] Particularly with regard to Article 4(2) TEU, the Court stipulated that it requires the European Union to respect the equality of Member States before the Treaties as well

[78] 'Article 4(2) TEU as a Protection of the *Institutional* Diversity of the Member States', *European Public Law*, vol. 27, Issue 3, Kluwer Law International, 2021, p. 563.

[79] B. De Witte, 'Article 4(2) TEU as a Protection of the *Institutional* Diversity of the Member States', *European Public Law*, vol. 27, Issue 3, Kluwer Law International, 2021, p. 561 and 565.

[80] B. De Witte, 'Article 4(2) TEU as a Protection of the *Institutional* Diversity of the Member States', *European Public Law*, vol. 27, Issue 3, Kluwer Law International, 2021, p. 566. A different perspective is taken by L. Besselink who indicates that, as the wording of Article 4(2) TEU refers to national identity 'inherent in' the fundamental structures of the Member States, it is not limited to 'institutional structures' only, as what gives those structures an identity may not be their institutional nature but their substance, context and purpose. See L. Besselink, 'The Persistence of a Contested Concept: Reflections on Ten Years Constitutional Identity in EU Law', *European Public Law*, vol. 27, Issue 3, Kluwer Law International, 2021, p. 606.

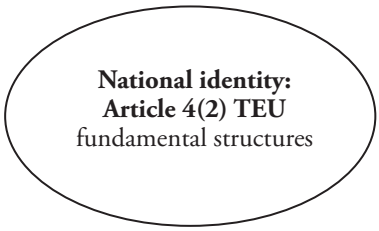
[81] Case C-767/21P *Rivière et al. v European Parliament*, ECLI :EU:C:2023:987.

[82] Article 10(3) of the Rules of Procedure provides that Member States shall not display banners during parliamentary sittings. On the basis of those Rules, Members of the European Parliament are supposed to express themselves by speaking and do not have, in principle, other means of expression.

[83] Case C-767/21P *Rivière et al. v Europea Parliament*, ECLI :EU:C:2023:987, § 40.

[84] Case C-767/21P *Rivière et al. V European Parliament*, ECLI :EU:C:2023:987, § 57.

as their national identities, inherent in their fundamental structures, political and constitutional, and their essential State functions but does not refer to 'national membership'.[85] The picture is hence as follows:



3.2 EU competences and EU law's scope of protection[86]

The final category of case law in which national identity was reflected upon by the Court concerns cases relating to the width of the EU's overall competence and the encompassing scope of protection granted by EU law.

Romania v Commission[87] concerned a European citizens' initiative with regard to the cohesion of the regions. While the Commission believed that some elements of the initiative did not fall outside its competence and that is was hence entitled to submit a proposal for legal acts, Romania claimed that the exercise of the EU's powers is limited by Article 4(2) TEU and that the objectives of the citizens' initiative all related to language, education and culture, which are all fields belonging in essence to the field of competence of the Member States. The Court held that Romania failed to demonstrate that Article 4(2) TEU precludes the adoption of specific measures which seek to ensure, *within* the European Union's fields of competence, respect by the European Union for the values on which it is based, such as respect for the rights of persons belonging to minorities, and to pursue the objectives set out in Article 3 TEU, which include respect for the rich cultural and linguistic diversity of the European Union.[88] Member States can hence not invoke Article 4(2) TEU to restrict the Union's

[85] Case C-767/21P *Rivière et al. V European Parliament*, ECLI :EU:C:2023:987, § 55.

[86] See for more information A. Von Bogdandy and S. Schill, 'Overcoming absolute primacy: Respect for national identity under the Lisbon Treaty', *Common Market Law Review* 48, 2011, pp. 1417–1454.

[87] Case T-391/17 *Romania v. European Commission*, ECLI:EU:T:2019:672 as confirmed in higher appeal by C-899/19P *Romania v. European Commission*, ECLI:EU:C:2022:4. The applicants desired access to various EU funds so that their characteristics and their proper economic development could be guaranteed. Those guarantees should include the establishment of autonomous regional institutions vested with powers sufficient to assist national minority regions in preserving their national, linguistics and cultural characteristics as well as their identity.

[88] Case T-391/17 *Romania v. European Commission*, ECLI:EU:T:2019:672 as confirmed in higher appeal by C-899/19P *Romania v. European Commission*, ECLI:EU:C:2022:41, § 57.

competence and the common provisions mentioned in Article 3 TEU which are all seconded by the Member States when signing the Treaty.

The scope of protection granted by EU law was also at stake in *Moreira*.[89] The Court held that in an area where Member States have transferred competence to the Union, such as the matter of safeguarding employees' rights in the event of transfers of undertaking, that provision cannot be interpreted so as to deprive a worker of the protection granted by Union law.[90] This resembles the Court's reasoning in *Coman* and *V.M.A.* in a free movement context, where it held that national measures that are liable to obstruct the exercise of free movement may be justified only where such a measure is consistent with the fundamental rights guaranteed by the Charter. To recall, this holds true even in areas where Member States have retained powers, such as the institution of marriage, as also those powers need to be exercised in accordance with EU law.[91] This entails that the scope of application of EU law extends beyond the subject areas over which the EU has been given jurisdiction or competence.[92] The national identity clause has not been able to prevent his, even though it was adopted in a context to protect Member States from the so-called competence creep of the Union.[93]

In this regard the infamous Hungarian and Polish claims with regard to the invalidity of the Conditionality Regulation[94] cannot be left out. *Hungary v European Parliament and Council*[95] concerns Hungary's claim that the Court should annul Regulation 2020/2092 on a general regime of conditionality for the protection of the Union budget. Article 4 of this Regulation obliges the Commission to propose measures that can be adopted (and amended) by the Council where it is established that breaches of the principles of the rule of law in a Member State affect or seriously risk affecting the sound financial management of the Union budget or the protection of the financial interest of the Union in a sufficiently direct way. It was claimed by Hungary that the Regulation breaches the principles of legal certainty and legislative clarity, as the concepts on the basis of which a Member State may be found to have breached the principles of the rule of law, have no uniform definition in the Member

89 Case C-317/18 *Moreira*, ECLI:EU:C:2019:499.

90 Case C-317/18 *Moreira*, ECLI:EU:C:2019:499, § 62.

91 M. Bonelli, 'National Identity and European Integration Beyond "Limited Fields"', *European Public Law* Vol. 27, Issue 3, Kluwer Law International, 2021, p. 542.

92 L. Azoulai, 'The "Retained Powers" Formula in the Case Law of the European Court of Justice: EU Law as Total Law?', in: *Eur. J. Legal Studies*, 4(3), 2011, p. 179; M. Bonelli, 'National Identity and European Integration Beyond "Limited Fields"', *European Public Law* Vol. 27, Issue 3, Kluwer Law International, 2021, p. 543.

93 M. Bonelli, 'National Identity and European Integration Beyond "Limited Fields"', *European Public Law* Vol. 27, Issue 3, Kluwer Law International, 2021, p. 543.

94 Regulation 2020/2092 of the European Parliament and of the Council of 16 December 2020 on a general regime of conditionality for the protection of the Union budget, OJ L 4331, 22.12.2020, pp. 1–10.

95 Case C-156/21 Hungary v European Parliament and Council, ECLI:EU:C:2022:97.

States. More specifically it was submitted that the concept 'rule of law' does not lend itself to a precise definition and cannot be given a uniform interpretation, because of the obligation to respect the 'national identity' of each of the Member States.[96] The Court of Justice held that even though the principle of legal certainty requires that the rules of law be clear and precise and that their application be foreseeable for those subject to the law[97], that does not preclude the EU legislature from having recourse, in a norm that it adopts, to an abstract legal notion, nor as requiring that such an abstract norm refers to the various specific hypotheses in which it applies, given that all those hypotheses could not be determined in advance by the legislature.[98] With regard to national identity, the Court held that even though article 4(2) TEU requires the Union to respect the national identities of the Member States inherent in their fundamental structures, such that those Member States enjoy a certain degree of discretion in implementing the principles of the rule of law, this does not entail that that obligation as to the result to be achieved may vary from one Member State to another.[99] Indeed, whilst Member States have separate national identities, inherent in their fundamental structures, political and constitutional, which the European Union respects, they adhere to a concept of 'the rule of law' which they share, as a value common to their own constitutional traditions, and which they have undertaken to respect at all times.[100] The Court held more specifically, that the principles of the rule of law are developed in the case-law of the Court and are thus recognised and specified in the EU legal order and have their source in common values which are also recognised and applied by the Mem-

[96] In addition, it was argued that the EU legislature tried unsuccessfully to elucidate the constituent elements of the concept of 'the rule of law' as that it merely reproduces the parallel elements of Article 2 TEU, which are equally abstract, such as respect for fundamental rights, the prohibition of discrimination and the principle of effective judicial protection. Hungary submitted that that circumstance confirms the fact that the values of Article 2 TEU inspire political cooperation within the European Union, but do not have their own legal content. By defining the concept of 'the rule of law' in a sector-specific regulation and thereby allowing other instruments of secondary legislation to use a different conception of it, it was argued that the EU legislature had undermined the interpretation of that concept as a common value of the European Union, as defined by Article 2 TEU. See Case C-156/21 Hungary v European Parliament and Council, ECLI:EU:C:2022:97, § 205.

[97] Case C-156/21 Hungary v European Parliament and Council, ECLI:EU:C:2022:97, § 223 and 225. The Court held that the fact that a law confers a discretion on the authorities responsible for implementing it is not in itself inconsistent with the requirement of foreseeability, provided that the scope of the discretion and the manner of its exercise are indicated with sufficient clarity, having regard to the legitimate aim in question, to give adequate protection against arbitrary interference.

[98] Case C-156/21 Hungary v European Parliament and Council, ECLI:EU:C:2022:97, § 224.

[99] The Court stipulated that article 2 TEU is not merely a statement of policy guidelines or intentions, but contains values which are an integral part of the very identity of the European Union as a common legal order, values which are given concrete expression in principles containing legally binding obligations for the Member States Case C-156/21 Hungary v European Parliament and Council, ECLI:EU:C:2022:97, § 232-233.

[100] Case C-156/21 *Hungary v European Parliament and Council*, ECLI:EU:C:2022:97, § 234.

ber States in their own legal systems.[101] In *Hungary v European Parliament and Council* the Court made it hence very clear that the concept 'national identity' is related to the fundamental structures of a Member State *and* it's scope is limited by the *values common to the constitutional traditions* of the Member States. This means that Member States cannot invoke it arbitrarily.[102] This is in line with the Court's reasoning in *Coman* and *V.M.A.* in which it held, in a free movement context, that Article 4(2) TEU can only be relied on if it is not invoked arbitrarily and that national measures that are liable to obstruct the exercise of free movement may be justified only where such a measure is consistent with the fundamental rights guaranteed by the Charter.[103] While these fundamental may not qualify as principles belonging to national constitutions but as general principles of EU law[104], the essence of the message is comparable. Even though Member States hence enjoy discretion in the implementation of the rule of law, Article 4(2) TEU does not prevent that that this implementation is reviewed by the Court of Justice.[105]

In the mirroring case *Poland v European Parliament and Council*, the Court repeated its reasoning.[106]

Finally, *RS*[107], concerned the prohibition for ordinary courts to exercise their jurisdiction when it comes to examining the conformity of a national provision with EU law when the Constitutional Court had already found that provision to comply with the Romanian constitution.[108] The Court of Justice held that although the organisation of justice in the Member States, including the functioning of a constitutional court, falls within the competence of those Member States, these are required, when exercising that competence, to comply with their obligations deriving from EU law and, in particular, from Articles 2 and 19 TEU.[109] Every Member State must hence ensure that the bodies which are

[101] Case C-156/21 *Hungary v European Parliament and Council*, ECLI:EU:C:2022:97, § 237.

[102] Although the Commission and the Council must make their assessments taking due account of the specific circumstances and contexts of each procedure conducted under the contested regulation and, in particular, taking into account the particular features of the legal system of the Member State in question and the discretion which that Member State enjoys in implementing the principles of the rule of law, that requirement is in no way incompatible with the application of uniform assessment criteria. See Case C-157/21 *Hungary v European Parliament and Council*, ECLI:EU:C:2022:97, § 235.

[103] Case C-673/16 *Coman*, ECLI:EU:C:2018:385, § 47.

[104] B. Guastaferro, 'Beyond the *Exceptionalism* of Constitutional Conflicts: The *Ordinary* Functions of the Identity Clause', *Yearbook of European Law*, Vol. 31, NO 1, 2012, p. 312–313.

[105] See e.g. Case C-391/09 *Runevič-Vardyn and Wardyn*, ECLI:EU:C:2011:291 and Case C-391/20 *Cilevičs*, ECLI:EU:C:2022:638.

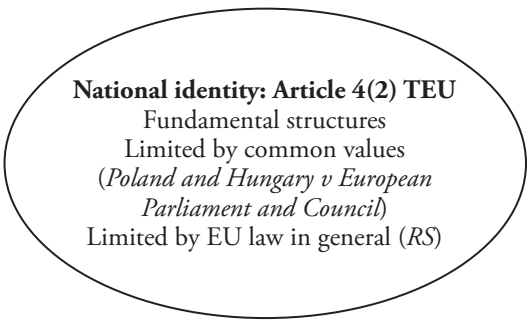
[106] Case C-157/21 *Poland v European Parliament and Council*, ECLI:EU:C:2022:98, § 265-266.

[107] Case C-430/21 *RS*, ECLI:EU:C:2022:99.

[108] Case C-430/21 *RS*, ECLI:EU:C:2022:99, § 19.

[109] Case C-430/21 *RS*, ECLI:EU:C:2022:99, § 38.

called upon as 'courts or tribunals'[110] meet the requirements of effective judicial protection and independence.[111] The Court importantly stressed that Article 4(2) TEU does not authorise a constitutional court of a Member State, to disapply a rule of EU law, on the ground that that rule undermines the national identity of the Member State concerned as defined by the national constitutional court.[112] Only the Court of Justice has jurisdiction to declare an EU act invalid.[113] The case of *RS* is highly important as the Court of Justice expressly widened the range of limitations to national identity. While in *Coman* and *V.M.A.* limitations were found in EU fundamental rights, and in the cases of *Poland* and *Hungary v European Parliament and Council* limitations were related to common values, *RS* widened the scope of limitations to all EU law. This approach was followed in *Rivière* were the Court explicitly held that Article 4(2) TEU has neither the object nor the effect of authorising a constitutional court of a Member State, in disregard of the obligations under, in particular, Article 4(2) and (3) and the second subparagraph of Article 19(1) TEU, which are binding upon it, to disapply a rule of EU law, on the ground that that rule undermines the national identity of the Member State concerned as defined by the national constitutional court.[114]



[110] These are courts or tribunals within the meaning of EU law which rule on questions related to the application or interpretation of EU law and thus come within the Court of Justice's judicial system in the fields covered by EU law.

[111] Case C-430/21 *RS*, ECLI:EU:C:2022:99, § 40.

[112] Case C-430/21 *RS*, ECLI:EU:C:2022:99, § 70. A Constitutional Court may nevertheless, under Article 4(2) TEU be called upon to determine that an EU obligation does not undermine the national identity of a Member State.

[113] Case C-430/21 *RS*, ECLI:EU:C:2022:99, § 71-72. As the Court has exclusive jurisdiction to provide the definitive interpretation of EU law, the constitutional court of a Member State cannot, on the basis of its own interpretation of provisions of EU law, including Article 267 TFEU, validly hold that the Court has delivered a judgment exceeding its jurisdiction and, therefore, refuse to give effect to a preliminary ruling from the Court.

[114] Case C-767/21P *Rivière et al. V European Parliament*, ECLI :EU:C:2023:987, § 70.

4. CONCLUSION

National identity issues have only been invoked sparingly before the Court of Justice. After the concept was first referred to in *Groener* in a free movement context in 1989, for decades it was hardly to be found in case law. In the last few years it has gained more attention.

While national identity is considered to be a legitimate aim that is to be respected by the Union legal order, whether or not national identity can be considered as an independent public policy ground that can justify a restriction to free movement is to be questioned. While the Court seems to have argued in that direction in *Commission v Luxemburg* (see part 2.2.), in all other cases the court considered (other) public policy goals, such as the protection of a state's official language or equality before the law as mandatory reasons of public interest (see part 2.1.). Public policy goals were sometimes found to be part of the (broader) concept of national identity (language protection). While the Court of Justice has repeated many times that national identity, as referred to in Article 4(2) TEU, is connected to the fundamental structures of a Member State, it did not make very clear why certain aspects, such as language protection, were considered to be part of these fundamental structures. These aspects support Advocate-General Emiliou remark that was referred to in introduction, to a certain extent.

National measures that are liable to obstruct the exercise of free movement may be justified only where such a measure is consistent with the fundamental rights guaranteed by the Charter (see part 2.1.3.). While public policy goals can justify restrictions to free movement, the proportionality requirement does not require all Member States to protect such goals in the same manner. The broad discretion the Member States enjoy can however not justify a serious undermining of the rights which individuals derive from the provisions of the Treaties enshrining their fundamental freedoms (see part 2.2.). Outside a free movement context, the Court has held that national identity is limited by the common values of the Member States, and even by the content of EU law in general. Reliance on Article 4(2) TEU does hence not limit the scope of application of EU law. That being said, it may contribute to reach results that show deference to national preferences and leave room for national diversity.[115] While European fundamental rights and common values can hence put limits to national identity, they are not necessarily *part* of national identity, especially when there is no link with national fundamental structures. It can be concluded that the concept of national identity in EU law, both in and outside the context of free movement law is – and will continue to be – much narrower in scope than the sociological definition which includes cultural elements that are not

[115] M. Bonelli, 'National Identity and European Integration Beyond "Limited Fields"', *European Public Law* Vol. 27, Issue 3, Kluwer Law International, 2021, p. 537 and 554.

connected to any structure or state function.[116] As rightly held by De Witte, national identity is not about the preservation of cultural identity or specificity, nor is it about protecting a shared sense of belonging or particular moral values.[117]

[116] The sociological definition is more aligned with the concept of national identity as interpreted by the European Court of Human Rights. In the Strasbourg system, national identity is understood as encompassing political, economic, cultural or social characteristics. See D. Fromage and B. De Witte, 'National Constitutional Identity Ten Years on: State of Play and Future Perspectives, *European Public Law*, vol. 27, Issue 3, Kluwer Law International, 2021, p. 418, referring to L. López Guera, 'National Identity and the European Convention on Human Right' in A. Saiz Arnaiz & C. Alcoberro Llivinia (eds.), *National Constitutional Identity and European Integration,* Intersentia, 2013, p. 307.

[117] B. De Witte, 'Article 4(2) TEU as a Protection of the *Institutional* Diversity of the Member States', *European Public Law,* vol. 27, Issue 3, Kluwer Law International, 2021, p. 560–561.