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ON A CONSTITUTIONAL AND NATIONAL IDENTITY OF THE EU MEMBER STATES: SAME BUT DIFFERENT? [1,2]

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Abstract
This article examines whether the concepts of national identity and constitutional identity in the European Union's legal framework can be used interchangeably. By tracing the historical evolution and *travaux préparatoires* of Article 4(2) TEU, the paper demonstrates that the drafters consistently employed the term national identity as an autonomous concept of EU primary law, deliberately omitting any reference to constitutionality. Building on the theoretical framework proposed by Elise Cloots, the article develops a teleological and interpretative argument showing that the interchangeable use of these terms lacks textual and historical support. It then examines how Member States' constitutional courts, particularly the German Federal Constitutional Court have constructed a doctrine of constitutional identity review rooted in national constitutional law. This jurisprudence distinguishes constitutional identity as an absolute, domestically defined limit to European integration, while national identity under Article 4(2) TEU functions as a principle of respect constraining the exercise of Union competences. The article concludes that conflating these two notions risks both conceptual confusion and constitutional deadlock within the EU. A clear differentiation between national and constitutional identity is therefore essential for maintaining a coherent balance between national sovereignty and the primacy of EU law.
Keywords: *constitutional identity, national identity, constitutional law, primacy, sovereignty*

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1. Introduction

Almost twenty-five years after its adoption, the Maastricht Treaty remains a milestone that reshaped European integration by creating the European Union (EU) as we know it today. While the Treaty of Lisbon (2009) revised the founding treaties into their current form, certain provisions, most notably Article 4(2) of the Treaty on European Union (TEU), continue to provoke scholarly debate that is far from concluded.

The Maastricht Treaty introduced the three-pillar structure and expanded EU competences into areas previously reserved for Member States, including foreign policy, defence, and justice. In response, Member States sought safeguards to protect sovereignty, leading to the inclusion of two key concepts: subsidiarity (now Article 5(3) TEU) and respect for national identity (now Article 4(2) TEU) (Cloots, 2015).

Article 4(2) TEU requires the EU to respect the equality of Member States before the Treaties, their *national identities*, and their essential state functions. The reference *to "national identities"* has become the focal point of academic discourse (see Schnettger, 2021; von Bogdandy & Schill, 2011; Blagojević, 2017; Konstadinides, 2013a). Some authors regard it as a *national constitutional identity clause* (Blagojević, 2017), while others use "national" and "constitutional" identity interchangeably (von Bogdandy & Schill, 2011). This ambiguity is mirrored in the jurisprudence of national constitutional courts, which invoke Article 4(2) TEU in diverse and sometimes inconsistent ways (Trybunał Konstytucyjny, 2021a; 2021b; Alkotmánybíróság, 2021).

The differing approaches across Member States (particularly Germany, Italy, and Poland) illustrate the uncertainty surrounding identity protection. Key questions persist: Are the terms *national* and *constitutional identity* equivalent? Does Article 4(2) TEU protect both, or only the former? And how is this distinction applied in practice?

Building on previous research (Kiššová, 2021; 2022a; 2022b; 2023), this article argues that Article 4(2) TEU enshrines a *national identity clause*, whereas constitutional courts have developed *constitutional identity* through their case law. Thus, equating the two is conceptually inaccurate. This critique follows Cloots (2016), who contends that conflating these terms undermines analytical clarity and legal precision.

The article therefore aims to refine Cloots' reasoning and provide a framework distinguishing *national identity* from *constitutional identity* within Article 4(2) TEU. It contends that maintaining this distinction is essential for preserving the balance between EU integration and Member States' constitutional autonomy, thereby preventing potential interpretative and institutional deadlocks within the Union.

2. Reviewing Cloots' views on the non-interchangeability of the two concepts

In her article, Cloots (2016, p. 83) presents three main arguments explaining why *national identity* and *constitutional identity* cannot be used interchangeably in relation to Article 4(2) TEU. First, she grounds her reasoning in the theory of legal interpretation. Second, she argues that the protection of *national identity* and the protection of *constitutional identity* are based on different normative assumptions. Third, she emphasises that the drafters of the Treaties had sound reasons for employing the term *national identity* rather than *constitutional identity*.

I will now focus more closely on Cloots' first argument, in which she contends that interpreting Article 4(2) TEU through the lens of *constitutional identity* lacks a sound foundation in legal interpretation theory. According to Cloots (2016, p. 83), several authors have referred to Article 4(2) TEU in different ways, most commonly framing it as an expression of *national constitutional identity* or, alternatively, as *constitutional identity* in a general sense. It is indeed the case that, when examining scholarly works addressing Article 4(2) TEU, the vast majority of authors use the terms interchangeably, often without reflecting on whether such usage is appropriate (See: Besselink, 2010; Besselink, 2012; Claes, 2012; Konstadinides, 2013b). I concur with Cloots on this point, as my own analysis likewise confirms that academic literature frequently employs both concepts interchangeably (see: Callies & Van der Schyff, 2021; Drinóczi, 2020; Hamuľák, Kopal, & Kerikmäe, 2017; Kelemen & Pech, 2019). The cases analysed in these studies primarily concern issues of constitutional pluralism and constitutional identity, either within selected Member States or specifically in the contexts of Hungary, Poland, and Germany. In these works, the authors employ the term of *constitutional identity* in relation to Article 4(2) TEU. Their analyses focus either on the general notion of *constitutional identity* or on its application in the case law of the Court of Justice of the European Union (hereinafter also referred to as "CJEU") and the constitutional courts of individual Member States, including the Federal Constitutional Court of Germany (*Bundesverfassungsgericht*) (hereinafter also referred to as "BVerfG"), which is discussed later in this article.

Cloots (2016, p. 84) contends that the authors thereby engage in what she describes as a "conceptual leap," which, in her view, lacks substantive justification. She argues that this "conceptual leap" is not founded on a sound theory of legal interpretation. At best, it seems that the authors implicitly assume that the drafters of the Lisbon Treaty intended to reassure constitutional courts that had insisted on the recognition of their respective constitutional orders. In this regard, Cloots argues that such authors appear to interpret Article 4(2) TEU through an *"intentionalist interpretation"* referring to the intention

of the treaty-makers, i.e. the drafters of the Lisbon revision which rephrased Article 4(2) TEU into its current form. Cloots (2016, pp. 85–86) advances two counterarguments: first, that the so-called *"intentionalist approach to the theory of legal interpretation"* is widely contested, and second, that EU law lacks an *"tradition of intentionalism"*, as the Court of Justice rarely relies on the drafters' intentions or historical records in its interpretive practice.

At this juncture, however, I take the liberty of engaging critically with Cloots's argument regarding the absence of an intentionalist tradition in the jurisprudence of the Court of Justice, thereby laying the foundation for the present article. It is indeed true that, for a considerable period, the Court refrained from relying on the *travaux préparatoires* when interpreting the Treaties, largely due to their general unavailability.[4] Yet, in later CJEU case law, most notably in *Pringle*[5] and/or *Inuit Tapiriit*[6], the Court appears to have relied on a teleological approach when addressing preliminary reference question. In the case *Inuit Tapiriit*, the General Court employed a teleological interpretation to determine the purpose of introducing the notion of a *"regulatory act"* in Article 263(4) Treaty on the Functioning of the European Union (hereinafter also referred to aa "TFEU") by analysing the drafting history of that provision (Lenaerts & Gutiérrez-Fons, 2013, pp. 19–20). In the appellate proceedings in this case, Advocate General Kokott expressly addressed the use of *travaux préparatoires*, emphasising that, owing to the increased transparency in the treaty revision process, *travaux préparatoires* are emerging as a new and useful supplementary interpretative tool for the interpretation of EU primary law, provided that the wording, context, and objectives of a provision do not yield a clear answer.[7]

While I concur with Cloots in her position that the concepts of *national identity* and *constitutional identity* cannot be conflated under Article 4(2) TEU, I intend to expand her argument by relying precisely on a teleological (and to some extent intentionalist) interpretation of Article 4(2) TEU. For this reason, the following analysis will primarily examine the drafting history of Article 4(2) TEU. Subsequently, the argument regarding the non-interchangeability of the two concepts will be further developed through an analysis of the approach adopted by one of the most active guardians of *constitutional identity* – the

[4] See: Opinion of Advocate General Mayras delivered on 28 May 1974 in *Reyners v Belgium*, Case 2/74, ECLI:EU:C:1974:59, p. 666.

[5] Judgement of the Court of Justice of the European Union of 27 November 2012, *Thomas Pringle v Government of Ireland and Others*, Case C-370/12, EU:C:2012:756, para. 135.

[6] Judgement of the General Court of 6 September 2011, Case T-18/10 *Inuit Tapiriit Kanatami and Others v European Parliament and Council*, EU:T:2011:419.

[7] Opinion of Advocate General Kokott delivered on 17 January 2013 in *Inuit Tapiriit Kanatami and Others v European Parliament and Council,* Case C-583/11 P, *ECLI*:EU:C:2013:2, para. 39.

BVerfG. This analysis builds upon Cloots's (2016, p. 83) observation concerning the distinct theoretical narratives underpinning these two concepts. The central hypothesis of this article may therefore be formulated as follows: *Under Article 4(2) TEU, the concept of national identity cannot be equated with that of constitutional identity*.

3. Extending Cloots' views on the non-interchangeability of the two concepts

In this chapter, I will build upon Cloots's (2016) analysis and draw on an examination of the previous revisions of Article 4(2) TEU. In doing so, I demonstrate that the drafters of the Treaties never intended to introduce the term "constitutional" in this context but, from the outset, consistently framed the concept in EU primary law by reference to the term *national*. I then proceed to analyse each relevant treaty revision and its *travaux préparatoires*.

3.1. National identity in the process of treaty revision: from Maastricht to Lisbon

3.1.1. The Maastricht Treaty

The preparation of the Maastricht Treaty was carried out within the framework of two parallel Intergovernmental Conferences (one devoted to Economic and Monetary Union and the other to Political Union), held during the Luxembourg and Dutch Presidencies. The Conferences were launched at the Council meeting in Rome in December 1990 and concluded approximately one year later at the European Council of 9–10 December 1991 in Maastricht (Loth, 2013, pp. 67–84). With respect to Article 4(2) TEU, there are no relevant *travaux préparatoires* originating from the drafting of the Maastricht Treaty.[8] In my view, however, the various draft versions of the Treaty shed light on the background of the drafting process. The observable changes in the provision concerning the *national identity clause* invite reflection on why these specific modifications were introduced into the text.

In April and June 1991, the Luxembourg Presidency presented two separate drafts of the Maastricht Treaty. clause appeared in Article D(1) of the first draft and in Article G(1) of the second draft. The wording of Article D(1) was as follows (Noël, 2025):

[8] The available *travaux préparatoires* contain no references to the drafting process of Article F. See: *Draft Treaty amending the Treaty establishing the European Economic Community with a view to achieving Economic and Monetary Union*, *Bulletin of the European Communities*, Supplement 2/91.

"The Union shall exercise its powers with due respect for the national identity of the Member States and their constitutional systems founded on democratic principles."

From this wording, it is evident that the drafters intended from the outset to employ the term *national identity* while, according to a grammatical interpretation, simultaneously distinguishing the constitutional systems from that concept through the use of the conjunction "and". It can therefore be argued that, already in the very first draft, *national identity* appeared as an autonomous notion, distinct from "the constitutional systems of the Member States", which could otherwise be understood as denoting *constitutional identity*.

It is therefore particularly relevant to examine the wording in the second Luxembourg draft of the TEU, in which Article G(1) removed any reference to constitutionality, resulting in the following formulation:

"The Union shall respect the national identity of its Member States, whose systems of government are founded on democratic principles."[9]

Here, the modification in the text regarding the scope of the Union's obligation is also noteworthy. The original clause "*The Union shall exercise its powers with due respect for…"* was replaced with the more neutral *"The Union shall respect..."*. As a result, the provision no longer delineated the ambit of the Union's competences nor the scope of the obligation.

At this stage, divergent language in the linguistic versions may also be observed. In the French versions of both drafts, the verb *respecter* was consistently employed in relation to Article D(1) and (2), as well as Article G(1) and (2). In contrast, the English versions of different draft texts referred to the Union's duty to *"have due regard"* to the *national identity* of the Member States. Only in the final version of the Maastricht Treaty was this obligation reformulated in the English text as *"respect"*. This discrepancy is particularly striking, as the formulation *"have due regard"* appears, in terms of both formality and binding force, stronger than the term *"respect"*.

In the draft presented by the Dutch Presidency in September 1991, the *national identity clause* was absent altogether and was therefore not the subject of further discussions after the second Luxembourg draft.[10] The Maastricht

[9] *Projet de traité sur l'Union de la présidence luxembourgeoise* [Draft Treaty]. (1991, June 18). Luxembourg. Retrieved from: https://www.cvce.eu/en/obj/projet_de_traite_sur_l_union_de_la_presidence_luxembourgeoise_luxembourg_18_juin_1991-fr-dbebd2a6-a860-4915-8edf-0a228ecde976.html.

[10] *Projet de traité vers l'Union européenne de la présidence néerlandaise* [Draft Treaty]. (1991, September 24). Maastricht. Retrieved from: https://www.cvce.eu/en/obj/projet_de_traite_vers_l_union_europeenne_de_la_preside

Treaty, signed on 7 February 1992, eventually codified the *national identity clause* in Article F(1) in essentially the following unchanged wording:

"The Union shall respect the national identity of its Member States, whose systems of government are founded on the principles of democracy."[11]

The Maastricht Treaty thus marked the first introduction of *national identity clause* into EU primary law as an autonomous legal notion, without any reference to the constitutional systems of the Member States or any other indication of a linkage between *national identity* and *constitutional identity*. At the same time, the drafters did not shy away from engaging with constitutionality altogether. Article F(2) laid down the Union's obligation to respect *"...fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950, and as they result from the constitutional traditions common to the Member States, as general principles of Community law".* This provision played an essential role in primary law at that stage of integration, since the EU had not yet codified fundamental rights in its own legal order. The Union therefore committed to respecting fundamental rights derived from the constitutional traditions common to the Member States, but only as general principles of EU law. In my view, the drafters (as can be inferred from the changes observed between the two Luxembourg drafts) clearly intended to separate the *national identity clause* from any reference to the constitutionality of Member States.

The *national identity clause*, as introduced by the Maastricht Treaty, subsequently generated uncertainty, particularly regarding its potential interchangeability with *constitutional identity*, an uncertainty that began to dissipate only gradually with the progressive implementation of various areas of EU integration. What, precisely, constitutes the *national identity* of a Member State? Is this clause legally enforceable by the Member States, or is it merely a political declaration by the Union *vis-à-vis* the Member States? Does the *national identity clause* serve as a barrier between Member State sovereignty and the primacy of EU law?

One would logically expect answers to these questions to be found primarily in CJEU case law. Yet, when drafting the Maastricht Treaty, Member States deliberately chose not to confer upon the Court jurisdiction to interpret or review the common provisions of the Treaty, which at that time included the

nce_neerlandaise_maastricht_24_septembre_1991-fr-d39ea094-caef-4bab-a345-f8ba104bb740.html.

[11] European Union. (1992). Treaty on European Union (Maastricht Treaty). Official Journal of the European Communities, C 191, 1-112.

national identity clause.[12] Llivina (2014, pp. 150–151; see also von Bogdandy & Schill, 2010, p. 706) argues that the rationale behind this choice lies in Article F(2). The Member States, she explains, were reluctant to *"hand over the gavel"* to the Court in such a sensitive domain as fundamental rights and freedoms, fearing in particular that the Court might also claim interpretative authority over *national identity* as enshrined in Article F(1).[13]

3.1.2. The Amsterdam and Nice Treaties: Article 6(3) TEU

With the adoption of the Amsterdam Treaty, the European Union was preparing for the accession of the post-communist countries within the framework of the so-called "big enlargement" of 2004. By enshrining in Article 6(1) TEU the declaration that "the Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, principles which are common to the legal systems of the Member States," fundamental rights ceased to be merely general principles of EU law as referred to in Article F. Instead, they became a foundational principle of the Union, legally enforceable under the TEU – then Article 7 TEU, Article 309 EC, or Article 46 TEU (see Molinier, 2005). However, with the enshrinement of the principles in Article 6(1) TEU, the *national identity clause* was "relegated" to Article 6(3) TEU, in the following shortened form:

"The Union shall respect the national identities of its Member States."[14]

From the wording of the clause, the phrase *"... whose systems of government are founded on the principles of democracy"* disappeared. In my view, the reason for this omission lies in the fact that the principle of democracy had, by then, been expressly incorporated among the values set out in Article 6(1) TEU, and it was therefore no longer necessary to reiterate it in the context of *national identity clause*. At the same time, the newly inserted Article 46 TEU conferred on the Court of Justice jurisdiction to review compliance with Article 6(2) TEU. The *national identity clause*, however, remained excluded from judicial review. The Treaty of Nice did not introduce any changes with regard to the *national identity clause*.

[12] Article L of the Maastricht Treaty.

[13] Nonetheless, during this period, one CJEU judgment referred to national identity where the Court held that respect for the national identity of the Member States constitutes merely a *"legitimate aim"* and therefore should not be balanced against other principles of the European Union. See: Judgment of the Court of Justice of 2 July 1996, *Commission of the European Communities v Grand Duchy of Luxembourg*, Case C-473/93, ECLI:EU:C:1996:263, para. 35.

[14] European Union. (1997, October 2). Treaty of Amsterdam amending the Treaty on European Union, the Treaties establishing the European Communities and certain related acts. Official Journal of the European Communities, C 340, 1-144.

3.1.3. The Draft Treaty on the Constitution for Europe: The One That Tells Us the Most?

It is rather paradoxical that the milestone in the history of the European Union, which I dare to describe as one of the greater setbacks of European integration, is also the one for which we have the richest collection of *travaux préparatoires* since the Maastricht Treaty. Why, then, should one look behind the scenes of the drafting process of a treaty that never entered into force? The relevance lies precisely in the fact that the drafters of the Lisbon Treaty drew extensively upon the Draft Treaty on the Constitution for Europe (hereinafter also referred as *"Draft Constitutional Treaty")*. The very notion of *national identity*, as developed in the *Draft Constitutional Treaty*, was formulated in almost identical terms to those found today in Article 4(2) TEU. The drafters of the *Draft Constitutional Treaty* paid particular attention to articulating this concept, and the corresponding *travaux préparatoires* provide us with the most comprehensive insight into how the idea of *national identity* was conceived and shaped. Let us therefore proceed step by step.

The 2004 and 2007 EU enlargements exposed institutional limits of the Nice Treaty framework. To address them, the European Council convened the 2001 Convention on the Future of Europe in Laeken to prepare a new constitutional framework. Eleven working groups examined key issues – division of competences, treaty simplification, democratic legitimacy, and a coherent constitutional document. Their work culminated in the Draft Constitutional Treaty, which ultimately exceeded the initial expectations of its drafters.

For this article, particular importance lies in Working Group V, chaired by Henning Christophersen, which examined complementary competences, areas of national policy closely linked to Member States' identity (Working Group V, 2002a, p. 1). The group focused on redefining these competences and clarifying the overall division of powers, emphasising that the Union may act only within the limits conferred by the Treaties. It also highlighted the need for clear, citizen-oriented definitions that would distinctly separate Union and national powers. (Working Group V, 2002a, pp. 2–3).

During the deliberations of the Working Group V, Christophersen issued an independent *Opinion Paper* outlining several possible models for defining the limits of the Union's competences within the Treaty framework (Christophersen, 2002a, pp. 2–3). Among the four proposed models (the *Community Model*, the *Union Model*, the *Constitutional Model*, and the *Political Model*) it was the Union Model that explicitly incorporated the notion *of national identity* as a potential criterion for demarcating the boundaries of EU competence. According to Christophersen (2002, p. 2), the Union Model possessed a key advantage: it was already embedded within the TEU framework and was thus both familiar and adaptable, allowing it to be expanded to address matters of particular relevance to citizens. Christophersen (2002a, p. 2) went even further by proposing an extended interpretation of the *national identity clause* (then enshrined in Article 6(3) TEU) suggesting that the *national identity* of the Member States encompasses their constitutional and political

structures, including regional and local organisation, the administration and enforcement of law (except where the Treaties provide otherwise), relations between the state and the church, policies concerning income redistribution and the maintenance or enhancement of social welfare benefits, the exclusive right to levy personal taxes, and so forth.

Christophersen's ideas articulated in his *Opinion Paper* were subsequently reflected in the final report of the Working Group V, which provided a comprehensive examination of the division of competences within the Union. Spanning eighteen pages, the report advanced a number of proposals that, in modified form, can be discerned in the current Treaty framework following the Lisbon revision. Particularly noteworthy is Part Seven of the report, which addressed the principles governing the exercise of EU competences. Alongside the core principle of competence allocation, the Working Group V explicitly identified respect for *national identity* as one such guiding principle. It is, however, striking that the concept was not placed among the *"other general principles governing the exercise of competence"*, a category that included, for example, subsidiarity and proportionality (Working Group V, 2002a, p. 13).

From its inception, the *Draft Constitutional Treaty* drafters appear to have regarded *national identity* as a distinct and self-standing legal instrument within primary law, intended to delineate the substantive limits of the Union's powers. This understanding is further reinforced by the explicit formulation of the principle in the Working Group's report, which described it as *"a fundamental principle... [that] constitutes essential elements of national identity, which the EU must respect in the exercise of its competence"* (Working Group V, 2002a, p. 10). Had this not been the case, one would likely have encountered critical reactions from other members of the Convention to the content of Working Group V's final report. Further evidence supporting this understanding emerges from other contemporaneous materials, notably the report by Joachim Wuermelling (representing the European Parliament) which endorsed the view that the *national identity clause "should give the impression of a list of 'important competences' of the Member States rather than a negative catalogue of Union competences"* (Working Group V, 2002b, p. 4). Equally relevant is Christophersen's concluding statement (2002b, pp. 6–7) on the outcome of Working Group V's deliberations at the Convention, in which he characterised respect for *national identity* as a provision operating concurrently with the exercise of Union competences – that is, wherever the EU acts within the scope of its conferred powers, it must do so in accordance with the principle of respect for *national identity*. Importantly, the intention of the Working Group V was not to substantively alter the concept, but to render it more transparent and accessible to EU citizens.

The remainder of Section 7 of Working Group V's final report is crucial for interpreting the *national identity* clause, offering rare insight into how the concept was understood – insight absent for Article 4(2) TEU due to the lack of Lisbon *travaux préparatoires*. In framing national identity as a limit on Union competences, Working Group V likely drew inspiration from

Christophersen's Union Model. Consequently, this formulation has come to be referred to as the "Christophersen clause" (Christophersen, 2002a, p. 2; see also: von Bogdandy & Schill, 2011, p. 1426). The Working Group V (2002a, p. 11) focused on two areas in which it identified the competences of the Member States as fundamental *(i) the basic structures and essential functions of the Member State*, which included: (a) the political and constitutional structure, including regional and local self-government; (b) state citizenship; (c) territory; (d) the legal status of churches and religious communities; (e) national defence and the organisation of armed forces; (f) the choice of official languages; and (ii) *the fundamental public policy choices and social values of the Member State*, which included: (a) income redistribution policy; (b) taxation and the selection of specific taxes; (c) the social security benefits system; (d) the education system; (e) the public healthcare system; (f) the preservation and development of culture; and (g) compulsory military or civilian service. The Working Group V thus emphasised the need to clarify Article 6(3) TEU, as only in this way could the main concerns expressed within the group and in other forums regarding the preservation of the role and significance of the Member States in the Treaties be properly addressed. However, the report provides no clear explanation as to why some elements were classified as *basic state structures* while others were treated as *fundamental public policy choices and social values of the Member State*. Of particular note is Working Group V's conclusion that such a provision neither constitutes nor establishes an exception. Member States thus remain bound by the Treaties, yet, at the same time, this does not mean that Union activity can never affect these areas (Working Group V, 2002a, p. 11).

In the final draft of the *Draft Constitutional Treaty*, the *national identity clause* was codified in Article I-5(1), entitled *"Relations between the Union and the Member States",* which provided as follows:

"The Union shall respect the equality of Member States before the Constitution as well as their national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government. It shall respect their essential State functions, including ensuring the territorial integrity of the State, maintaining law and order and safeguarding national security."[15]

The provision delineates the dual dimension of the principle: the structural (respect for Member States' constitutional and political organisation) and the functional (recognition of their essential state functions). Its wording anticipates almost verbatim the formulation later enshrined in Article 4(2) TEU, thereby confirming a strong line of textual and conceptual continuity between the *Draft Constitutional Treaty* and the Lisbon revision. This continuity suggests that the Lisbon drafters did not conceive *national identity* as a newly

[15] Official text from the Draft Treaty establishing a Constitution for Europe, OJ C 310, 16 December 2004, p. 11.

created legal instrument but rather as a refined constitutional safeguard, inherited from the Convention's work, designed to preserve the core elements of Member State sovereignty within the evolving constitutional framework of the Union.

The analysis of the *Draft Constitutional Treaty* yields several observations relevant to the present inquiry. First, the *national identity clause* was never conceived as a negative delimitation of competences, nor as a derogation from EU law. Instead, it was envisaged as a principle operating on the same normative plane as the doctrine of primacy of EU law, aimed at safeguarding certain domains where the Union exercised so-called functional competences. Secondly, the deliberations of the Working Group V attributed to *national identity* a considerably broader set of fundamental elements than the "basic political and constitutional structures" that now dominate the formulation of Article 4(2) TEU. Finally, and perhaps most importantly, the *travaux préparatoires* reveal no meaningful engagement with the idea of *constitutional identity* in conjunction with the term of *national identity*. This conceptual separation would only emerge later, through post-Lisbon judicial and academic developments.

3.1.4. Lisbon Behind Closed Doors: The Unrecorded Identity and the Continuity Beneath Silence?

The rejection of the Draft Constitutional Treaty ushered in a period of ambivalence—both closure and unfinished business—that, despite political disappointment, was intended as a phase of institutional self-reflection (Luxembourg Presidency, 2005). This period ended with Germany's 2007 Council Presidency, which raised expectations for renewed leadership in shaping the Union's future.

The Berlin Declaration, adopted on the fiftieth anniversary of the Treaties of Rome, became the first concrete step forward. Serving as both political roadmap and symbolic recommitment, it outlined the framework for negotiations on a new treaty to be endorsed by the European Council in June 2007 (European Communities, 2007). Germany then initiated discreet bilateral consultations with Member State governments to secure rapid consensus.

These talks revealed two opposing camps: those seeking to preserve the substantive content of the failed Constitutional Treaty and those preferring a return to the institutional framework of Nice. The ensuing Intergovernmental Conference operated under similar confidentiality, leaving no record of *travaux préparatoires* and depriving scholars of the interpretative material available during the Convention process.

While the broader institutional reforms of the Lisbon Treaty have been thoroughly examined elsewhere (Piris, 2010; Giuliani, 2007), the present discussion focuses specifically on the national identity clause now codified in Article 4(2) TEU.

It may be observed that the Lisbon Treaty reproduced Christophersen's clause almost verbatim, as originally formulated in Article I-5 of the Draft Constitutional Treaty. The sole substantive addition distinguishing Article 4(2) TEU from its constitutional predecessor is the inclusion of a third sentence explicitly reaffirming that *"in particular, national security remains the sole responsibility of each Member State".* The consolidated wording of the *national identity clause* now reads as follows:

„The Union shall respect the equality of Member States before the Treaties as well as their national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government. It shall respect their essential State functions, including ensuring the territorial integrity of the State, maintaining law and order and safeguarding national security. In particular, national security remains the sole responsibility of each Member State."[16]

Although *travaux préparatoires* for the Lisbon revision are largely unavailable, it remains debatable whether one may accept the thesis that, since no textual amendments were introduced to the provision as originally proposed in the Draft Constitutional Treaty, reliance may nonetheless be placed on the preparatory documents related to that draft.

For the purposes of this article, I accept this thesis, since if the wording of the provision remained unchanged, it is reasonable to assume that its substance and underlying rationale did not change either. Accepting this interpretative premise means advancing and substantiating the argument that *national identity clause* is intrinsically linked to the exercise of the Union's competences and does not constitute a derogation clause for the Member States.

What, however, remains "shrouded in mystery" is the rationale behind the systematic placement of the concept within Article 4 TEU positioned between the principle of conferral and the principle of sincere cooperation. In my opinion, its placement within the general provisions of the TEU, immediately following Article 4(1) TEU, which codifies the principle of conferred competences, confirms its function as a structural safeguard delimiting the scope of Union action within its competences.

Building on the preceding analysis, this section advances three claims. First, from Maastricht through Lisbon the terminology has remained stable: treaty drafts and revision working groups consistently speak of *national identity*. Second, if one accepts that Working Group V drew on the earlier drafting efforts, the *travaux préparatoires* to the Draft Constitutional Treaty provide a legitimate conceptual baseline for defining the meaning and function

[16] Consolidated version of the Treaty on European Union, OJ C 326, 26 October 2012, p. 17.

of the clause in EU primary law. Third, a purely drafting-history perspective is ultimately inadequate. The absence of Lisbon's *travaux préparatoires* undermines institutional memory and weakens transparency in a constitutional project of this scale – a shortcoming that warrants explicit criticism.

Consequently, the analysis must turn to Member States' practice: how national authorities understand and operationalise Article 4(2) TEU in practice. That inquiry also illuminates the important non-equivalence between *national identity* and *constitutional identity*, which should not be treated as interchangeable categories.

3.2. Constitutional Courts and protection of identity: the case of Germany

The term of identity entered the European scholarly discourse in a systematic manner only in the second half of the twentieth century. From the 1960s onwards, it gradually became a subject of sustained scholarly inquiry across disciplines including history, philosophy, sociology, and political science (e.g. see: Bartal, 1998; Brubaker & Cooper, 2000). Conceptual frameworks emerging from the humanities and social sciences thus gradually began to influence legal scholarship, drawing legal theorists into discussions on the term of identity. Nevertheless, law as a discipline entered this debate relatively late: for a long period, the concept of identity had little, if any, significance within the legal reasoning of the European Community.

A turning point came with the transition from the European Communities to the European Union. A process of profound constitutional and structural transformation characterized by the establishment of the Economic and Monetary Union and the introduction of the Union's three-pillar system (Patakyová et al., 2025, pp. 82–83). In this new institutional setting, the idea of *national identity* became embedded in the Union's treaty framework.

Membership in the European Union entails not only a partial transfer of sovereignty from the national to the Union level but also an inherent recalibration of the constitutional order within the Member States. Successive revisions of the Union's founding treaties have introduced far-reaching transformations that, in turn, prompted Member States to articulate their constitutional boundaries *vis-à-vis* the expanding scope of EU competences. From the outset, several Member States voiced concerns about the potential encroachment of EU law upon their domestic legal orders, seeking to preserve the fundamental principles of statehood – the so-called hard core (material core) of their constitutions. In this respect, Germany and Italy stand out for their long-standing constitutional jurisprudence resisting the idea of the absolute supremacy of EU law, instead promoting a vision of conditional primacy grounded in the protection of *constitutional identity*.[17] Both constitutional

[17] For example see: *Corte costituzionale*, judgment of 18 December 1973, No. 183/1973, [*Frontini*]; *Corte costituzionale*, judgment of 22 October 1975, No. 232/1975, [*Industrie Chimiche Italia Centrale*]; *Corte costituzionale*, judgment of 5

courts have sought to safeguard those elements of their domestic constitutional orders that are deemed inviolable and non-transferable, and therefore lie beyond the reach of the integration process. It is within this context that the notion of *constitutional identity* began to emerge with increasing prominence. As reflected in their constitutional jurisprudence, the notion carries a meaning distinct from that of *national identity* as enshrined in Article 4(2) TEU.

In particular, the BVerfG progressively articulated the doctrine of *constitutional identity* as a protective shield against the encroachment of EU law into domains regarded as forming the essential core of the German constitutional order. As part of this jurisprudential evolution, the BVerfG formulated two complementary doctrines: the *ultra vires review* and the *constitutional identity review* – both designed to demarcate the limits of permissible European integration and to safeguard the core principles protected by the eternity clause of the German Constitution *(Grundgesetz)* (hereinafter also referred as "the GG"). Since I have examined the *ultra vires doctrine* in detail elsewhere (see: Kiššová, 2022a), the following discussion will focus on *the constitutional identity review,* as developed and refined by the BVerfG in its post-Maastricht and Lisbon case law.

From a historical perspective, the term *constitutional identity* first appeared in the case law of the BVerfG in the 1970s. Since then, the Court has further developed this concept and gradually applied it within the context of the relationship with the legal order of the European Union, particularly when assessing the claim of the absolute supremacy of EU law. In this regard, the judgments in *Solange I* and *Solange II* are of key importance,[18] as they marked the Court's first use of the so-called *ultra vires doctrine*. The following section focuses primarily on the *Lisbon Treaty decision* and the *OMT decision*, in which the BVerfG explicitly elaborated on the notion of *constitutional identity*.

3.2.1. The Lisbon Treaty Judgement

The *Lisbon Treaty* judgment represents a pivotal moment in this analysis, as the BVerfG not only delineated the outer limits of the European integration process, but also articulated the doctrine of *constitutional identity review*. At first sight, it may seem that the BVerfG operates primarily with the term of *national identity*, a concept that appears repeatedly throughout the judgment. In conjunction with Article 50 TEU, the Court refers to *national identity* as a legal instrument serving the protection of state sovereignty.[19]

However, the BVerfG subsequently elaborates on these considerations in a distinct doctrinal direction, shifting the focus from the protection of *national identity* under EU law to the preservation of *constitutional identity*

June 1984, No. 170/1984, [*Granital*]; *Corte costituzionale*, judgment of 13–21 April 1989, No. 232/1989, [*Fragd*].

[18] *BVerfG*, Judgment of 29 May 1974, Case 2 BvL 52/71; *BVerfG*, Judgment of 22 October 1986, 2 BvR 197/83.

[19] *BVerfG*, Judgment of 30 June 2009, 2 BvE 2/08, (*Lisbon Judgment*), para. 153.

under the GG. A cornerstone of this doctrinal development is Article 79(3) of the GG to which the BVerfG accords the status of an *eternity clause*. This provision encapsulates the very essence of Germany's *constitutional identity*, safeguarding it from amendment or erosion. Specifically, Article 79(3) renders immutable Articles 1 to 20 GG, which enshrine the core constitutional principles of human dignity, personal liberty, the rule of law, democracy, and federalism.[20]

In its comprehensive assessment of the compatibility of the Lisbon Treaty with the GG, the BVerfG concluded that the transfer of sovereign powers to the European Union must not extend into areas safeguarded by the eternity clause of Article 79(3) GG. The Court identified a number of constitutionally sensitive domains that are essential for preserving Germany's democratic capacity for self-determination. These domains encompass, e.g. criminal law and the state's monopoly on the use of force, fiscal autonomy in determining public revenue and expenditure, the constitutional configuration of the welfare state, as well as culturally embedded areas such as family law, education, and religious affairs. Collectively, these spheres constitute the core elements of Germany's *constitutional identity* that remain beyond the reach of European integration.[21]

The BVerfG emphasised that criminal law is deeply rooted in each state's cultural, historical, and linguistic context. While recognising shared European values, particularly the right to a fair trial, the Court held that harmonisation of criminal law within the EU is feasible only to a limited extent and mainly in cross-border cases.[22]

The BVerfG similarly held that decisions on the use of armed forces must remain at the national level and cannot be transferred to supranational bodies, even within collective security frameworks, as such delegation would breach the constitutional principles of peace and democracy enshrined in Article 23(1) GG.[23]

In the fiscal sphere, the BVerfG stressed that the Bundestag must retain ultimate authority over budgetary decisions. Although not every financial commitment arising from Germany's participation in the EU or other international bodies violates this principle, the Court affirmed that parliamentary budgetary autonomy constitutes a non-transferable core element of Germany's constitutional identity.[24] The Court further held that social policy must remain primarily within the domestic competence of Germany, given that the European Union's powers in this area are limited and subsidiary in nature.[25] The BVerfG also identified education, family law, and religion as integral to Germany's *constitutional identity*, arguing that these areas, deeply rooted in

[20] *Ibidem*, paras. 216–217.
[21] *Ibidem*, para. 252.
[22] *Ibidem*, para. 253.
[23] *Ibidem*, paras. 254–255.
[24] *Ibidem*, para. 256.
[25] *Ibidem*, paras. 257–259.

national history and culture, must remain within domestic competence. By emphasising them, the Court reaffirmed that constitutional identity safeguards cultural diversity and pluralism within the EU, ensuring integration does not erode Member States' foundational structures.[26]

The principle of conferral and the obligation to respect *national identity* as enshrined in Articles 6(3) and 4(2) TEU collectively embody the constitutional traditions and fundamental principles of the Member States. These provisions delineate the constitutional basis upon which the European Union's legal order interacts with national legal systems, affirming that Union law does not derive its authority in opposition to, but rather through, the constitutional frameworks of the Member States.[27] Nevertheless, the BVerfG drew a clear boundary, affirming that the inviolable *constitutional identity*, enshrined in Article 79(3) of the GG, remains beyond the reach of European integration. In this regard, the BVerfG affirmed that the responsibility for integration must allow for judicial scrutiny, particularly in cases of manifest overreach of EU competences that threaten to encroach upon the inviolable constitutional identity of Germany. Such scrutiny is exercised through the *constitutional identity review*.[28] At this point, the Court delineated its jurisdiction to perform *constitutional identity review*, a competence that originates in German constitutional law itself and derives from the principle of openness of the GG towards European law. According to the Court, this form of review is justified on two principal grounds: a) it does not conflict with the principle of loyal cooperation under Article 4(3) TEU; and b) the absence of such review would deprive the Member States of any means to safeguard their fundamental political and constitutional structures, which are explicitly recognised under Article 4(2) TEU. The Court thus argues that the protection of *national identity* and *constitutional identity* are complementary and mutually reinforcing. On this basis, the *constitutional identity review* serves as a mechanism for protecting only a specific part of *national identity* – namely those principles of Articles 1 to 20 of the GG, which Article 79(3) GG designates as inviolable. Through this framework, the Court ensures that the primacy of EU law applies only within the scope of continuing constitutional authorisation granted by the German constitution.[29]

3.2.2. The OMT Judgement

The legal position of the BVerfG discussed above was reaffirmed and further developed in its ruling on the *OMT* (Outright Monetary Transactions) case.[30] In this case, the Court examined whether Germany's participation in the OMT mechanism, designed to stabilise the euro area through the purchase of

[26] *Ibidem*, para. 260.
[27] *Ibidem*, para. 234.
[28] *Ibidem*, para. 240.
[29] *Ibidem*, para. 240.
[30] *BVerfG*, Judgment of 14 January 2014, 2 BvR 2728/13, para. 27 (OMT).

government bonds of eurozone Member States conditional upon participation in financial assistance programmes, was compatible with the GG.

The Court held that if an EU act infringes upon the principles protected under Article 79(3) GG, such an act is invalid within the German legal order. A key part of the *OMT* judgement lies in the Court's express clarification that the *constitutional identity* under the GG is not identical to the *national identity* as referred to in Article 4(2) TEU. First, the *national identity* of a Member State may be broader in scope than its constitutional identity. Second, under the interpretation of the CJEU, *national identity* serves *merely as a legitimate objective* to be taken into account in the application of EU law. By contrast, the constitutional identity protected by Article 79(3) GG is inviolable and non-negotiable, immune to balancing against other legal interests or values (see more: Kiššová, 2022, pp. 39–43).[31]

Therefore, it can be argued that above mentioned marks a crucial doctrinal distinction introduced by the BVerfG: The CJEU treats *national identity* as a contextual principle of respect, subject to balancing within the EU legal framework and, on the other hand, the BVerfG treats *constitutional identity* as an absolute barrier derived from the German constitutional order itself, which operates autonomously from EU law. By drawing this line, the *OMT* judgement crystallised the dual-layer model of identity protection: one anchored in EU law (Article 4(2) TEU) and another in constitutional law (i.e. Article 79(3) GG). This model underpins the later *PSPP* (*Weiss*) judgement, where the Court explicitly invoked both the *ultra vire*s and *identity control doctrines*.[32]

In conclusion, it may be observed that the BVerfG draws a clear distinction between the concept of *national identity* as enshrined in Article 4(2) TEU and the mechanism of *constitutional identity review*. The Court recognises a difference between the substantive content and functional purpose of each concept in the relationship between the European Union and its Member States. The *national identity clause* operates as a limitation directed at the European Union, restraining the exercise of its competences and requiring respect for the essential political and constitutional structures of the Member States. Its substantive elements, however, partially overlap with those that constitute the *constitutional identity* of a state. By contrast, *constitutional identity* (and the corresponding *constitutional identity review*) forms a distinct mechanism of domestic constitutional law. Its content and boundaries are determined autonomously by the Member State, and through the *constitutional identity review*, the constitutional court exercises supervisory control to ensure that the essential core of the constitution remains untouched by the process of European integration.

[31] *Ibidem*, paras. 27–29.
[32] *BVerfG*, Judgment of 5 May 2020 , 2 BvR 859/15 , paras 116 *et seq*. (PSPP or Weiss).

4. Summary of the findings: Distinguishing National and Constitutional Identity

The analysis conducted in the preceding sections supports Cloots's original argument regarding the non-interchangeability of *national identity* and *constitutional identity*. The analysis conducted in the preceding sections supports Cloots's original argument regarding the non-interchangeability of *national identity* and *constitutional identity*. Through the analytical framework presented in section 3 hereof, this article has sought to expand and reinforce that argument. The findings confirm the working hypothesis that, within the meaning of Article 4(2) TEU, the concept of *national identity* is not identical to that of *constitutional identity*. Accordingly, references to Article 4(2) TEU should neither be equated with nor interpreted as referring to *constitutional identity*.

The first argument for the non-interchangeability of the two concepts lies in the historical and textual origin of the term *national identity* as embedded in Article 4(2) TEU. From the earliest drafts of the Maastricht Treaty onwards, the clause has evolved as an autonomous concept of EU law, whereas the expression *constitutional identity* is entirely absent from the *travaux préparatoires* of any treaty revision up to and including the Lisbon Treaty.

The second argument emerges from the Member States' constitutional courts' development of the doctrine of *identity review*, particularly in Germany, Italy, and Poland.[33] Among these, the BVerfG remains the most influential actor in shaping the discourse on the relationship between EU law and national-constitutional law. Its jurisprudence (beginning with *Solange I* and *Solange II* and continuing through the *Lisbon Treaty* judgement and the *OMT* judgement) demonstrates a consistent, intellectually coherent, and legally respectful approach. The BVerfG's doctrines of *ultra vires review* and *identity review* are both sophisticated and restrained in nature. Crucially, the Court distinguishes clearly between *national identity* as a limitation on EU competences and *constitutional identity* as a mechanism of domestic constitutional self-protection. The latter, developed in the *Lisbon Treaty* and *OMT* judgements, serves to safeguard the core of the GG against both international obligations and domestic actions. In my view, such review, when conducted within the limits of the principle of loyal cooperation (Art. 4(3) TEU), cannot be regarded as conflicting with EU law.

The third, and at the same time practical, argument for the non-interchangeability of these concepts lies in the potential consequences of misunderstanding the distinction between the doctrine of respect for *national identity* under Article 4(2) TEU and the doctrine of *constitutional identity review*. In this regard, I refer to the proceedings before the Polish Constitutional

[33] See: *Trybunał Konstytucyjny*, Judgment of 11 May 2005, case no. K 18/04 (*Accession Treaty Judgment*) and *Trybunał Konstytucyjny*, Judgment of 24 November 2010, case no. K 32/09 (*Lisbon Treaty Judgment II*).

Tribunal in *P 7/20*[34] and *K 3/21*[35] judgements, which, in my view, reflect a fundamental misapprehension of both *national identity clause* under Article 4(2) TEU and the manner in which the BVerfG applied *constitutional identity review* in the *OMT* judgment. Based on my prior research into the activity of the Polish Constitutional Tribunal (see: Kiššová, 2023, pp. 130-142), I conclude that the Polish Constitutional Tribunal conflated and distorted the meaning of both identity protection doctrines. It employed the term *constitutional identity* in connection with Article 4(2) TEU, while simultaneously invoking the reasoning and terminology of *constitutional identity review* as developed by the BVerfG.[36] Although the Polish Constitutional Tribunal in *P 7/20* and *K 3/21* judgments formally declared that it was conducting a *constitutional identity review* following the German model, the purpose and context of this review were entirely different. The declared review was carried out under fundamentally divergent circumstances and by different means from those employed by the BVerfG.

The difference between the two situations is most apparent in the subject matter of the decisions rendered by the German and Polish constitutional courts. The BVerfG applies *constitutional identity review*, often alongside *the ultra vires doctrine*, in relation to secondary EU law, whereas the Polish Constitutional Tribunal has challenged the validity of EU primary law itself. Their motivations also differ – in Germany, such cases arise from individual constitutional complaints without political intent. By contrast, in the *K 3/21* judgement, the proceedings were initiated directly by the Prime Minister Morawiecki, a politically engaged actor. Another distinction concerns their attitude toward EU law. The BVerfG consistently emphasises respect for the effects of EU law and recognises the CJEU's authority. When conducting *constitutional identity review*, the BVerfG considers it indispensable to observe procedural obligations, in particular by initiating preliminary reference proceedings to enable the CJEU to express its opinion on the contested issues. The Polish Constitutional Tribunal, however, refrains from engaging in such judicial dialogue –neither in the context of *constitutional identity review* nor when invoking *national identity clause* under Article 4(2) TEU.

In conclusion, it may be asserted that drawing attention to the non-interchangeability of *national identity* and *constitutional identity* in the context of Article 4(2) TEU carries genuine legal significance. The aim of this article has been to demonstrate that, since the adoption of the Maastricht Treaty, EU primary law recognises only the *national identity clause*. Ultimately, the determination of what constitutes the *"fundamental political and constitutional structures"* of a Member State falls exclusively within the interpretative competence of the CJEU. If one accepts the relevance of the *travaux préparatoires* to the Draft Constitution Treaty, and particularly the documents of the Working Group V, the meaning of the *national identity* clause in Article

[34] *Trybunał Konstytucyjny*, Judgment of 14 July 2021, case no. P 7/20.
[35] *Trybunał Konstytucyjny*, Judgment of 7 October 2021, case no. K 3/21.
[36] *Trybunał Konstytucyjny*, Judgment of 14 July 2021, case no. P 7/20, paras. 124–125.

4(2) TEU can be defined with precision. At the same time, if one acknowledges the interpretative approach of the BVerfG, it becomes evident that the *constitutional identity review* conducted by constitutional courts rests on a different legal foundation and possesses a broader substantive scope, as its content is determined autonomously by each Member State.

In light of the foregoing analysis, this article recommends that both the CJEU and national constitutional courts adopt a more precise and disciplined use of the concept of *identity* within the EU constitutional framework. The CJEU should continue to interpret Article 4(2) TEU as a clause protecting *national identity* understood in structural and functional terms, rather than extending it to *constitutional identity*. Conversely, national constitutional courts should exercise *constitutional identity review* with self-restraint and in compliance with the principle of sincere cooperation under Article 4(3) TEU. Establishing a clearer conceptual boundary between *national* and *constitutional identity* would prevent the instrumentalization of these notions in domestic political discourse and reduce the risk of constitutional confrontation between EU law and national constitutions.

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