

THE NATIONAL IDENTITY NARRATIVE IN THE RELATIONSHIP BETWEEN THE MEMBER STATES FROM CENTRAL AND EASTERN EUROPE AND THE EUROPEAN UNION: A RECENT CASE LAW ANALYSIS

Abstract

This paper explores the argument surrounding protection of national identity which in recent years has underpinned the relationship between the European Union and some of the Member States from the region of Central and Eastern Europe, particularly Hungary, Poland and the Czech Republic. It relates to cases where national governments (as well as other institutions at the national level such as national courts) invoke the ‘national identity’ clause of Article 4(2) of the Treaty on European Union, concerning the EU’s duty to respect the national identities of its Member States, in order to derogate from rules and principles of EU law and justify actions at the national level that run counter to them (most notably, those related to compromising judicial independence, the rule of law, and democratic values).

The analysis in the paper centers on Poland and the developments in this country as a pertinent case in point through which the practical applications of the ‘national identity’ clause are analysed, bringing into focus some more recent cases before the EU Court of Justice and the Polish Constitutional Tribunal. Equally, the paper reflects on the scope and breadth of the ‘national identity’ plea, inspecting the limits of a Member State’s discretion to employ national identity arguments in order to derogate from the primacy of EU legal rules and principles. Lastly, the paper also addresses the existence of a sometimes-fluid dividing line between legitimate use and misuse (or abuse) of ‘national identity’ claims by Member States, whereby the ‘national identity’ arguments are being used as a pretext rather than an actual justification for contravening actions and practices.

I. Introduction

The tension between national sovereignty and supranational integration in the context of the European Union remains a critical issue for the Union's legal order and unique system of governance. This tension becomes especially evident when a Member State uses the concept of national identity as a derogation or exception from fully embracing the primacy of EU law in the domestic legal system, or, as grounds for questioning or undermining the EU’s fundamental values.

* Ilina Cenevska, PhD., Full Professor, Ss. Cyril and Methodius University in Skopje, Iustinianus Primus Faculty of Law, e-mail: i.cenevska@pf.ukim.edu.mk

The present paper¹ explores the argument surrounding protection of national identity which has pervaded the relationship between the European Union and the Member States from the Central and Eastern European region, particularly Hungary, Poland and the Czech Republic. In this context, it draws on cases where national governments (as well as other institutions at the national level, such as national courts) invoke the ‘national identity’ clause of Article 4(2) TEU and potentially (or actually) use it as a shield against their EU law-mandated obligations and responsibilities.

The national identity clause of Article 4(2) of the Treaty on European Union (TEU) recognizes that the Union must respect the national identities of its Member States, but at the same time it does not set firm limits regarding the extent to which Member States can invoke this clause to justify actions that violate EU rules and fundamental principles – most notably, those related to jeopardising judicial independence, democracy and the rule of law. The nature of Article 4(2) TEU has been described as a dual one: firstly, the provision requires the EU institutions to take into account Member States’ national identities in all areas of their work, especially when *adopting legislation* and other legally binding acts – in this respect, the provision functions as a parameter for the validity of said acts. Secondly, this Treaty provision requires the EU institutions – including the Court of Justice of the EU (CJEU) – to take into account Member States’ national identities when *interpreting and applying* EU law.²

The analysis in this paper puts a special emphasis on Poland and the developments in this country as a pertinent case in point through which the practical applications of the ‘national identity’ clause are analysed, bringing into focus some more recent cases before the EU Court of Justice and the Polish Constitutional Tribunal. Specifically, Poland has in the past years invoked the national identity clause in a series of legal disputes with the EU. Reviewing the relevant case law, the analysis spotlights the variance between how the EU institutions interpret the national identity clause of Article 4(2) EU and its breadth as opposed to the interpretation provided by the Polish government and the Polish Constitutional Tribunal. These last have, on a number of occasions, tested the boundaries of the discretion granted to Member States to propose and frame their national identity claims.

This paper is structured as follows. The first part elaborates on the elements that could potentially fall under the notion of ‘national identity’ and thus form part of a Member State’s ‘national identity’ plea under Article 4(2) TEU. The second part of the paper provides an overview of the references directly or indirectly relating to national identity, found in EU primary law – the Union Treaties and the EU Charter of fundamental rights. In the third part, the ‘national identity’ exception is examined through a case law analysis, focusing on three cases that have appeared before the CJEU and involve Poland. In each of the cases, the Polish side has raised a national identity plea to justify EU law violations: the first case concerning the rule of law conditionality for the protection of the EU budget, the second case regarding the independence and inviolability of the judicial function, and the third case, possibly the most controversial of all, relating to alleged breach of the principle of primacy of EU law by the Polish Constitutional Tribunal, Poland’s highest judicial body. The concluding part of the paper reflects on the disingenuous national identity arguments’ potential to disrupt the established institutional balance and dynamic in the

¹ An earlier version of this paper was presented by the author at the XI World Congress of the International Council for Central and East European Studies (ICCEES), 21-25 July, University College London.

² Opinion of Advocate General Emiliou in Case C-391/20 Boriss Cilevičs and Others (delivered on 8 March 2022), ECLI:EU:C:2022:166, point 83. According to AG Emiliou, any irreconcilable conflict between an EU act and the national identity of one or more Member States would represent a breach of Article 4(2) TEU and would therefore be invalid.

relationship between the Brussels and the Member States, equally addressing the existence of the sometimes-fluid dividing line between legitimate use, misguided use and abuse of national identity claims (whereby these claims are being used as a pretext rather than a genuine justification or legitimate defense).

II. First things first: What elements come under the ‘national identity’ banner?

The elusive notion of ‘national identity’ can have different meanings to different Member States. At the same time, there is a limit to how broad and elastic this concept can potentially be and what its limitations are. For some states, national identity matches the notion of state identity and is mainly understood in its political and constitutional sense; for others, it is construed as additionally encompassing certain linguistic, ethnic, religious and cultural elements.³ The notion of ‘national identity’ has over time been further enhanced through the addition of more legally relevant layers, especially those with EU law relevance, thus morphing into a distinct notion in its own right – that of ‘constitutional identity’ or ‘national constitutional identity’.⁴ National identity has frequently been conflated or even used synonymously with constitutional identity. The two concepts do share common elements,⁵ but do not appear to have the identical nature and scope. While the scope of constitutional identity is more restrictive and largely confined to matters related to a state's constitution and the values and principles it enshrines, national identity is broader and incorporates *the entirety* of elements differentiating one state from another.⁶

The concept of national identity in the EU context, as it flows from Article 4(2) TEU, has not been clearly defined and has led to varying, even opposing, interpretations by different institutional actors at the national and the EU level, including the CJEU as the EU's highest judicial organ. An important downside to this is that any unwarranted flexibility in the interpretation of the notion of national identity can pose significant challenges when determining whether specific national identity claims are genuine or used as pretexts to evade obligations imposed by EU law.⁷

As indicated in the Introduction, the third part of the paper offers a comparative overview of cases before the CJEU (one of which still pending), where Poland, appearing as an applicant or defendant, has attempted to exercise its right to the ‘national identity’ exception of Article 4(2) TEU. The CJEU has in the past encountered various arguments surrounding national identity from different national governments, pertaining to strictly constitutional matters as well as language, culture, etc.⁸ However, so far, the CJEU's reasoning on the national identity aspect has rarely been detailed or sufficiently elaborate to the point of providing a comprehensive definition of the notion

³ L. Besselink, National and constitutional identity before and after Lisbon, *Utrecht Law Review* (2010) Vol. 6, Issue 3, p.42.

⁴ Ibid, p.37.

⁵ In its judgments, the Polish Constitutional Court tends to use the two notions interchangeably (see, inter alia, Judgment of 24 November 2010 Ref. No. K 32/09; Judgment of October 7, 2021, ref. no. K 3/21). This approach was criticized by judge Mariusz Muszyński, himself a member of the Polish Constitutional Tribunal, in his Dissenting opinion to Judgment of October 7, 2021, ref. no. K 3/21.

⁶ For more on these concepts and how they interact, see, European Parliament Policy Department for Citizens' Rights and Constitutional Affairs, Study “The notion of constitutional identity and its role in European integration”, PE 760.344, March 2024, p.11 et seq;

⁷ See, P. Bard, N. Chronowski and Z. Fleck, Use, misuse and abuse of constitutional identity in Europe, CEU DI Working Papers 2023/06, p.5-10; E. Cloots, National Identity, Constitutional Identity, and Sovereignty in the EU, *Netherlands Journal of Legal Philosophy*, Vol. 45, Issue 2, 2016.

⁸ For more on this, see E. Orban, Constitutional Identity in the Jurisprudence of the Court of Justice of the European Union, *Hungarian Journal of Legal Studies* (2022) Vol. 63 Issue 2; M. Bonelli, Has the Court of Justice embraced the language of Constitutional Identity?, *Diritti Comparati: Comparare i diritti fondamentali in Europa*, 26 April 2022.

of national identity and its core components, including a much-needed insight into the Court's own understanding and interpretation of the notion.

III. The protection of national identity from the perspective of EU's primary law

Article 4(2) TEU is the cornerstone of the EU's recognition of the national identity of its Member States. The so-called 'national identity' clause provides that the Union shall respect the equality of Member States before the Union Treaties as well as their national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government. Further, the Union shall respect the Member States' essential State functions, including ensuring the territorial integrity of the State, maintaining law and order and safeguarding national security. On the other hand, the provision immediately following the national identity clause, *Article 4(3) TEU*, inaugurates the principle of sincere cooperation which requires that the Union and the Member States, in full mutual respect, assist each other in carrying out tasks that flow from the Union Treaties, whereby the Member States are obligated to take any measures appropriate to ensure the fulfilment of obligations stemming from the Treaties or resulting from the acts of the Union institutions.

As previously mentioned, the *Article 4(2) TEU* national identity clause is usually invoked by Member States wishing to legitimise actions or policies at the national level that might otherwise be considered as violating EU law. However, the EU's respect for national identity carries its own limitations and is certainly not a blank cheque for contravening behaviour by the Member States, especially since, as evidenced by *Article 4(3) TEU*, a corollary to the EU's duty to respect the national identities of the Member States is the latter's responsibility to respect the Union's legal order and the obligations dictated by EU law.

Another EU primary law provision relating to national identity can be found in *Recital 3 of the Preamble to the EU Charter of fundamental rights*, where it is declared that the Union contributes to the preservation and to the development of its common values alongside to respecting the diversity of the cultures and traditions of the peoples of Europe, the national identities of the Member States, and the organisation of their public authorities at the national, regional and local levels.

As concerns the Member States' cultural and linguistic diversity as a component of the (broadly-construed) notion of national identity, a relevant provision in this regard is the *fourth subparagraph of Article 3(3) TEU*, according to which the Union pledges to respect its rich cultural and linguistic diversity and ensure that Europe's cultural heritage is safeguarded and enhanced. This provision in a certain way mirrors *Article 22 of the EU Charter of fundamental rights* which states that the Union shall respect cultural, religious and linguistic diversity. Furthermore, the *Declaration No.16 on Article 55(2) TEU* highlights the Union's attachment to the cultural diversity of Europe and the special attention the EU will continue to pay to the languages of its Member States and other languages.

Finally, another, albeit less prominent manifestation of national identity embedded in the cultural and religious traditions of the Member States, is the treatment of animals and animal welfare. Pursuant to *Article 13 TFEU*, in formulating and implementing the EU's agriculture, fisheries, transport, internal market, research and technological development and space policies, the Union and the Member States undertake to pay full regard to the welfare requirements of animals, while respecting the Member States' legislative and/or administrative provisions and customs concerning, in particular, religious rites, cultural traditions and regional heritage.

IV. The National Identity Exception in Action: A Case Law Analysis

As mentioned in the Introduction, in each of the cases outlined in this part, the Polish side has raised a national identity plea as a defense against the allegations for violating rules and principles of EU primary law. The first case concerns the rule of law conditionality for the protection of the EU budget, the second case relates to the independence and inviolability of the judicial function, while the third case, possibly the most controversial of all, pertains to alleged breach of the principle of primacy of EU law and ultra vires control over the CJEU jurisprudence by the Polish Constitutional Tribunal.

A. Case C-157/21 Poland v. Parliament and Council (*re. rule of law conditionality for the protection of the EU budget*)

The EU Regulation 2020/2092 (known as the Rule of Law Conditionality Regulation),⁹ which entered into force on 1 January 2021¹⁰, establishes a rule of law conditionality mechanism that makes Member State access to the EU funds conditional upon their respect for the principles deriving from the rule of law as a fundamental value of the EU system. Once a Member State's rule of law violations have been established and deemed as posing risk to the EU budget, the EU can in turn suspend or reduce funding to that Member State. Essentially, this conditionality mechanism aims to protect the Union's financial interests by ensuring sound financial management and preventing potential misuse of funds by the Member States.¹¹

The Polish government, much like the Hungarian government in a different case dealing with the same subject matter,¹² had found fault with the Rule of Law Conditionality Regulation, claiming that by adopting the regulation, the EU had failed to fulfil its obligation to respect the essential State functions of the Member States – including ensuring the territorial integrity of the State, maintaining law and order, and safeguarding national security – as a duty that flows from the second sentence of Article 4(2) TEU.¹³ It maintained that legally regulating the organisation and functioning of the State institutions identified by Regulation 2020/2092 (including investigation services, public prosecution services and courts) was solely a national competence, governed by the second sentence of Article 4(2) TEU.¹⁴

The Polish side contended that the principles of the rule of law stem from the constitutional and political traditions of the Member States and that their content is specified through the case-law of the national constitutional courts. Hence, on account of the differences that exist between the Member States regarding their national identities, constitutional and legal systems, as well as legal traditions, it would be beyond the competence of the EU legislature to specify the means by which the objectives pursued by the principles of the rule of law may be achieved.¹⁵ Consequently,

⁹ Regulation (EU, Euratom) 2020/2092 of the European Parliament and of the Council of 16 December 2020 on a general regime of conditionality for the protection of the Union budget, OJ L 433I, 22.12.2020, pp. 1–10.

¹⁰ https://commission.europa.eu/strategy-and-policy/eu-budget/protection-eu-budget/rule-law-conditionality-regulation_en

¹¹ European Commission, Communication “Guidelines on the application of the Regulation (EU, EURATOM) 2020/2092 on a general regime of conditionality for the protection of the Union budget” C(2022) 1382 final, Brussels, 2.3.2022.

¹² C-156/21 Hungary v. Parliament and Council, ECLI:EU:C:2022:97.

¹³ C-157/21 Poland v. Parliament and Council, ECLI:EU:C:2022:98, para.260; AG Sanchez-Bordona Opinion in C-157/21 Poland v Parliament and Council, point 70.

¹⁴ Ibid.

¹⁵ Para.68.

Poland claimed, the obligation for the Member States to observe those principles is limited to the need to guarantee *their essence*.¹⁶

CJEU's response to the national identity arguments provided by Poland was framed in the following way. First, the Court reiterated that the values contained in Article 2 TEU (among which, the rule of law) are shared by all Member States and define the very identity of the EU as a common legal order, for which reason the EU must be able to defend those values within the limits of its powers laid down by the Treaties.¹⁷ In spite of having different national identities, inherent in their fundamental political and constitutional structures, the Member States are presumed to adhere to a concept of the 'rule of law' which they share as a value common to their constitutional traditions, which they have undertaken to respect at all times.¹⁸ The CJEU's rebuttal is compelling and excellently crafted as it rejects Poland's 'national identity' claim by relying on the *commonality of the Union's values* as a defining feature of the EU's identity. Next, the Court held that the second sentence of Article 4(2) TEU cannot be interpreted as allowing the Member States to disregard obligations imposed on them by EU law in areas of national competence related to the exercise of essential State functions, since, while the organisation of the national justice system does indeed fall within national competence, *in exercising that competence*, the Member States are required to comply with their obligations deriving from EU law.¹⁹

B. Case C-204/21 Commission v. Poland (*independence and inviolability of the judicial function*)

At issue in this case were the extensive reforms in the organisation of the Polish justice system, implemented via the 2019 Law amending the Law on the organisation of the ordinary courts, the Law on the Supreme Court and certain other laws. These judicial reforms helped the Polish government at the time to strengthen its hold on the national judiciary and have effective control over the judges and their appointments, most notably through the formation of a Disciplinary Chamber within the Supreme Court of Poland, aimed at sanctioning those judges who are deemed as not politically independent.

Poland took issue with the Commission's case against it, claiming that it has exclusive competence to organise its national justice system and that any interference on the EU's part would be a flagrant breach of the principle of conferral of powers and a failure to respect its national identity inherent in the fundamental political and constitutional structures. The CJEU countered this argument, asserting that, although the organisation of the justice system falls within the competence of the Member States – in particular, the establishment, composition, powers and functioning of the national courts, and the rules governing the process for appointing judges or those applicable to the status of judges and the performance of their duties – it nevertheless remains that, *when exercising that competence*, the Member States are required to comply with their obligations deriving from EU law.²⁰

The CJEU reaffirmed that the Union is composed of States which have freely and voluntarily committed themselves to the values set out in Article 2 TEU (democracy, rule of law, protection of human rights) and which respect those values and undertake to promote them. Furthermore, the

¹⁶ Para.68.

¹⁷ Para.145.

¹⁸ Para.266.

¹⁹ Para.260; AG Sanchez-Bordona Opinion in C-157/21 Poland v Parliament and Council, point 76.

²⁰ C-204/21 Commission v. Poland, ECLI:EU:C:2023:442, para.63.

mutual trust between the Member States, and, more specifically, their courts and tribunals, is based on the fundamental premise that the Member States share these common values.²¹ Importantly, it was emphasised that compliance by a Member State with the values of Article 2 TEU is a condition for the enjoyment of *all the rights* deriving from the application of the Union Treaties to that Member State.²² By consequence, compliance with those values cannot be reduced to an obligation which a candidate State is required to respect in order to accede to the EU and which it may disregard after its accession.²³

Referring to its constitutional identity, the Polish government argued that it is the Member States' constitutional courts that have the final word regarding the powers transferred to the EU under the Treaties. In its understanding, this is because the EU's powers are defined by the principle of conferral as a principle of EU law that encompasses *both* the constitutional principles of the Member States and the Union's obligation to respect their national identities.²⁴ In his Opinion, Advocate General Collins addressed this specific claim by recalling that EU law does not require of its Member States to choose a given constitutional model – but, at the same time, the national constitutional orders must guarantee the independence of their courts and, furthermore, by virtue of the principle of primacy of EU law, Member States cannot rely on their national laws, even their national constitution, to undermine the unity and effectiveness of EU law.²⁵ In other words, domestic law, including its constitutional provisions, cannot act as an obstacle to the principle of primacy.²⁶

Crucially, the CJEU rejected the argument that the EU law requirements arising from the EU's values and principles such as the rule of law, effective judicial protection and judicial independence, which are also conditions for both accession to and participation in the EU, are capable of affecting the national identity of a Member State within the meaning of Article 4(2) TEU.²⁷ In fact, a 'national identity' claim should be framed by taking into account the EU law provisions of the same rank: the 'national identity' clause of Article 4(2) TEU cannot be interpreted as exempting the Member States from their obligation to comply with the requirements stemming from those EU law provisions.²⁸

C. Case C-448/23 Commission v. Poland (*violations of EU law by the Polish Constitutional Tribunal*) (*pending case*)

Following the rulings of the Polish Constitutional Tribunal (CT) of 14 July 2021 and 7 October 2021, in the latter of which the CT declared certain provisions of the Treaty on European Union and the relevant jurisprudence of the CJEU as incompatible with the Polish Constitution, thereby expressly challenging the primacy of EU law, in February 2023 the Commission started infringement proceedings against Poland. This is the first time that the Commission has brought an infringement action against a Member State directed not only against a position adopted by a

²¹ Para.66; See, also, to that effect, C-791/19 Commission v. Poland (*Disciplinary regime for judges*), EU:C:2021:596, para.50.

²² Para.68; See, also, to that effect, C-156/21 Hungary v. Parliament and Council, EU:C:2022:97, para.126.

²³ Para.68; Effectively, the CJEU here underscores the duty and resulting principle of non-regression (on this, see Case C-896/19 Repubblika v. Il-Prim Ministru, ECLI:EU:C:2021:311, para.64).

²⁴ See, AG Collins Opinion in C-204/21 Commission v Poland, footnote 19.

²⁵ AG Collins Opinion in C-204/21 Commission v Poland, point 60.

²⁶ Ibid.

²⁷ Para.72.

²⁸ Ibid.

national constitutional court, but also against the constitutional court's case-law which, in this instance, challenges the CJEU's authority on the ground of an (alleged) incompatibility with the national constitution.²⁹ The principle of primacy of EU law being the essential tool for ensuring the uniformity and equal application of EU law across the Union, the Commission's assertion is that the above mentioned rulings of the Polish CT violate the EU's principles of autonomy, primacy, effectiveness and uniform application of EU law and undermine the binding effect of the Court of Justice's rulings.³⁰

The unique aspect of the pending case *C-448/23 Commission v. Poland*, is that here the Commission reproaches Poland for having outright rejected the primacy of EU law, which in itself can be seen as a challenge to the very basis of European integration.³¹ A further contentious aspect of the case is that the Polish CT, in the name of Poland's constitutional identity, has reserved for itself the prerogative to directly review the compliance of CJEU's judgments with the Polish Constitution, thereby abjectly disregarding the principle of the primacy of EU law and the authority of the Court of Justice.³²

The Polish CT judgment of October 7, 2021 (Ref. act K 3/21) can undoubtedly be described as the pinnacle of controversial judgments adopted by a constitutional court of a Member State, one that not only goes against, but in fact negates the very constitutional foundations upon which the EU legal order was built. Focusing on the matter of competence (or, in its rationale, the lack thereof), the Polish CT maintained that the scope of competences that cannot be transferred to the EU is determined by the values on which the Polish Constitution and its guiding principles are based – namely, by its constitutional identity.³³ The Polish government, which initiated the proceedings before the CT, recalled the Union's duty to respect the Member States' national identity, especially in its political and constitutional aspect, contending that, in the light of Article 4 TEU, it is up to the Member States to *freely assess what their constitutional identity is* – in accordance with Polish law and the Polish Constitution, the only body authorized to perform this assessment is the Polish CT.³⁴ The Commission did not accept this framing of the 'national identity' argument, asserting that, although the EU respects the national identity of the Member States, that identity *cannot justify* a breach of the Union's fundamental values, such as the rule of law and the independence of the judiciary.³⁵

Furthermore, the Polish CT's judgment highlighted the need for a balance to be struck between safeguarding the subjectivity of the Member States and the subjectivity of the EU.³⁶ The CT noted that it fully appreciates the place and role of the CJEU as an institution exclusively entitled to adjudicate in the areas entrusted to the EU under the Union Treaties – however, solely within the framework of the competences transferred to the EU and while *at the same time* respecting the constitutional identity and fundamental functions of the Member States.³⁷ The CT held that, any interpretation of the Union Treaties aimed at eliminating state sovereignty, threatening national

²⁹ AG Spielmann Opinion in Case C-448/23 *Commission v Poland*, point 5.

³⁰ Press release "The European Commission decides to refer Poland to the Court of Justice of the European Union for violations of EU law by its Constitutional Tribunal", Brussels, 15 February 2023 [https://ec.europa.eu/commission/presscorner/detail/ga/ip_23_842].

³¹ AG Spielmann Opinion in Case C-448/23 *Commission v Poland*, point 34.

³² Ibid.

³³ Referring to Judgment K 32/09 of the Polish Constitutional Tribunal of November 24, 2010, OTK ZU No. 9/A/2010, item 108.

³⁴ Polish Constitutional Tribunal, Judgment K 3/21 of October 7, 2021, point 4.4.

³⁵ AG Spielmann Opinion in Case C-448/23 *Commission v Poland*, point 58.

³⁶ Polish Constitutional Tribunal, Judgment K 3/21 of October 7, 2021, point 4.4.

³⁷ Ibid.

identity, or at taking over sovereignty outside the scope of the transferred competences, should be considered as contrary to the Union Treaties and the fundamental principles of the EU legal order.³⁸

As Advocate General Spielmann aptly describes it, the pending case *C-448/23 Commission v. Poland* puts the focus on the interaction between two principles which the Polish CT considers to be antagonistic: on the one hand, the primacy of EU law, as a ‘centripetal’ principle that serves as the foundation for the EU’s supranational integration, and, on the other hand, the respect for the Member States’ national identities as an, admittedly, ‘centrifugal’ concept which incorporates all the elements that differentiate one state from another and enables it to be recognised and distinguished from other states.³⁹ The foregoing brings us to the key question: namely, which of the two principles should take precedence? Does the centripetal trump the centrifugal? While the answer is not always so black and white, what is certain is that, in matters concerning EU law and its implementation, a Member State cannot give precedence to its national identity over the primacy of EU law. This finding is borne out by a set of general principles inherent in the EU legal order (including the principle of equality of the Member States, the principle of cooperation in good faith and the principle of sincere cooperation) that derive from the autonomous character of EU law and are founded on the principle of primacy.⁴⁰ It follows then that the EU Court of Justice alone is the authority vested with the power to *definitively* settle any conflict arising between EU law and the constitutional identity of a Member State.

As a final remark, it is important to mention that – arguably, on account of Poland’s new government coming to power – in its rejoinder to the CJEU proceedings dated 31 January 2024, Poland withdrew the observations previously submitted in its defense and fully accepted the complaints made by the Commission. Regardless, the case will still proceed, giving the CJEU the chance to determine whether or not the failures claimed by the Commission exist, even if the State concerned does not deny them.⁴¹

V. Conclusion: Bridging the “EU law versus national identity” divide

The potential tension that may arise between the duty to respect the Member States’ national identity (regardless of how broadly or narrowly the notion may be construed) and the goal of ensuring the primacy of EU law in all areas of EU’s competence is a critical issue for the functioning and development of the Union legal order. The above discussed case law of the EU Court of Justice demonstrates that ‘national identity’ claims and the resulting derogations must be carefully scrutinized by the relevant actors to determine whether these claims are rooted in considerations and concerns that the Member States genuinely have, so as to prevent their misuse or abuse.

While it is crucial that in the way it carries out its work the EU respects the national identities of the Member States and the diversity of their national constitutional and political models, yet, the former cannot be used as a front for disregarding the fundamental values of the Union legal order and, consequently, jeopardising the autonomy, coherence and uniformity of the EU legal order. Furthermore, instead of perceiving Article 4(2) TEU as an obstacle or a sticking point in the relationship between the EU and the national governments, the ‘national identity’ clause should

³⁸ Ibid; The Constitutional Tribunal also makes further reference to its previous Judgment ref. no. K 32/09.

³⁹ Ibid, point 35.

⁴⁰ Ibid, point 62.

⁴¹ Ibid, point 32.

be viewed as enabling a dynamic and mutually beneficial dialogue between the EU's and the national legal orders.⁴²

Admittedly, certain matters which affect *both* the EU's supranationally defined goals and the Member States' nationally held interests, bring to light the evident tension between the need to preserve the unity and effectiveness of EU law and the desire to protect the uniqueness of the national identities.⁴³ The resolution of this tension will ultimately depend on the EU and the Member States' ability to engage in a dialogue that takes due consideration of *both* the specificity of the Member States' national identities and the fundamental principles that underpin the European integration project. However, as the cases discussed above illustrate, in the event of conflict between the two, it is essential that the EU Court of Justice retain the final authority to resolve such type of conflict by ensuring that the primacy of EU law and the Union's basic values are safeguarded.⁴⁴ In other words, the resolution of the conflict cannot come at the cost of compromising the core values of Article 2 TEU which define the Union for what it is.⁴⁵

It is fitting to add to these concluding remarks by recalling the poignant observations made by Pierre Pescatore (law professor and former judge of the Court of Justice) already back in 1963. Pescatore emphasised the Court of Justice's complex role of combining its authority as 'supreme arbiter' in the interpretation of EU law with that of an authority attentive to the legitimate interests of the Member States.⁴⁶ The first function is that of being the guardian of the interests of all central (EU) institutions and their prerogatives, which requires a strong Court of Justice that can impose Community (Union) authority "on States which have remained sovereign and are all too readily inclined, as such, to take back with the left hand what they conceded with the right hand in signing the European Treaties".⁴⁷ The second, one may say, competing function, is to respect the Member States' legitimate interests as well as their residual sovereignty "against the attacks of a central authority which could become invasive".⁴⁸ As an embodiment of the federal spirit, the challenging task for the Court of Justice, but also the rest of the EU institutions, is to reconcile the necessity for unity with a strong respect for the legitimate rights and vested interests of the Member States.⁴⁹

⁴² See, *ibid*, point 93.

⁴³ *Ibid*, point 37.

⁴⁴ *Ibid*, point 93.

⁴⁵ For more on the link between the EU's fundamental values and the Member States' national identity claims, see, I. Cenevska, How do 'national identity' considerations factor into the way the EU employs its values-based conditionality? – Exploring a complex interplay, *EUWEB Legal Essays: Global & International Perspectives*, Issue 2/2024, July 2024.

⁴⁶ P. Pescatore, *Études de droit communautaire européen 1962-2007: Collection droit de l'Union européenne – Grands écrits*, Bruylant, Brussels, 2008, p.87,88.

⁴⁷ *Ibid*.

⁴⁸ *Ibid*.

⁴⁹ See, *ibid*.

References

1. Bard, P., Chronowski, N. and Fleck, Z., “Use, misuse and abuse of constitutional identity in Europe”, CEU DI Working Papers 2023/06.
2. Besselink, L., “National and constitutional identity before and after Lisbon”, *Utrecht Law Review* (2010) Vol. 6, Issue 3.
3. Bonelli, M., “Has the Court of Justice embraced the language of Constitutional Identity?”, *Diritti Comparati: Comparare i diritti fondamentali in Europa*, 26 April 2022.
4. Cenevska, I., “How do 'national identity' considerations factor into the way the EU employs its values-based conditionality? Exploring a complex interplay”, *EUWEB Legal Essays: Global & International Perspectives* (2024) Issue 2/2024.
5. Cloots, E., “National Identity, Constitutional Identity, and Sovereignty in the EU”, *Netherlands Journal of Legal Philosophy* (2016) Vol. 45, Issue 2.
6. European Parliament, Policy Department for Citizens’ Rights and Constitutional Affairs, Study “The notion of constitutional identity and its role in European integration”, PE 760.344, March 2024.
7. Orban, E., “Constitutional Identity in the Jurisprudence of the Court of Justice of the European Union”, *Hungarian Journal of Legal Studies* (2022) Vol. 63 Issue 2.
8. Pescatore, P., *Études de droit communautaire européen 1962-2007: Collection droit de l’Union européenne – Grands écrits*, Bruylant, Brussels, 2008.
9. European Commission, Communication “Guidelines on the application of the Regulation (EU, EURATOM) 2020/2092 on a general regime of conditionality for the protection of the Union budget” C(2022) 1382 final, Brussels, 2.3.2022.
10. European Commission, Press release, “The European Commission decides to refer Poland to the Court of Justice of the European Union for violations of EU law by its Constitutional Tribunal”, Brussels, 15 February 2023.
11. [https://ec.europa.eu/commission/presscorner/detail/ga/ip_23_842].
12. European Parliament and Council of the EU, Regulation (EU, Euratom) 2020/2092 of the European Parliament and of the Council on a general regime of conditionality for the protection of the Union budget, OJ L 433I, 22.12.2020, pp. 1–10.
13. Court of Justice of the European Union, Case C-157/21 *Poland v. Parliament and Council* (Rule of law conditionality for the protection of the European Union budget), ECLI:EU:C:2022:98.
14. Court of Justice of the European Union, Case C-204/21 *Commission v. Poland* (effective judicial protection — independence of judges), ECLI:EU:C:2023:442.
15. Court of Justice of the European Union, Case C-448/23 *Commission v. Poland* (ultra vires control of the CJEU jurisprudence — primacy of EU law) (*pending*).
16. Opinion of Advocate General Emiliou in Case C-391/20 *Boriss Cilevičs and Others*, delivered on 8 March 2022, ECLI:EU:C:2022:166.
17. Opinion of Advocate General Sanchez-Bordona in Case C-157/21 *Poland v Parliament and Council*, delivered 2 December 2021, ECLI:EU:C:2021:978.
18. Opinion of Advocate General Collins in Case C-204/21 *Commission v Poland*, delivered on 15 December 2022, ECLI:EU:C:2022:991.
19. Opinion of Advocate General Spielmann in Case C-448/23 *Commission v Poland*, delivered on 11 March 2025, ECLI:EU:C:2025:165.
20. Polish Constitutional Tribunal, Judgment of October 7, 2021, Ref.act K 3/21 [available at: <https://trybunal.gov.pl/en/hearings/judgments/art/11662-ocena-zgodnosci-z-konstytucja-rp-wybranych-przepisow-traktatu-o-unii-europejskiej>].