THIRTY YEARS OF THE CONCEPT OF NATIONAL IDENTITY IN THE PRIMARY LAW OF THE EUROPEAN UNION: CLEARLY UNCLEAR?

Sára KIŠŠOVÁ
PhD Student, Institute of European Law
Comenius University in Bratislava, Faculty of Law
E-mail: sara.kissova@flaw.uniba.sk

Abstract
This paper deals with the concept of national identity, which was incorporated into the primary law of the European Union (EU) 30 years ago by the adoption of the Maastricht Treaty. Subsequent revisions of the Treaty changed the wording of this concept until it was established in Article 4(2) of the Treaty of Lisbon. This paper summarizes knowledge about the concept and examines its development from the point of view of the jurisprudence of the Court of Justice of the EU (CJEU). First, the article deals with the definition of the term 'national identity' and examines it from a theoretical-interpretive point of view. Secondly, the article focuses on the development of the concept in the jurisprudence of the CJEU in the period from the Maastricht Treaty to 2022 to the present. The analysis of CJEU jurisprudence is divided into two chapters. Chapter 2 points to the stagnant development of the concept, and the Chapter 3 points to a recent shift in the attitude towards the concept on the part of the EU. The main goal of this paper is to assess and evaluate this concept from the point of view of the jurisprudence of the CJEU. This paper uses methods of analysis and synthesis of individual sources into comprehensive conclusions.

***Keywords**: national identity, constitutional identity, article 4(2) TEU, ultra vires doctrine*

National identity under the primary law of the EU

Even though national identity is an autonomous concept of the European Union, its definition by the Union may be perceived as insufficient. The Court of Justice of the European Union has clarified several times what is included in the term 'national identity' in the sense of the concept of national identity, but it must be noted that despite such case law, this term remains vague and ambiguous. Many academic authors, therefore, have contributed to a discussion about how exactly to define this term or even whether it is identical to the term

'constitutional identity'. I will approach this issue more closely along the following lines.

When defining national identity, it is first necessary to focus on the term identity, which has its roots in the Latin word *idem*, which, in English means 'the same'. Von Bogdandy writes about the need to perceive, before any interpretation of the term identity, two different meanings of the term *idem*, since the term originates therefrom. (Bogdandy & Schill, 2011, s. 1428). He points to two understandings of this term, an objective understanding and a subjective understanding. While the older, objective understanding focuses on the perception of a person or a nation from the outside world, that is, it focuses on characteristics considered essential from an external point of view, the subjective understanding focuses on internal attitudes. In the subjective understanding, identity is the result of spiritual and mental processes that express a certain belonging to something/someone. (Bogdandy & Schill, 2011, s. 1428). According to Von Bogdandy, when defining identity as contained in EU primary law, it is necessary to consider both interpretive perspectives. Even though the concept of national identity in Article 4(2) Treaty of the European Union (TEU) refers to the elements included in political and constitutional systems, objective understanding. The subjective understanding deals with democratic states deriving their legitimacy from their citizens who identify with the state, hence it represents all mechanisms that form or that support identification with the state (Bogdandy & Schill, 2011, s. 1429).

Before we move on to the analysis of the term national identity, I will focus on the term constitutional identity, which is often used interchangeably with the term 'national identity'. In short, we look into whether such interchangeable use of the terms is appropriate and correct regarding Article 4(2) TEU. The conclusions from this part of the analysis will only clarify whether there is a difference between the terms or whether they are identical.

Regarding the concept of constitutional identity, there is also no agreement on its meaning and exact definition. In this regard, we will point to Rosenfeld, who, despite the opinion that constitutional identity is a disputed term where there is no agreement on what it means or what it refers to, perceives three different understandings of the term through the research of individual authors (Rosenfeld, 2012, s. 756). The first understanding of the term is oriented towards the constitution as the fundamental law of the state, so the authors consider constitutional identity as the identity of the constitution itself. Important for defining constitutional identity from the point of view of this understanding are its main features, who has constituent powers and who is the constitutional subject, what is and is not included in the document, what form of government the constitution establishes and what collective identity it creates. The second understanding equates constitutional identity with constitutional culture. The third understanding of constitutional identity tries to analyse the interplay between the text of the constitution and national identity. (Rosenfeld, 2012, s. 760-764).

Despite the vagueness and various interpretations of the term constitutional identity, it is possible to perceive its identical use and interchange

with the term national identity in the sense of Article 4(2) TEU. It is not only the academic field where these terms are used interchangeably (Besselink, 2010; Claes, 2012; Konstadinides, 2011; Simon, 2011), but there are also several opinions of the General Advocates who have used the term constitutional identity in connection with the concept of national identity.[1] However, it can be seen, for example, in the case of *Michaniki*, where Attorney General Maduro stated that respecting the constitutional identity of the Member States is an obligation of the European Union and that 'the said national identity obviously includes the constitutional identity of the Member State'.[2] Such subsuming of the concept of constitutional identity under the concept of national identity was also carried out by Advocate General Bot in the *Melloni* case, referring to numerous professional literature devoted to constitutional identity.[3] Finally, some of the constitutional courts of the Member States, which in the course of the revision of the treaties, identified themselves several times as the defenders of their constitutional identity and subjected several secondary sources of the EU to review, basing this competence on the concept of national identity.

From the above, it can be concluded that the scientific and professional public generally accepts the use of these two terms interchangeably. However, there is also criticism of this view, particularly that the treaty makers, in the wording of the treaties, had reasons to enshrine respect for the national identity of the Member States and not their constitutional identity. In this sense, I refer to the opinion of Cloots, who, in her research, deals with national identity and bases her arguments on the impossibility of confusing these two concepts on the way of interpreting the provision of the concept in the TEU. (Cloots, 2015). According to Cloots, it is probably the Lisbon version of the concept of national identity that leads the authors to use the terms 'national identity' and 'constitutional identity' in the same sense because it points to "the national identity contained in political and constitutional systems*"* (Basselink, 2010; Van der Schyff, 2012; Von Bogdandy & Schill, 2012). She also talks about the tacit assumption that by adding the amendment on political and constitutional systems to national identity, the creators of the Treaty of Lisbon tried to fulfil the demand of some constitutional courts that EU law respect the identity of their constitutional order (Cloots, 2015, s. 84). However, Cloots suggests there must be a justification for such interpretations, and questions whether such an interpretation is based on a proper theory of legal interpretation typical of the

[1] Opinion of Advocate General M. Poiares Maduro delivered on 20 September 2005 in Case C-53/04 *Marrosu and Sardino*, § 40.

[2] Opinion of Advocate General M. Poiares Maduro delivered on 8 October 2008, in Case C-213/07 *Michaniki*, §§31-33.

[3] Judgement of the German Constitutional Court, *Lissabon*, BVerfGE, 2 BvE 2/08; Judgement of the Polish Constitutional Court delivered on 24 November 2010, K 32/09 (*Lisbon Treaty*); Judgement of the French Constitutional Council delivered on 27 July 2006, n. 2006-540; Judgement of the Spanish Constitutional Court, delivered on 13 December 2004, Rs. 1/2004.

EU legal order while pointing to the incorrect use of 'intentionalist' approach to legal interpretation. She criticizes this type of interpretation from several points of view, but the most crucial argument to which we must draw attention is that this type of interpretation has never been used and is also not used to interpret treaties by the Court (Cloots, 2015, p. 85). Cloots rather focuses on the linguistic interpretation of this provision, based on which she sees the interpretation of Article 4(2) TEU through moral principles.[4]

The obligation to respect the national identity of the Member States was first enshrined in Article F(1) of the Maastricht Treaty, [5] while the Amsterdam Treaty only slightly modified the wording of the original article.[6] The most extensive change to this provision occurred with the Treaty of Lisbon in 2009. Since Lisbon, the concept of national identity can be found in Article 4(2) TEU, while the wording of the provision of Article 4(2) TEU connects the concept of national identity to fundamental political and constitutional systems. To accommodate these ideas, national identity must be perceived at the level of the constitutional law of the Member States.

From the wording of the provision, it is not possible to identify what national identity is and who decides on what it is and is not. Moreover, even when defining national identity through grammatical interpretation, we will not reach conclusions about what exactly is contained in this term. (Bogdandy & Schill, 2011, p. 1428-1429) However, Article 4(2) TEU refers to what is relevant for determining the content of national identity. The national identity will thus be an element contained in the fundamental constitutional and political structures, in other words, it will be the fundamental elements of the constitution, which are considered the core of the constitution of the Member State. The word fundamental determines the limit, or boundary for the definition of national identity. Thus, Member States cannot include every element of the constitution in the definition of this term. Therefore, it is very important to focus on the interpretation of the word fundamental, because without emphasizing this criterion, everything connected with the constitutional law of a Member State could be considered as national identity.

In this context, in theory, one can encounter two ways of determining the national identity of a Member State. The first way of determining the national identity of a Member State is directly through the provisions of the constitution. Such provisions of the constitution should represent the fundamental values of the state and should be subject to increased protection, they are the so-called ‘core of the constitution’ (Bogdandy & Schill, 2011, p.1432). In the case of increased protection, it should mainly be about the immutability of these provisions, so that, within the framework of the constitution, the process of adopting a constitutional amendment is made more

[4] For more on moral principles according to Cloots, see the mentioned work.
[5] Article F(1) of the Maastricht Treaty: *'The Union respects the national identity of its member states whose systems of government are based on the principles of democracy.'*.
[6] Article 6(3) of the Treaty of Amsterdam: *'The Union respects the national identity of its member states.'*.

difficult (BLAGOJEVIĆ, 2017, p.215). Examples of constitutional provisions that explicitly prohibit the change of some values or provisions of the constitution include Article 9(2) of the Constitution of the Czech Republic[7] or Article 7(3) of the Constitution of Germany. [8] On the other hand, it can only be a more complex procedural procedure for amending the constitution, such as the condition for declaring a referendum, as is the case, for example, in Article 44(3) of the Constitution of Austria.

The second way of determining national identity is the decision-making activity of the constitutional courts of the Member States in matters of the relationship between European Union law and national constitutional law. It is the constitutional courts of the Member States that started to use the argument of national identity in proceedings dealing with the question of the primacy of EU law in relation to the constitution. The German Constitutional Court (hereafter referred to as 'BVG') used the term identity constitution as early as 1974 in the Solange I decision, a few years before the adoption of the Maastricht Treaty and Article F. However, the most famous and most significant in relation to national (constitutional) identity (identity review) is *the Lisbon decision.*[9] In this decision, the BVG examined whether the inviolable core of the German constitution and especially Article 79(3) are in accordance with the Treaty of Lisbon while re-acknowledging the German jurisdiction's two powers of review, which it exercises as a constitutional court vis-à-vis the EU: *ultra vires review*[10] and *identity review*. In connection with identity control, the BVG stated that the application of such control is governed by the principle of openness of the constitution (*Europarechtsfreundlichkeit*), towards European law and therefore does not contradict the principle of loyal cooperation (Article 4(3) TEU). The BVG evaluates national identity in the light of developing integration as the only protection of the fundamental political and constitutional structures of a sovereign Member State with justification found in Article 1 to Article 20 of the German Constitution. The BVG thus states that the identity check *'*ensures that the primacy of Union law is exercised only on the basis of and in the context of a constitutional mandate that remains in force.*'* [11]

[7] Article 9, Paragraph 2 of the Constitution of the Czech Republic*: 'Changes to the essential elements of a democratic legal state are inadmissible.'.*

[8] Article 79 (3) of the German Constitution: 'Amendments to the Constitution that have an impact on the division of the federation into federal states, their fundamental participation in the legislative process or the principles established in Articles 1 and 20 are inadmissible.'.

[9] Judgement of the German Constitutional Court, *Lissabon*, BVerfGE, 2 BvE 2/08.

[10] Ultra vires control was declared by the German Constitutional Court in the decision Maastricht, BverfG, 2 BvR 2134/92 and 2159/92. For the purposes of this paper, it will not be developed further, but it needs to be seen as closely connected to national identity.

[11] *Lissabon*, §240.

National Identity in the jurisprudence of the Court of Justice of the EU

National identity can be examined not only through the decision-making activity of the constitutional courts of the Member States but also through the jurisprudence of the CJEU. However, when examining the jurisprudence of the CJEU, we cannot precisely determine the content of the national identity of the Member States, as the definition of the content of the national identity of the Member State is left to the Member State itself through the constitutional interpretation of the material core of its constitution. However, this autonomous concept can also be looked at through the eyes of the EU by examining the jurisprudence of the CJEU. If a Member State does not act in accordance with EU law or objects to the EU's action through the argument of the concept of national identity, the matter will most likely be brought before the Court of Justice of the EU, either through proceedings on a preliminary issue pursuant to Article 267 TFEU or within the procedure under Article 258 of the TFEU, in proceedings for non-fulfilment of obligations. From these proceedings, it is possible to observe what the CJEU has recognized as national identity in its activities so far in cases where the question of national identity has arisen. Therefore, it is necessary to state that even if a Member State determines the content of its national identity that comes into conflict with EU law, this does not automatically mean the possibility of non-application of EU law, as such actions will, in a certain way be reviewed by the CJEU. Although the concept of national identity protects the respect of the national identities of the Member States, the objection to interference with the national identity of a Member State is not automatic and definitive and will be subject to review by the Court of Justice at a certain stage of the process. Through the analysis of the jurisprudence of the CJEU, this chapter will examine what the CJEU recognized and did not recognize as part of the national identity of a Member State.

Before analysing the jurisprudence of the CJEU after the adoption of the Maastricht Treaty, we will point out the case of Anita Gröener, where the concept of national identity appeared even before the adoption of the Maastricht Treaty. In it, the court accepted the argument that the protection of the national language is part of the Irish national identity but added that even such a justification for restricting the free movement of workers must be applied in a reasonable and non-discriminatory manner. Together with reference to national proceedings before the constitutional court of Germany and Italy, this is further evidence that national identity emerged naturally in the context of the European Union.[12]

[12] Judgment of the Court of Justice of 28 November 1989, *Anita Groener v Minister for Education and Dublin City Vocational Training Committee*, C-379/87, ECLI:EU:C:1989:599.

One of the first decisions of the Court after enshrining Art. F in the Maastricht Treaty, was the judgment in *Commission v Luxembourg* I from 1993, in which the Court of Justice dealt with the legality of the constitutional conditions of Luxembourg nationality for the employment of a teacher in the public education system. In the field of education, the Luxembourg government has primarily argued that teachers must have Luxembourgish nationality in order to transmit traditional values, given the size of the country and its specific demographic situation. It would not be possible to preserve the Luxembourgish identity if most teachers came from other countries. In the case of primary and secondary school teachers, the Luxembourg Government points out that these teachers perform non-commercial functions which involve the protection of the general interests of the State.[13] In this case, the Court of Justice stated that the condition of the nationality of teachers to preserve traditional values as a protection of national identity is disproportionate and discriminatory and therefore cannot be an element of national identity in this case.

In Case *Spain v United Kingdom*, the concept of national identity appeared only marginally on the side of the Commission's statement, which strengthened the position of the concept within EU law. This proceeding can be seen as a continuation of the judgment of the European Court of Human Rights (hereafter referred to as 'the ECtHR') in *Matthews v. the United Kingdom*, in which the ECtHR found that the United Kingdom had organized elections to the European Parliament in Gibraltar in violation of Article 3 of Protocol No. 1 to the European Convention on Human Rights.[14] The United Kingdom sought to comply with the Matthews judgment, so the right to vote in Gibraltar's European elections was extended to qualified Commonwealth citizens who were not citizens of the United Kingdom, and so Gibraltar was included in an existing constituency in England. Spain did not like this procedure and filed an action with the Court of Justice.[15] However, within the judgment itself, national identity appears only in paragraph 58, where the Court of Justice paraphrases the words of the Commission, which states that *"*[w]hile the concept of citizenship of the Union is a fundamental concept for the Union, the same applies to the Union's obligation to respect the national identity of its members. Article 8 of the 1976 Act confirms this principle, as it provides that national provisions governing the electoral procedure may, where appropriate, take account of particularities in the Member States.*"* The conclusion could be drawn from the Commission's statement that it considers the national identity of the Member States as fundamental to the Union and equates this concept with the institution of European citizenship. Implicitly, it can be said that the

[13] Judgment of the Court of Justice of 2 July 1996, *Commission of the European Communities v Grand Duchy of Luxembourg*, C-473/93, ECLI: EU: C: 1996: 263.
[14] Judgment of the European Court of Human Rights of 18 February 1999, *Matthews v United Kingdom*, Application No. 24833/94. §32.
[15] Judgment of the Court of Justice (Grand Chamber) of 12 September 2006, *Kingdom of Spain v United Kingdom of Great Britain and Northern Ireland*, C-145/04, ECLI: EU: C: 2006: 543, § 11.

Commission indicated in its statement that the national provisions regulating the electoral procedure form part of the national identity of the Member States.

The jurisprudence in the case of Sayn Wittgenstein enriches the concept of national identity.[16] The post-Habsburg Austrian constitution, with an effort to create a republic, abolished all titles and privileges, essentially banning surnames denoting nobility. Specifically, it was a law which abolished the nobility, which had the legal force of constitutional law. In the court proceedings in question, this law prevented an Austrian citizen from acquiring a surname containing a noble title based on adoption by a German citizen who legitimately uses that noble title as part of his name. However, according to the law on the abolition of nobility, Austrian citizens do not have the right to use a title of nobility, even of foreign origin. The Court of Justice referred here to its earlier jurisprudence in the Anita Gröener case and *Commission v. Luxembourg I.* It recalled that according to Article 4(2) of the TEU the European Union respects the national identity of its Member States, adding to this the finding that the content of national identity can also be a republican state establishment.[17] The Court of Justice saw Austria's actions as consistent with EU law, as the proportionality of the constitutional law was fulfilled, there was no discrimination. At the same time the republican state establishment as the national identity of Austria was protected. With the Sayn Wittgenstain ruling, the Court of Justice expanded the possible content of the national identity of the Member States to include the republican state establishment, which was later confirmed in the Bogendorff Von Wolffersdorff decision.[18]

The Court of Justice recognized the protection of national identity in the Runevič-Vardyn case as compatible with EU law, which concerned the refusal of one of the Lithuanian registry offices to change the names of the applicants. A Lithuanian national of Polish origin who married Polish citizen Lukasz Pawel Wardyn requested that her name in the marriage certificate be written in the Polish version of the name 'Małgorzata Runiewicz-Wardyn' and not be written with a 'V'. Lithuanian laws stipulate that first names and surnames must be given in official documents using the spelling and rules of the country's official language, and therefore Mrs. Runevič-Vardynova's request for correction was rejected because the Lithuanian alphabet does not recognize the letter 'w'.

Advocate General Jääskinen stated in his Opinion that there had been a violation of the general principle of equal treatment. He saw the protection of the official language to protect national unity and preserve social cohesion as a reasonable, legitimate goal that could objectively justify the given action (as

[16] Judgment of the Court of Justice of the EU of 20 December 2010, *Ilonka Sayn-Wittgenstein v. Landeshauptmann von Wien*, C-208/09, ECLI: EU: C: 2010: 806.
[17] *Ibidem*, §92.
[18] Judgment of the Court (Second Chamber) of 2 June 2016 *Nabiel Peter Bogendorff von Wolffersdorff v Standesamt der Stadt Karlsruhe and Zentraler Juristischer Dienst der Stadt Karlsruhe*, Reference for a preliminary ruling from the Amtsgericht Karlsruhe, C-438/14, ECLI: EU: C: 2016: 401, §64 and §73.

argued by the Lithuanian government, which pointed to the interests and traditions of the Lithuanian language as justification for such an obstacle). However, GA Jääskinen took the view that the Lithuanian regulations do not represent an adequate and necessary means to achieve the goal of protecting the state language. On the other hand, even though the Court of Justice followed the opinion of Advocate General Jääskinen and, in view of their objective, tried to apply the relevant provisions while also respecting Lithuanian law, as a result they decided on all points of the procedure rather vaguely. The Court of Justice left the solution to the question to the national court, which was supposed to evaluate the situation and Lithuanian law through the proportionality test. The spelling of names thus belongs to the national identity of the Member States, but measures related to it must again be subject to proportionality and non-discrimination. [19]

The case of *Coman* concerned the interpretation of the term 'spouse' in the context of Directive 2004/38 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States. Mr. Coman, a Romanian and American citizen, lived with Mr. Hamilton, an American citizen, in New York from 2002 to 2009 and later married in Belgium in 2010. In December 2012, they were informed of the possibility of obtaining Mr. Hamilzona's right to stay legally in Romania for more than three months as a family member of Mr. Coman. However, the Romanian authorities believed that since same-sex marriage was prohibited, he could only stay in Romania for three months. Therefore, the question was whether Article 21(1) TEU prevents Member State from refusing to grant p. Hamilton's right of residence on the grounds that domestic law does not recognize marriage between persons of the same sex. In its judgment, the Court of Justice recalled that Mr. Coman was a Romanian national and thus, as an EU citizen who had exercised his freedom of movement and residence in other Member States, he could exercise his rights under Article 21 of the TFEU, and at the same time decided that the term 'husband' is gender neutral and also applies to same-sex marriages.[20] In addition, attention should be paid to the comments of the Latvian government, which brought the concept of national identity into the case by claiming that such an interpretation of the term spouse is contrary to public policy and Article 4(2) TEU, as it violates the Latvian constitutional identity.

In this part, it is rather difficult for me to interpret the position of the Court based on its statements. On the one hand, in paragraph 43, the Court recalls the Union's obligation to respect the national identities of the Member States but

[19] Judgment of the Court of Justice (Second Chamber) of 12 May 2011, *Malgožata Runevič-Vardyn and Łukasz Paweł Wardyn v Vilniaus miesto savivaldybės administracija and others*, C-391/09, ECLI: EU: C: 2011: 291, §75.

[20] Judgment of the Court (Grand Chamber) of 5 June 2018, *Relu Adrian Coman et al. v Inspectoratul General pentru Imigrări and Ministerul Afacerilor Interne*, C-673/16, ECLI:EU:C:2018:385. §§35-36.

continues to address the argument of the protection of public order and does not further comment on the concept of national identity. When the reader looks at paragraphs 42-45, two conclusions can be drawn. Either the reader will adopt a conclusion similar to that of Advocate General Kokott in her proposals in the V.M.A. case, where she states in paragraph 76 that "[i]n this context the Court has already implicitly recognized that the rules governing marriage are part of national identity within the meaning of Article 4(2) TEU" while referring to paragraphs 42 and 43 of the judgment in question.[21,22] Or the reader can conclude that the Court hereby rejects the arguments of the Latvian government in the sense that they do not meet the conditions for assessment under Article 4(2) TEU. Either the stated value is not considered part of the national identity of the Member State, or the intervention is considered marginal.

A change in the Union's approach to the concept of national identity?

In the case of *V.M.A v. Stolichna Obshtina, Rayon Pancharevo***,** a Bulgarian national who lived in a registered partnership, had a child with her partner, for whom they wanted to issue a Bulgarian identity document, for which a birth certificate issued by the Bulgarian authorities is required. However, the sample birth certificate valid in Bulgaria has only one column for the mother and another for the father, and therefore the Bulgarian authority called on the V.M.A to add information about the child's biological mother. As the V.M.A refused to provide the requested information, the Bulgarian birth certificate was not issued due to the lack of information about the biological mother and the fact that the reference to two female parents in the birth certificate is against Bulgarian public policy. In the domestic proceedings, the Administrative Court of the City of Sofia (Administrativen sad Sofia-grad) was unsure whether the refusal of the Bulgarian authorities to register the birth of a Bulgarian national in these circumstances violated the rights granted by the TFEU and the EU Charter of Fundamental Rights. The CJEU thus received a set of questions regarding the interpretation of several articles, including Article 4(2) of the TEU. For the purposes of this article, we will be primarily interested in the proposals of Advocate General Kokott in the part of the preliminary question concerning Article 4(2) TEU, in which the referring court asks the Court of Justice, whether Article 4 par. 2 of the EU could have justified the refusal of the Bulgarian authorities to issue a birth certificate. The National Court of Bulgaria states that the possible obligation to issue a birth certificate listing two persons of the female gender as parents could affect public order as well as the national identity of Bulgaria, since the Bulgarian Constitution and Bulgarian family law do not regulate the parentage of two persons of the same

[21] Opinion of Advocate General Kokott of April 15, 2021, *V.M.A. v Stolichna obshtina, rayon 'Pancharevo'*, C-490/20, ECLI:EU:C:2021:296, §76.

[22] The Advocate General perceives the Court's implicit finding that the institution of marriage is part of the national identity of a Member State.

sex.[23] In this part, the Court of Justice emphasizes the need to understand the justification for deviating from fundamental freedom based on the reservation of public order strictly in the sense that its scope cannot be determined unilaterally by each Member State without control by the institutions of the European Union.[24] The Court of Justice does not further comments on the concept of national identity.

On the other hand, Advocate General Kokott provided a relatively detailed analysis of the concept of national identity consisting of several steps in paragraphs 70 to 134 of her Opinion.

The GA was the first to state that Article 4(2) TEU introduces an autonomous concept of Union law, the interpretation of which belongs to the Court of Justice, but the exact content of the concept may differ in individual Member States. This concept cannot be interpreted abstractly at the level of the Union.[25] For the interpretation of the concept of national identity, according to AG Kokott, important information is provided by the national court and the concerned Member State, which have a wide degree of discretion, which is, however, limited by the duty of loyal cooperation contained in Art. 4 par. 3 TEU.[26] In relation to the matter in question, AG recalls that the Court of Justice has already ruled in the context of national identity and family law in the Coman case, [27] where the Court recognized that the rules governing marriage are part of national identity in the sense of Article 4(2) TEU, as it is an expression of the state's own conception both at the political and social level. However, the Court of Justice can only carry out a limited review of measures adopted by a Member State to protect national identity in the case of a fundamental expression of national identity. This means that the limited review by the Court will not consider the proportionality of the measures, because that would move the national identity to the level of a legitimate objective. Under the fundamental expression of national identity, as opposed to any expression of national identity, we should understand a situation where there is a possibility that an act required on the basis of European Union law can change a domestic legal institute or a domestic legal concept and thus interfere with the exclusive competence of the Member States.[28] According to AG, it is important to take care and to distinguish the type of definition of national identity and to conduct a limited review of only the fundamental definition in order to avoid a situation

[23] Judgment of the Court (Grand Chamber) of 14 December 2021, *V.M.A. v. Stolichna obshtina, rayon 'Pancharevo'*, C-490/20, ECLI:EU:C:2021:1008, §53.
[24] *V.M.A. v. Stolichna Obshtina, rayon Pancharevo*, §55.
[25] AG Kokott, *V.M.A. in. Stolichna obshtina, rayon "Pancharevo"*, §70 and §72.
[26] *Ibidem*, §73.
[27] Judgment of the Court (Grand Chamber) of 5 June 2018, *Relu Adrian Coman et al. v. Inspectoratul General pentru Imigrări and Ministerul Afacerilor Interne*, C-673/16, ECLI:EU:C:2018:385, §42-44.
[28] AG Kokott, *V.M.A. in. Stolichna obshtina, rayon "Pancharevo",* §§89-92.

where the application of Article 4(2) TEU comes into conflict with the principle of primacy of Union law.[29]

In 2020, Advocate General Nicholas Emiliou presented his opinion in case C-391/20, which arose out of domestic proceedings initiated by the Constitutional Court of the Republic of Latvia, dealing with a proposal submitted by 20 members of the Latvian Parliament. The proceedings questioned the compatibility of some provisions of the Latvian Law on Higher Education Institutions (as amended) with EU law. More precisely, it was the provisions of the law that required courses offered by higher education institutions to be conducted exclusively in the state language. The applicants before the Constitutional Court argued the limitation of the autonomy of private higher education institutions and the limitation of the academic freedom of teaching staff and students. The applicants also pointed to the possible restriction of the performance of business activities by institutions of higher education while arguing the creation of barriers to market entry in the field of higher education or violation of the right to provide services and freedom of establishment, according to Article 49 and 56 TFEU.[30, 31]

The concept of national identity, according to Article 4(2) TEU in this proceeding is directly in one of the preliminary questions, where the Constitutional Court of Latvia asks "what aspects need to be taken into account when assessing the reasonableness, appropriateness and adequacy of this legislation in relation to its legitimate goal of protecting official language as an expression of national identity."32 With regard to chapter 2, in which the concept of national identity was analysed in the jurisprudence of the CJEU, this is a case in which the expression of the concept appears as an argument in the main case directly in the preliminary question, which did not happen in previous cases.

The Advocate General addresses the justification of the limitation of Article 49 TEU immediately at the beginning of its analysis, while it clearly states that the disputed provisions lead to a restriction according to Article 49 TFEU.[33] The contested provisions, which, according to the Advocate General, constitute a restriction, are justified by the Latvian government as an expression of the will to protect and promote the use of the official language. The reader can claim that the subject of the proceedings, in which the national language and national identity are concerned, has already appeared in the jurisprudence of the CJEU and was analysed in this article. AG Emiliou's proposals are, however, interesting mainly because of his thoughts in the paragraphs devoted to Article

[29] *Ibidem*, §90 a §92.
[30] Opinion of Advocate General Emiliou of 8 March 2022, *Boriss Cilevičs and others*, C-391/20, ECLI:EU:C:2022:166, §§14-15.
[31] Even though the provisions in dispute were amended as of May 1, 2021, the Constitutional Court of Latvia insisted on continuing the preliminary proceedings.
[32] AG Emiliou, *Boriss Cilevičs and others,* §19.
[33] *Ibidem*, §76.

4(2) TEU. In addition to summarizing general knowledge of the concept of national identity, [34] AG Emilio emphasized the fact that not every national measure for the protection of the state/national language, which is based on the concept of national identity, is compatible with EU law.

What is interesting about AG 's statement is his observation that the CJEU has not yet dealt with the concept of 'national identity' or the content or scope of the concept of national identity. It is the first time ever that such a statement comes from a representative of the Union. Therefore, Emiliou continues his own reflections on the concept of national identity and, from the point of view of Article 4(2) of the TEU, talks about the dual nature of the concept of national identity. On the one hand, he sees the concept as a kind of 'parameter of validity', that is, he views, the concept as a rule that requires the EU lawmaker to consider the national identity of the Member States. On the other hand, he sees the concept of national identity as something that requires EU bodies and institutions (including the judiciary) to always take into account the national identity of the Member States when interpreting and applying the law.[35] Emiliou adds that it is still not clear whether and if so to what extent the concept of national identity can be interpreted in the sense that it introduces a horizontal or general clause that serves as a certain exception to EU rules.[36] With this, he confirms that the CJEU has not yet devoted itself to clarifying the concept of national identity. Regarding the scope of the concept, Emiliou points out that it can only be invoked in connection with the basic constitutional elements of a Member State, and it is up to the Member States to determine these elements that form part of their national identity. However, these basic elements must be compatible with the constitutional framework of the Union, more precisely with the values of the Union, which are reflected in Article 2 of the TEU and the goals of the Union, which are reflected in Article 3 TEU.[37]

In two recent cases, *Hungary v. European Parliament* (C-156/21) and *Poland v. European Parliament* (C-157/21), the Court of Justice dealt with an action for annulment brought identically by Poland and Hungary against a conditionality regulation that introduced a mechanism by which funding can be suspended for Member States that violate the principles of the rule of law. [38] According to some commentators, these two judgments are exceptional precisely because the Court of Justice provided two Member States with more in-depth reasoning than they requested in their applications. Pekka Phajankosi and Niels Kirst even wrote that it is surprising how consistent both decisions are from the point of view of the constitutional law of the European Union and thus state the significance of the judgment for this area of Union law

[34] *Ibidem*, §79.
[35] *Ibidem*, §83.
[36] *Ibidem*, §84.
[37] *Ibidem*, § 87.
[38] Regulation (EU, Euratom) 2020/2092 of the European Parliament and of the Council of 16 December 2020 on the general cross-compliance regime for the protection of the Union budget.

(Pahjankoski,2022, p.3; Kirts, 2022, p.7-8). This case will be analysed only from the part that touches on Article 2 TEU and Article 4(2) TEU.

In §127 of the judgment C-156/21 and in §145 of the judgment C-157/21, the Court (identically) commented for the first time ever on the term 'identity of the European Union' in the sense that *"*the values contained in Article 2 of the TEU, determined and shared by Member States. They define the very identity of the Union as a common legal order."[39,40]

However, let us focus on the arguments the case brought by Hungary, which in its proposals pointed to the vagueness of the concept of the rule of law, which could potentially disrupt the national identity of the Member States according to Article 4(2) TEU. More specifically, Hungary argued that the mechanism introduced by the contested regulation (that is, the control of compliance with the rule of law within the Member State) interferes with the national identity of the Member State by enabling the examination of the legal regulations and actions of the state even in areas that do not belong to the competence of the European Union.[41] In light of this claim, the Court stated that respect for national identity, which is a basic political and constitutional provision as stated in Article 4(2) TEU, represents that the Member States have a certain degree of discretion in ensuring the application of the principles of the rule of law.[42,43] It follows from the arguments of the Court that the Member States have a different national identity, which the Union respects, but together with their membership in the Union they recognize the values in Article 2 TEU, which are the common values of their own constitutional traditions, which they are committed to constantly observe.[44] The rule described above basically follows that the national identity of a Member State cannot be in conflict with the identity of the European Union, and thus one cannot argue with national identity if any national regulation is in conflict with Article 2 TEU. At the same time, it is possible to draw the conclusion from this argumentation of the Court that Article 2 TEU is on the same level as Article 4(2) TEU.

[39] Judgment of the Court of Justice (full court) of 16 February 2022, *Hungary v European Parliament and Council of the European Union*, C-156/21, ECLI:EU:C:2022:97, §127.

[40] Judgment of the Court of Justice (full court) of 16 February 2022, *Poland v. European Parliament and Council*, C-157/21, ECLI:EU:C:2022:98, §145.

[41] *Hungary v European Parliament and Council of the European Union*, §202.

[42] Respectively, regardless of the given case, it is a matter of discretion when ensuring obligations arising from membership in the Union.

[43] *Hungary v European Parliament and Council of the European Union*, §§232-233.

[44] *Ibidem*, §234.

Conclusion: what do we really know about the concept of national identity?

According to Article 4(2) TEU, the concept of national identity is an 'concept' that aims to protect the parts of a Member State's national identity contained in its fundamental political and constitutional system. However, these parts of the national identity must be determined by the Member State itself. Even though this article did not focus on the concept from point of view of the Member States, we will take a moment to look at this before summarizing the analysed knowledge. As already mentioned, we perceive the concept from two levels. The first level concerns the Member States, which *de facto* define their national identity, and the second level is the Union, which has an obligation to respect this national identity but also to set limits to what this identity is. It is even more necessary for the Union to set these limits when recent attempts to apply this concept have been (apparently) made *mala fide.* As an example, there is Poland, which tried to abuse national identity as a way of circumventing the principle of the rule of law. The fact is that even after 30 years of existence of this concept in the EU primary law, it can be concluded that we know a lot and, at the same time, little about it. Why?

Regarding the selected jurisprudence of the CJEU in chapter 2, in which the term 'national identity' appeared, the following can be said: In none of the facts was the direct application of the concept of national identity by the Member State. On the contrary, we can conclude that the term 'national identity' appeared as an argument within the dispute only in cases related to the internal market, as a legitimate reason. In the case of *Commission v. Luxemburg I*, there was a violation of EU citizenship along with the free movement of persons when Luxembourg made the profession of a teacher in the general education system conditioned on Luxembourgish affiliation, which was justified precisely by the protection of the national identity of Luxembourg due to the specific demographic situation. In the latter case, *Commission v. Luxemburg II*, the principle of freedom of establishment was on the contrary, when the Duchy of Luxembourg once again had Luxembourg nationality as a condition for performing notarial activities. In the remaining analysed jurisprudence such as *Spain v. the United Kingdom, Sayn-Wittgenstein, Runevič-Vardyn* and *Coman*, it was about interference with EU citizenship and the free movement of persons. All the cases analysed above point to the fact that 'national identity' and the concept of national identity is a present argument justifying a specific policy or action of the Member State, which tries to protect a particular element within the national system. Therefore, the concept of national identity was presented in the second chapter only as a justification for the intervention of a Member State in one of the freedoms of the internal market.

However, the issue of the concept of national identity has been enriched by the recent judgments of the Court of Justice and the opinions of general advocates, which were presented in chapter 3. In this part, I was interested in the analysis of AG Kokott, who outlined a possible theoretical insight into the

use of the argument of national identity according to Article 4(2) TEU. Her reasoning suggests that it is necessary to distinguish between the so-called 'fundamental expression of national identity' and 'any other expression of national identity'.

This is because a limited review of measures adopted by a Member State to protect its national identity can only occur in the case of a fundamental expression of national identity. These are situations where an act of the European Union can change the national concept or legal institution, which would interfere with the exclusive competence of the Member States in the area concerned. Indeed, the proceedings described in chapter 2 were not a fundamental expression of national identity. In the matter *Commission v. Luxembourg I and II*, whether in the Sayn-Wittgenstein case, it was a restriction of the free movement of citizens, which the Member States based on a legitimate reason, the concept of national identity. For this reason, it is appropriate to agree with the statement and theoretical insight into the concept of national identity of AG Kokott, in the sense that it is necessary to look at what kind of expression of the concept it is and ask the following question*:* Is it a basic expression of the concept of national identity or does the Member State use the concept of national identity as a legitimate reason for restricting some of the freedoms of its citizens? At the same time, however, the content of the national identity of a Member State must be in accordance with the values of the Union in Article 2 TEU, as the CJEU argued in the case *Hungary v. European Parliament.*

From the point of view of the European Union towards the concept of national identity, a slow development can be observed over the period of thirty years. It only accelerated in recent years as a result of the uncontrolled use of the concept by some Member States. At the same time, however, even the Member States did not rush to use this concept for three decades. It is questionable whether such passivity occurred due to a lack of clearness and the concept's vagueness or whether the Union acted during this period in accordance with the principles of subsidiarity and proportionality so that the Member States did not perceive their national identity as threatened.

Bibliography

Besselink, L.F.M., (2010). "National and constitutional identity before and after Lisbon". *Utrecht Law Review*, 6(3), pp.36–49. DOI: http://doi.org/10.18352/ulr.139.

Blagojević, A. (2017) "Procedures regarding National Identity Clause in the National Constitutional Court's and the CJEU's Case-Law". *Procedural Aspects of EU Law: EU and Comparative Law Issues and Challenges Series*, pp. 210-237.

Claes, M. (2012). "Negotiating constitutional identity or whose identity is it anyway?" In M. Claes, M. D. Visser, P. Popelier, & C. V. D. Heyning (Eds.), *Constitutional conversations in Europe. Actors, topics and procedures* (pp. 205-234). *Intersentia. Ius Commune Europaeum* No. 107

Cloots, E. (2015). "National Identity, Constitutional Identity, and Sovereignity in the EU". *Netherlands Journal of Legal Philosophy, 45(2),* pp. 83-98.

Kirts, M. (2022) "Rule of Law Conditionality Before the Court- A Judgment of Constitutional Nature Judgments in C-156/21, Hungary v. Parliament and Council and C-157/21, Poland v. Parliament and Council". *EU law live, 2022*(Weekend Edition No 91), pp.7-11.

Konstadinides, T. (2011). "Constitutional Identity as a Shield and as a Sword: The European Legal Order within the Framework of National Constitutional Settlement". *Cambridge Yearbook of European Legal Studies*, 13, pp. 195-218. DOI:10.5235/152888712801753031

Pohjankoski, P. S. (2022). "The Unveiling of EU's Constitutional Identity: Judgments in C-156/21, Hungary v. Parliament and Council and C-157/21, Poland v. Parliament and Council". *EU Law Live, 2022*(Weekend Edition No 91), pp.3-6.

Rosenfeld, M. (2012). "Constitutional Identity". In M. Rosenfeld, and A. Sajó (Eds.) T*he Oxford Handbook of Comparative Constitutional Law*. (pp. 756-776). Oxford: Oxford University Press. DOI: https://doi.org/10.1093/oxfordhb/9780199578610.013.0037.

Simon, D. 2011 "L'identite constitutionnelle dans la jurisprudence de l'Union europeenne" [Constitutional Identity in the Case Law of the European Union] *L. Burgorgue Larsen (sous la dir. de), L'identité constitutionnelle saisie par les juges en Europe IREDIES Paris 1, Cahiers européens n°*. (pp. 27-43). Paris: Éditions Pedone.

Van Der Schyff, G. (2012) "The Constitutional Relationship Between the European Union and its Member States: The Role of the National identity in Article 4(2) TEU". *European Law Review*, 37 (2012), pp. 567-568.

Von Bogdandy, A., & Schill, S. (2011). "Overcoming Absolute Primacy: Respect for National Identity Under the Lisbon Treaty". *Common Market Review*, 45(5), pp.1417-1453.

Jurisprudence

Judgement of the French Constitutional Council delivered on 27 July 2006, n. 2006-540.

Judgement of the German Constitutional Court, *Lissabon*, BVerfGE, 2 BvE 2/08.

Judgement of the Polish Constitutional Court delivered on 24 November 2010, K 32/09 (*Lisbon Treaty*).

Judgement of the Spanish Constitutional Court, delivered on 13 December 2004, Rs. 1/2004.

Judgment of the Court (Grand Chamber) of 14 December 2021, *V.M.A. v. Stolichna obshtina, rayon 'Pancharevo'*, C-490/20, ECLI:EU:C:2021:1008.

Judgment of the Court (Grand Chamber) of 5 June 2018, *Relu Adrian Coman et al. v Inspectoratul General pentru Imigrări and Ministerul Afacerilor Interne*, C-673/16, ECLI:EU:C:2018:385.

Judgment of the Court (Grand Chamber) of 5 June 2018, *Relu Adrian Coman et al. v. Inspectoratul General pentru Imigrări and Ministerul Afacerilor Interne,* C-673/16, ECLI:EU:C:2018:385.

Judgment of the Court (Second Chamber) of 2 June 2016 *Nabiel Peter Bogendorff von Wolffersdorff v Standesamt der Stadt Karlsruhe and Zentraler Juristischer Dienst der Stadt Karlsruhe,* Reference for a preliminary ruling from the Amtsgericht Karlsruhe, C-438/14, ECLI: EU: C: 2016: 401.

Judgment of the Court of Justice (full court) of 16 February 2022, *Hungary v European Parliament and Council of the European Union*, C-156/21, ECLI:EU:C:2022:97.

Judgment of the Court of Justice (full court) of 16 February 2022, *Poland v. European Parliament and Council*, C-157/21, ECLI:EU:C:2022:98.

Judgment of the Court of Justice (Grand Chamber) of 12 September 2006, *Kingdom of Spain v United Kingdom of Great Britain and Northern Ireland*, C-145/04, ECLI: EU: C: 2006: 543.

Judgment of the Court of Justice (Second Chamber) of 12 May 2011, *Malgožata Runevič-Vardyn and Łukasz Paweł Wardyn v Vilniaus miesto savivaldybės administracija and others*, C-391/09, ECLI: EU: C: 2011: 291.

Judgment of the Court of Justice of 2 July 1996, *Commission of the European Communities v Grand Duchy of Luxembourg*, C-473/93, ECLI: EU: C: 1996: 263.

Judgment of the Court of Justice of 28 November 1989, *Anita Groener v Minister for Education and Dublin City Vocational Training Committee*, C-379/87, ECLI:EU:C:1989:599.

Judgment of the Court of Justice of the EU of 20 December 2010, *Ilonka Sayn-Wittgenstein v. Landeshauptmann von Wien*, C-208/09, ECLI: EU: C: 2010: 806.

Judgment of the European Court of Human Rights of 18 February 1999, *Matthews v United Kingdom*, Application No. 24833/94.

Opinion of Advocate General Emiliou of 8 March 2022, *Boriss Cilevičs and others*, C-391/20, ECLI:EU:C:2022:166.

Opinion of Advocate General Kokott of April 15, 2021, *V.M.A. v Stolichna obshtina, rayon 'Pancharevo'*, C-490/20, ECLI:EU:C:2021:296.

Opinion of Advocate General M. Poiares Maduro delivered on 20 September 2005 in Case C-53/04 *Marrosu and Sardino*.

Opinion of Advocate General M. Poiares Maduro delivered on 8 October 2008, in Case C-213/07 *Michaniki*.

Regulation (EU, Euratom) 2020/2092 of the European Parliament and of the Council of 16 December 2020 on the general cross-compliance regime for the protection of the Union budget.