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A Living Constitutional Identity: The Contribution of Non-Judicial Actors

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A Living Constitutional Identity: The Contribution of Non-Judicial Actors

Pietro Faraguna*

Abstract

In federal states, constitutional identity is the glue that holds together the Union. On the contrary, in the European Union – not a fully-fledged federation yet – each Member state has its own constitutional identity. On the one hand, the Union may benefit from the particular knowledge, innovation, history, diversity and culture of its individual states. On the other hand, identity-related claims may have a disintegrating effect. Constitutional diversity needs to come to terms with risks of disintegration. The Treaty on the European Union seeks a balance, providing the obligation to respect the constitutional identities of its Member states. Drawing from the European experience, this article compares judicial and non-judicial means of accommodation of divergent constitutional values. In the category of non-judicial means, political negotiated exemptions and opt-outs in favor of certain Member states have been considered. In the category of judicial means of accommodation, this article analyzes how national and supranational Courts approach the concept of constitutional identity. This article finds that non-judicial means of accommodation of identity-related conflicts are a crucial complement to judicial ones and – under certain circumstances – a superior alternative.

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* Emile Noël Fellow-in-Residence AY 2014-2015, Jean Monnet Center | NYU School of Law; PhD (Constitutional Law) Università di Ferrara; Post-doc research associate, Università di Trieste. This paper is the result of an extremely enriching research year at the Jean Monnet Center at NYU. I am profoundly thankful to the Center and my fellow fellows, Bilyana Petkova, Dominik Steiger, Katarzyna Granat, Mor Bakhoum, Vanessa Mak, Àine Ryall, Andrew Mitchell, Tania Voon and Luc Peeperkorn, with whom I had the chance to share uncountable discussions and a unique research experience. In particular, the first steps of this research benefited from the instructions of Gráinne de Búrca and Armin von Bogdandy. In the last steps of my research, this paper has benefited from precious comments by Peter Lindseth and Marta Cartabia. I am also very indebted to Sergio Bartole, Yaniv Roznai, Giuseppe Martinico, Tomáš Dumbrovský and Nicola Lupo who read an earlier version of the present paper and provided precious comments. Here as everywhere, the usual disclaimer applies: nobody but the author can be taken to account for the many omissions and imperfections that remain in spite of all the support received.

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A. INTRODUCTION

1. #Identity: a trending topic?

Over the last decades, the lexicon of European constitutional scholars has apparently changed. If the interests of EU law scholars could be gauged through Twitter, a trending topic would likely be: #identity[1].

It is difficult to explain this development, yet this new trend is unsurprising for a number of reasons. Europe is a small continent: the smallest continent in fact. However, no other corner of the planet bears such an intensity of difference and contrast[2]. Compared with the rest of the world, part of Europe's character is the richness which is brought by the many different languages spoken, and the many histories and traditions, in an area of only half a million square kilometers (smaller than Brazil or Australia, less than half the size of China, and equivalent to only a fraction of Russia).

The rise of identity claims in the European Union over the last two decades is perfectly consistent with the development of a long history of national identity in Europe and its neighboring regions: it is no coincidence that the last remaining multiethnic states in the region – Czechoslovakia, Yugoslavia and the USSR – disappeared during the 1990s, to make room for more nationally homogeneous entities. The 1990s have seen years of claims to national identity, and the European Union was no exception to this trend[3]. In 1992, 'national identity' made it into the Maastricht Treaty.

The increase of identity claims over the last two decades has been a matter of theoretical speculation. With the euro crisis, identity claims have changed from being matters of theory to matters of practice. At present, Europe seems to be sitting on a tick-

[1] In 2005 it had already been noted that "[t]o protect national sovereignty is passé: to protect national identity by insisting on constitutional specificity is à la mode": cf. JHH Weiler, 'On the Power of the Word: Europe's Constitutional Iconography' (2005) 3 International Journal of Constitutional Law 173, 184.

[2] These considerations open the formidable history of postwar Europe by Tony Judt, *Postwar: A History of Europe Since 1945* (Penguin Books 2006).

[3] ibid 637–638. One should say that not all these States were multiethnic (Czechoslovakia was a multinational not a multiethnic State) and even if every single dissolution had its own development, the territorial fission of the late Nineties was in line with the ethnic "simplification" of the European map.

ing time bomb – loaded with identity claims – and this issue is no longer purely theoretical: are Eurobonds compatible with the German constitutional identity? Is the Republic of Ireland entitled to prohibit the medical practice of terminating pregnancies, and/or to restrict the provision or advertising of this medical service, in the Republic of Ireland, when the procedure can be carried out in another Member State? Are the family rights of a same sex couple, validly married in France, to be recognized in the Polish legal order?

This paper will fall short of dealing directly with substantive questions such as these, which relate to identity issues. However, I will try to address the precursory question of which actor is best placed to answer these crucial questions. Is it the Court of Justice of the European Union (CJEU) that should decide upon identity issues? Or should the constitutional and supreme courts of Member States be entitled to the final word on the subject? I will argue it should be neither.

In this paper I will question the judicial monopoly over the national constitutional identity which has emerged in the development of the European integration process in recent decades. To do this, I will begin by analyzing the notion of national constitutional identity from a court-centric perspective (para. 3).

The paper will offer a brief overview of the meaning of constitutional identity found in case-law relating to European integration, in particular some highly influential decisions of constitutional courts (para. 4). The paper will then focus on some early decisions of the CJEU, where Article 4(2) of the Treaty on the European Union (TEU) was in play, and go on to consider the analysis on the identity clause in Advocate Generals' opinions (para. 5 and 6). On the basis of this case-law, I will argue that national constitutional identity remains a very vague concept. In the following section of the paper, I will argue that the indeterminacy of the concept of national constitutional identity in Article 4(2) TEU may not be a flaw within the provision, but one of its most resourceful aspects (para. 7). I will elaborate on the interpretation of this notion, moving away from the courts. A purely judicial approach to national constitutional identity has not increased our understanding of the concept, and the judicial route has recently illustrated

the risk of achieving disastrous results (I refer in particular to the Gauweiler/OMT case, see para. 8). In light of this, I will argue that other methods to assess strong national interests exist. These methods need to be developed further and be connected with the obligation in EU law to "respect national identities" (para. 9). These methods can partly rely on legal arrangements which already exist and which are encapsulated within the broad notion of differentiated integration (para. 10). In addition, I will demonstrate that differentiated integration has been used to neutralize potential conflicts between EU law and "qualified interests" within national legal systems (para. 11). There is empirical evidence in practice of the result of the application of differentiated integration, which I will investigate in some detail (in particular, I will look at opt-outs, identity-tailored protocols and quasi opt-outs, para. 11.1, 11.2, 11.3, 11.4, 11.5). In this part of the analysis, I will consider the type and nature of national interests that trigger differentiated integration, aiming at recognizing possible overlaps with judicial readings of national constitutional identity (para. 12).

My paper will then address three other areas where a non-judicial understanding of national constitutional identity may emerge. They are: a) areas of EU competence that remain subject to the rule of unanimity, b) enhanced co-operation agreements, c) the position of national Parliaments in the application of the subsidiarity principle. With regard to unanimity (para. 13), I will argue that the reluctance to move from unanimous to majority voting in EU-28 may provide a suggestion of there being a mutual mistrust between Member States, which fear losing control in certain areas. This may indicate (although not prove) that these matters are constitutional-identity-sensitive, and that decisions taken in these fields may indirectly affect national constitutional identities. As to enhanced cooperation agreements (para. 14), I will examine the two initial examples put in force. Enhanced cooperation is a mechanism of differentiated integration which responds to the need to cut certain Member States out of the next phase of European integration. My paper will examine whether national concerns of non-participating Member States can be linked with the notion of national constitutional identity. Finally, I will consider the references to national constitutional identity in the

reasoned opinions of national Parliaments in the framework of the application of the principle of subsidiarity (para. 15).

To conclude the analysis of this non-judicial route, this paper will compare the outcomes of the examined methods for neutralizing possible conflicts with the outcomes of the court-centric perspective of interpreting national constitutional identity. We will see that remarkable overlap will emerge (para. 16).

Finally, this paper will adopt a speculative perspective, and I will argue that empirical evidence shows that differentiated integration and flexibility have already being used as non-judicial tools to respect (or rather to neutralize future infringements of) national constitutional identities. This pragmatic, flexible application has stemmed from an ever more acute need to differentiate in an expanding European Union (para. 17). On the basis of this pragmatic approach, I will argue for an interpretation of Article 4(2) TEU that demands a legal obligation to use a wide range of differentiated integration for the purpose of respecting national constitutional identities.

2. Art. 4(2) TEU: national or constitutional identity?

The Treaty on the European Union refers to 'national identity'. So, why are the shelves of law libraries weighed down by massive amounts of literature on 'constitutional identity'? To cut a long story short, the interpretation of the notion of 'national identity' has gradually shifted towards a legal approach, moving away from a historical or sociological one[4]. This move has been partly supported, if not caused, by the amendment of the Treaty formulation with the adoption of the Lisbon Treaty[5]. Nevertheless, literal

[4] Legal scholars arrived relatively late in approaching this trending topic, following other social sciences where an interest in nations and nationalism studies came to the fore some years earlier. Among many others, see Lutz Niethammer, *Kollektive Identität. Heimliche Quellen einer unheimlichen Konjunktur* (Rowohlt Taschenbuch 2000). On the delay of the legal scholarship see Elke Cloots, *National Identity in EU Law* (Oxford University Press 2015) 4.

[5] The Maastricht Treaty's wording narrowly provided that "The Union shall respect the national identities of its Member States, whose systems of government are founded on the principles of democracy" (Art. F(1)). The Treaty of Lisbon added that the Union shall respect the equality of the Member States 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

interpretation seems a blunt instrument in this field, considering the fact that a crucial element such as the singular or plural conjugation varies in the Treaty's translations[6].

Although the concept of identity has always been subject to ambiguities and interpretative uncertainties, the connection between national and constitutional identity has gradually been taken for a self-evident truth[7]. On the contrary, it seems necessary to devote some attention to the point[8]. The Maastricht Treaty represented a sort of watershed in the evolution of the legal thought about identity in the EU. On one hand, the treaty took important steps in the way of an ever closer European Union, with the introduction of a European citizenship, a deeper economic Union and a monetary Union, and an ever closer political Union; these are steps that were able to challenge the traditional role of the national State. On the other hand, the fear of a supranational overcoming of the national State was balanced by the introduction of principles aimed at safeguarding Member States[9], such as the principle of respect for national identities[10].

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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" (Art. 4(2)).

[6] So, in English the Union shall respect national *identities*, whereas in Italian 'L'Unione rispetta l'*identità* nazionale', in German 'Die Union achtet die nationale *Identität*', in French 'L'Union respecte l'*identité* nationale' and in Polish 'Unia szanuje tożsamość *narodową*'.

[7] On this point an efficient summary is to be found in a relatively recent AG's opinion: "I would make it clear that the position which I propose that the Court should adopt in the present case does not mean that account is not to be taken of the national identity of the Member States, of which constitutional identity certainly forms a part", Case C-399/11 *Criminal proceedings against Stefano Melloni* [2012], Opinion of AG Bot, para. 137

[8] On the understanding of national identity as constitutional identity see Roberto Toniatti, 'Toniatti, Sovereignty Lost, Constitutional Identity Regained' in Alejandro Saiz Arnaiz and Carina Alcoberro Llivinia (eds), *National Constitutional Identity and European Integration* (Intersentia 2013) 62 ff; Leonard FM Besselink, 'National and Constitutional Identity before and after Lisbon' (2010) 6 Utrecht Law Review 36, 42–44. *Contra* Michel Rosenfeld, *The Identity of the Constitutional Subject: Selfhood, Citizenship, Culture, and Community* (Routledge 2009) 29; Cloots (n 5) 167–168.

[9] On the counterbalancing effect of the identity-clause with respect to "on-going constitutionalization of the EU", see Monica Claes, 'National Identity: Trump Card or Up for Negotation?' in Alejandro Saiz Arnaiz and Carina Alcoberro Llivinia (eds), *National Constitutional Identity and European Integration* (Intersentia 2013) 118. In the same sense see also Cloots (n 5) 63, 82, 179, 184.

[10] See Art. F of the Maastricht Treaty, the first provision in a European Treaty which explicitly mentioned *national* identity: "The Union shall respect the national identities of its Member States, whose system of government are founded on the principles of democracy".

In the EU a process of balancing between new national claims and integrationist forces continued in the successive amendments of the Treaties[11], through some minor changes in the formulation of the principle of protection of national identities and – above all – through the introduction of the subsidiarity principle[12].

If the Treaty of Maastricht brought a vast attention to the concept of national identity, the Lisbon Treaty was a successive landmark in the evolution of the identity literature. Art. 4(2) was the first EU Treaty provision to codify national *constitutional* identity, through a reformulation of the identity clause which was largely drawing from the text of the ill-fated Constitutional Treaty. For the first time the wording shifted from the purely *national* qualification of identity to a much wider one. (National) identity is now inherent in Member States' "fundamental structures, political and constitutional, inclusive of regional and local self-government"[13]. The textual evolution of the clause encompassed the inclusion of equality of Member States in the same Art. 4(2) TEU. Among the innovation of the Treaty of Lisbon in the field of identity, one should moreover mention the preamble of the Charter of Fundamental Rights of the European Union (CFREU), establishing the obligation to respect the "national identities of the Member States and the organization of their public authorities at national, regional and local levels".

Against this background, it was quite clear that the concept of national identity consisted not only of a mere historical or sociological reference, but, on the contrary,

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[11] The treaty of Amsterdam reformulated the principles, splitting the democratic principle and the protection of national identities. The democratic principle was formulated in a separated paragraph, as a fundamental principle both of the Member States and the Union: "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 Member States". The obligation of the Union to respect the national identities was formulated in the third paragraph of the same article: "The Union shall respect the national identities of its Member States".

[12] On the role of Subsidiarity (then beside the dismantled pillar system and the "variable geometry" approach of closer cooperation) in these conflicts between European and national sovereignty claims see Peter L Lindseth, 'Democratic Legitimacy and the Administrative Character of Supranationalism: The Example of the European Community' (1999) 99 Columbia Law Review 628, 668 ff.

[13] Art. 4(2) TEU.

bore a legal meaning and more precisely a constitutional one[14]. It comes as no surprise that this constitutionalization of the concept of identity triggered an even deeper involvement of the constitutional courts in many Member States. A number of judgments had already been pronounced on the matter when the Treaty of Maastricht was adopted. Nonetheless, the outbreak of such judgments on the matter of constitutional identity after Maastricht and above all after Lisbon has been remarkable.

One could argue that these decisions have nothing to do with Article 4(2) TEU and with the autonomous notion of national identity in EU law. As a matter of fact, the Treaties' wording does not refer to constitutional identity, but to national identity, and a literal understanding of the identity clause would not allow any correspondence with the domestic notion of constitutional identity. Accordingly, one should interpret the legal meaning of 'nation', to determine the authentic understanding of the identity clause in Art. 4(2) TEU. This reasoning would not lead very far: the very concept of 'nation' is highly controversial as well as subject to ambiguities, vagueness, and indeterminacy. There are at least two, radically different, understandings of this notion in the history of the legal thought in the last two centuries. According to the ethnic-centered reading of the nation, the concept is related to the existence of common elements in a community: language, history, customs, if not blood and ethnicity. In contrast with this view, the civic conception of nation identifies the notion with a subjective sense of belonging to a community, based on very different elements, such as citizenship, law, culture, religion. Additionally, a narrow interpretation of the concept of 'national identity' would not be able to embrace the reality of the many multinational Member States in the EU[15]. In particular if the singular declination of 'national identity' would be taken into consideration under this narrow interpretation, what about the Member States comprising multina-

[14] The reference to fundamental political and constitutional structures "distances the notion of national identity in Article 4(2) TEU from cultural, historical or linguistic criteria and turns to the content of domestic constitutional orders". See Armin von Bogdandy and Stephan Schill, 'Overcoming Absolute Primacy: Respect for National Identity under the Lisbon Treaty' (2011101) 48 Common Market Law Review 1417, 1427.

[15] Besselink (n 9) 42–43.

tional identities? A "pure national" interpretation of the notion of "national identity" would lead to a complex legal puzzle[16].

As a matter of fact, the self-understanding in a community of the proper meaning of nation can greatly vary and, most importantly, "the content of what constitutes national identity … is determined by reference to domestic constitutional law"[17]. This brings us back to the broader notion of "national constitutional identity".

B. CONSTITUTIONAL IDENTITY IN THE COURTS: AN OVERVIEW

3. A court-centered canon

Art. 4(2) TEU has been frequently described as a "Europeanized counter-limit"[18], consisting of a binding obligation for the EU to respect national constitutional identities. The interpretation of the extension and implications of this obligation as a matter of positive law is crucial with respect to two of the most fundamental principles of the European constitutional order, such as primacy and uniform application of EU law. Therefore it is not surprising that vast attention has been devoted to the judicial interpretation of the legal meaning and scope of the abovementioned provision.

The identity clause has been seen as a twofold "invitation to struggle"[19]: on one hand the struggle involves the interpretation of the identity clause. On the other, it af-

[16] See on this point Cloots (n 5) 151–154.

[17] von Bogdandy and Schill (n 15) 1429.

[18] Giuseppe Martinico, *The Tangled Complexity of the EU Constitutional Process: The Frustrating Knot of Europe* (Routledge 2012) 89 ff; Antonio Ruggeri, '"Tradizioni Costituzionali Comuni" E "Controlimiti", Tra Teoria Delle Fonti E Teoria Dell" Interpretazione' 2003 Diritto pubblico comparato ed europeo 102. According to Dobbs "therefore, the conflict is no longer technically between national and EU law, but between aspects of EU law", see Mary Dobbs, 'Sovereignty, Article 4(2) TEU and the Respect of National Identities: Swinging the Balance in Favour of the Member States?' [2014] Yearbook of European Law 1, 28.

[19] An "invitation to struggle" for the direction of foreign and security policy is the image used by Corwin to describe the US constitution and its distribution of powers between the President and Congress: see Edward S Corwin, *The President: Office and Powers, 5th Edition* (5 edition, NYU Press 1984) 177.

fects the definition of the competent authority in charge of the interpretation[20]. Invited or not, national and supra-national Courts struggle.

A court-centered interpretative canon of the identity clause has supported an "*exceptionalist* understanding"[21] of Art. 4(2) TEU. The identity argument has been seen as a last resort "to only apply in exceptional cases of conflict between EU law and domestic constitutional law"[22]. This is certainly true as far as the judicial use of national constitutional identity is concerned. As a matter of fact, consequences of the application of Art. 4(2) TEU to justify a relativization of the EU law primacy are difficult to predict, and preferable to avoid.

4. National constitutional identity in the case-law of the Member States' constitutional courts

Although the very first judgment where a national Court theorized domestic constitutional reservations to the primacy of EU law is the *Frontini Judgment*[23] of the Italian Constitutional court, it is without doubt that the counter-limits case-law of the German *Bundesverfassungsgericht* (*BVerfG*) played a major role in this matter[24].

The example and model of the German *BVerfG* counter-limits doctrine has been subject to a quick evolution. The counter-limits' doctrine initially consisted of a human rights proviso (*Solange*), then turned into an *ultra vires* test (*Maastricht*) and finally into a constitutional identity test (*Lisbon*)[25].

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[20] See Kumm, "The Jurisprudence of Constitutional Conflict" and Toniatti (n 9) 68.

[21] The term is drawn from Barbara Guastaferro, 'Beyond the Exceptionalism of Constitutional Conflicts: The Ordinary Functions of the Identity Clause' (2012) 12 Jean Monnet Working Paper <http://www.jeanmonnetprogram.org/papers/12/documents/JMWP01Guastaferro.pdf>.

[22] von Bogdandy and Schill (n 15) 1431.

[23] Corte costituzionale, judgement no. 183 of 1973. The Italian Constitutional Court did not explicitly make use of the term 'identity', but followed a very similar approach to the *Solange* saga.

[24] This role has been boosted by the "overwhelming academic and political attention on the Bundesverfassungsgericht's pronouncements on EU law" and this attention "risks putting the case law of other national constitutional courts in the shade": see Cloots (n 5) 52.

[25] Mehrdad Payandeh, 'Constitutional Review of EU Law after Honeywell. Contextualizing the Relationship between the German Constitutional Court and the EU Court of Justice' (2011) 48 Common Market Law Review 9.

The (in)famous role of the *BVerfG* as a stringent watchdog of the State-centered constitutional model was inaugurated with the *Solange I* judgment in 1974, and passed through a series of landmark decisions (*Solange II*, *Maastricht*, *Banana Market Decision*, *Lisbon*, *Mangold-Honeywell*, *Euro Crisis*, *OMT*), vastly commented on in the constitutional and EU law literature. Assessing this case-law in detail would take us too far from the focus of this paper. Briefly, with regard to this German "obsession"[26], what should be noticed is the fact that the *BVerfG* played a crucial role in interpreting the issues related with national constitutional identities.

This model implies that constitutional identity consists of a core that is not subject to any modification. This constitutional core sets a limit to European integration that not even a constitutional amendment may remove. The content of this core is enshrined in the so called 'eternity clause' in accordance with Art. 79.3 GG, which was extended to the European matters pursuant to Art. 23 GG and further interpreted by the *BVerfG* itself. Hence, within the constitutional core, the eternity clause includes the principle of democracy, the essence of which consists in the constitutional voting rights of German citizens. Against this background, the *BVerfG* states that the German Fundamental Law impedes the conferral of those competences to the EU that would bear a risk of deprivation of the right to vote and the principle of democracy of their substantive contents. In the view of the *BVerfG*:

> *"Particularly sensitive for the ability of a constitutional state to democratically shape itself are decisions on substantive and formal criminal law (1), on the disposition of the monopoly on the use of force by the police within the state and by the military towards the exterior (2), fundamental fiscal decisions on public revenue and public expenditure, the latter being particularly mo-*

[26] The protection of national identity lies in between an "obsession" and a "serious concern" in the words of Tomuschat, "The Defence of National Identity by the German Constitutional Court", in Alejandro Saiz Arnaiz and Carina Alcoberro Llivinia, *National Constitutional Identity and European Integration* (Intersentia 2013) 205.

tivated, inter alia, by social policy considerations (3), decisions on the shaping of living conditions in a social state (4) and decisions of particular cultural importance, for example on family law, the school and education system and on dealing with religious communities (5) ~~and the right of coinage (6)~~ "[27]

This model has proved successful, and was the object of a wide migration of a persuasive "constitutional idea"[28]. As a matter of fact, the EU-related case-law of many Constitutional and Supreme Courts – Poland, Hungary and Czech Republic – bear resemblances to the *BVerfG*'s doctrine of constitutional identity. In some cases these resemblances are made explicit, with open references to the *Lissabon Urteil* of the *BVerfG*. This is the case of the Polish Constitutional Court's decision on the Treaty of Lisbon, manifestly inspired by the German model. According to the Constitutional Courts' view, the constitutional rule concerning the transfer of competences (Art. 90 of the Polish Constitution) protects Poland's constitutional identity, by excluding from the transfer the matters that are fundamental for the organization of a State. These are the decisions concerning the fundamental principles of the constitution, the fundamental rights, the principle of statehood, the democratic principle, the rule of law, the welfare state, subsidiarity and the competence to amend the constitution itself.

Additionally, the Polish Constitutional Court made it clear that the concept of constitutional identity is an equivalent of – or at least is very closely related with – the concept of national identity, which also includes the tradition and culture, drawing its interpretation not only from Art. 4(2) TEU, but also from the preamble of the Treaty on European Union, where one of the indicated objectives of the Union is to deepen the solidarity between the peoples of the Union while respecting their history, culture and traditions. In this respect, according to the Polish Constitutional Court's view, "the idea of

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[27] *BVerfG*, 2/08, Judgment of 30 June 2009, *BVerfGE* 123, 267 ff. The right of coinage – that has always been a classical state competence in traditional theoretical models – was not mentioned in the Court's list of the hardcore of Member State competence, and the reason of this omission is quite clear.

[28] Sujit Choudhry (ed), *The Migration of Constitutional Ideas* (Reissue edition, Cambridge University Press 2011).

confirming one's national identity in solidarity with other nations, and not against them, constitutes the main axiological basis of the European Union"[29].

The Hungarian Court case-law too bears resemblances with the *Lissabon-Urteil* of the *BVerfG*, although there are no explicit references to the judgment of the German colleagues. In its decision on the compatibility of the act of promulgation of the Lisbon Treaty with the Constitution, the Hungarian judges rejected an individual complaint, but affirmed that the Parliament has an obligation to reconcile the commitment derived from Hungary's membership in the EU and the observance of the Constitution[30].

The position of the Czech Constitutional Court is rather more open toward European law[31], but has some similarities to the German saga. The Court acknowledges the principle of an EU-conforming interpretation of constitutional law, but in case of a conflict between EU law and the Czech constitution – specially its "material core"[32] – the latter must prevail[33]. Unlike the *BVerfG*, the Czech Court does not consider it possible, in view of the position that it holds in the constitutional system of the Czech Republic, to create a catalogue of non-transferrable powers and authoritatively determine "substantive limits to the transfer of powers"[34]. According to the Czech Court's view, this is not the Constitutional Court's task. Limits to the transfer of powers exist, but these "should

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[29] Constitutional Court of Poland, Judgement of 11 November 2010, (K 32/09), *Treaty of Lisbon*, 23. An English version is available at http://trybunal.gov.pl/uploads/media/SiM_LI_EN_calosc.pdf.

[30] Hungarian CC, Judgement of 12 July 2010, No. 143/2010.

[31] For a general and up-to-date overview on the relation between the Czech Constitution and EU integration, see Lubos Tichy and Tomas Dumbrovsky, 'The Czech Constitution and EU Integration' (Social Science Research Network 2015) SSRN Scholarly Paper ID 2615617 <http://papers.ssrn.com/abstract=2615617> accessed 20 July 2015.

[32] The identification of the "material core" of the Czech Constitution came to the fore not only with respect to EU law, but also in the internal forum, with the declaration of unconstitutionality of a constitutional amendment. See Czech Constitutional Court 2009/09/10, Case Pl ÚS 27/09, *Constitutional Act on Shortening the Term of Office of the Chamber of Deputies*. An English translation of the judgment is available at: <www. concourt.cz/clanek/pl-27-09>. On the identification of the "material core", cf. Yaniv Roznai, 'Legisprudence Limitations on Constitutional Amendments? Reflections on The Czech Constitutional Court's Declaration of Unconstitutional Constitutional Act' (2014) 8 Vienna Journal on International Constitutional Law 29.

[33] Polish CC *Lisbon I*, Judgment of 26 November 2008, Pl. ÙS 50/04.

[34] Czech Constitutional Court, case Pl ÚS 20/09 *Treaty of Lisbon II*, judgment of 3 November 2009, § 110. The English translation is available at *usoud.cz/en/decisions/?tx_ttnews%5Btt_news%5D=466&cHash=eedba7ca14d226b879ccaf91a6dcb2*

be left primarily to the legislature to specify. This is due to its being, *a priori*, a political question, which provides the legislature wide discretion"[35]. The gap between the Czech Constitutional Court and the *BVerfG* enlightens a crucial point. Both in the Czech and in the German judicial approach to the protection of the national role of the Constitution, substantive limits to the transfer of power exist. In the case of the *BVerfG*, these limits may be directly interpreted by the Constitutional Tribunal, entrusted both to write a list of non-transferable duties and to review the possible violations of these limits. In the case of the Czech constitutional system, the mere *existence* of substantive limits to the transfer of competence is ascertained by the Constitutional Court: the concrete individuation of these limits is left open to future developments, where the role of the Court cannot be excluded, even though the Czech Court keeps for itself a higher degree of flexibility.

This approach is clearly in favor of the political process, and it gets the Czech Court's view closer to the French approach than to the German one. In the framework of an *ex ante* review (Art. 54 of the French Constitution), the *Conseil Constitutionnel* reviewed the compatibility of both the Constitutional Treaty and the Treaty of Lisbon with the French Constitution. In both cases the *Conseil* deemed a constitutional revision necessary in view of the ratification of the Treaties. In a few words, the *Conseil* ascertained some constitutional limits in respect to certain provisions of the Treaty, but the nature of the domestic limits is merely formal[36]. In these cases, the *Conseil* did not declare substantive limits to the development of European integration, but deemed necessary the revision of the French Constitution to admit the entry into force of certain new provisions of the Treaties (such as the conferral of new competences to the EU, the introduction of supranational modes of decision-making, the introduction of the general bridge clause in accordance with Art. 48.7 TUE and with the new powers conferred to national

[35] Ibid.

[36] See among many others Jean-Philippe Derosier, *Les limites constitutionnelles à l'intégration européenne: étude comparée: Allemagne, France, Italie* (LGDJ 2015).

Parliaments under EU law). The discussion shifted back to the political spectrum, and the Parliament promptly reacted with the necessary constitutional amendments[37].

The French path may be seen as the opposite and alternative model to the German *BVerfG* position[38]. Unlike the German judges, the *Conseil Constitutionnel* defers a much wider margin of discretion for the political actors to set the constitutional limits to the future development of European integration. The *Conseil* role has been limited to ascertain if a prior revision of the Constitution was necessary in case of ratification of new Treaties that provided clauses running counter the Constitution. As far as the constitutional identity was concerned, a landmark decision of the *Conseil* was pronounced in 2006. In a nutshell[39], the *Conseil* held that the obligation to implement EU secondary law only encountered limits in a principle "inherent in the constitutional identity of France, except when the constituting power consents thereto"[40]. What is to be included in the "constitutional identity of France" is not clear at all, but this notion "relates to what is not shared with other States, to what is specific of France"[41].

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[37] See the constitutional laws no 2005-204, 1 March 2005 (with regard to the Constitutional Treaty) and no 2008-103, 4 February 2008 (with regard to the Lisbon Treaty).

[38] For wide analysis of this "relatively cooperative strategy", see Francois Xavier Millet, *L'Union Européenne et l'identité constitutionnelle des Etats membres* (Lgdj 2013) 25–46. Additionally, on the French experience, see Martin Quesnel, *La Protection de L'identité Constitutionnelle de La France* (Dalloz 2015).

[39] For a broad analysis, see Marie-Luce Paris, 'Europeanization and Constitutionalization: The Challenging Impact of a Double Transformative Process on French Law' (2010) 29 Yearbook of European Law 21.

[40] Conseil constitutionnel, Decision no. 2006-540 DC, 27 July 2006, para. 19 (an official English translation is available at http://www.conseil-constitutionnel.fr/conseil-constitutionnel/root/bank/download/2006540DCen2006_540dc.pdf).

[41] See Claes (n 10) 127., referring to the official comment of the *Commissaire du government* Gyonmar of the *Conseil d'État* published in *Les Cahiers du Conseil constitutionnel* no. 17, p. 28-29. Some commentator proposed the 'principe de laïcité' and the social character of France as part of this peculiarly French constitutional identity: See 'Commentaire de La Décision N° 2008-564 DC – 19 Juin 2008' (2008) 25 Les Cahiers du Conseil constitutionnel <http://www.conseil-constitutionnel.fr/conseil-constitutionnel/root/bank/download/2008564DCccc_564dc.pdf>; Selma Josso, 'Le Caractère Social de La République, Principe Inhérent à L'identité Constitutionnelle de La France?' (2008) <http://www.droitconstitutionnel.org/congresParis/comC1/JossoTXT.pdf>.

5. National constitutional identity in the case-law of the CJEU

National identity made it into the Treaties since 1992, under the formulation of Article F(1) of the Maastricht Treaty, but it became subject to the jurisdiction of the Court of Justice only after the entry into force of the Lisbon Treaty[42]. Nevertheless the (then) European Court of Justice (ECJ) made reference to the notion of national identity also before the entry into force of the latter Treaty.

Surprisingly, many cases that are often referred to as milestones of the ECJ's case-law in matter of national identity – such as *Omega*[43], *Portugal v Commission (re Azores)*[44] or *Gibraltar*[45] – do not mention Article F(1), nor the successive numbering of the identity clause (Art. 6 and Art. 4(2) TEU). In some of these cases the principle at stake was the recognition and respect of diversity among constitutional systems of Member States, without any reference to national or constitutional identity[46].

However, an explicit reference to 'national identity and culture' emerges in the ECJ's case law already before the adoption of Article F(1) in the Treaty of Maastricht. The first explicit reference emerges already in the *Groener* judgment in 1989[47]. The case dealt with the denial of an appointment as a teacher in Ireland for a Dutch citizen, because of her failure in an Irish language test. In its decision the ECJ found that the provisions of the EC Treaty do not go against the adoption of a policy seeking the protection

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[42] Article 46 TEU pre-Lisbon outlined the boundaries of the CJEU's jurisdiction with a positive list of reviewable provisions that did not include the provision on national identity. On this point see Dobbs (n 19) 3; Leonard FM Besselink, 'Respecting Constitutional Identity in the European Union: An Essay on ECJ (Second Chamber), Case C 208/09, 22 December 2010, Ilonka Sayn-Wittgenstein v. Landeshauptmann von Wien' (2012) 49 Common Market Law Review 671, 678; Monica Claes, 'Negotiating Constitutional Identity or Whose Identity Is It Anyway?' in Monica Claes and others (eds), *Constitutional Conversations in Europe*, vol 107 217. On the other hand, other authors noted that this "scholarly fixation on the fact that identity clause was not formally included in the Court's jurisdiction as an explanation for why the ECJ did not explicitly seek guidance from the clause when interpreting or reviewing community legislation seems exaggerated": see Cloots (n 5) 165.

[43] Case C-36/02 *Omega Spielhallen* [2004].

[44] Case C-88/03 *Portugal v. Commission* [2006].

[45] Case C-145/04 *Spain v UK* [2006].

[46] Despite this fact, many comments considered these cases "among the most illustrious examples of the Court's 'silent' sensitivity to domestic constitutional provisions inspired by national identity": see Cloots (n 5) 7.

[47] Case C-379/87 *Anita Groener and The Minister for Education and the City of Dublin Vocational Education Committee* [1989].

and promotion of the language of a Member State (both the national and official language) "as a means of expressing national and cultural identity"[48].

The *Groener* case can be held as a sort of ancestor of the much more recent *Runevič* judgment. The case concerned a dispute regarding the spelling of foreign names in Lithuania. A Lithuanian citizen of Polish origin wanted her name to be registered under the Polish spelling rules ("Małgorzata Runiewicz Wardyn"), but the Vilnius Civil registry refused her request, on the ground that only surnames and forenames in a form which complies with the spelling rules of the official national language may be registered. The ECJ argued that the spelling restriction did not constitute a restriction of the right of free movement, and partly based its reasoning on the fact that the provisions of EU law do not preclude the adoption of a policy for the protection and promotion of a language of a Member State, which is both the national language and the first official language. The ECJ referred to *Groener*, inevitably enriching its reference with normative coordinates that occurred after *Groener*. In this respect, the Court stated that "[a]ccording to the fourth subparagraph of Article 3(3) TEU and Article 22 of the Charter of Fundamental Rights of the European Union, the Union must respect its rich cultural and linguistic diversity. Article 4(2) EU provides that the Union must also respect the national identity of its Member States, which includes protection of a State's official national language"[49].

The spelling of names was also the subject-matter of a previous case, the first one carried out after the entry into force of Article 4(2) TEU. The case concerned an Austrian constitutional law prohibiting the use of surnames indicating a title of nobility. This impeded an Austrian citizen who had resided in Germany for 15 years and had been adopted by a German citizen, acquiring the surname of her adoptive father, to use her full name "Fürstin von Sayn-Wittgenstein" and, according to Austrian authorities, required its amendment in "Sayn-Wittgenstein".

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[48] Ibid, para 18.

[49] Case C-391/09 *Malgožata Runevič-Vardyn, Łukasz Paweł Wardyn v Vilniaus miesto savivaldybės administracija, Lietuvos Respublikos teisingumo ministerija, Valstybinė lietuvių kalbos komisija, Vilniaus miesto savivaldybės administracijos Teisės departamento Civilinės metrikacijos skyrius* [2011], para 86.

The applicant affirmed that a modification of her name damaged her professional activity, since she was known in her sector (luxury real estate) under the previous full name. Therefore, the applicant alleged that her freedom of movement and residence was restricted by the application to her name of the Austrian constitutional law. The Austrian Government contended that the constitutional law in question reflected the principle of equality and is intended to protect the constitutional identity of the Republic of Austria. The Court's reaction on this point was welcoming, noting that "[i]n that regard, it must be accepted that, in the context of Austrian constitutional history, the Law on the abolition of the nobility, as an element of national identity, may be taken into consideration when a balance is struck between legitimate interests and the right of free movement of persons recognized under European Union law"[50]. The ECJ expressly acknowledged that national identities under Article 4(2) TEU "include the status of the State as a Republic"[51]. However, national identity was used by the ECJ only as a supporting argument, since the reasoning of the Court was mainly based on the existence of a legitimate restriction. According to the case-law of the Court "[a]n obstacle to the freedom of movement of persons can be justified only where it is based on objective considerations and is proportionate to the legitimate objective of the national provisions"[52]. In the specific case the Court held that the national provisions were not disproportionate to the legitimate objective[53].

6. National constitutional identity in AG's opinions

The brief overview of the CJEU's decisions related to national constitutional identity would give a partial picture of the judicial understanding of the notion, were the opinions of the Advocate General (AG) not taken into account. AGs showed, indeed, a

[50] Case C-208/09, *Ilonka Sayn-Wittgenstein v Landeshauptmann von Wien* [2010], para 83.
[51] Ibid. at para 92.
[52] Ibid at para 81.
[53] In the Court's words "the Austrian authorities responsible for civil status matters do not appear to have gone further than is necessary in order to ensure the attainment of the fundamental constitutional objective pursued by them" (§ 93).

strong inclination toward the notion of national identity[54]. In the case *Spain v Eurojust* a reference to the former Article 6(3) TEU and Article 22 of the CFREU is made with regard to linguistic diversity, being the latter "a specific expression constituting the plurality inherent in the European Union"[55]. In *Marrosu and Sardino*, constitutional requirements were invoked by the Italian Government as the legal basis for a Member State (Italy, in that case) to prevent some unjustified fixed-term employment relationships from being converted into permanent contracts of indefinite duration. In his Opinion, the AG recognized that "national authorities, in particular the constitutional courts, should be given the responsibility to define the nature of the specific national features that could justify such a difference in treatment. Those authorities are best placed to define the constitutional identity of the Member States which the European Union has undertaken to respect"[56].

An explicit reference to the constitutional understanding of national identity may be found in the Opinion of AG Kokott in the *UGT Rioja case*. Firstly, it is recalled that under Article 6(3) EU the European Union must respect the national identities of its Member States. Secondly, AG Kokott interprets this clause as it means "that the Union cannot encroach on the constitutional order of a Member State, whether it is centralist or federal, and does not in principle have any influence on the division of competences within a Member State". Finally, a reference to the revision of that provision by the Treaty of Lisbon, with an explicit intention of the Union to respect the constitutional structures of Member States, supports the constitutional understanding of the identity

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[54] According to a well-informed author, "[t]he 'objective defenders of law' are indeed 'identity lovers'": see Laurence Burgorgue-Larsen, 'A Huron at the Kirchberg Plateau or a Few Naive Thoughts on Constitutional Identity in the Case-Law of the Judge of the European Union' in Alejandro Saiz Arnaiz and Carina Alcoberro Llivinia (eds), *National Constitutional Identity and European Integration* (Intersentia 2013) 284. In his study, Burgorgue-Larsen gives evidence of the higher number of references to constitutional and national identity in the AGs' opinions than the number of references in ECJ's judgments.

[55] Case C-160/03 *Kingdom of Spain v Eurojust* [2005], Opinion of AG Maduro, para 35.

[56] Case C-53/04 *Cristiano Marrosu and Gianluca Sardino v Azienda Ospedaliera Ospedale San Martino di Genova e Cliniche Universitarie Convenzionate* [2006] Opinion of AG Maduro, para 40.

clause. The same AG referred to the former Article 6(3) in the *UTECA* case, with regard to "respect for and promotion of the diversity of its cultures"[57].

In 2008 AG Maduro delivered his much-quoted opinion in the *Michaniki* case, by far the most important judicial Manifesto on the history and function of the identity-clause. The case dealt with the Article 13, par. 9 of the Greek Constitution. This provision excluded tenderers involved in the media sector from participating in public procurement contracts, and provided a sort of presumption of incompatibility between media sector agents and public tenderers, with the purpose of ensuring equal treatment and transparency. AG Maduro recognized that "constitutional identity of the Member States can thus constitute a legitimate interest which, in principle, justifies a restriction of the obligations imposed by Community law"[58]. In fact, according to the AG's view, the Greek legislation exceeded what was necessary so as to observe equal treatment, and therefore did not satisfy the requirement of the principle of proportionality.

In June 2009 AG Colomer's released in the *Umweltanwalt von Kärnten* case[59], where the obligation to respect national identities plays a role in the identification of national authorities that are entitled to submit a reference for a preliminary ruling. According to Colomier's opinion, **"**[i]f a Member State allocates judicial duties to quasi-judicial bodies and confirms that allocation when such a body is established, that is an expression of will closely linked to national identity and national constitutional autonomy. An expression the Court must respect. Accordingly, Article 234 EC provides for a communication channel with national authorities which *constitutionally have the power to dispense justice*. In some Member States that role is entrusted exclusively to the judiciary while in others it is divided between a number of bodies, in a lawful configuration of institutional organization which Community law does not question"[60].

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[57] Case C-222/07, *Unión de Televisiones Comerciales Asociadas (UTECA)* [2008], Opinion of AG Kokott, para 93.

[58] Case C-213/07 *Michaniki AE v Ethniko Simvoulio Radiotileorasis Ipourgos Epikratias Elliniki Technodomiki (TEVAE), formerly Pantechniki AE Sindesmos Epikhiriseon Periodikou Tipou* [2008], Opinion of AG Maduro, para 33

[59] Case C-205/08 *Umweltanwalt von Kärnten and Alpe Adria Energia SpA* [2009], Opinion of AG Colomber.

[60] Ibid.

In 2012 AG Bot delivered an important opinion in the case *Melloni*, which was submitted to the Court with the first preliminary reference by the Spanish Constitutional Court. The case concerned a European arrest warrant issued by Italy against Melloni (Italian citizen), who was sentenced *in absentia* before an Italian judge. Melloni challenged the case before the Constitutional Court of Spain, arguing that the sentence issued in Italy encroached upon his right to a fair trial. AG Bot affirmed that in principle a "Member State which considers that a provision of secondary law adversely affects its national identity may therefore challenge it on the basis of Article 4(2) TEU"[61], but that *Melloni* case did not face this situation. According to the AG's view, "the participation of the defendant at his trial is not covered by the concept of the national identity of the Kingdom of Spain"[62]. AG Bot finally discerned between the protection of a fundamental right and the application of Article 4(2) TEU, namely the respect of national identity or, more specifically, the constitutional identity of a Member State.

Finally, in January 2015 AG Cruz Villalón released his opinion on the case *Gauweiler*. The case was about the financial operations of the European Central Bank and its importance derived also from the fact that the case had been promoted with the first reference for a preliminary ruling from the German *Bundesverfassungsgericht*. In its decision, the German Tribunal had flatly rejected any bridging function between the German Fundamental Law and EU law of Article 4(2) TEU, noting that «the identity review performed by the Federal Constitutional Court is fundamentally different from the review under Art 4 (2) sentence 1 TEU by the Court of Justice of the European Union»[63]. AG Cruz Villalón devoted a significant paragraph of his opinion to this point. He noted that it seems "an all but impossible task to preserve *this* Union, as we know it today, if it is to be made subject to an absolute reservation, ill-defined and virtually at the discretion of each of the Member States, which takes the form of a category described as 'con-

[61] Case C-399/11 *Criminal proceedings against Stefano Melloni* [2012], Opinion of AG Bot, para. 139.

[62] Ibid., para 140.

[63] BVerfG, 2 BvR 2728/13 par 27

stitutional identity'. That is particularly the case if that 'constitutional identity' is stated to be different from the 'national identity' referred to in Article 4(2) TEU"[64]. According the AG's opinion, this would lead EU law towards an unacceptable subordinate position and would moreover neglect the hard work done to reconcile EU law with the constitutional traditions common to the Member States. An alternative approach is possible, on Cruz Villalón's account, and would consist in "a clearly understood, open, attitude to EU law" that "should in the medium and long term give rise, as a principle, to basic convergence between the constitutional identity of the Union and that of each of the Member States"[65].

7. Art. 4(2) TEU: an "incomplete contract"

Despite the vast attention devoted to Art. 4(2) TEU by the legal scholarship, the very notion of constitutional identity remains quite unclear. 'Ambiguity' is one of the adjectives that are more frequently associated with the concept of national and constitutional identity[66]. This seems to be the fate of every notion of identity, being "an essentially contested concept as there is no agreement over what it means or refers to"[67]. The controversial nature of identity challenges constitutional theorists, whose interests have been mostly focused on the reduction of the ambiguity of the concept[68]. One could nonetheless argue that a certain degree of indeterminacy of the notion may have a positive effect of the constitutional system. The European Union represents an innovative model, and innovation always brings about risks and unpredictable developments. Against this background, loose concepts may play the role of a safety valve, and avoid ultimate constitutional crashes. Such an experience is not uncommon in the constitutional develop-

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[64] Case C-62/14, *Gauweiler et alii v German Bundestag* [2015], Opinion of AG Cruz Villalón, para 59.

[65] *Ibidem*, para 61.

[66] Among many others, see Constance Grewe and Joël Rideau, *L'Identité Constitutionnelle Des états Membres de l'Union Européenne: Flash Back Sur Le Coming-out D'un Concept Ambigu* (Dalloz 2010); Dobbs (n 19) 9; Cloots (n 5) 137.

[67] Michel Rosenfeld, 'Constitutional Identity', *The Oxford Handbook of Comparative Constitutional Law* (Oxford University Press 2013) 756.

[68] Among many others, see the prominent works of Rosenfeld (n 9). and Gary Jeffrey Jacobsohn, *Constitutional Identity* (Harvard University Press 2010).

ments of pluralistic polities. Ambiguity may be the optimal trade-off to neutralize precise disagreements, which are invisible in the formulation of constitutional principles that are general enough to welcome very different readings and understandings. This *praxis* is familiar in the post-war constitutional experience. Disagreements are settled through "incompletely theorized agreement", to use the language of Cass Sunstein[69], or "irregular contracts", using the language of transaction-cost economics. The use of these theoretical "tricks" blunts or at least delays potential conflicts; insofar the formulation of the agreed principles is broad enough to welcome all different interpretations preferred by the negotiators.

Empirical evidence of an identity-disagreement may be found in analysis of the working documents of the European Convention, dealing with the provision set out in the Art. I-5 of the ill-fated Constitutional Treaty (CT). Indeed, the current formulation of Art. 4(2) TEU is built exactly on the same wording of the so-called Christophersen-clause of the CT. Therefore the *travaux préparatoires* of the European Convention are a meaningful source to elaborate on the details of the above mentioned misunderstanding[70].

As a matter of fact, a cleavage emerged between the Member States' representatives and the European Commission's ones in the proceedings of the working group V, chaired by Mr. Hennig Christophersen. The working group mandate dealt with a clearer delimitation of competence between the EU and the Member States, but formally covered the narrower issue of a better definition and regulation of complementary competences in the CT. Among the members of the working group, both Members States' and the Commission's representatives shared one common concern, namely the necessity to contain EU competence creep. The means to be used to address this shared concern were nonetheless subject to a deep disagreement. The Member States' main worry was

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[69] Cass R Sunstein, 'Incompletely Theorized Agreements' (1995) 108 Harvard Law Review 1733.

[70] See Guastaferro (n 22). It has been noted that "expediency and self-interest seem to be what motivated the drafters" and that "politics rather than principle lay at the root of the identity clause's incorporation into the Treaties": see Cloots (n 5) 82–83.

the "*delimitation* of the EU scope of action vis-à-vis those of the Member States"[71]. Some of the proposals of the Member States' representative drew on the *Lamossoure Report*[72] of the European Parliament, where the problem of the distribution of competences between the EU and the Member States had been addressed through a tripartite classification: a) competences of the EU; b) exclusive competence of the Member States and c) EU's and Member States' shared competences (concurrent and complementary).

In the Member States' representative views, the delimitation of the EU competence was the main concern of working group V. Conversely, the Commission representatives focused much more on other aspects, namely the specification of the scale of intervention and the exercise of EU action. A catalogue of Member States' exclusive competences, possibly bearing the core of Member States' constitutional identity in the *Lissabon-Urteil* manner, was therefore incompatible with the Commission's view. According to the latter, a classification of competences was far too rigid and simplistic[73].

The Member States interpreted the Cristophersen clause exactly as the Commission was not disposed to do, and thus as a sort of competence clause protecting Member States' powers under the guise of respect of national identities. The terms of the disagreement were rather clear in the position of the Commission, where it was clarified that an identity clause ought "not lead to the limitation of the scope and exercise of the competencies allocated to the Union to take account of the specific requirements of each Member State, for this would jeopardize the distribution of competencies established by the Treaty"[74].

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[71] Guastaferro (n 22) 18. [emphasis in the original]

[72] European Parliament – Committee on Constitutional Affairs (24 April 2002), *Report on the division of competences between the EU and the Member States* (2001/2024(INI)), available at http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+REPORT+A5-2002-0133+0+DOC+PDF+V0//EN.

[73] "It was quite clear that in the Commission's view – much more defensive of the *status quo* – there was no space for any explicit or more nuanced enumeration of Member States' reserved powers – what the "Christophersen clause" actually represented for the Member States' Representative": see the wide analysis of the *travaux préparatoires* with regard to the identity clause by Guastaferro (n 22) 24.

[74] Working Group V European Convention, 'Note from M. Paolo PONZANO, Commission's Representative "Combining Clarity and Flexibility in the European Union"s System of Competencies"' 5 <http://european-convention.europa.eu/docs/wd5/3134.pdf>.

On the other side of the fence, Member States were reluctant to openly claim for the introduction of national exclusive competences because this could have implied that the sovereign authority allocating competences was the Union. This approach would have been clearly inconsistent with the jealously preserved idea of the Member States as *masters of the Treaties* and the principal of conferral.

In summary: the Commission refused the idea of the identity-clause as "counter-limits' clause" in the sense of the *BVerfG*'s Lissabon-doctrine; the Member States' representative interpreted the clause as a sort of list of Member States' reserved powers, even if they were reluctant to the idea of introducing such an enumeration of powers in the CT.

The final wording of the Christophersen-clause (now Art. 4(2) TEU, with the addition of a final sentence) did not draw any list of Member States' exclusive competences, and avoided to specify that its application was limited to the cases of EU competences exercise[75]. Finally, the drafting of the "identity clause" met the Commission's and Member States' representative expectations, even though for very different reasons.

In this context, it is hardly surprising that the interpretation of Article 4(2) TEU is controversial. This is not necessarily linked to a bad drafting of the Treaty. Ambiguity may not be an unintended character of the national constitutional identity clause[76]. Art. 4(2) TUE bears some elements to answer the question of sovereignty in the EU and in the Member States, but these elements are not enough to collect an ultimate answer. When the Treaty drafters tried to give such an answer, they failed. Even in the ill-fated constitutional Treaty a proper supremacy clause was missing – if compared with Art. 6 of the US Constitution – and after Lisbon the only point the parties managed to agree

[75] In an earlier stage of the drafting, the Christophersen clause had an incipit by virtue of which "*when exercising its competencies*, the Union shall respect the national identities" (emphasis added). In the successive drafting the incipit was removed. See Working Group V European Convention, 'Note by Mr Peter Altmaier "The Division of Competencies between the Union and the Member States" (revised Version)' 20 <http://european-convention.europa.eu/docs/wd5/2341.pdf>; Guastaferro (n 22) 26.

[76] Drawing from the words that Milan Kundera wrote with regard to the existence of the Czech nation ("The existence of Czech nation was never a certainty, and precisely this uncertainty constitutes its most striking aspect", cited in Judt (n 3) 637.), one could say the uncertainty of the concept of national identity constitutes its most striking aspect.

upon was an almost illegible declaration, adopting an opinion of the Council's legal service[77].

8. In search of a new canon: constitutional identity out of the courts

The overview of the CJEU's case-law related to Article 4(2) – and to Art. 6(3)/F(1) TEU before Lisbon – shows an enormous discrepancy between the understanding of national identity "in the books" and national constitutional identity in action. Despite the «excess of literature on constitutional identity»[78], the CJEU referred to the identity-clause very rarely.

Nonetheless there are good reasons to welcome the CJEU's reluctance to use the identity-argument, being «left between a rock and a hard place in relation to the scope of the provision»[79]. On one hand, under a narrow interpretation of the identity-clause, the CJEU exposes EU law to the risk of rejection of the principle of primacy from the Member States' constitutional and supreme courts. On the other, a broader interpretation of the clause, welcoming the national constitutional courts' counter-limits doctrines, would consist of too strong a concession to Member States' sovereignty claims, equally undermining the CJEU's understanding of the principle of primacy.

This is why the identity-clause works much better if it remains a dead letter of the Treaties and goes unused, at least in courts. As a judicial "nuclear weapon", a concrete application of the national constitutional identity argument would probably trigger very violent reactions from CJEU and/or the Member States. From the former, if the notion is used by the Member States' constitutional courts to protect the national legal order from European constitutional spill-overs. From the latter, if the notion of Member States' national identity is (mis-)used by the CJEU.

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[77] The declaration adopted the Council's legal service opinion, which substantially referred to the CJEU's settled case-law: "It results from the case-law of the Court of Justice that primacy of EC law is a cornerstone principle of Community law. According to the Court, this principle is inherent to the specific nature of the European Community. At the time of the first judgment of this established case law (Costa/ENEL, 15 July 1964, Case 6/644) there was no mention of primacy in the treaty. It is still the case today. The fact that the principle of primacy will not be included in the future treaty shall not in any way change the existence of the principle and the existing case-law of the Court of Justice"

[78] Burgorgue-Larsen (n 55) 275.

[79] Dobbs (n 19) 36.

Despite the risks of this judicial nuclear "cold-war" between the CJEU and the Member States' constitutional and supreme courts, for a long time the most reputable legal literature put confidence in the miraculous effect of the so-called judicial dialogue. The Europeanization of the counter-limits under Article 4(2) TEU was supposed to defuse any risk of nuclear war between courts.

Recent developments of the judicial interactions around the notion of identity present quite a different reality. The *Bundesverfassungsgericht* (a sort of commander-in-chief of the national constitutional courts' army in this respect) firstly adopted a swinging approach between sovereignist temptations (*Lissabon-Urteil*) and *Europarechtsfreundlichkeit* [openness towards European law] (*Mangold-Urteil*)[80]. Then, after a long-lasting reluctance to engage directly the CJEU, the *BVerfG* finally submitted its first preliminary reference question to the CJEU in the Outright Monetary Transactions (OMT)/Gauweiler case in 2012. In a nutshell[81], the case regards the decision of the European Central Bank (ECB) to establish a framework for the purchase on the secondary market of a potentially unlimited amount of government bonds from (only) certain Member States. When the *BVerfG* submitted its reference, the program had only been announced, and still has not been put into effect. Nonetheless the sole announcement of the Program triggered two remarkable reactions: it calmed down the financial markets and it drew the anger of the *Bundesverfassungsgericht*. The Federal Constitutional Tribunal in Karlsruhe was submitted four separate *Verfassungsbeschwerde* (individual constitutional complaints)[82] and a complaint through *Organstreitverfahren*. The com-

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[80] On these developments see Theodore Konstadinides, *Constitutional Identity as a Shield and as a Sword: The European Legal Order within the Framework of National Constitutional Settlement*, 13 CAMB. YEARB. EUR. LEG. STUD. 195–218 (2012). His considerations on the use of constitutional identity "as a sword" have been largely borne out by the successive case-law of the *BVerfG*, in particular with regard to the OMT case.

[81] On the OMT reference see the special issue of the German Law Journal, Volume 15 (2014) available at <http://www.germanlawjournal.com> and Mattias Wendel, 'Exceeding Judicial Competence in the Name of Democracy: The German Federal Constitutional Court's OMT Reference' (2014) 10 European Constitutional Law Review (EuConst) 263.

[82] The constitutional complaints were so to say individual, provided that the action was joined by 37,000 German citizens.

plaints contested, above all, the (non-monetary but) economic nature of the Program, being therefore forbidden by Article 123 TFEU. In its decision to submit the reference to the CJEU, the *BVerfG* expressly assumed that the decision of the European Central Bank (ECB) was *ultra vires* and infringed the constitutional identity of Germany. Nonetheless, instead of directly declaring the decision *ultra vires* and/or violating German constitutional identity, the German federal Tribunal submitted a reference for a preliminary ruling to the CJEU. Finally, the ECJ opted for a largely diplomatic decision. On the one hand, the Court considered the program compatible with EU law, but on the other hand the ECJ filled its motivation with reassurances and reasons for the *BVerfG* to welcome the judgment as a victory of the German Federal Constitutional Court's approach. Also, with regard to the protection of the German constitutional identity, the *BVerfG*'s approach was far from cooperative: on the contrary, in its reference the German Tribunal noted that that «the identity review performed by the Federal Constitutional Court is fundamentally different from the review under Art 4 (2) sentence 1 TEU by the Court of Justice of the European Union»[83]. The point did not go unnoticed by the AG, who objected that such an interpretation of national constitutional identity as an absolute reservation would put EU law in a subordinate position. Unlike the AG, the ECJ preferred not to address this point at all in its decision. At the time of writing this paper, the decision is pending again before the German *BVerfG*, which in principle might still declare the program unconstitutional, being a violation of the German constitutional identity. The effort made by the ECJ to defuse this judicial crisis makes this scenario quite implausible, but nonetheless the OMT case shows that the so-called judicial dialogue "in action" may not have the hoped-for results when constitutional identity is at stake. Whatever the follow-up of the ECJ's decision, the OMT case reveals all the dangers and shortcomings of the so-called judicial dialogue: dialogue, when identity issues and vital interests of a Member State are at stake, seems likely to turn into a deaf ultimatum.

[83] BVerfG, 2 BvR 2728/13 par 27

C. CONSTITUTIONAL IDENTITY AND DIFFERENTIATED INTEGRATION

9. Neutralizing the conflict: respect of national identities and differentiated integration

The above summarized judicial developments suggest that blind faith in judicial dialogue may fall short of providing viable solutions when identity-related issues are at stake. Moreover, this is not the only reason to dismiss the myth of the miraculous effect of the judicial dialogue. Another one comes from the framing of the constitutional identity problem. In fact, an orthodox conception of this controversial concept usually focuses on broadly shared principles (democracy, rule of law, fundamental rights…): in these matters, chances for a constitutional clash are scarce and lie more on the interpretative ground than on the substantial one. Indeed, it is rather unlikely that the development of the European integration will move in the opposite direction of the basic principles of constitutionalism. In many cases the real issue under constitutional identity-related questions is connected with the outcomes of a balancing process. It is extremely implausible, to put it mildly, that an EU regulation shall suddenly declare elections illegal, or entrust all jurisdictional competences to Governments, or enact other similar serious infringements of the basic principles of constitutionalism.

Those principles are deeply rooted and widely shared in all Member States, and with regard to them the European orchestra of the EU institutions and the Member States can count on a symphonic music score. Dissonances that may arise because of different readings of those basic constitutional principles would be linked to the musical execution and not to the composition of the music score.

A very different case may arise when certain elements of a Member State's constitutional identity are part of a particular legal tradition of that Member State. In this respect, the emergence of legal conflicts is much more plausible. Under these circum-

stances no symphony can be played, provided the substantial cacophony[84] of the music score. Such a perspective would take into account those elements of the constitutional identity that distinguish a particular constitution from another[85], focusing on a heterodox conception of the notion of national constitutional identity. This notion emphasizes non-shared elements of the Member States' constitutional identities, and – as an added value – opens the door to different interpretations, rather than adding a supplementary analysis to the massive amount of scholarly investigations on the judicial understanding of the identity-clause**.** Empirical evidence demonstrates that, in this respect, differentiated integration has already played a role. What I argue in this paper is that: a) the current state of European integration calls for an ever more central role for differentiated integration and that b) differentiated integration can serve as an efficient instrument of preventive neutralization of ultimate conflicts between EU law and particular (non-shared) elements of national constitutional identity.

10. An analytical approach: constitutional differentiated integration in the European Union

The accommodation of increasingly variegated national preferences in the European project is far from novel. On the contrary, differentiated integration is a concept that was not alien to the very first steps of European integration[86]. The Treaty of Rome of 1957 was not a flinty body of norms, equally applicable in every corner of the European Economic Community (EEC). It admitted the perpetuation of preexisting forms of regional cooperation among the Benelux countries, acknowledging a sort of primitive

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[84] The image of a «danger of constitutional cacophony in relation to national identity» is drawn from von Bogdandy and Schill (n 15) 1435.

[85] For an analysis of this constitutional conception of the identity concept, in opposition to the concept of the identity of the people see José Luis Martí, 'Two Different Ideas of Constitutional Identity: Identity of the Constitution v. Identity of the People', *National Constitutional Identity and European Integration* (Intersentia 2013).

[86] See Dominik Hanf, 'Flexibility Clauses in the Foundign Treaties, from Rome to Nice', *The Many Faces of Differentiation in EU Law* (Intersentia nv 2001).

form of enhanced cooperation[87]. The whole Part Four of the Treaty was devoted to the "Association of the Overseas Countries and Territories", recognizing a special status and a limited application of the norms of the treaties to the territories having special relations with Belgium, France, Italy, the Netherlands and the United Kingdom[88]. Special provisions were provided to compensate for the economic disadvantages caused by the division of Germany[89], and transitional *ad hoc* arrangements and derogations were commonly introduced in the Accession Treaties of new Member States[90].

Since the times of the signature of the first European Treaties things have changed significantly. From a small group of relatively homogeneous Member States, the European integration project has gone far ahead. Thus, the six founding Member States formed a small and homogeneous club in the postwar Europe: the gap in GDP *per capita* between richer and poorer economies was much smaller in 1951 than today[91]. The political homogeneity is also incomparable, should we remember that all six foreign

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[87] Art. 233 of the Treaty of Rome: "The provisions of this Treaty shall not preclude the existence or completion of regional unions between Belgium and Luxembourg, or between Belgium, Luxembourg and the Netherlands, to the extent that the objectives of these regional unions are not attained by application of this Treaty", and similarly a Nordic regional cooperation agreement between Denmark, Finland, Iceland, Norway and Sweden survived and was explicitly mentioned in the Accession Treaties of the States that successively joined the Union.

[88] See Part IV of the Treaty of Rome and the list of territories enclosed in Annex IV to the same Treaty.

[89] See Art. 82 "The provisions of this Title shall not form an obstacle to the application of measures taken in the Federal Republic of Germany to the extent that such measures are required in order to compensate for the economic disadvantages caused by the division of Germany to the economy of certain areas of the Federal Republic affected by that division" and Art. 92(2): "The following shall be compatible with the common market: … c) aid granted to the economy of certain areas of the Federal Republic of Germany affected by the division of Germany, in so far as such aid is required in order to compensate for the economic disadvantages caused by that division".

[90] More than half of the Protocols on the Treaty of Rome provided derogations. The same was true for most of the Accession's treaties: see Hanf (n 87).

[91] In 2007, when Romania accessed the EU, German GDP *per capita* was 4 times the Romanian. In 1951, the lowest GDP *per capita* amounted at more than an half of the biggest one, despite the very different impact of war in national economies. As a matter of fact, this gap was even smaller in 1957, when the Treaty of Rome was signed by the same six Member States. Data are obtained from Jutta Bolt and Jan Luiten Zanden, 'The Maddison Project: Collaborative Research on Historical National Accounts' (2014) 67 The Economic History Review 627.

ministers who signed the Treaty of the European Steel and Coal Community in 1951 were members of their respective Christian Democratic Parties[92].

A growing internal heterogeneity in the European Union is well captured by a comparison with the US. Regional inequality is today much greater in the EU than in the US[93]: the average per capita income is immensely more disproportionate between Luxembourg and Romania than between State of New York and Mississippi. The ratio amounts at more than 10 times in the first case, less than two times in the latter[94]. The EU enlargement certainly had an important impact on this picture, but a growing diversity was already a settled trend before 2004[95]. This being said, it comes as no surprise if theories of integration, disintegration and differentiated integration move back to the 1970s[96].

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[92] Judt (n 3) 157.

[93] Giandomenico Majone, 'Rethinking the Union of Europe Post Crisis. Has Integration Gone Too Far?' (*Cambridge University Press*) 39.

[94] The comparison of the GDP *per capita* in Luxembourg and Romania is striking, but may be dismissed as inaccurate, as long as it considers extreme examples. Nonetheless it is remarkable that Romania's GDP *per capita* amounts at less than half of the GDP per capita in not less than 15 Member States. Similar outcomes would result if GDP *per capita* of Bulgaria, Hungary or Croatia were used for the comparison. Data are drawn from the U.S. Bureau of Economic Analysis, "Per Capita Real GDP, Interactive Data", available at <http://www.bea.gov/iTable/iTableHtml.cfm?reqid=70&step=10&isuri=1&7003=1000&7035=1&7004=naics&7005=1&7006=28000,36000&7036=1&7001=11000&7002=1&7090=70&7007=2013&7093=levels> and from the Statistical Office of the European Communities. *EUROSTAT: Regional Statistics. Reference Guide*. Luxembourg: Eurostat, 2014, available at <http://ec.europa.eu/eurostat/tgm/table.do?tab=table&plugin=1&language=en&pcode=tec00001>.

[95] To put it in another way: "[t]he levels of economic development are very different from one Member State to another. Taking into account the figures available for the year 2009 and with 100 as the index average for the EU-27 GDP per capita, seven Member States were below 65% of this average and two of them were around 45% of this average. [...] As a comparison, for the USA and for the same year 2009, no State was less than 70% of the average national index". The analysis is based on EUROSTAT data, see Jean-Claude Piris, 'It Is Time for the Euro Area to Develop Further Closer Cooperation Among Its Members' (2011) 5/11 Jean Monnet Working Paper 31 <http://www.jeanmonnetprogram.org/papers/11/110501.pdf>. This growing heterogeneity does not emergence only from a comparison with the United States, but also from a comparison of the economic picture of Europe at the very first steps of the integration project with today's picture. In 2007, when Romania accessed the EU, German GDP *per capita* was 4 times the Romanian. In 1951 the lowest GDP *per capita* amounted at more than an half of the biggest one, despite the very different impact of the war on national economies. As a matter of fact, this gap was even smaller in 1957, when the Treaty of Rome was signed by the same six Member States. Data are obtained from Bolt and Zanden (n 92).

[96] This debate has been characterized by "an excess of terminology, which can give even the most experienced specialist of European integration a severe case of semantic indigestion" (Alexander CG Stubb, 'A Categorization of Differentiated Integration' (1996) 34 JCMS: Journal of Common Market Studies 283, 283.. I will refer to 'differentiated integration' in the meaning of a term used to "denote variations

One of the first models of differentiated integration emerges from a series of articles published in 1973 by Ralph Dahrendorf, at that time European Commissioner[97]. His proposal of '*integration à la carte*' was based on the idea that no Member State must participate in everything, and sometimes recurred again in more recent years.

Only a few years later, the European federalist and Belgium Prime Minister Tindemans elaborated on a 'multi-speed Europe' in 1975. His report on the future of European integration considered differences among the (at that time) nine Member States already very large. Therefore Tindemans held that whatever European target would be set in the following times, different Member States would never be able to reach them at the same speed.

The further 'concentric circles' model is based on the idea of a highly integrated hardcore and raised some interest since 1994, when the France's prime minister referred to it, followed by the '*Schäuble-Lamers-Paper*', which has been adopted by the CDU/CSU Parliamentary Group in the German Parliament and referred to a *Kerneuropa*. Resemblances of this approach bear again in year 2000 in the *avant-garde* project favored by Joschka Fischer, whose challenge was accepted by Delors and Chirac and relaunched by Chirac and Schröder some years later.

Another possible response to a growing heterogeneity of Europe has been built on a European declination of James Buchanan's theory of clubs[98]. Majone's Europe as a

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in the application of European policies or variations in the level and intensity of participation in European policy regimes", as specified by Helen Wallace, 'Differentiated Integration', *Encyclopedia of the European Union* (Lynne Rienner Publishers 1998) 137. For a thorough analysis of differentiated integration until 1996 and a very complete categorization see Stubb. A more updated analysis is to be found in Kenneth Dyson and Angelos Sepos (eds), *Which Europe?: The Politics of Differentiated Integration* (Palgrave Macmillan 2010).

[97] The articles were published in "Die Zeit" under the pseudonym 'Wieland Europa'. Dahrendorf's idea of a *Europe à la carte* is summarized in his 'Jean Monnet Lecture' held at the European University Institute in Florence, on November 26th 1979. Many parts of the lecture are not only very inspiring, but in hindsight, prophetic: "I have often been struck by the prevailing view in Community circles that the worst can happen is any movement towards what is called *Europe à la carte*. This is not only somewhat odd for someone who likes to make his own choices, but also illustrates that strange puritanism, not say masochism which underlies much of Community action: Europe has to hurt in order to be good", Ralf Dahrendorf, 'A Third Europe?' [1979] European University Institute <http://aei.pitt.edu/11346/2/11346.pdf>.

[98] James M Buchanan, 'An Economic Theory of Clubs' (1965) 32 Economica 1.

'club of clubs'[99] has been theorized as a model of differentiated integration which aims at reducing the so-called costs of uniformity through a variety of institutional arrangements. One of the most relevant implications of the application of this model, would be the understanding of the European Monetary Union as a 'club good' rather than a 'collective good' (i.e. the Euro should be transformed from a collective good imposed to all European Members to a good from whose benefits and burdens the Member of the European club may be excluded or may choose to be excluded).

Lately the possibility (and desirability) of a concentric development of the European Union was envisaged in the proposal of a 'Euro Area avant-garde' group[100], which is *de facto* already imposing itself in the Euro crisis developments. The idea includes both elements of the concentric circles model and the temporariness of the multi-speed Europe model.

Whichever model of differentiated integration one considers, a common denominator deserves attention: all the above mentioned examples (and many other models which have been theorized) are based on the assumption that flexibility is needed in an ever larger and socio-economically more heterogeneous union. The prescribed therapies may vary greatly, but there is a broad agreement on the diagnosis: since Member States are strikingly diverse in terms of socio-economic conditions and political preferences, the *one-size-fits-all* model of European integration is too strict and largely inadequate. In this picture, the *legal* and *constitutional* diversity of the 28 Member States is hardly considered, and the diversity of constitutional identities rarely appears as a possible source of differentiated integration.

Comparing 1951 or 1957 with 2015 Europe, the differences are not limited to the economic or political dimension. The gap grew also in constitutional terms, in particular with regard to the unamendable core of Constitutions. The constitutional cultures of the six founding countries experienced an unprecedented development, and the Union progressively welcomed an increasing number of members, whose constitutional traditions

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[99] Majone (n 94) 113–117, 316–322.
[100] Piris (n 96).

have very different roots if compared with the ones of the founding countries, or whose constitutional texts belong to very different constitutional generations. A growing constitutional variety has been registered on two fronts. Under a static horizontal perspective, it is undeniable that the legal tradition of the six founding Member State expressed much more homogeneous legal cultures, if compared with those Member States that joined the Union in the successive enlargements. The EU gradually embraced the common law tradition of the UK, the Nordic models of State and the post-socialist countries with the last enlargements. This diversity has moreover to be combined with a vertical stratification of constitutional diversity. After World War II, a "flowering time"[101] of constitutional clauses providing substantive limitations to constitutional amendment power has started. Although the idea (and problem) of limiting the constitutional amendment power was not new, it took a much more central role in the post-war constitutional developments. In many cases the 'counter-limits' doctrines were founded upon the achievements of these new developments in the field of the limits to constitutional amendment power[102]. Against this background, 'constitutional identity' has been gradually developed as a unitary category that encompassed together limits to constitutional amendments and counter-limits. In very few countries this experience developed by means of explicit constitutional adjustments. This was the case of Europa-Artikel in the German Fundamental Law (Art. 23 GG), which was introduced by means of a constitutional amendment in 1992, and provides an explicit referral to the limits to the constitutional amendment power (Art. 79.3 GG). In a nutshell, according to these combined provisions, the German Fundamental Law opposed the same ultimate limits it opposed to the constitutional amendment power to EU law. In several other Countries the challenge to unconditional normative freedom of constituted powers developed in the ab-

[101] For the overview of this time of flowering eternity-clauses (the A. refers to a "*Blütezeit*" in the original text), see K. Stern, *Das Staatsrecht der Bundesrepublik Deutschland*, Band III/2, München, 1994, 1094

[102] Patricia Popelier, '"Europe Clauses" and Constitutional Strategies in the Face of Multi-Level Governance' (2014) 21 Maastricht journal of European and comparative law 300.

sence of eternity-clauses[103]: in the silence of the constitution, constitutional limits to the constitutional amendment power have been an interpretative outcome of many constitutional courts' case-law.

The combination of these horizontal and vertical developments enhanced both the constitutional diversity and the constitutional rigidity of the untouchable cores of the Member States' constitutions. Alongside socio-economic factors and political preferences, these constitutional developments deserve consideration in the framework of differentiated integration.

11. Opt-outs, derogations, legal guarantees: a Europe of bits and pieces?

It is against this background that differentiated integration may be considered as a viable means of accommodation of non-shared features of Members States' national constitutional identities. Empirical evidence of the application of differentiated integration with this purpose may be drawn from the European experience and some pragmatic development in the last twenty years. After decades of academic speculation and political debate, the Treaties of Maastricht and Amsterdam represented a significant turning-point in the practice of differentiated integration in the EU. Indeed, enhanced cooperation was incorporated in the structure of the treaties. Here I am not referring only to the proper institute of closer/enhanced cooperation (firstly regulated in Art. K.12 of the Treaty of Amsterdam, later amended by the Nice and Lisbon Treaties), but to a broader concept. This includes "in-built" forms of enhanced cooperation: (in)famously the Euro and the Schengen Area.

These have been started with the participation of a limited number of Member States, but were aimed at including all EU Member States. Legally speaking, decision adopted in the Schengen and Euro Areas are part of the *acquis communautaire*. The Schengen cooperation aims at removing the checks on persons at internal borders and granting access to the Schengen Information System. The Schengen Area was founded

[103] On these developments, among many others see Yaniv Roznai, 'Towards a Theory of Unamendability' (Social Science Research Network 2015) SSRN Scholarly Paper ID 2569292 <http://papers.ssrn.com/abstract=2569292> accessed 13 July 2015.

in 1985 by means of an international Agreement, established outside of the European Community, by five out of the ten EU Member States *ratione temporis*. It was incorporated in the EU Treaties by the Amsterdam Treaty in 1999 and since then it has been an "in-built" mechanism of enhanced cooperation ever since. Twenty-two out of the twenty-eight EU Member States have joined so far. Four out of the six EU Member States which are not part of the Schengen Area – Bulgaria, Croatia, Cyprus and Romania – are legally bound and wish to join the area. Eventually, only Ireland and the UK will maintain opt-outs (see below para. 11.1 and 11.2).

By contrast, the first steps towards a Euro Area were taken within the framework of the EU institutions. The Euro was meant to become the common currency of the European Union. The reluctance of some Member States made things more complicated and, as widely known, Denmark and the UK obtained a permanent opt-out through the Treaty of Maastricht, whilst Sweden obtained a *de facto* opt-out[104]. All other Member States are subject to the general principle that the Euro is the single currency of all EU Member States, although the participation in the Euro is conditional upon the fulfilment of the mandatory convergence criteria[105], subject to a decision of the Council.

That being said (also in light of some successive adjustments), the Treaty of Maastricht could be considered as a leap of quality jump from an old conception of the European integration process to a new one. Opt-outs and derogations could be seen as inevitable side-effects of this progress. Such an interpretation would give only a very partial picture of the 1992 European moment of truth.

As a matter of fact, the Treaty of Maastricht has also been a turning point in the constitutional narrative of the European integration process. As already mentioned, the Maastricht Treaty included for the first time the respect of national identities in the

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[104] Under the 1994 Treaty of Accession, Sweden is obliged to join the Eurozone once it meets the requirement laid down by the Treaties. But Sweden obtained that joining the second step of European Exchange Mechanism (ERM) should be voluntary and subject to approval by a referendum: as accession to ERM is a condition to adopt the single currency, Sweden is *de facto* still master of its own monetary destiny.

[105] See Art. 140 TFEU and Protocol Nr. 13 on the "convergence criteria".

wording of EU Treaties. The appearance of national identity in the Treaty of Maastricht was part of a more comprehensive balance between supranational achievements and fears of a supranational overcoming of the national State. Against this background, it is not a matter of coincidence that the Treaty of Maastricht marked a decisive milestone also in the field of differentiated integration[106]. The Treaty introduced a set of protocols and declarations addressed to specific needs of certain Member States, allowing for limited exemptions from the *acquis communautaire*. This fragmentation has been described as a "significant blow to the vision of integration espoused by the classical narrative"[107], and a threat to the uniform application of EU law[108]. In a more catastrophist view, opt-outs and exemptions were able to open a Pandora box: they would have led to the undesirable destiny of a "Europe of bits and pieces"[109]. Other commentators predicted no less than a destructive disintegration of the EU[110]. On the other side of the fence are those scholars who welcomed opt-outs as desirable means of a new path of differentiated integration[111]. According to this view, there should be no single supreme authority (neither the national State, nor the EU): integrative and disintegrative dynamics should be accommodated within the EU legal order, and perspectives of differentiated integra-

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[106] On the trade-off between enlargement of EU competences and flexibility see Matej Avbelj, 'Revisiting Flexible Integration in Times of Post-Enlargement and the Lustration of EU Constitutionalism' (2008) 4 Croatian Yearbook of European Law and Policy 131, 139. For an assessment of the same trade-off after Lisbon, see Dobbs (n 19).

[107] Matej Avbelj, 'Questioning European Union Constitutionalisms' in Russell A Miller and Peer Zumbansen (eds), *Comparative Law as Transnational Law: A Decade of the German Law Journal* (Oxford University Press 2012) 395.

[108] Gráinne de Búrca and Joanne Scott, 'Introduction' in Gráinne de Búrca and Joanne Scott (eds), *Constitutional Change in the EU: From Uniformity to Flexibility* (Bloomsbury Publishing 2000).

[109] Deirdre Curtin, 'The Constitutional Structure of the Union: A Europe of Bits and Pieces' (1993) 30 Common Market Law Review 17. The metaphor already emerged in the EUI Working Paper by Joseph HH Weiler, 'Supranationalism Revisited, a Retrospective: The European Communities after 30 Years', *Noi si mura: selected working papers of the European University Institute* (European University Institute 1986) 356–357.

[110] Svein S Andersen and Nick Sitter, 'Differentiated Integration: What Is It and How Much Can the EU Accommodate?' (2006) 28 Journal of European Integration 313.

[111] See Jo Shaw, 'European Union Legal Studies in Crisis? Towards a New Dynamic' (1996) 16 Oxford Journal of Legal Studies 231. Renaud Dehousse, 'Beyond Representative Democracy: Constitutionalism in a Polycentric Polity' in Joseph HH Weiler and Marlene Wind (eds), *European Constitutionalism Beyond the State* (Cambridge University Press 2003).

tion in a multi-level dimension are welcomed as a desirable and necessary development of a "post-sovereign" model[112].

Whatever opinion one may have on these issues, the opt-outs annexed to the Treaty of Maastricht has not been an isolated experience of the recent European integration's developments. The negotiations between more or less integrationist Member States frequently led to deadlocks, where "braking actors" may operate as veto players. In these circumstances there are three possible ways out of the deadlock: a) the controversial measure may be abandoned b) the *avant-garde* states may accommodate the rearguard states by granting them opt-outs, exemptions or derogations (a clear example is the Eurozone) or c) the *avant-garde* may step out from the EU framework and conclude a separate treaty (this is the case of the Fiscal Compact and the European Stability Mechanism).

In the following paragraphs I will analyze some of the most significant examples of differentiated integration. The analysis makes of course no claim of being exhaustive of all derogations in force, but rather aims at addressing a reasonable number of case-studies. I will mainly concentrate my attention on authentic opt-outs. Where appropriate, I will also take into account other form of derogations. However the analysis is limited to the level of primary law. Since authentic opt-outs are currently in place in favor of the UK, Ireland and Denmark, it will make sense to proceed with a country-by-country analysis.

11.1. United Kingdom

The United Kingdom is commonly recognized as an opt-out champion. This idea is partly based on the overall rough reputation of the UK as a euro-cynical-in-nature Member State, and in part based on an accurate picture of the legal reality. The UK benefits from a special status in many areas of the EU, and at least two of them lie in the core of the integration project: Schengen and Euro.

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[112] Neil MacCormick, *Questioning Sovereignty: Law State and Nation in the European Commonwealth* (Oxford University Press 1999).

The negative British attitude towards the border-free zone moves back to the times of the conclusion of the (then) international agreement that Margaret Thatcher refused to sign. Since then the stance has changed in many respect, but what seems still today to be a total taboo is the very core of Schengen, namely the common border policy. A more pro-European attitude of the British government in 1997 allowed in fact the incorporation of the Schengen *acquis* into the Amsterdam Treaty. This move came at a price in favor of the UK, namely its non-participation. The UK was indeed granted an opt-out Protocol from Schengen, with a limited degree of flexibility. The British Government could not just pick the measures in which it considered to participate, but could only request to take part in some or all of the provisions of the Schengen *acquis*.

In March 1999 the United Kingdom applied to participate in several measures, including the police and judicial cooperation provisions and part of the Schengen Information System. This request was approved by a Council Decision in 2000 and fully implemented by a Decision of the Council of the EU starting on 1 January 2005.

Nonetheless, the core of the Schengen idea – the free border zone – remained untouched over the Channel: "[a] significant majority on the domestic scene, led by Conservatives and other eurosceptics, have 'securitized' the British Schengen protocol to the extent that it appears to constitute a guarantee of the survival of the British nation"[113].

A second remarkable exemption obtained by the UK concerns the single currency. Protocol No. 11 was annexed at the Treaty of Maastricht (now renumbered Protocol No. 15) and recognizes "that the United Kingdom shall not be obliged or committed to move to the third stage of Economic and Monetary Union without a separate decision to do so by its government and Parliament". Later, during the negotiations of the Amsterdam Treaty of 1997, the UK was granted an opt-out from what was the Justice and Home Affairs Pillar. The character of this derogation was extremely flexible, allowing the UK to participate in EU measures on a case-by-case basis. After the dismantling of

[113] Rebecca Adler-Nissen, 'Behind the Scenes of Differentiated Integration: Circumventing National Opt-Outs in Justice and Home Affairs' (2009) 16 Journal of European Public Policy 62, 71. See also Antje Wiener, 'Forging Flexibility - the British "No" to Schengen' (2000) 1 European Journal of Migration and Law 441.

the three-pillars structure, the opt-out was renewed in the area of freedom, security and justice (AFSJ) with the Treaty of Lisbon (Protocol No 20). Additionally, according to Protocol No 36[114], the UK had an all-or-nothing choice to opt out of all acts of the Union in the field of police cooperation and judicial cooperation in criminal matters which have been adopted before the entry into force of the Treaty of Lisbon. Then the UK would have been able to opt in again in single measures on a case-by-case basis. This all but plain procedure[115] led to a full opt out of the UK from the approximately 130 "ex-third-pillar" measures in July 2014, after which the UK notified its wish to opt back into 35 of these measures, six of which are included in the Schengen *acquis*. Among these are the chapters of the Schengen Convention on police and judicial cooperation in criminal matters and the Schengen Information System (SIS II, which is the police/justice body of the Schengen data base). The remaining 29 non-Schengen measures include the European Arrest Warrant, Europol and Eurojust.

A different case is the UK's opt-out in social policy. Its peculiarity lies in the fact that the British opt-out from the social chapter is a ceased one. The opt-out was included in Protocol No 14 to the Maastricht Treaty, excluding the UK from the EU decision-making procedures on social rights' implementation. Any legislation adopted in these fields would not apply to the UK. Finally the differentiation terminated for a very simple reason: the Labor Party won the elections, and the opt-out did not match the new political orientation in the UK.

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[114] Whereas Protocol No 20 regards the application of certain aspect of the AFSJ to the UK and to Ireland, Protocol No 36, Article 10(4)(5) is only applicable to the UK. As a consequence, the Irish and British position with regard to the possibility of opting-out and opting back in shall be considered separately.

[115] On the details of the opt-out and in procedure see Alicia Hinarejos, John R Spencer and Steve Peers, 'Opting out of EU Criminal Law: What Is Actually Involved?' [2012] CELS Working Paper <http://www.cels.law.cam.ac.uk/publications/working_papers.php>.

11.2. Ireland

Ireland shares with the UK more than one opt-out, even though the underlying reasons not to participate in the concerned matters can be very different in the two Countries[116].

The Irish position with regards to the Schengen Agreement has always been strongly influenced by the British reluctance to join the free-borders area. Irish accession to the Schengen Area without the UK would have caused the end of the long established Common Travel Area between Ireland and the UK, and would therefore impose exit and entry controls on persons traveling through the two Countries, including the land frontier between the Republic of Ireland and Northern Ireland.

Ireland was therefore granted with the UK an opt-out from the Schengen Area in a Protocol to the Amsterdam Treaty. The same Protocol provided both Countries with the possibility to request to take part in some or all of the provisions of the Schengen *acquis*. As far as police and judicial cooperation provisions of the Schengen *acquis* are concerned, Ireland applied to participate in June 2000. The Irish request was approved by a Council Decision in 2002, but has by far not yet been implemented.

Ireland joined the UK in the Protocol No 21 as well, being granted an opt-out in the area of Freedom, Security and Justice[117]. The Irish position with regard to the AFSJ differs from the British one only with regard to Article 10(4)(5) of Protocol 36. These provisions, carrying out the complicated procedures of opting-out and selective opting back in at the end of the transitional period, only apply to the UK.

This being said, the most interesting position regarding Ireland is, for our purposes, the Irish Protocol on the Lisbon Treaty. This Protocol forms part of the agreement reached between the Heads of State or Government after the Irish negative out-

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[116] This dependency has for a long time caused a lack of scholarly interest on Irish opt-outs and derogations, in short because "so far Ireland mainly follows the UK" (in these terms Adler-Nissen (n 114) 64.) and deserves therefore little consideration. Things changed after the Irish "No" to the Lisbon Treaty and the negotiation of an "authentic" Irish protocol (see below in the body text).

[117] See the debate at the Dáil Éireann held on Wednesday, 24 October 2007, available at http://oireachtasdebates.oireachtas.ie/. See also Maria Fletcher, 'EU Criminal Justice: Beyond Lisbon' in Christina Eckes and Theodore Konstadinides (eds), *Crime within the Area of Freedom, Security and Justice: A European Public Order* (Cambridge University Press 2011) 26.

come in the referendum on the Lisbon Treaty. To cut a long story short, the Irish 'no' seemed to cast the ill-fated Constitutional Treaty's shadows on the ratification procedure of the Lisbon Treaty. The "concerns of the Irish people"[118] were addressed with three instruments (informally called 'the Guarantees'): a decision of the Heads of State or Government of EU Member States acting in their capacity as sovereign states; a solemn declaration by the European Council on workers' rights, social policy and other related issues and a National Declaration by Ireland on Irish security and defense policy.

The first instrument was a legally binding international agreement and was adopted with the intention of transforming the decision into a protocol to the EU treaties with the adoption of the next Accession Treaty[119].

The Protocol included three "clarifications". Firstly, it was clarified that the provisions of the Irish Constitution on the protection of the right to life[120], family and education would not be affected by the Lisbon Treaty or the provisions of the CFREU. Secondly, the Protocol confirmed that nothing in the Treaty of Lisbon makes any change of any kind, for any Member State, to the extent or operation of the competence of the European Union in relation to taxation. Thirdly, the Protocol provided a clarification that Ireland's traditional policy in military neutrality will remain unchanged and unaffected by the Treaty.

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[118] These concerns were collected in the findings of a government-commissioned public survey about the reasons of the 'no' vote in the Irish Referendum. The survey was conducted six weeks after the vote, and indicated among these reasons a 'lack of knowledge/information/understanding' of the Treaty; concerns about the 'loss' of an Irish commissioner after the planned reduction of the number of Commissioners; the threat to the traditional Irish neutrality and possible military implications, such as a conscription to a European army and finally the threats to the respect of the right to life of the unborn. In the same survey, Irish electorate held as very important the protection of workers' rights, the national control over public services and corporation taxation rates. See David Phinnemore, *The Treaty of Lisbon Origins and Negotiation* (Palgrave Macmillan 2013) 190.

[119] The Protocol was approved in Section 2 of the Treaty of Accession of Croatia and was then drafted as a separate document, entering into force on 1 December 2014.

[120] Note that the Irish Protocol on Abortion constitutional policies, which has been in force since 1993, remains unaffected.

Additionally, a separate agreement was reached among the Member States to reassure the Irish concerns about the possible loss of a representative in the Commission, along with the planned reduction in its size[121].

11.3. Denmark

Denmark was granted a number of exemptions and derogations from Maastricht to Lisbon, so that it has been described as "a smart state handling a differentiated integration dilemma"[122]. In 1991, the final draft of the Maastricht Treaty gave Denmark the right to decide if and when they would join the Euro[123]. A first referendum was called on the whole Maastricht Treaty at the beginning of the following year, and resulted in a narrow 'no'. A national compromise followed: the Social Democratic Party, the Socialist People's Party and the Social Liberal Party agreed on a position that claimed the opt-out from the single currency as the highest national priority. This position proved successful and the agreement on the Euro opt-out was included in the 1992 Edinburgh Agreement, a Council decision that followed the Danish negative outcome on the Maastricht referendum. Actually, the agreement granted Denmark four opt-outs, concerning not only the third stage of the EMU, but also the Common Security and Defense Policy, the Justice and Home Affairs and the citizenship of the Union[124].

A new referendum on the Maastricht Treaty was called on 19 May 1993, resulting in an approval by the 56,7% of voters. As far as the Euro opt-out is concerned, when the third stage of EMU started (1 January 1999), the Danish Government decided to call for a new referendum on the abolition of the opt out. The Danish voters, though, rejected once more the full participation to the EMU. Since the beginning of the Euro Crisis in 2008 the Danish full participation in the EMU seems a far-off prospect.

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[121] The agreement to maintain the number of Commissioners equal to the number of Member States was reached in the European Council at its meeting of 11-12 December 2008.

[122] Lee Miles and Anders Wivel, 'A Smart State Handling a Differentiated Integration Dilemma?' in Lee Miles and Anders Wivel (eds), *Denmark and the European Union* (1st ed, Routledge 2014).

[123] For an overview of the troubled relation between Denmark and the single currency, see Martin Marcussen, 'Denmark and the Euro Opt-Out' in Lee Miles and Anders Wivel (eds), *Denmark and the European Union* (1st ed, Routledge 2014).

[124] In this paper I will not elaborate on all the Danish opt-outs, but I will focus only on the Euro and the AFSJ opt-outs.

The repeated rejection to join the third phase of the EMU bears some peculiarities and merits special attention: for many years, governing parties have all been in favor of overcoming the Euro opt-out[125], and it has been considered "technically unproblematic for Denmark to sign up for the Euro-philosophy"[126]. The reluctance to join the EMU was the result of a combination of factors, which gave birth to the Danish way to approach important EU-related decisions, requiring an open and wide debate and eventually a referendum. This should be the way to manage essential EU-related issues, "irrespective of the attitude of the majority of the parliament"[127].

The economic dimension of the opt-out-or-in played of course an important role, but it was not the only factor that was taken into consideration, if for no other reasons, than there was no one right answer to the matter. Besides the economic dimension of the decision, other forces pushed in the direction of the opt-out, namely the fact that the euro was not seen "only as a mean of payment" but also "as an expression of national identity and sovereignty"[128].

Still now, a similar feeling seems still now to pervade the Danish understanding of the opt-out from the (then) Justice and Home Affairs (JHA)[129]. The opt-out was included in the Edinburgh package and survived through the 'semi-permanent Treaty revision process'[130]. Nonetheless the European normative framework in the area has changed significantly and against this new background the opt-out takes on an entirely new significance.

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[125] Marcussen (n 124) 52.
[126] ibid 48.
[127] ibid.
[128] ibid 55.
[129] According to Adler-Nissen "[t]he opt-out remains an important symbol of autonomy for large parts of the Danish population", Rebecca Adler-Nissen, 'Justice and Home Affairs. Denmark as an Active Differential European' in Lee Miles and Anders Wivel (eds), *Denmark and the European Union* (Routledge 2014) 67. See also Lene Hansen, 'Sustaining Sovereignty: The Danish Approach to Europe' in Lene Hansen and Ole Wæver (eds), *European Integration and National Identity: the Challenge of the Nordic States* (Routledge 2002).
[130] Bruno de Witte, 'The Closest Thing to a Constitutional Conversation in Europe: The Semi-Permanent Treaty Revision Process' in PR Beaumont, Carole Lyons and Neil Walker (eds), *Convergence and Divergence in European Public Law* (Hart Publishing 2002).

The 1992 opt-outs were expression of the refusal of a federal Europe, and left the door open to intergovernmental cooperation, which was in any case the rule in the form third pillar matters. Indeed, Denmark's full participation in cooperating on JHA was expressly stated in the Edinburgh Agreement. The turning-point came in 1997 with the Amsterdam Treaty and the supranationalization of important matters, such as asylum, immigration, border control and civil law policies. Except for criminal law and police cooperation, areas where the intergovernmental method still applied, Denmark was left out from many JHA policy areas.

With the adoption of the Lisbon Treaty the potential impact of the Danish opt-out had dramatically increased. The dismantling of the pillars' system has the consequence of excluding Denmark from the areas where intergovernmental method had still applied before Lisbon. The former JHA opt-out currently appears under Protocol No 22 to the treaties. First of all, it provides that Denmark is bound by the Schengen rules (Denmark joined the Schengen Agreement in 1996), but only under international law (which means no CJEU's jurisdiction applies). Conversely, Denmark is not bound by any other provision of (or adopted pursuant to) Title V of Part Three of the TFEU (immigration and asylum law, or civil cooperation)[131]. Denmark is bound by acts of the Union in the field of police cooperation and judicial cooperation in criminal matters adopted *before* the entry into force of the Treaty of Lisbon, but the Country is not bound by acts in these areas if adopted *after* the entry into force of the Treaty of Lisbon.

Finally the opt-out protocol is coupled with an "auto-termination clause" that allows Denmark to renounce the opt-out, or to transform it into a selective opt-out-or-in, following the British and Irish Model. The opt-in needs a referendum approval, which Danish recent history showed to be always insidious. The Danish Prime Minister has recently announced such a referendum, considering the fact that Europol reform would have excluded the Country's participation from that measure, in virtue of the provisions of Protocol 22.

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[131] Denmark concluded parallel agreements with the EU in some of these areas, such as the Dublin rules on asylum applications; the Brussels Regulation on civil and commercial jurisdiction; and the Regulation on service of documents.

According to the outlined framework, Denmark seems one of the most mistrustful and reluctant Member States. Denmark certainly "profited" from some of its arrangements of differentiated integration, mainly through different policies on certain issues. In particular, with regards to the asylum and immigration conundrum the opt-out left room to adopt strict policies regarding asylum and family reunification. Conversely, an in-depth analysis of the Danish policies in many other fields where the Country retained an opt-out shows the opposite. In almost every aspect of the former JHA pillar, Danish authorities adopted legislative policies, which are perfectly consistent with EU law policies. A "systematic mimicking and copying of EU legislation"[132] has been revealed in many areas, making Denmark an "active copycat"[133]. Informal harmonization, parallel agreements and EU regulation mimicking made of Denmark more "a rule-taker" than "a rule-maker"[134].

11.4. The curious case of the UK, Poland (and Czech Republic) and the Charter of Fundamental Rights of the European Union

It is not uncommon to find in the category of opt-outs also the British and Polish Protocol concerning the Charter of Fundamental Rights of the European Union. During the negotiations on the Lisbon Treaty, the UK and Poland insisted upon a special Protocol to the Treaties regarding the EUCFR, which was finally annexed to the Treaty (Protocol No 30)[135]. The wording of the Protocol consisted in a normative puzzle, including a relatively long preamble and two substantive provisions, aiming at limiting the application of the EUCFR in the UK and Poland[136].

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[132] Adler-Nissen (n 130) 69.

[133] ibid.

[134] Adler-Nissen (n 130).

[135] Czech Republic has not been initially included in Protocol 30. After the insistence of President Václav Klaus – who affirmed that Czech Republic would have refused to ratify the Treaty unless the Country would have been added to the Protocol – EU leaders agreed to amend the protocol at the time of the next accession Treaty (Croatia). The amendment was drafted and the procedure started, but successively the very Czech Republic, with its new President Miloš Zeman, withdrew the request. In May 2014, the Council formally acknowledged the Czech withdrawal for a quasi-opt-out from the EUCFR.

[136] Article 1: 1. The Charter does not extend the ability of the Court of Justice of the European Union, or any court or tribunal of Poland or of the United Kingdom, to find that the laws, regulations or ad-

If compared with all previous opt-outs, the situation is partially different. Indeed, qualification of the Protocol as a proper opt-out has been controversial from the outset. Nowadays the major part of the legal literature[137], supported by and supporting the CJEU[138] case-law, tends to exclude that protocol No 30 provides an opt-out from the EUCFR if favor of the UK and Poland. It is nonetheless interesting to investigate the reasons behind the negotiation of the protocol. To cut a long story short, the Protocol to the Charter has been "an exercise in smoke and mirrors"[139]. The "British Protocol" No 30 has been presented to the Eurosceptic audience as a proper opt-out, but has never been interpreted in this manner by the British Government. Official statements of Government's branches openly stated that "the UK Protocol does not constitute an 'opt-out'"[140]. In this respect, it has been noted that "these opt-outs imply an outright rejection of political integration"[141] and seem to be 'purely political phenomena' (I will get back to this category in the conclusive consideration, see below para. 12). This is however questionable. As a matter of fact, the (then) Prime Minister Tony Blair's words seem

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ministrative provisions, practices or action of Poland or of the United Kingdom are inconsistent with the fundamental rights, freedoms and principles that it reaffirms.

2. In particular, and for the avoidance of doubt, nothing in Title IV of the Charter creates justiciable rights applicable to Poland or the United Kingdom except in so far as Poland or the United Kingdom has provided for such rights in its national law.

Article 2: To the extent that a provision of the Charter refers to national laws and practices, it shall only apply to Poland or the United Kingdom to the extent that the rights or principles that it contains are recognised in the law or practices of Poland or of the United Kingdom.

[137] Steve Peers, 'The "Opt-Out" That Fell to Earth: The British and Polish Protocol Concerning the EU Charter of Fundamental Rights' (2012) 12 Human Rights Law Review 375; Ingolf Pernice, 'The Treaty of Lisbon and Fundamental Rights' in Stefan Griller and Jacques Ziller (eds), *The Lisbon Treaty* (Springer Vienna 2008) 244–9; Catherine Barnard, 'The "Opt-Out" for the UK and Poland from the Charter of Fundamental Rights: Triumph of Rhetoric over Reality?' in Univ-Prof Dr Stefan Griller and Univ-Prof Dr Jacques Ziller (eds), *The Lisbon Treaty* (Springer Vienna 2008); Paul Craig, *The Lisbon Treaty: Law, Politics, and Treaty Reform* (Oxford University Press 2010) 237–40.

[138] The CJEU clearly stated that Protocol No 30 "does not call into question the applicability of the Charter in the United Kingdom or in Poland" and that "it does not intend to exempt the Republic of Poland or the UK from the obligation to comply with the provision of the Charter", see Case C-411/10 *NS*, para 119-120.

[139] Barnard (n 138) 281.

[140] House of Lords EU Select Committee, *The Treaty of Lisbon: An Impact Assessment*, 10th Report, 2007-8, HL Paper 62, para. 5.86. Exactly the same words "the UK-specific protocol is not an 'opt-out'" were used by Jim Murphy, Minister for Europe in his address to the House of Commons' European Scrutiny Committee, see European Scrutiny, 35th report, 2006-7.

[141] Giandomenico Majone, *Europe as the Would-Be World Power the EU at Fifty* (Cambridge University Press 2009) 217.

to refer to something more serious than a political tantrum. Explaining the reasons of the opt-out, Blair referred to the "long and difficult memories of the battles fought to get British law in proper order"[142] in the areas addressed by the Charter, and not to his Government's political preferences. As a matter of fact the opt-out may come as a surprise, if one considers that negotiations have been conducted by a government run by the Labor Party, whose origins lie in the workers movement. This would suggest that British concerns were not 'purely political phenomena', but that they expressed a deeper constitutional understanding.

The Polish situation seems even more surprising, if not ironic, provided that the Government embarrassment was expressly stated in a declaration enclosed to the Lisbon Treaty: "Poland declares that, having regard to the tradition of social movement of 'Solidarity' and its significant contribution to the struggle for social and labor rights, it fully respects social and labor rights, as established by European Union law, and in particular those reaffirmed in Title IV of the Charter of Fundamental Rights of the European Union"[143]. This suggests that the Polish position on the EUCFR was not a 'purely political phenomena', or at least that the Polish quasi opt-out was not expressing a political preference in the field of social and labor rights. In the opinion of an authoritative part of the legal scholarship, this apparent paradox is explained with Poland's fear in other areas, such as family law, with special regard to same-sex couples regulation[144].

11.5. Identity-tailored protocols?

Besides the relatively (in)famous opt-outs analyzed above, various Protocols, opt-outs and derogations have been adopted in the history of European integration. Nonetheless, they can have little or no effect on or connection with the understanding of

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[142] The British position was summed up by Tony Blair in his Cardiff Speech of November 2002 and is cited in Finn Laursen, *The Rise and Fall of the EU's Constitutional Treaty* (Martinus Nijhoff Publishers 2008) 211.

[143] See Declaration No 62 by the Republic of Poland concerning the Protocol on the application of the Charter of Fundamental Rights of the European Union in relation to Poland and the United Kingdom.

[144] "Poland's concerns are not with social and labor rights. Poland's real fears lie with subjects such as gay marriage and abortion but the Protocol (and the Charter) do not touch on these": the apparent paradox is explained in these terms by Barnard (n 138) 276.

Member States' constitutional identity. Protocol No 3 on the Treaty of Accession of Sweden, granting to the Sami people an exclusive right to reindeer husbandry certainly provides a derogation of fundamental freedoms of the Treaty. This does not automatically mean that reindeer husbandry is part of the constitutional identity of Sweden.

The matter seems to have been treated differently with respect to the Treaty of Maastricht, which introduced a set of protocols. Some of these addressed national interests of certain Member States, and one could argue that the protocols consisted of preventative measures to avoid future conflicts. The ease with which narrowly tailored Protocols had been conceded in the Maastricht agreements was severely criticized at that time. It was in this respect that a potential hijacking of the *acquis communautaire* has been denounced in a well-known article, and a 'Europe of bits and Pieces'[145] has been deplored. Three of the protocols were questioned more than the others[146].

Protocol no. 17 (so-called *Grogan* Protocol) provided that "nothing in the Treaty on European Union, or in the Treaties establishing the European Communities, or in the Treaties or Acts modifying or supplementing those Treaties, shall affect the application in Ireland of Article 40.3.3. of the Constitution of Ireland". This provision originated from the famous *Grogan* judgment of the ECJ[147]. The case dealt with student organizations publishing in the Republic of Ireland – whose Constitution protects the right to life of the unborn – the names, addresses and phone numbers of abortion clinics in Great Britain. The ECJ had no reason (nor jurisdiction) to decide on the legality of abortion, but the Court held that the medical termination of pregnancy constituted a service within the meaning of Article 60 of the Treaty. Nonetheless the ECJ held that it is not contrary to EU law for Ireland to prohibit from distributing information about abortion clinics. According to the ECJ's view, Member States are allowed deference to restrict free movement of services for "justified public policy reasons", and this was the case.

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[145] Curtin (n 110).

[146] For an analysis of these protocols against the background of national constitutional identity, see Giuseppe Martinico, 'What Lies Behind Article 4(2) TEU?', *National Constitutional Identity and European Integration* (Intersentia 2013) 100 ff.

[147] Case C-159/90, *The Society for the Protection of Unborn Children Ireland Ltd v Stephen Grogan and others* [1991].

Nonetheless this judicial saga pushed Ireland to negotiate a permanent protocol to protect its constitutional protection of the right to life of the unborn, and Protocol No 17 was the European response to the Irish fears[148].

A similar path was followed by Denmark in respect to the case of the *Danish Second Home* protocol. As a matter of fact, Protocol No 1 of the Treaty of Maastricht neutralized every possible clash between the Danish legislation, prohibiting acquisitions of second homes in Denmark by non-Danish people and Community law. The protocol provided that "notwithstanding the provisions of this Treaty, Denmark may maintain the existing legislation on the acquisition of second homes"[149], granting a permanent derogation from the principle of non-discrimination on the basis of citizenship. Three years earlier, in 1989, the ECJ held that restrictions applied by a Member State to nationals of other Member States in regard to the acquisition and enjoyment of rights in immovable property are contrary to Community law[150].

Finally, Protocol No. 2 (the so-called-*Barber* Protocol) introduced a very specific and permanent derogation from the *acquis communautaire*[151]. It is not a coincidence that the Member States which pushed most to introduce the Protocol were those where the impact of a decision that the ECJ[152] delivered some years earlier could have been financially remarkable.

These examples show that protocols have been used not only to accommodate disagreements on the participation of a Member State in an entire policy (such as the

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[148] As mentioned above, the Protocol was renewed and confirmed in the Lisbon Treaty, and the same issue was object of reassurances in 'the Guarantees' after the Irish "No" in the referendum on ratification.

[149] Treaty of Maastricht, Protocol (no 1) on the acquisition of property in Denmark.

[150] Case C-305/87, *Commission v Greece* [1989] and case C-186/87, *Cowan v Trésor public* [1989].

[151] Protocol No 2 states that "for the purposes of Article 119 of this Treaty, benefits under occupational social security schemes shall not be considered as remuneration if and in so far as they are attributable to periods of employment prior to 17 May 1990, except in the case of workers or those claiming under them who have before that date initiated legal proceedings or introduced an equivalent claim under the applicable national law".

[152] Case C-262/88, *Douglas Harvey Barber v Guardian Royal Exchange Assurance Group* [1990].

single currency, the free-border zone or the former third pillar), but also to address very specific concerns. The *Grogan* Protocol may be considered the only one with an evident connection with constitutional values. Nonetheless, the tailoring method adopted in the three cases is highly significant as a plausible mean of conflict neutralization.

12. Opt-outs, declarations and legal guarantees, between political opportunism and sincere constitutional concerns

As far back as 1984, Claus-Dieter Ehlermann drew a fundamental distinction in the analysis of flexibility arrangements in the (then) Community law. Ehlermann discerned between economic and social factors on one hand and "purely political phenomena" on the other hand. According to his view, the former could in principle justify differentiation, but not the latter. The author chooses but one example, which makes for extraordinarily telling 30 years later: "For instance, the fact that the British government (or the majority in Parliament or even public opinion in the United Kingdom) is opposed to joining the European monetary system would not be a valid argument for differentiation"[153].

Almost 30 years later the UK did not join the third stage of the economic and monetary union, precisely because the British Government, the majority of the Parliament and the public opinion in the UK oppose the single currency. It may be that Ehlermann was right and the European Union was, so to say, wrong. In other words, it can be argued that the differentiation conceded to the UK was unjustified from the outset. Alternatively, it may be that it was Ehlermann to be mistaken, in the sense that what he identified as a purely political phenomenon (the UK opt-out from the single currency), in fact was not such a thing. In the second scenario we should reformulate his words, and assume that the fact that in one certain Member State the government, the majority in Parliament or even public opinion opposes a further step in the process of European integration should be held as a valid argument for differentiation.

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[153] Claus-Dieter Ehlermann, 'How Flexible Is Community Law? An Unusual Approach to the Concept of "Two Speeds"' (1984) 82 Michigan Law Review 1274, 1289.

What deserves special attention is the identification of what accounts for "purely political phenomena". It is certainly true that special arrangements in favor of specific Member States are based on very different justifications. For our purposes it is highly significant to discern the diverse nature of the "valid argument for differentiation". Beside socio-economic factors and "purely political phenomena", I argue for the possible existence of more than valid *constitutional* arguments for differentiation. It may not be easy to discern between purely political arguments and constitutional reasons for differentiation, especially in the case of the UK, where there is no formal document to look into. Nonetheless the assumption that the British opt-out from the single currency is a purely political phenomenon is highly debatable. Were this opposition to the single currency a purely political phenomenon, 25 years of changing governments would have at some point led the UK in the opposite political direction. What would have happened is the same thing that happened when the UK opted out of the social chapter. This opt-out was certainly based on a pure political phenomenon: as a matter of fact, in 1997 Labour's victory in the general elections caused the overturning of the contingent decision to opt-out from the social charter. The UK opted back in.

Nonetheless one could still argue that specific Member States, which were granted an opt-out on the basis of 'purely political phenomena', are impeded to opt back in even if governments and political preferences change, because some opt-outs become a totem in public opinion. In these cases Member States developed extensive experience in "circumventing" the opt-outs. If the structure of the specific opt-out is flexible enough to admit case-by-case opt-ins, Member States extensively used opt-ins to erode their non-participation in the policy areas in question. The UK has been a champion in "getting the best of both worlds"[154]: with regard to the opt-out from the former third pillar,

[154] It was the then Prime Minister Tony Blair who affirmed on October 25th 2004 that "There is no question of Britain giving up our veto on our border controls. In the Treaty of Amsterdam seven years ago we secured the absolute right to opt in to any of the asylum and immigration provisions that we wanted to in Europe. Unless we opt in, we are not affected by it. And what this actually gives us is the best of both worlds. We are not obliged to have any of the European rules here, but where we decide in a particular area, for example to halt the trafficking in people, for example to make sure that there are proper re-

for example, the UK opted into most civil law measures, asylum matters and measures on illegal immigration. When the opt-out is rigid and does not allow for "picking and choosing" strategy, internal legislation mimicking EU regulations or parallel intergovernmental agreements have been widely used to void opt-outs in substance (see the Danish experience, para. 11.3).

D. CONSTITUTIONAL IDENTITY BETWEEN COOPERATION, MISTRUST AND SUBSIDIARITY

There is no question of Britain giving up our veto on our border controls. In the Treaty of Amsterdam seven years ago we secured the absolute right to opt in to any of the asylum and immigration provisions that we wanted to in Europe. Unless we opt in, we are not affected by it. And what this actually gives us is the best of both worlds. We are not obliged to have any of the European rules here, but where we decide in a particular area, for example to halt the trafficking in people, for example to make sure that there are proper restrictions on some of the European borders that end up affecting our country, it allows us to opt in and take part in these measure

In the previous pages we tried to investigate differentiated integration as a mean to neutralize conflicts between EU law and certain particular characters of a Member State's national constitutional identity. This approach revealed unexplored aspects of both the concept of national constitutional identity and of differentiated integration. The latter seems to be able to play a role as a method of "self-enforcement"[155] of the identity clause. Nevertheless, differentiated integration is one of possible methods of "self-enforcement", or to be more exact, of non-judicial enforcement of the identity clause. In the present section we will investigate three further alternatives: the rule of unanimity

strictions on some of the European borders that end up affecting our country, it allows us to opt in and take part in these measures". On "getting the best" British attitude, see Andrew Geddes, 'Getting the Best of Both Worlds? Britain, the EU and Migration Policy' (2005) 81 International Affairs 723.

[155] This terminology is excerpted from Cloots (n 5) 39 ff.

as a safeguard of Member States' interests in identity-sensitive policy areas; enhanced cooperation as a way out of political deadlocks when identity-related interests of certain Member States are at stake; the principle of subsidiarity as a privileged forum to investigate the understanding of national constitutional identity by non-judicial national players.

13. Unanimity: a clue of constitutional identity-sensitive matters

The increasing application of majority voting has widely been considered one of the indicators of successful European integration. Starting from the Single European Act (1986), a set of reforms gradually extended the field of qualified majority voting (QMV) within the Council of ministers. Lately, the Treaty of Lisbon extended further the application of the qualified majority voting. Against the background of these developments, the rule of unanimity voting has been held as an obstacle to the desirable target of an efficient decisional process. The rule of unanimity implies rigidity and it has been considered as an expression of mutual mistrust between Member States. With regard to constitutional identity, one should take into account this "mistrust argument". It is in fact plausible that Member States can likely be very reluctant to extend the majority voting to fields that are, even if only indirectly, sensitive with regard to their constitutional identities. In these circumstances, unanimity – as an expression of Member States' mistrust to each other – should be considered only as a clue to identify possible constitutional identity-sensitive area, in so far as the Member States have considered keeping control of the decisions taken by the Council in these fields.

Even though the Lisbon Treaty extended the QMV further, unanimity is still required for many important decisions[156], for example in several institutional matters[157], where Member States agreed to govern unanimously on the development of European institutions. Some of the decisions subject to the unanimity rule are so crucial that it is

[156] See Piris (n 96).

[157] Jean-Claude Piris, *The Lisbon Treaty: A Legal and Political Analysis* (Cambridge University Press 2010).

hardly surprising to find them in the list: this is valid for the accession of new members in the European club (Art. 49 TEU), for the Accession of the EU to the ECHR (Art. 6(2) TUE and Art 218(8) TFEU) and for the authorization to proceed with enhanced cooperation (Art. 329(3) TFEU). To some extent a similar justification lies behind the application of unanimity voting for the adoption of a multiannual financial framework (Art. 312(2) TFEU) and for decisions laying down the provisions relating to the system of the Union's own resources (Art. 311(3) TFEU). Unanimity applies to those decisions that may affect the equality of Member States in the European institutions (composition of the European Parliament, Art. 14(2) TEU), with a special regard to important symbols (the seat of the EU institutions, Art. 341 TFUE) and the use of languages in the institutions (Art. 342 TFEU). In the list of institutional matters subject to unanimity voting, we find decisions that proved to be possibly problematic, such as the use of the flexibility clause (Art. 352 TFEU), and the conferral of jurisdiction on the CJEU in certain disputes related to European intellectual property rights (Art. 262 TFEU).

The most interesting suggestions come from the persistent application of unanimity in substantive matters. A common unanimous agreement in the Council is still required for: any decision taken under the chapter on the common foreign and security policy (Art. 31 TUE) and the common security and defense policy (Art. 42(2) TEU); the conclusion of certain types of international agreements; the negotiation and conclusion of agreements in the fields of trade in services and the commercial aspects of intellectual property, as well as foreign direct investment (Art. 207(4) TFEU); any decision concerning direct or indirect taxes (Art. 113, 192(2)(a), 194(3) TFEU); most of the measures concerning social security, specifically social security and social protection of workers, protection of workers where their employment contract is terminated, representation and collective defense of the interests of workers and employers, and conditions of employment for third-country nationals legally residing in Union territory (Art. 153(2) 3rd subparagraph); any provision strengthening or adding to the list of European citizen-

ship's rights[158] (Art. 25 TFEU); actions to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation (Art. 19(1) TFEU); provisions primarily of fiscal nature (Art. 192(2)(a)); some measures in the field of protection of the environment[159] and measures significantly affecting a Member State's choice between different energy sources and the general structure of its energy supply (Art. 192(2)(c)); measures concerning family law with cross-border implications (Art. 81(3) and (4)); any decision identifying aspects of criminal procedure not expressly listed in the Treaties that may be the legal basis to adopt directives facilitating mutual recognition of judgments and judicial decisions and police and judicial cooperation in criminal matters having a cross-border dimension (Art. 82(3)); the establishment of a European public prosecutor (Art. 86(1) TFEU); measures concerning operational cooperation between Members states' police, customs and other specialized law enforcement services (Art. 87 (3)); provisions laying down the conditions and limitations under which the Member States' competent authorities (judiciary, police, custom, and other

[158] According to Art. 20(2) TFEU, citizens of the Union "shall have, inter alia: (a) the right to move and reside freely within the territory of the Member States; (b) the right to vote and to stand as candidates in elections to the European Parliament and in municipal elections in their Member State of residence, under the same conditions as nationals of that State; (c) the right to enjoy, in the territory of a third country in which the Member State of which they are nationals is not represented, the protection of the diplomatic and consular authorities of any Member State on the same conditions as the nationals of that State; (d) the right to petition the European Parliament, to apply to the European Ombudsman, and to address the institutions and advisory bodies of the Union in any of the Treaty languages and to obtain a reply in the same language". In this respect, empirical evidence of the national concerns may already be found in the Danish positions with regard to the Maastricht Treaty. Following the first Danish rejection of the Treaty of Maastricht, the so-called Edinburgh Agreement granted Denmark four exceptions. Section A of the 'Heads of State and Government, meeting within the European Council, concerning certain problems raised by Denmark on the Treaty on European Union' stated that the provisions of part two of the EC Treaty (Citizenship of the Union') "do not in any way take the place of national citizenship. The question whether an individual possesses the nationality of A Member State will be settled solely by reference to the national law of the Member State concerned". This position was reaffirmed in the 'Unilateral declarations of Denmark'. With regard to the adoption of any provision to strengthen or to add EU citizens' rights, the Declaration stated that "[i]n Denmark, such adoption will, in the case of a transfer or sovereignty, as defined in the Danish Constitution, require either a majority of 5/6 of Members of the Folketing or both a majority of the Members of the Folketing and a majority of voters in a referendum". Both declarations are attached at the Conclusion of the Presidency of the European Council, 11-12 December 1992, and available at http://www.europarl.europa.eu/summits/edinburgh/default_en.htm.

[159] In accordance with Article 192(2)(b), unanimity is required for measures affecting town and country planning, quantitative management of water resources or affecting, directly or indirectly, the availability of those resources, land use, with the exception of waste management.

specialized law enforcement services) may operate in the territory of another Member State in liaison and in agreement with the authorities of that State; provisions concerning passports, identity cards, residence permits or any other such document (Art. 77(3)).

It is not hard to identify some *leit-motiv* in the substantive matters where unanimity is still required, and therefore a higher degree of mutual mistrust between Member States still persists. The rule of unanimity still expresses prudence and caution in matters that are traditionally located in the core of State sovereign powers: a) foreign affairs and internal defense and security b) taxation c) criminal law and procedure, including matters related to the monopoly of use of force and law enforcement; d) citizenships' rights and provisions directly or indirectly connected with the status of citizen.

Beside these areas, which are traditionally linked to essential State sovereign powers, the list of matters where unanimity is still required bears a list of matters that are expression of the fundamental social dimension of the postwar constitutional state, namely social security and non-discrimination. Finally, unanimity is required in possibly ethically sensitive matters like family law, some aspects related to protection of the environment and energetic policies and certain aspects in the field of property rights.

In the framework of social security matters, the unanimity required by Article 154(2) 3rd subparagraph is not the only point worthy of attention: according to Art. 153(4) TFEU, provisions unanimously adopted in the field of social security "shall not affect the right of Member States to define the fundamental principles of their social security systems and must not significantly affect the financial equilibrium thereof". Finally, a twofold guarantee is provided also in regard to the addition of new rights for EU citizens. In this matter, not only unanimity is required, but the TEU also states that any provision unanimously adopted, strengthening or adding new rights for EU citizens, shall enter into force after the "approval by the Member States in accordance with their respective constitutional requirements" (Art. 25(2) TFEU).

Therefore, it could be argued that unanimity may serve as an indicator of constitutional identity-sensitive matters, which are better kept under unanimous control by Member States. Nevertheless, on one hand this does not mean that every area where unanimity is still being applied indicates a constitutional identity-sensitive matter.

Member States can decide to apply unanimity for a variety of reasons, regardless of any constitutional identity-related concern. On the other hand, unanimity cannot be considered as an ultimate guarantee of respect of Member States' constitutional identity, or as an *exclusive* indicator of constitutional identity-sensitive fields. Indeed, an automatic protection of constitutional identity through the mere application of the rule of unanimity may be excluded in two alternative scenarios: a) the Council could unanimously adopt a decision violating the constitutional identity of a Member State or b) constitutional identity could be violated in one of the fields where QMV applies.

14. Enhanced cooperation: dribbling through national concerns?

Enhanced cooperation (EnC) is another fragment of the European mosaic that, in particular after 1992, consisted of an overall tension between a centripetal force of deeper supranational integration and a centrifugal national backlash. In short, enhanced cooperation is an institutional arrangement that makes possible for a certain number of Member States – but not all of them – to integrate further their policies within the EU. EnC has been thought of as a tool to overcome political deadlocks: under *certain conditions*, Member States that agree on a project of further integration may not be blocked by the substantial veto of Member States that do not agree. These certain conditions have been changing under successive Treaty amendments, from the introduction of the first set of rules in the Treaty of Amsterdam, to the regulatory framework provided by the Treaty of Lisbon, currently in force.

According to the discipline currently in force, EnC may be established in all sectors that do not fall within the EU's exclusive competence and the common foreign and security policy. At least nine Member States are entitled to submit a request to the Commission, and the Commission *may* submit a proposal to the Council. The latter has the power to authorize proceeding with the proposal by Qualified Majority Voting, after obtaining the consent of the European Parliament. A slightly different procedure applies within the framework of the common foreign and security policy. Leaving aside procedural details, EnC is based on two main pillars: the principle of transparency and the

principle of openness. The former requires that all Member States' representatives are authorized to sit in the Council meetings where deliberations on enhanced cooperation shall be adopted. Member States' representatives that are not part of the relevant EnC are simply not entitled to the right to vote in those matters.

The principle of openness is implemented by Art. 331 TFEU, providing conditions for third parties to subsequently join established cooperation agreements. Significantly, the competent authority on third party's application is the Commission and not the original member of the enhanced cooperation, with a sort of "appeal" to the Council, in case of a rejection by the Commission.

EnC has initially been seen suspiciously: the Treaty of Amsterdam provided very strict rules[160] that have likely been the reason why the (then) closer (now enhanced) cooperation provisions have never applied. Rules have been progressively softened, but traces of the original caution toward EnC are still present in the current set of regulations. The Treaties spell out very clearly that EnC may be adopted only as a last resort and that it may not lead to a deviation in the integration process in the EU, but shall rather "further the objectives of the Union, protect its interest and reinforce its integration process" (Art. 20, Par. 1, TEU). Furthermore, Art. 326 TFEU states that EnC "shall comply with the Treaties and Union law" and "shall not undermine the internal market or economic, social and territorial cohesion" nor shall it "constitute a barrier to or discrimination in trade between Member States, nor shall it distort competition between them".

Despite this permanent subtle mistrust of EnC, the new – and less complicated – set of procedural rules introduced with the Treaty of Lisbon finally led to the first concrete experiences of EnC. In 2012 and 2013 respectively enhanced cooperation agreements on divorce law and on unitary patent entered into force. It would be too much a digression to focus on the details of these agreements[161]. It is enough to note that, in

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[160] This was, at least, the position of a significant part of the legal scholarship. Among many others, see Claus Dieter Ehlermann, 'Differentiation, Flexibility, Closer Co-Operation: The New Provisions of the Amsterdam Treaty' (1998) 4 European Law Journal 246, 269.

[161] For further details, among many others see Aude Fiorini, 'Harmonizing the Law Applicable to Divorce and Legal Separation—Enhanced Cooperation as the Way Forward?' (2010) 59 International & Comparative Law Quarterly 1143; Steve Peers, 'Divorce, European Style: The First Authorization of En-

both cases, agreements followed a discussion of the projects at the European level, even though each agreement is a different story. In both cases, reasons for a comprehensive European regulation were self-evident: in the case of the EnC on divorce law, a significant and constantly increasing number of nationally mixed families[162]; in the case of the EnC on Unitary Patent, the high cost of the pre-existing system of inventions' protection[163]. Nonetheless harsh disagreements on the policy to adopt on these issues emerged soon. In the case of a European regulation on family law the disagreement had many facets, and was based on very different approaches, traditions, and domestic regulations in the matter of family law. A first proposal for a Council regulation was issued by the Commission in 2006. Firstly, the proposal encountered the opt-out of Denmark and the decision of the UK and Ireland not to participate in the measure. Secondly, the discussion of the single policies made clear the remarkable variations of position of Member States on the matter. The proposal had been presented on a table where at opposite ends were sitting representatives of States where divorce was prohibited (Malta) or very restrictively regulated (Poland) and other Nordic States where regulations were inspired to much more liberal views. It has been reported that Sweden was primarily responsible for the collapse of the negotiations, not being available to apply foreign divorce rules that would possibly be much less liberal than the domestic regulations[164].

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hanced Cooperation' (2010) 6 European Constitutional Law Review (EuConst) 339; Enrico Bonadio, 'The EU Embraces Enhanced Cooperation in Patent Matters: Towards a Unitary Patent Protection System' (2011) 3 European Journal of Risk Regulation 416.

[162] On this trend, among many others, see Giampaolo Lanzieri, 'Mixed Marriages in Europe, 1990-2010' in Kim Doo-Sub (ed), *Mixed marriages in Europe, 1990-2010* (2012).

[163] The system of European Patent of the European Patent Office, established by the European Patent Convention in 1973, consists of a mere sum of the individual countries' patents, requiring the validation in every single European country. This process is long and expansive, most of all because of translation costs. In compared with the US patent system, "it has been estimated that protecting an invention using the current EPO procedure in all twenty-seven EU Member States would cost applicants roughly €32,000, of which €23,000 would be incurred for translation fees alone. On the other hand, a US patent costs €1,850 on average": see Bonadio (n 162) 416.

[164] Fiorini (n 162) 1144.

With regard to the project of a European Patent with unitary effect[165], the disagreement did not break out on decisions on substantive policies, but on the language prerequisite. A common EU regulation establishing a Community patent had been proposed in 2000. In the following years, political hurdles and never-ending amendments to the Treaties' provisions on the legal basis made a decision on the proposal impossible. The discussion was re-launched in 2008-2009 and after the adoption of the Treaty of Lisbon[166] the Council reached an agreement on a revised text of the EU patent regulation, providing terms and conditions for obtaining a unitary patent right and its legal effects. Provisions on the delicate issue of translation –where unanimity was required in the Council– had been left aside from this agreement and were finally proposed by the Commission in June 2010. The model was linguistically inspired by the EPO system: EU patent claims would have to be only translated into one of the three EPO's languages[167]. On this proposal, where unanimity was needed, Spain and Italy objected with a firm opposition, due to concerns about the status of the Spanish and Italian language. This deadlock was challenged by many Member States, which soon suggested proceeding without Italy and Spain. The Commission proposed an EnC agreement, shortly afterward approved by the Council. All Member States except Italy and Spain[168] agreed to participate in this EnC.

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[165] Before the EnC adoption, the EU has been attempting to innovate on this field for several decades. For an overview of that background, see Steve Peers, 'The Constitutional Implications of the EU Patent' (2011) 7 European Constitutional Law Review (EuConst) 229.

[166] The Treaty of Lisbon conferred the Union explicit power "to establish measures for the creation of European intellectual property rights to provide uniform protection of intellectual property rights throughout the Union and for the setting up of centralized Union-wide authorization, co-ordination and supervision arrangements" (Art. 118 TFEU). The delicate language issue was addressed in a specific paragraph, as long as Art. 118, para. 2, provides that any rules to "establish language arrangements for the European intellectual property rights' must be adopted by a form of 'special legislative procedure'", requiring unanimity in the Council and the consultation of the European Parliament.

[167] More precisely, according the Commission's proposal applications not filed in English should have been translated into one of the other two languages. During a transitional period of maximum 12 years, patents filed in French or German should have been translated into English, and patent applications submitted in English should have been translated into any official language of the participating Member State that is an EU official language.

[168] Italy and Spain's opposition also found a judicial follow-up. These States submitted several complaints to the CJEU, challenging the authorization of EnC and the subsequent measures implementing it. All complaints have been by far dismissed by the Court: see Case C-1274/11, *Kingdom of Spain v Council of the European Union* [2013]; Case C-295/11, *Italian Republic v Council of the European Union*

These first experiences in the field of divorce law and European patent, show that EnC is a flexible mechanism in the EU architecture, and it may be capable of playing different and changing roles. It may not be excluded that its application aims also at enacting a further step in the integration process excluding one or more Member States, neutralizing possible conflicts with the domestic legal order. EnC usually stems out from EU projects that initially comprised all Member States, and that found strong opposition from a few Member States, expressing concerns that are not shared by other Member States. These concerns may be related to national features, constitutional values and other elements that can be easily traced back to the constitutional identity of Member States not participating in the EnC. Experience garnered from the first two examples of EnC lead to subject matters that are usually reconnected with national constitutional identity, namely family law and the protection of national language.

15. Subsidiarity

As previously mentioned, differentiated integration has always existed as a legal tool, by being able to accommodate special national interest in the European integration process. Nonetheless, the Treaty of Maastricht offers good reasons to be considered as a turning-point in this respect. A considerable widening of the EU competences has been balanced not only with the introduction of the principle of respect of national identities, but also – and perhaps more significantly – with the principle of subsidiarity. This triangle – European integration, national identity and subsidiarity – may be reasonably considered as a unique picture, carrying a new alternative to the sovereignty narrative in the European Union[169].

[2013]; Case C-146/13, *Kingdom of Spain v Council of the European* Union [2015]; Case C-147/13, *Kingdom of Spain v Council of the European* Union [2015]

[169] See Saiz Arnaiz and Alcoberro Llivinia, 'Introduction' in Saiz Arnaiz and Alcoberro Llivinia (n 27).

Since its introduction in Treaties, subsidiarity has always been a fundamental principle of EU law. It emerges in another normative triangle picture in Art. 5 TEU, besides the principle of conferral and the principle of proportionality. In the current formulation, subsidiarity applies in areas of non-exclusive EU competence and implies that "the Union shall act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level" (Art. 5(3) TEU).

The principle of subsidiarity has been mostly read as a "competence valve", determining when the EU is competent to legislate, and aiming at displacing the regulation power as closely as possible to the citizen. Nonetheless subsidiarity bears an extraordinary potential with regard to national constitutional identities. In this respect, recent studies have emphasized the versatile role that the principle of subsidiarity may play in the European Union, and some of them focused on the possible link between the implementation of the principle and the legal duty to respect national identities[170]. This reinterpretation revealed interesting aspects of subsidiarity, and enlightened its possible application as a non-judicial way to express concerns related to constitutional identity. Indeed the Protocol on the application of the principles of subsidiarity and proportionality defines the implementation of the principle and introduces several mechanisms to control and monitor its application. The Protocol was firstly attached to the Treaty of Amsterdam and successively amended by the Lisbon Treaty. The latter innovated these mechanisms and strengthened the role of national Parliaments, which have the right to

[170] See Barbara Guastaferro, 'Coupling National Identity with Subsidiarity Concerns in National Parliaments' Reasoned Opinions' (2014) 21 Maastricht journal of European and comparative law 320; Nicola Lupo, 'Subsidiarity and National Parliaments. Rationale, Scope and Effects of the Early Warning System' in Marta Cartabia, Nicola Lupo and Andrea Simoncini (eds), *Democracy and subsidiarity in the Eu: National parliaments, regions and civil society in the decision-making process* (il Mulino 2013); Marco Goldoni, 'The Early Warning System and the Monti II Regulation: The Case for a Political Interpretation' (2014) 10 European Constitutional Law Review (EuConst) 90. An unpredicted and unexpected flexibility of the Principle of Subsidiarity and its implementation through the EWS had already been proved by Philipp Kiiver, *The Early Warning System for the Principle of Subsidiarity: Constitutional Theory and Empirical Reality* (Routledge 2012).

police subsidiarity through the so-called "Early Warning System" (EWS)[171]. By virtue of the procedure provided by the Subsidiarity Protocol, national Parliaments may send to the Presidents of the European Parliament, the Council and the Commission a reasoned opinion stating why it considers that the draft in question does not comply with the subsidiarity principle.

If a "qualified minority" of the Member State's Parliaments acting together is met[172], a legislative draft proposed by the Commission may be temporary stopped by means of a so-called "yellow" or "orange card". National Parliaments have only carded twice so far, even though many reasoned opinions have been raised. In a few words, the experience of the EWS still seems to be open to a variety of purposes, and it may not be excluded that national Parliaments will use subsidiarity to raise concerns related with their constitutional identities. Some empirical evidence has already been proven in the above mentioned study.

Explicit references to Art. 4(2) TEU may be found in the Austrian Parliament's reasoned opinion on the Commission proposal on the award of concession contracts. The Commission initiative was based on Art. 114 TFEU, enabling the adoption of harmonization measures to ensure the functioning of the internal market. Since the draft directive was also related to services of general economic interest, the Austrian Parliament evoked in its reasoned opinion a number of Treaty provisions – and Art. 4(2) was

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[171] On the role of national parliaments in the EWS see Katarzyna Granat, *National Parliaments and the Policing of the Subsidiarity Principle* (European University Institute 2014). With regard to the specific experience of the commission proposal for an EU regulation on the right to strike, see Federico Fabbrini and Katarzyna Granat, '"Yellow Card, but No Foul": The Role of the National Parliaments under the Subsidiarity Protocol and the Commission Proposal for an EU Regulation on the Right to Strike' (2013) 50 Common Market Law Review 115.

[172] The qualified minority for a "yellow card" consists of one third of the votes (a quarter in the area of justice and home affairs). An "orange card" is raised when more than a half of the national Parliaments oppose a legislative draft on grounds of subsidiarity. In the first case the Commission may decide to maintain, amend or withdraw the legislative draft, being only obliged to motivate its decision. In case of the "orange card" the draft legislation must be reviewed and in case the Commission decides to maintain its proposal, it has to justify its decision with a reasoned opinion. The Council, by a majority of 55 per cent of its members, and the European Parliament shall decide on the basis of the Commission's reasoned opinion whether or not to adopt the act. The threshold is calculated taking into account the fact that each Parliament has two votes, and one vote is accorded to each chamber in the 13 bicameral Parliament States.

one of these – to emphasize the risk of a compression of the flexibility granted to the Member States in the area of services of general economic interest[173].

Similar concerns were expressed in the reasoned opinion delivered by the German Bundesrat on the same proposal of the Commission. The Bundesrat specially underlined the need of safeguarding local self-government when regulating the award of service connection, with an explicit reference to Art. 4(2) TEU[174].

With respect to the proposal for a directive on the award of concession contracts, the two mentioned reasoned opinions seem to interpret the flexibility clause in Art. 4(2) TEU as a safeguard of national autonomy[175]. Conversely, two reasoned opinions delivered by the Dutch and Swedish Parliaments on the Commission's proposal on the decree for the purpose of providing common rules regarding the temporary reintroduction of border controls at internal borders in exceptional circumstances refer to Art. 4(2) in a much vaguer sense. These opinions interpret the identity clause as a provision protecting national competences such as national security. The Dutch Parliament referred to Art. 4(2) in connection with other provisions of TEU and TFEU, with the aim of challenging the legal basis of the Commission proposal[176]. Similarly, the Swedish Parliament assumed that the Commission's proposal of providing new rules regarding the temporary reintroduction of border controls affected national security and the maintenance of law and order. In the view of the Swedish Parliament, these matters should remain under the responsibility of each Member State, by virtue of Art. 72 TFEU and Art. 4(2) TEU.

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[173] Guastaferro (n 171) 329.

[174] "Durch den zum 1. Dezember 2009 in Kraft getretenen Vertrag von Lissabon ist der Spielraum der EU, eine allgemeine Regelung für Dienstleistungskonzessionen zu schaffen, die auch Kommunen betrifft, nochmals eingeschränkt worden. Denn die EU hat nach Artikel 4 Absatz 2 Satz 1 EUV die jeweilige nationale Identität der Mitgliedstaaten zu achten, die in ihren grundlegenden politischen und verfassungsmäßigen Strukturen, einschließlich der regionalen und lokalen Selbstverwaltung, zum Ausdruck kommt", see 'Beschluss des Budesrates: Vorschlag für eine Richtlinie des Europäischen Parlaments und des Rates über die Konzessionsvergabe – COM(2011) 897, Ratsdok, 1896011, Drucksache 874/11, March 2nd 2012'.

[175] Guastaferro (n 171) 332.

[176] See 'Reasoned opinion (subsidiarity) on the Decree for the purpose of providing common rules regarding the temporary reintroduction of border controls at internal borders in exceptional circumstances – COM(2011)560, November 8th 2001', join reasoned opinion of the Dutch Senate and the House of Representatives.

In summary, national Parliaments started to use their power to have a say in the legislative process of the EU through the subsidiarity door[177]. In this respect some Parliaments made use of Art. 4(2) as a valid reason in support of identity-related concerns.

E. FINAL REMARKS

16. A court-centered perspective vs. Non-judicial neutralization of identity conflicts: remarkable overlaps

As outlined in the introduction, a vast attention of the legal scholarship has been devoted to the analysis of constitutional identity: most of the literature adopted a court-centric canon of interpretation, even though the judicial epiphanies of the notion are extremely rare at the EU law level (see para. 5 and 6), and often ambiguous in the case-law of the Member States' constitutional courts (see para. 4). The combination of these two aspects – a shortage of judicial material and vagueness of the concept – has been the starting point to embark on a non-judicial investigation of constitutional identity. At the present stage of the analysis, it is time to reassemble the collected fragments of this highly controversial notion. Elements of the judicial understanding of constitutional identity were collected in Part I. In Part II an analysis of methods of non-judicial neutralization of identity-related conflicts was undertaken. In Part III, I analyzed three possible indicators of constitutional identity sensitive matters: a) national interests underpinning the non-participation of certain Member States in enhanced cooperation agreements; b) matters where the unanimity rule still applies and c) references to constitutional identity in the national Parliaments' reasoned opinions.

[177] Every national parliament is indeed "free to interpret the functions conferred upon it by EU law in the manner which it retain to be the most beneficial", by virtue of the political nature of national parliaments. This being said, it comes as no surprise that the "the way in which the early warning mechanism develops in each national parliament tends to be influenced, to some degree, by its national characteristics, by it political and institutional culture [...], by the configuration of the parliamentary groups and committees, as well as the influence of the parliamentary bureaucracy. All these elements can be easily traced back to the constitutional identity of each Member State". Cf. Lupo (n 171) 127, 132.

If these fragments of the constitutional identity patchwork are put together, a surprisingly coherent framework emerges. By comparing the list of constitutional-identity-sensitive matters that the *BVerfG* compiled in its *Lissabon-Urteil* with the substantive matters involved in the illustrated opt-outs, exemptions and protocols remarkable overlaps emerge. Member States and the EU are struggling widely on the same identical matters inside and out of European and national constitutional courts. Among the highly considered national interests many elements are recurring. Firstly, the decision of family law, which emerges in the *Lissabon-Urteil* list (see para. 4), in one of the enhanced cooperation agreements (see para. 14), in the Irish guarantees (see para. 11.2) and behind the Polish quasi-opt-out from the CFREU (see para. 11.4). Secondly, general consideration of the protection of the welfare state, emerging – again – in the *Lissabon-Urteil*, in the decision of the Polish Constitutional Court on the Lisbon Treaty and in more than one reasoned opinion of the national Parliaments (see para. 15). Thirdly, the form of State, emerging in the CJEU's case-law (see para. 5) and in a more specific declination, comprising local self-government, in one reasoned opinion of the German *Budesrat* (see para. 15). Fourthly, peculiar national concerns regarding foreign and military policy underpin a part of the Irish guarantees (see para. 11.3) and of the Danish opt-out from decisions with defense implications (not specifically addressed in this paper). Fifthly, among national constitutional identity concerns a recurrent element is the protection of the national language (see the CJEU's case law on the point, para. 5 and 6 and the reasons behind the non-participation of Italy and Spain in the European Patent with Unitary Effect, para 18). Sixthly, fiscal autonomy emerges as part of constitutional identity in the *Lissabon-Urteil* list and in the Irish Protocol on the Lisbon Treaty (see para. 11.3). Lastly, overlapping concerns may be found in the *BVerfG* inclusion among the constitutional-identity sensitive matters of fundamental decisions on substantive and formal criminal law and on the use of force by the police. The significant opt-outs in the field of the Area of freedom, security and justice confirm the inclination of certain Member States to retain the highest possible level of autonomy in these areas (see para. 11.1 and 11.3).

Most of the matters that result sensitive to constitutional identity – little wonder – are comprised in the traditional understanding of essential State functions: the ability to shape the social conditions including family regulation, protection of the national language, form of the State, fiscal autonomy, defense and military policy, criminal law and monopoly of the use of force. Less obvious is the fact that greatly overlapping claims to retain a high grade of national autonomy have been managed in very different manners throughout the last developments of the European integration. In some cases, they have been left open to a judicial struggle. In others, they have been managed through a previous political neutralization by means of opt-outs, protocols, declarations and other political guarantees.

As the very first experience of judicial struggles on identity-related cases shows possible disastrous outcomes, whereas the accommodation of highly considered national interest through differentiated integration did not apparently result in the dissolution of the Union, a less timid use of the latter seems to be highly recommended. Indeed, the judicial monopoly of the interpretation of national constitutional identity issues did not clarify the notion of national constitutional identity and it seems not efficient in terms of avoiding dangerous outcomes either. The so-called judicial dialogue proved to be more a judicial fight than a dialogue. It seems highly unfit as a method of settlement of constitutional ultimate disputes. Under these circumstances, other methods need to be developed, both conceptually and practically. I argue that differentiated integration is already one of the alternative methods and needs to be developed further.

17. A legal duty of differentiation

After 1992 the outbreak of identity issues in the European Union has been accompanied by a parallel growth of differentiated integration, both in theory and in practice. These two trends, I argue, should be seen as closely linked to each other. According to a coordinated view of identity and differentiated integration, Article 4(2) TEU may be interpreted in the sense that it establishes a legal duty for the EU and Member States to neutralize any possible conflict before it breaks out by using opt-outs, interpretative dec-

laration, exemptions and any other suitable mean. The respect of national identities spelled out in Article 4(2) TEU includes a duty to differentiate as long as differentiation prevents a violation of constitutional identity.

What if things go wrong? What if a differentiated integration would have successfully neutralized an infringement of a peculiar character of the constitutional identity of a Member States, but none of the actors entitled to negotiate such an arrangement acted? In other words, if Art 4(2) imposes a legal duty to accommodate national constitutional identity claims through differentiated integration arrangements, what is the chosen sanction in case of any breach of this duty?

It is highly implausible for the CJEU to impose the introduction of a mechanism of differentiated integration, even if the latter would solve the legal problem. Is Article 4(2) providing a differentiation duty with no sanction? I think not. The point is that the sanction in question is not applicable by the CJEU or by any national constitutional court. In fact, an applicable sanction exists and namely consists of the accommodation of the disagreement outside of the European Union framework. If a strong resistance from a limited number of Member States impedes an agreement on a certain matter, and no tool of flexibility is put into effect to accommodate these reluctances in the EU framework, under certain circumstances a Member States avant-garde may go for a further option: international law.

This seems to be the picture that emerged with the so-called Fiscal Compact[178]: all of its parties are Member States of the EU; the only Member States that did not sign the Treaty were the UK and Czech Republic (Croatia was not a Member of the Union yet). The Stability Treaty introduced new stringent forms of budgetary surveillance in (and over) the current Euro zone, improving the monitoring, surveillance and coordination of economic policies and providing enforcement measures to correct excessive macroeconomic imbalances. The procedures laid down in the Treaties involve a fundamen-

[178] Formally the Treaty on Stability, Coordination and Governance in the Economic and Monetary Union, signed on 2 March 2012 by all Member States except for the Czech Republic and the United Kingdom.

tal role of the European institutions[179]. The Treaty sets some specific targets for the signatory Countries, that in short may be summarized as follows: to achieve a balanced (or in surplus) budget, to avoid an excessive government deficit and to correct macroeconomic imbalances. Even though the Stability Treaty provides rules on stability, coordination and governance in the economic and monetary union, its application extends to Members States which benefit from a permanent *de jure* opt-out (Denmark), a *de facto* opt-out (Sweden) and to "Member States with a derogation" (those are Member States that have not adopted the Euro yet, but are legally obliged to do so as soon as they meet the requirements)[180].

In summary, the Stability Treaty looks more like an EU Treaty with the opt-out of the UK and Czech Republic than an international agreement between most of the EU Member States[181]. With a significant difference: being an international treaty, it enjoys the protection from referendum that is usually granted to diplomatic acts[182]. And this is not a small difference, in particular after the referendum fear that followed the French and Dutch 'No' to the Constitutional Treaty in 2005 and the Irish 'No' to the Lisbon Treaty in 2008. This scenario supports once more the idea that the judicial monopoly on

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[179] Each part of the Treaty submits a stability program to ECOFIN and the Commission and sets a 'medium-term budgetary objective' to be assessed by the Council. For a concise analysis of the Treaty in relation to the authentic enhanced cooperation model on one hand, and with the threat of disintegration on the other hand, see Carlo Maria Cantore and Giuseppe Martinico, 'Asymmetry or Dis-Integration? A Few Considerations on the New "Treaty on Stability, Coordination and Governance in the Economic and Monetary Union"' (2013) 19 European public law 463.

[180] Treaty on stability, coordination and governance in the economic and Monetary Union, Art. 14(5). "This Treaty shall apply to the Contracting Parties with a derogation, as defined in Article 139(1) of the Treaty on the Functioning of the European Union, or with an exemption, as referred to in Protocol (No 16) on certain provisions related to Denmark annexed to the European Union Treaties, which have ratified this Treaty, as from the date when the decision abrogating that derogation or exemption takes effect, unless the Contracting Party concerned declares its intention to be bound at an earlier date by all or part of the provisions in Titles III and IV of this Treaty".

[181] The so-called Fiscal Compact provides the obligation to codify the budget rule in national law 'through provisions of binding force and permanent character, preferably constitutional, or otherwise guaranteed to be fully respected and adhered to'. This provision has been criticized as excessively intrusive in the national State constitutional autonomy, and its compatibility with the EU law principle of respect of the national identity and constitutional structure of the EU Member States has been questioned by Cantore and Martinico (n 180) 464–465.

[182] Majone (n 94) 246, 247.

national constitutional identity through the myth of the so-called judicial dialogue is an unsuitable institutional arrangement. Moreover it draws a rather dangerous picture. These are sufficient reasons to argue in favor of a need to reform these inappropriate institutional arrangements. Such prospects for reform are far from being new in the European debate[183]. From the "Constitutional Council"[184] to the "European Conflicts Tribunal"[185], there is a relevant common denominator in many of the reform proposals of the Union, namely the awareness of the present inadequacy of the given judicial system of resolution of "ultimate conflicts" between the supranational and the national level[186].

A promising starting point for any proposal should be the awareness that "not all legal problems can be solved legally"[187]. Conflicts related to constitutional identity certainly belong to the category of legal problems that will unlikely be solved legally. This being said, the proposed model of a European Conflicts Tribunal could have a successful impact not only with respect to conflicts between EU and Member State competences, but also with respect to national constitutional identity-related issues. Lindseth's proposal is based on the above mentioned MacCormick's admonition: in a nutshell, the Tribunal should be comprised of judges from supreme and constitutional courts and presided over by the president of the CJEU, having competence a) on norm control upon reference by a Member State or a EU institution and b) on conflicts of jurisdiction sub-

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[183] The debate exploded at around the turn of the century. Among many others, see Franz C Mayer, 'Die drei Dimensionen der Europäischen Kompetenzdebatte' (2001) 61 Zeitschrift für ausländisches öffentliches Recht und Völkerrecht (ZaöRV) Zeitschrift für ausländisches öffentliches Recht und Völkerrecht 577.

[184] Joseph HH Weiler and Ulrich R Haltern, 'The Autonomy of the Community Legal Order-Through the Looking Glass' (1996) 37 Harvard International Law Journal 411. also published in Joseph HH Weiler, 'The Autonomy of the Community Legal Order: Through the Looking Glass', *The constitution of Europe: 'Do the new clothes have an emperor?' and other essays on European integration* (Cambridge University Press 1999) 322–323.

[185] Lindseth (n 13) 726.

[186] As a matter of fact "the ECJ Is an EU institution and has often been depicted as a major engine of the European integration process. The Court might therefore be expected to be more receptive to integration-based arguments. Secondly it cannot be excluded that the Court may not feel very comfortable with certain identity-related arguments, especially if they are inspired by national aims which are not, as such, shared by the EU": cf. Cloots (n 5) 211.

[187] Neil MacCormick, 'The Maastricht-Urteil: Sovereignty Now' (1995) 1 European Law Journal 259, 265.

mitted by national courts or individual litigants, as long as all other available legal remedies have been exhausted.

As far as constitutional identity-related conflicts are concerned, the most promising aspect relies upon the proposed additional political safeguards, to be guaranteed to Member States dissatisfied with a ruling of the Conflicts Tribunal. In these cases the Tribunal should refer the matter to the European Council for consideration. As a last option, in case "the concerned Member State cannot negotiate a satisfactory political solution within the European Council, the Member State should then be allowed to opt out of the legislation"[188].

[188] Lindseth (n 13) 732.

NYU School of Law • New York, NY 10011