LL.M. Final Thesis
in Natural Resources and International Environmental Law

National Constitutional Identity in the European Union
and the Principle of Primacy

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Supervisor: Dóra Guðmundsdóttir

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Abstract

Even though the idea of respect for National and Constitutional Identity has been present for a long time, the meaning of those terms and their consequences have not been analysed and understood accurately, remaining a current issue. This is not to endorse the notion that the concept has no meaning as we can analyse its development within European Union Law. In general, we can affirm that the idea of the respect for National Identity has been strengthened by the Lisbon Treaty and that The European Court of Justice (ECJ) is competent to interpret the concept.

Even though the main focus will be on the interpretation of the Article 4(2) TEU and its express mention to the respect for National Identity, we find the need to address the topic from a juridical standpoint, given that, as the previous paragraph points out, the conceptual development of national identity has the ECJ as a main character, as its case-law sets the limits and features of the concepts.

Nevertheless, we should note that not many cases where Article 4(2) TEU is used have been studied by the ECJ. Furthermore, those that do study the matter, address the issue in an unclear way, both when defining what should be understood as National Identity and when addressing its relationship with the Primacy Principle. That is why the role of the ECJ as well as the Member States' Constitutional Courts help us understand the term. National Constitutional Courts are empowered to invoke the clause of National Identity to resist the concept of absolute primacy of the European Union laws. It is therefore necessary to investigate which is the meaning of the concept, which can be achieved by examining -in a non-exhaustive way- the case law of the Constitutional Courts, and by the analysis and comparison between the constitutional provisions of the member states.

It is also worth emphasizing that the ECJ allows some exceptions to the European Law obligations on the grounds of Article 4(2), and the ECJ also controls the validity of secondary legislation and reviews the legality of acts of the institutions, which are obliged to respect National and Constitutional Identity.
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1. Introduction

The aim of this thesis is to inquire about the National Identity of the Member States of the European Union and how it can be relied on against the measures taken by the European Union as a whole and how that action can interfere and often limit, in some way, the sovereignty of the Member States. The specific question that is intended to be developed in this work is basically if the National Identity of the Member States can be used as a barrier to avoid the application of the European Union Law, based on Article 4(2) TEU.

Assessing ‘national identity’ of the member states and the values involved is a difficult task. It is partly a question of political determination and touches on political aspects of constitutionalism as well as legal aspects. Commentators have asked if the European Union and its institutions are under a duty to respect national identities, and if it is a legal obligation. Commentators also ask, if the ECJ itself is under a legal duty to respect the ‘national identities’ of the Member States, and then how that obligation has been ensured, or if it falls to the supreme courts, or constitutional courts, of the Member States to protect ‘national identity’ against measures taken by EU institutions, including the Court of Justice. ¹

As a background it is vital to understand the Primacy Principle, and its relationship with the National Identity Clause, given that when referring to the respect for national identity of the Member States and whether it can be used as a barrier for the application of European Union Law by a member state, we are, as a matter of fact, analysing if the Primacy Principle is or is not an insurmountable barrier, and therefore if the respect of national identity constitutes an exception to the European Union Law Primacy Principle.

Similarly, to be able to give an effective answer to the questions raised in the previous paragraph, it will be necessary to define what National Identity is, or to comprehend what is currently understood by the term “national identity”, something that surely strikes as difficult, but at the same time is vital to be able to understand the issue at hand, and it relationship with European Union Law.

Different points of view from the doctrine about National Identity and its place in the European Union are going to be addressed. This work aims at generating an overview map of the situation and the subject matter, taking into account that there are 28 member states and that their various cultures are inherent to their fundamental structures, politically and

constitutionally speaking; for that reason, Article 4(2) TEU provides that the European Union shall respect the National Identities of each Member State.

The difference between the concepts of National Identity and Constitutional Identity will be discussed. Besides, the legal framework of National Identity in Article 4(2) TEU will be examined through the analysis of the basic problems, such as the scope of National Law when making policies at the European level, as well as the interpretation that the Member States' National Courts and European Tribunals make of the European Legal framework. The research question that the work is concerned with is: Can the Member States of the European Union limit the application of European Union Law in their territory using the concept of National Identity in Article 4(2) TEU and to what extent? Some practical examples from the jurisprudence of the European Court and the Courts of the Member States will also be used to illustrate this matter.

To answer these questions, we will account for both the European doctrine and case-law, and the member states’ case-law, given that, as we will see later, many of those judgements set out the guidelines of those of the European Union. Here, it must be stated, that it is not possible to give a full account of all the Member States of the European Union, so a selection will be made, based on the literature. We will also use a philosophical perspective when addressing more complex subjects outside of a pure legal perspective, having in mind that this work intends to answer the questions posed in the preceding paragraphs.

That said, once the questions to address by this paper have been raised, it is necessary to explain the method that will be used, as the subject of national identity can be analysed from multiple points of view, and various methods can be used, ranging from the analysis of the role of national identity in European Union Law or a more national approach to this issue, studying a certain state. In this paper we will start studying the idea of the existing relationship between multiple concepts such as sovereignty and transfer of powers that will lead us to the Primacy Principle. We will later analyse the concept of national identity, and finally, we will study the relationship between said concept and the Primacy Principle, as well as the possible limitations to it.

First, we will analyse the history of the concept, and why we find ourselves with these issues at this time. It will therefore be necessary to analyse the existing relationship between sovereignty and transfer of power.

Once the historic context has been analysed, it will be necessary to understand what the primacy principle means in European Union law, as the issue of National Identity is strongly linked with said principle. For that, we will have to study and analyse the European doctrine
and case-law concerning European Union Law Primacy Principle against National Law to better understand the controversy and the contradiction that may exist between the Primacy Principle and the respect for National Identity.

Also, once understood what primacy is and what it means to European Union Law, we will have to analyse the concept of National Identity. For that, we will use the case-law and the different points of view of both national and European doctrine. To this extent, we will have to differentiate the concept of National Identity and National Constitutional Identity.

Subsequently, and after having analysed the concept and delimited the issue at hand, it will be necessary to know what methods are used to determine National Identity, as well as studying the existence of a single criterion to apply to identify National Identity. In this respect, the point of view of the Spanish legal system will be analysed primarily.

Lastly, one of the most important and controversial aspects of National Identity will be analysed: its relationship with the Primacy Principle. This will, in one way or another, draw us to the issue of whether National Identity can be used as a limit to the Primacy Principle.
2 Historical background and conceptual issues

2.1 Historical Background

History helps us understand why do we find ourselves discussing this issue, and the reasoning behind the questions raised in the present work introduction. At this point, it is important not only to mention how certain events took place, but also to analyse how those events have caused problems, and, to a greater or lesser degree, have contributed to the existing confusion on the subject of National Identity, as it is an issue of current interest for both the European doctrine and European case-law.

In principle, the European Union was created with a clear vocation: to solve a raft of problems, and as a means to a common end, unattainable by the member states on their own. But the creation of the European Union also led to new problems, especially some considerations difficult to solve such as creating rights for individuals that stand in conflict with rights guaranteed at the national level. The Member States of the European Union have sovereignty in their respective territories and the acceptance of European Union Law was reached gradually in many subjects. It is commonly agreed, however, that by signing the Treaties, the Member States limited their sovereignty, within the fields where powers were conferred to the institutions of the European Union.

It was not until the adoption of the Lisbon Treaty that the division of powers between the Union and the Member States were clearly set out in the Treaties. It adds to the already known principles of subsidiarity and proportionality, the principle of conferral we can find in article 5 of the Treaty on European Union (TEU). This principle is of great importance, and allows the Union to act only within the limits of the powers conferred upon the Member States in a number of areas.

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4 Case 6/64 Flaminio Costa v E.N.E.L. [1964] ECR 585 ("Member States have limited their sovereign rights, albeit within limited fields, and have thus created a body of law which binds both their nationals and themselves").
7 Also known by its acronym: TUE.
The main doctrine of the European Union established clearly that the defining characteristics of the principle of conferral are mainly three: (i) The European Union can only act within the powers attributed by States in the Treaties (ii) The EU can only act within the positive and negative limits of the powers conferred and (iii) The EU cannot confer powers to itself.  

This means that the country in question retains its sovereignty and power, as the exercise can be recovered when so required.  

The clause in the Lisbon Treaty concerning the right of withdrawal assisting Member States from the European Union point confirms this view. Clause d of the Lisbon Treaty provides a mechanism for voluntary and unilateral withdrawal from the European Union (Art. 50 TEU). The Member State wishing to stop being part of the European Union notifies its intention to the European Council, which presents guidelines for the conclusion of an agreement establishing the form of withdrawal.

The level of decentralisation, understood as "all measures taken at the political level to strengthen the role of subnational regional authorities in the process of making national and European decisions and resulting in a transfer of powers from central government to local and regional institutions", recognizes that Member States of the EU are not obligated in any way to opt in its institutional organisation for a particular model of decentralization, transfer or allocation of powers between the different models of governance, although at the same time it stresses that the EU explicitly states, in particular in its Article 4(2) TEU, the respect for the local and regional autonomy.

Article 352 of the Treaty on the Functioning of the European Union (TFEU) contains a flexibility clause concerning the areas of competence of the European Union. This clause allows the institutions to adjust the powers of the Union to the goals established

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14 ibid.
15 Also known by its acronym: TFUE.
by the treaties if these have not provided the necessary powers to achieve those objectives.\textsuperscript{17} The importance of this clause lies on the fact that it includes the principles of subsidiarity and proportionality, understood as corrective criteria and a limitation to the excessive production rules "less regulation, better regulation". In this regard, it is worth mentioning the budgetary austerity; the prevalence of shared powers with the States and also the existence of purely complementary skills or support; the proposals referred to above are aimed at the re-nationalization of some policies.

Now, to be clear about the existing distribution of functions between the European Union and the Member States, the concept of “principle of institutional balance”\textsuperscript{18} -that regards mainly the distribution of powers between the institutions of the EU- must be understood. This concept implies that each institution has to act in accordance with the powers conferred upon it by the Treaties, and in accordance with the division of powers. The principle itself is not set out in words in the Treaties but derives from a judgment by the Court of Justice in Meroni vs High Authority in case 9/56.\textsuperscript{19} The principle of Community institutional balance thus prohibits any encroachment by one institution on the powers conferred upon another. It is the responsibility of the European Court of Justice to ensure that this principle is respected.

The relationship between the European Commission, the Council of the European Union and the European Parliament is governed by the idea of the "institutional triangle". Their relationship and the powers conferred on them by the Treaties have changed radically over the years, particularly for the Parliament, whose influence has increased considerably.\textsuperscript{20}

With the adoption of the Treaty of Lisbon, the imbalance which existed between the legislative powers of the Council and those of the Parliament has lessened. The Parliament has been accorded wider legislative and budgetary powers. Furthermore, it has extended the decision procedure, also known as the ordinary legislative procedure, to a greater number of policy areas as it contributes to the re-balancing of powers between the Parliament and the Council of the European Union.\textsuperscript{21}

The Principle of Primacy and Direct Effect are cornerstones in regard to European Union


Law. The jurisprudence of the European Court of Justice (ECJ) aims to understand and clarify that those principles constitute a kind of coherence of the notion of "division of powers". It was in the Hague Congress of 1948, where the term "transfer of sovereign rights" was collected for the first time, which contributed to the emergence of new terms for already existing concepts such as “sovereignty”.

The direct effect of European Union Law was first established by the Court in the significant case denominated Van Gend en Loos from 5th of February 1963. In that judgment, the European Court states that European Union Law not only creates obligations for Member States but also rights for individuals. This refers to the fact that individuals can claim these rights and directly invoke European standards at national and European jurisdictions.

Consequently, it is not necessary that the Member State implements the relevant European standard in its domestic legal system, as such regulations enjoy direct application. Although directives are acts directed to the states so that they are applied via transposition, the recent jurisprudence of the European Court of Justice has determined that in some cases, they have direct application. Various laws and Constitutions of the Member States talk about the principle of conferral.

2.2 European integration and state sovereignty beyond the economic sphere

Federalism is often referred to as a model for understanding the European Union, but there is agreement that the European Union is not a federal state. Rather, as e.g. Leanerts explains, if federalism is taken to provide a model for a centralized authority and decentralized component entities, and this model helps in adjusting the balance between the powers and tasks of the central entity and the decentralized entities, which retain their sovereign powers within their sphere of competences, this can be a useful model.
Currently, the term “federalism” is a politically controversial when applied to European level - it should be noted that the European Union is not a federation like the United States or simply an organisation for cooperation between governments, like the United Nations. The Member States remain independent sovereign nations but they pool their sovereignty to delegate some of their decision-making powers to shared institutions they have created to be made democratically at European level decisions on specific matters of joint interest. This domain was the "first pillar" of the EU. There are also areas where Member States have not delegated their powers but are simply working together in an "intergovernmental cooperation" that constitutes the "second pillar" Common Foreign and Security Policy (CFSP) and "third pillar" Police and Judicial Cooperation in Criminal Matters (PJCCM).28

However, both the institutional framework of the United States of America and the European Union are based on vertical and horizontal divisions of powers between institutions elected or appointed in different ways. Vertical separation of powers implies a distribution of powers between governments at different levels, including local, state and union levels. The rights of the states in USA and the principle of subsidiarity in the EU intends to be a guidance for the distribution of powers between a vertical arrays of levels of government. However, in both cases, you can detect fluctuations in the relative power of the union, states and regions or counties in different periods.29 But it has been kept in some federalist policies or European authorities, such as, arguably, the citizens of the Union, the monetary union, or the judicial system.30

It should also be mentioned that it’s politically controversial talking of a European Federal Union; the European federation is for some the political horizon of the European Union.31

Indeed, the tendency in recent years has been to assess our European participation in primarily economic terms, diminishing political and historical importance that has led to our accession to the European integration process, at least from the point of view of countries such as Spain, Portugal or Greece. Clearly the European acquis contains layouts, different depth and ambition concerning powers of the state, such as foreign policy or immigration.


30 ibid.

31 Laura Allison, *The EU, ASEAN and interregionalism: regionalism support and norm diffusion between the EU and ASEAN*. (Houndmills, Basingstoke, Hampshire New York, NY: Palgrave Macmillan, 2015) p. 90 ISBN 978-1-137-49479-5 (Barroso Durão: “Let’s not be afraid of the words: we will need to move towards a federation of nation states. This is what we need. This is our political horizon”).
Both orders, as well as monetary policy, are reserved to the exclusive jurisdiction of the state in the 1978 Spanish Constitution, as an illustration.

It should be noted that even with the disappearance of the pillars and the full absorption of the European community by the EU phenomena caused by the Treaty of Lisbon, in the Union coexist supranational integration and classic intergovernmental cooperation. This is happening in foreign policy, despite the aforementioned removal of pillars, the institutional strengthening and the concentration of international standards around a single title. Naturally, in the economic field characteristic of the EC and the political ambit formally assigned to the Common Foreign and Security Policy (CFSP), have never been sealed and perfectly bounded compartments.32

It is clear that the achievements of European Union Law are highly appraised and without parallels in the international system itself. Precisely, in order to emphasize this unique identity, some concepts of ambiguous sense as “supranational “or “Legal integration” have been coined.33

To continue the development of this section is necessary to mention the theories of European integration.34 Since these allow the reader to better understand the different phases that have occurred in the European Union and thus understand the term integration and that means every of these theories that have been part of the history of the European Union. We can say that the theories of European integration are functionalism and neo-functionalism.35

Early theories of integration understood that process implicitly as political integration.36 The theorist defines integration as the development of an international community through functional cooperation.37 In general, the theory of functionalism was adopted as a strategy towards a federal organisation promoted by Jean Monnet. Nevertheless, we must say that integration view from the functional point of view focused basically on the enumeration of causes that made that integration impossible, especially the need to transfer...
individual loyalties governments to the functional centre.\textsuperscript{38}

The critique of neofunctionalism arose from the inability to establish an independent and comparative model of analysis for the European situation. These criticisms of the system opened up new ways to understand the phenomenon of European integration. So theorizing became dominated by studies based on theories of international relations. The main idea of these new theories is based on the assumption that the Community had to be understood not through their specificity, but through concepts applicable to other relationship schemes between states, such as regime or system.\textsuperscript{39}

The restructuring of Europe undertaken by the Constitutional Treaty has been extended, but watered down in the Lisbon Treaty; this can be regarded as a sign that the European States still prevail; that is, they still have the constituent, original and reforming power of the European integration project, and their instrument is still the international treaty.

The truth is that the state sovereignty is incontestably remodelled, both "ad intra" and "ad extra", where the EU aims to exert "soft power". It is imposed at this point to correct the traditional and the front separation between the state as omnipotent subject of international legal relations, and the international organisation endowed with powers of allocation and functional mere coordination. However, I am sure that the state role in European integration remains the best guide to unravel this phenomenon, whose ultimate horizon is unknown and does not even point inexorably towards increasing and uniform integration. In other words, the formal sovereignty –in some cases several hundred years old- is not seriously challenged at the moment, and there is no popular or state clamour to challenge it, of course. The Treaty of Lisbon itself, which deepens, streamlines and democratizes the integration in many aspects, does not undermine essentially this state of affairs; in some cases, even strengthens it, for example when it enshrines for the first time in the primary law the right of withdrawal.

For the state’s self-interest and patriotism narrowly understood, it is appropriate to invigorate the European integration in many areas and contribute to “construct a better Europe”. Now, one of the most important or fundamental issues of national courts of the Member States of the European Union has been the action of accepting the claim that the European Union Law is the supreme law of the countries comprising the European Union, taking priority over national legislation.\textsuperscript{40}

\textsuperscript{38} ibid 341.
\textsuperscript{39} ibid.
\textsuperscript{40} Mattias Kumm, ‘The Jurisprudence of constitutional conflict: Constitutional Supremacy in Europe before and after the
2.3 The European Union as a legal system

The European Union clearly possesses a legal system framed in a *sui generis* legal order as it is unique and it cannot be encompassed in International Law, and much less in the domestic law of the member states. That said, having a legal system implies having some powers that states have yielded to the European institution for it to be part of the creation of laws, which will concern the member states of the European Union.

We could say, without any doubt, that the European Union does not possess a general power to create laws at will, let alone enforce them in the territories of the Union. This power must be previously authorised by the member states, and only to reach the desired goals of the European Union. On this basis, it is clear that the power to legislate is to be found in the treaties. Proof of that is article 289 TFEU, which establishes the legislative process.

By this, we can discern that member states themselves decide to yield certain powers to the European Union. These powers are limited, and are yielded with a clear purpose in mind. However, some problems may arise.

At this point, it is easy to understand that a problem exists concerning the subject of national sovereignty and the transfer of powers to the European Union by the member states. Therefore, we will analyse the issue in the following paragraphs, to better grasp the concept of National Identity, and how this clause is of vital importance in European Union Law, as the relationship between national sovereignty and the transfer of powers makes understanding the reason behind the National Identity clause easier.

2.4 The tension between sovereignty and transfer of powers

The issue of sovereignty has two clear aspects with respect to European Union Law. On the one hand, the political vision, and on the other hand, the legal vision. The first will not be analysed in the following paragraphs, as we are only concerned with the legal dimension of the subject, which is an already difficult task. It is clear that national sovereignty is considered to emanate from the people (understood as the citizens of each member state), and they delegate their power to the government, to be used to benefit the citizens. However, this

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*constitutinal treaty*’ [2005] (European Law Journal. Volume 11 Nº 3) p. 266 “EU Law is the supreme law of the land (call this European Constitutional Supremacy or ECS)”.

41 Chalmers (n 2) 98-99.


idea can lead us to conclude that national sovereignty cannot be transferred to a different institution.

The question to address is what happens in those cases where a state transfers part of its powers to an international body? In other words, what happens when a member state transfers powers to the European Union? Does the state lose its sovereignty in those fields or can it give or take its powers as it pleases? Logically, this question has been raised not only within the framework of the European Union. It also affects the international relationships between states, existent nowadays. Concerning these topics we can conclude that the states delegate their powers either to a certain institution or commits to obey and follow, by domestic law, the covenants or agreements they ratify.

What drives us to want to analyse that relationship is that, from the strictest point of view, we must understand that the membership in an international community or organisation –or in the present work, to the European Union- cannot reduce part of the national sovereignty, national independence or national identity. These expressions are in some cases, mutually related.

As regards the sovereignty, it is divested legally to the European Union by the member state, to achieve its goals. However, national sovereignty is not transferred, but shared to achieve this common goal. This means that the European Union is autonomous to legislate, and therefore, it is not an exclusive power to the member state anymore. On that point, treaties play a key role, as they establish the guidelines concerning the transfer of powers.

Given that the state does not hold the exclusivity to legislate in the areas where powers have been transferred -that could be exclusive, joint or supporting-, one can wonder if the European Union could even change the member states’ laws to the extent of tampering with its national identity. This issue is not trivial, as many voices against the European institutions have raised these concerns –losing national identity- as a problem in the foreseeable future, given that it would be needed to achieve the goal of a much stronger European project.

At this stage, the Primacy Principle plays, without doubt, a relevant role both in the relationship between sovereignty and the transfer of powers and in the national identity clause, as all of those elements have an indivisible relationship, doomed to reach an agreement.

44 ibid 38.
45 ibid.
47 Chalmers (n 2) 185.
3. The Principle of Primacy

3.1 Approach
The primacy principle is established in the renowned judgment Costa vs. ENEL (Case 6/64)\(^48\) by which, in case of conflict between a National norm and a European norm, the national judges and Courts must apply the latter, confirming the full enforcement of the European Union Law. The principle of primacy plays a key role in the uniform implementation of European Union Law by the Member States.\(^49\)

The importance of the primacy principle in connection with the clause of National Identity is of great importance, as it allows us to better understand how to apply said clause, and determine if the primacy principle can be considered as absolute. In the following I will discuss different approaches to the question whether the primacy principle is absolute or is not

It’s possible defends the idea of the primacy of European Union Law against National Law, including Constitutional norms\(^50\) and it is also possible understand that Constitutional Identity is an actual issue with no easy solution. The primacy principle must prevail over National Law, except for those norms that belong to the “Constitutional Identity”, which have to be defended against the primacy of European Union Law. This way, we could conclude that European Union Law primacy is not absolute.\(^51\)

3.2 Primacy
It was the famous judgment of 1970 known as Internationale Handelsgesellschaft (Case 11/70),\(^52\) in which the European Court of Justice stated that the Treaty rights cannot, due to their nature, be denied validity or not enforced. More clearly, the ECJ said that as a consequence of what was stated before, a Member State could not ignore what is specified by a Treaty ratified by them; not even in the cases in which the argument of inapplicability are based on fundamental rights or constitutional principles of the Member States.\(^53\)

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\(^53\) Maria Elvira Mendez Pinedo, Authority of European law: the exploring primacy (Reykjavik: Lagastofnun H.I, 2013) p. 40
This idea of the primacy in the relationship between European Union Law and national law from the member states was ratified for other cases e.g. case C285/98\textsuperscript{54} denominated like Kreil case, about the equal treatment for men and women and the Limitation of access by women to military posts in the Bundeswehr.\textsuperscript{55}

It’s important to mention the number of constitutional courts and supreme courts have disagreed with the European Union point of view. Such is the case of the German Judgment of 2009.\textsuperscript{56} In the famous judgment about the Lisbon Treaty, the Federal Constitutional Court of Germany (Bundesverfassungsgericht) states that the Basic Law aims to integrate Germany into a peaceful and legal community of Free states, but does not yield sovereignty ultimately contained in the German Constitution.\textsuperscript{57} It is the Court itself who understands that there is no contradiction between the aim of the opening of the inter (legislative) and the supremacy of the National Law.\textsuperscript{58}

On the other hand, the Judgment of Lisbon refers to the possible conflicts between international treaties and the German Fundamental Law, in which the German Federal Constitutional Court played the role of safeguarding the supremacy of the German Constitution, even in those cases in which the German States incurs in international liability. The German Federal Constitutional Court understands that the principle of primacy for which the European Union Law is applied, is a competence transferred by an International Treaty; it means it is understood as law of derived character.\textsuperscript{59}

Following the word of Méndez-Pinedo: ‘In the view of the German Federal Constitutional Court, the foundation of and the limit on the applicability of European Union law in the Federal Republic of Germany can only be determined within the limits of the current constitutional order. The federal constitutional court acknowledges the primacy of application of European Union Law on this premise and, from this perspective it is insignificant whether the primacy of application is provided in the Treaty itself or in a declaration annexed to it. As Thy notes, not only does the Court reaffirm its earlier case-law

\textsuperscript{55} Pinedo (n 53) 41.
\textsuperscript{58} ibid.
on ultra vires review, but introduces the German constitutional identity control’ (ref. to Thym, in Beneyto and Pernice, (2011) Europe’s Constitutional Challenges in the Light of the Recent case Law of National Constitutional Courts). 60

In my opinion, both the TEU and TFEU are not simply international treaties, even if their nature indicates otherwise; they are general principles of the Law of the Union and configure what is known as “European Public Power”. This term is used to define the special situation that prevails the European Union, that is, the differentiation between the public power known as “national public law” and the power created with the international relationships between the different countries, “public international law”. In the case of the European Union, we are faced with a composite law, as it is integrated by the European Union law, as well as the national regulations of member states. 61 This law is configured according to the principle of primacy. Which is at the service of an integration at supranational level. 62 Its legitimacy is born not only from the German and French Parliamentarian, but also from the values of the Constitutions of other Member States; this idea leads us to understand that the notion of supremacy of the Member States’ Constitutional Law, taken as sovereign principle, is absolutely refutable.

The existing relationship between the European Union Law and the Constitutions of the Member States must be understood from a point of view different from the one taken by the previously mentioned constitutions. It must be understood that the primary law of the European Union forms an integrated constitutional framework (“intertwined constitutionalism”)63 which leads us to understand that the European Court of Justice and the Supreme Court or the Constitutional Courts of the Member States when it is the case, must accomplish their functions based on the principle of sincere cooperation that stems from Article 4 of the Treaty on European Union (TEU), in the context of relations between the European Union (EU) and Member States and Article 13 of the TEU in the context of relations between the EU institutions. 64

Besides the points indicated in the precedent paragraphs, it is worth mentioning that the

60 Pinedo (n 53) 98.
64 ibid.
declaration 1/2004 elaborated by the Spanish Constitutional Court, in which the Court highlights that the treaty by which it is established a constitution for Europe, was subject to the exercise of competences attributed to the EU regarding both the fundamental rights and the Constitutional Identity of the Member States of the European Union; this is established now by the TEU.65

3.3 Infringement of the constitutional identities of the Member States

The exercise of the legislative power by the European Union can lead to the infringement of the Constitutional Identity of the Member States; this idea is nonetheless difficult to imagine.66 But the argument is that theoretically, at least, the Constitutional identity can be on some occasions incompatible with the Treaties of the European Union themselves (or the Treaties incompatible with Constitutional Identity). It is in this last assertion in which the Courts of the Member States exert what it is called the “preventive control” and that is what occurred for example in the Lisbon Judgment (2 BvE, 2/08, judgment 30 June 2009). This analyses the scope of the cession of the autonomy right and as it is reflected in the same judgment, it cannot lead to the emptying of the German system of democratic sovereignty.

As Méndez-Pinedo has described, a number of constitutional courts in Europe have voiced constitutional resistance to absolute primacy of EU law over national law. The German case law is well known, but in addition constitutional courts in Spain and the Czech Republic have voiced similar concerns, as well as the highest courts in Denmark, France and Italy.67 The Czech court is the only court that has concluded that there was, in the case, an infringement of ‘constitutional identity’.68

When the Constitutional Identity and its possible infringement are mentioned -which can occur when the European Institutions exercise their competences-, it is supposed that article 4(2) of the TEU is enough guarantee to avoid the infringement of the Constitutional Identity.

This can happen, when EU rules have an impact upon constitutional provisions of the Member States, such as provisions protecting fundamental human rights (as will be mentioned below). It can also happen when EU rules impact upon other constitutional rules. When this is argued before the ECJ, the assumption would be that the ECJ does not accept

65 Spanish Constitutional Court, declaration 1/2004 (Constitutional Treaty).
67 Pinedo (n 53) 98-112.
68 Pinedo (n 53) 96-99.
that constitutional identity is infringed, as we see in a number of cases that will be discussed in Chapter 7.

The Case Michaniki 69 and case Angelidaki 70 can be taken as an example. In the first case the Court considered a Directive about public procurement contracts that in its own words, is contrary to the Constitution of Greece. 71 This covers the issue about the prohibition of awarding public contracts to corporations whose owners, shareholders, partners or managers enjoy the same position in mass media; this Directive added causes of exclusion aiming to guarantee an equal treatment and the transparency and at the end the ECJ decided that the Greek provision was incompatible with the principle of proportionality. 72 The Greek provision therefore had to be set aside.

The same decision was taken by the Court for the case Angelidaki, which refers to the Directive 199/70 73 and its incompatibility with article 103 of the Constitution of Greece. In both judgments, a conflict between the Constitutional Law of the Member State and the legislation of the European Union (Constitution vs Directive) can be clearly seen. However, none of the Directives were considered to violate Constitutional Rights of special protection; a proof of that is how article 14.9 is mentioned by the first judgment was amended in 2001 by the Parliament of Greece; this is, after the existence of the Directive and article 103 appears after the Directive entered into force.

Now, it is necessary to point out the European Court of Justice foresees that the Constitutional Identity has been used as a possible justification of a National norm contrary to the European Union Law. The judgment of 2010 in the case Sayn-Wittgenstein states that it must be admitted that, it’s also the first case that cited article 4(2) in relationship with the national law and European Union Law, in this case article 21 TFEU and domestic law about abolition of the nobility titles. 74 In the context of the constitutional history of the Austrian Constitutional history, the Law on the Abolition of Nobility as an element of the National Identity, can be taken into account when considering the legitimate interests with the right of

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71 In Michaniki case the Court considered that the Directive 93/38 about public contracts of construction was contrary to article 14.9 of the Greek Constitution.
74 Giacomo Di Federico, Identifying constitutional identities in the case law of the Court of Justice of the European Union (University of Bologna, School of Law, 2014) p. 3.
free movement of persons recognised by the European Union Law.\textsuperscript{75}

At this point, it is important to note the difference between one case and the other, as one can observe how in one case, an infringement of the National Identity is found, while on the other, it is not. That is why it is necessary to understand what is included in the term “national identity” and what is not, because, however paradoxical it may seem, two similar situations having different judicial outcomes –concerning the infringement of national identity–, could be justified given that, what could be understood as pertaining to the national identity for one state according to its history or domestic law, could be different for another. Naturally, the European Court of Justice plays a key role in this matter, as it determines whether this clause is applied. This topic will be further studied later in this work.\textsuperscript{76} For the time being, we can say that the European Court of Justice has ruled on the issue of national identity in very few instances, hampering the understanding of the subject.\textsuperscript{77}

Nevertheless, the European Court of Justice understands that the respect for national identity is something that falls within the scope of European Union Law, and therefore, it is covered not only by domestic law, but also by European Union Law, and thus protected by it. References are made to the idea of preserving the member states’ national identity even against European principles, as one can observe in the Michaniki case, against the freedom of movement principle.\textsuperscript{78}

But what happens in the previously analysed case (C-208/09 Ilonka Sayn-Wittgenstein and Landeshauptmann von Wien) as the evaluation of what we could call “similar” cases –seeking the same respect for relevant national legislation– have different outcomes by the same Court. Well, to find an answer to this question we must simply analyse what was mentioned in the judgment of case Sayn Wittgenstein, as well as the provisions of the Treaty. It follows that National Identity is not applied uniformly or rigidly, but is instead tailored to the member states\textsuperscript{79}. Facts such as the political considerations can make the European Court of Justice to determine if we are really facing an alleged infringement of the respect for national identity or not.

\textsuperscript{75} C-208/09 Ilonka Sayn-Wittgenstein y Landeshauptmann von Wien [2010] ECRI-13693.
\textsuperscript{76} Chapter 5 of this document. Determination of the national identity.
\textsuperscript{77} Cloots (n 1) 4.
\textsuperscript{78} ibid 176.
\textsuperscript{79} ibid.
3.4 Primacy of the European Union Law

The Primacy of the European Union Law creates a series of problems for the National Courts of the Member States. Particularly, in the situations in which the National Court of a Member State tries to declare void a European Union Law (generally directives). This, of course, is a competence that the National Courts do not enjoy; in other words, a National Court, no matter its level (Supreme Court, Constitutional Court) does not have power to declare void a European Union Law. This highlights the supremacy of the European Union Law of Member States.

A clear example of this is Case 314/85, Firma Foto-Frost v Hauptzollamt Lübeck-ost, in which a company dedicated to the sale of photographic products is forced to pay a posteriori the customs fees corresponding to the shipment of goods to Denmark and the United Kingdom, violating the regulation No 1697/79, asking the commission to decide on the matter. After the negative response by the Foto-Frost commission, the company asked for the suspension of the liquidation due, to be able to afford the fees. The German authorities understood that the validity of the commission ruling was questionable, and therefore, Foto-Frost immediately brought an appeal asking for the nullity of the liquidation.

Said appeal raises the question of whether or not the German Court has jurisdiction as to examine the validity of the Commission ruling. The ECJ declared that national courts do not have the power or authority to declare acts of EU institutions and authorities unenforceable or void. This idea has been reiterated by ECJ case-law, as we can see in Case 66/80 SpA International Chemical Corporation v Amministrazione delle finanze dello Stato.

In these two cases, the idea that national Courts -even though their mission is to ensure proper enforcement of the rules- do not have the authority to determine the validity of acts by a European institution, is manifest. The question could be raised whether Article 4(2) TEU changes this, so that the national court could now, relying on the concept of national identity

83 Council Regulation (EEC) No 1697/7 of 24 July 1979 on the post-clearance recovery of import duties or export duties which have not been required of the person liable for payment on goods entered for a customs procedure involving the obligation to pay such duties [1979] OJ L 197/1.
84 Case C-314/85. Op. cit. para. 15
85 Case 66/80 SpA International Chemical Corporation v Amministrazione delle finanze dello Stato 1981 ECR -01191
declare void an act of the institutions that does not respect national identity. The Court’s case law does not support that conclusion.

The fundamental nature of EU Law is what makes it prevail against any norm, despite it being posterior or previous to the creation date of said EU Law, and no matter its rank and hierarchy.86 This results in the conflicts between a European provision and a National provision, it is applied the European one. That said, it must be taken into account that the identity clause to which the European Union Treaty is subject, and the European institutions must consider the clause when developing and creating as well as implementing European provisions. Now, the existence of a clause of National Identity with the objective of protecting the principles that Member States consider worthy of such status, cannot be used to the ineffectiveness of European norms, even in those cases in which a conflict arises between a provision through directive and a constitutional provision of the Member State.87

This Principle of primacy, under which EU Law is applied above the National Law of Member States, is not a principle contained in any treaty,88 it is actually a jurisprudential principle of the European Court of Justice. This principle is accepted by the doctrine and case-law of Member States, and is indispensable for the European norms because without it they would lack sense and loose the logic of the European Union itself.

Then, it is difficult to contemplate a European Union in which its norms are not only unapplied but also violated. In this paragraph it is considered necessary the use of case-law that has been happening over the years, because as mentioned previously, the principle of primacy of the EU Law against the Member States Law is a principle based and contained in the jurisprudence of the European Court of Justice and not in the treaties.89 Well, even when this work has a chapter exclusively dedicated to analyse the case-law, the judgments that will be addressed in this chapter are totally different regarding its content. Then, the first determines and evaluates the Principle of National Identity more than the Primacy of the European Union Law or the National Law; while in the judgments that will be addressed now, we will talk exclusively about the primacy of the European Union Law.90

87 ibid 149.
88 ibid.
90 ibid
3.5 Judgment Costa c. ENEL (as 6/64), 15 July 1964

The importance of this judgment lies in that it is the first time that a judgment of a Court of Justice mentions the Principle of Primacy of the European Union Law over to the National Law.⁹¹ The case is about Mr Costa, an Italian citizen with owner shares in an electricity company. Mr Costa opposed to the Nationalisation of the electric sector in Italy and said he would not pay his electricity bills to the new company named Enel.⁹² In his pleading he argues that the nationalisation of the electric company infringed the provisions of the Treaty of Rome and the Italian Constitution. The case got to the Italian Constitutional Court and then to the European Court of Justice, The Italian Constitutional Court in his decision of 1994, established that the Italian Constitution has a capacity to limit its own sovereignty by International Organisations, in this case EEC.⁹³

Here, the conflict arises from the fact that the Constitutional Court of Italy was based on the precept that the posterior norm prevails over the previous norm for the resolution of the conflict between the Treaty of Rome and the Law of Nationalisation in Italy; it means, that the Treaty of Rome that was incorporated to the Italian Legislation in 1958, cannot prevail over the Law of Nationalisation of Electricity due to it was promulgated in 1962. This ludicrous judgment makes evident that the Italian Government was who puts forward before the European Court of Justice its revision, based in that the Italian Tribunal does not have the power to leave aside the National Legislation.⁹⁴ Then, the European Court of Justice decides partially in favour of the Italian Government and the reason for this is that the Treaty of Rome in the articles that refers to the market says that it is exclusive competence of the Commission, reason by which in case of conflict is the European Commission who must intervene against the Italian Government, so Mr. Costa was not legitimated to challenge the decision because the provision contained in the Treaty of Rome about markets does not have direct effect.⁹⁵

Logically, this judgment, does not transcend in the legal aspect due to a matter of legitimation, but because at the time that the Court of Justice determined that Mr. Acosta was not legitimated to challenge the judgment it showed that did not agree with the Italian

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⁹¹ Arnell & Chalmers (n 66) 180-182.
⁹² ibid.
⁹⁵ ibid.
Government. The European Court of Justice indicated that the European legislation was not effective if Mr. Costa could not challenge the National legislation based on the incompatibility of the European Union Law.\(^{96}\)

This provision enunciates the Primacy of the European Union Law which is based in the following principles:

1. The attribution of competences to the European Union limits in a correlative way the sovereign rights of Member States.

2. The mandatory character of the provisions of the derived European Union Law.

3. The commitment of Member States to loyal cooperation abstaining from all measures that can risk the achievement of the objectives of the Treaty.

4. The need to preserve the unity of the European Union Law: that requires not to vary from a State to other, by the will of the National legislation.

3.6 Judgment of 9 March 1978. Amministrazione delle Finanze dello Stato v Simmenthal SpA

This judgment is a lawsuit placed before the Court in application of article 177 of the Treaty of Rome,\(^{97}\) which occurred in Italy as well. In this case, a fee of sanitary control to the society which imported meat through the Italian frontier \textit{Simmenthal} was demanded, provided in the Law created by the National Government of Italy in 1970 (posterior to the Treaty of Rome). \textit{Simmenthal} argued that the Law created by the Italian Government violated the precepts of the European Union and the case got to the European Court of Justice, which established that the imposed fee violated the principles of the European Union and consequently ordered the refund of the payments made.\(^{98}\)

The particular fact of the judgment is not that the fees were not adequate, but that it was the public Italian administration, after knowing the decision, refused to comply with it, based on that the requirement of payment is supported in a provision posterior to the Treaty of Rome. For this reason, the European Court of Justice developed in this judgment the idea of supremacy, addressed in the judgment previously mentioned. It was established in this

\(^{96}\) ibid.

\(^{97}\) Case I06/77 Simmenthal [1978] ECR 629.

judgment that when the incompatibility is produced by a national provision preceding the European Union Law, the latter makes inapplicable every national provision contrary to it. On the other hand, if it is about a national provision posterior to the European Union Law, the jurisdictional organ must disapply the national provision—without waiting for its derogation or examining its constitutionality—and apply the European one, because the validity of the European provision prevents the valid formation of new national legislative acts incompatible with the European Union Laws.99

So, the European Court of Justice declares:

1. If the incompatible National Law is previous to the European Union Law, the latter makes the first inapplicable ipso iure since its entry into force.

2. If the incompatible National Law is posterior to the European one, the last impede the valid formation of new legislative acts if they are not compatible with the European Union Law.

The Court added that it does not matter if the norm is previous or posterior. In any case, the national jurisdictional organ does not have to wait until the National Law is derogated, nor will bring an exception of unconstitutionality, as the judge in the dispute is who can (and must) discuss the exclusion and apply the European norm by the authority that is awarded to him or her by the European Union Law.

In conclusion, it can be highlighted that the Principle of Primacy is a requirement for the good functioning of the European Union Law that derives from its special nature and at the same time makes it prevail over all the National legal systems; in consequence, this is a characteristic of the European Union Law. Additionally, it should be made clear that this principle not only prevails in the relationship among the Member States and the European Institutions, but it is also imposed to the Jurisdictional National Organs; which must not apply the National Law that enters in conflict with the European Union Law, without having to wait for its derogation or to bring the exception of unconstitutionality if it is posterior to the European norm.100

It is the self-priority of application of the European Union Law with respect to the National Law in case of conflict of both normative spheres. This is consequence of the

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99 ibid.
100 ibid.
attributions of sovereignty of competence developed by each Member State in favour of the

communitarian institution. This attribution guarantees the uniform application of the
European Union Law in all the Member States, it means, the sovereign faculties of the
Member States are reduced when this attribution is produced and it is the regular judge who
is in charge of applying and respecting the European Union Law.\textsuperscript{101}

3.7 Critique to the European Primacy Principle

As mentioned in the previous paragraph, the principle of primacy was created as a
jurisprudential construction (Judgment Costa c. ENEL (as 6/64), 15 July 1964), in the interest
of the European Court of Justice to guarantee the autonomy and unity of the European Union
Law (by then European Community).\textsuperscript{102} Finally, the institutionalisation of this precept was
gathered in article 1.6 of The Treaty establishing a Constitution for Europe (TCE)\textsuperscript{103} that at
the end wasn’t given application and it must be added the express cases gathered in the
constitutions of the Member States of the European Union, in favour of the primacy of the
European Union Law. An example of this is Article 29.4 of the Irish Constitution.\textsuperscript{104}

This way, the Principle of Primacy of the European Union Law was based on a
constitutional construction and to the express remission to it by national constitutions. For
this reason it is understandable the critique of a principle of such relevance but that
nonetheless is not explicitly stated in a treaty of the European Union and even more
important, a principle not ratified by the Member States.\textsuperscript{105} Then, it is easy to find
jurisprudence against this principle or at least that does not respect it totally; a perfect
eexample of that situation is Federal Constitutional Court of Germany in its judgment of 29
May 1974 (Solange I)\textsuperscript{106} 22 October 1986 (Solange II).\textsuperscript{107} This cases are analysed in the next
chapter.

The Courts of Member States have accepted the Primacy of the European Union Law,
which is derived before the constitutions themselves, provided that they respect some

\textsuperscript{101} ibid.
\textsuperscript{102} José M. De Areilza & Cristina Martinez del Peral, “Detracts the Democratic legitimacy” (Europa fin de Siglo, Centro de
\textsuperscript{103} Treaty establishing a Constitution for Europe [2004] OJ C 310/1.
\textsuperscript{104} Constitution of Ireland from 1937.
\textsuperscript{105} Allan Rosas, Leviis Egils and Yves Bot, The Court of Justice and the Construction of European analyses and perspectives
on sixty years of Case-law = La Cour de Justice et la Construction de l’Europe: Analyses et Perspectives de Soixante Ans de
\textsuperscript{106} Solange I BVerfGE 37, 271 [1974].
\textsuperscript{107} Solange II BVerfGE 73, 339 [1986].
minimum standards like democracy, fundamental rights and territorial decentralisation. With all this we could say that the Primacy Principle continues to be in force from the European Union Law point of view, and its relationship with the member states’ legal systems. But with some reservations, or rather, some exceptions.\(^{108}\)

\(^{108}\) Barnard & Peers \(n\ 94\) 160.
4. National and Constitutional Identity in the Treaties

4.1 Conceptual Approach

Constitutional identity is a complex concept. We could say that the existence of certain specific traits that differentiate between two legal systems, and the presence of other features enable their grouping in a basic methodology when it comes to undertaking a legal study. This allows defining the legal system with certain elemental traits, to be able to differentiate it from others. These features are essential for the legal system to enjoy an “individual specificity”, and therefore, make it possible for us to understand its identity.\footnote{Manuel Núñez Poblete, ‘Introducción al concepto de identidad constitucional y a su función frente al derecho supranacional e internacional de los derechos de la persona’ [2008] (Ius et Praxis AÑO 14 - N° 2) Pp. 331-372.} You could say in a nutshell that it is the realisation of the actual existence of certain traits, features that allow us to differentiate a law from another and certain common features, which allow us to make clusters.

For example: Spain is defined as a parliamentary monarchy, while France is defined as a republic, and there is clearly a difference in the legal system of the first and second; but if we add that Italy is a republic, Italy and France can be grouped as Republican models different from Spain and England as monarchists, although the latter is not a parliamentary monarchy but a constitutional monarchy.\footnote{ibid 334.}

These traits that allow us to differentiate a particular legal system are part of the basic methodology of legal or comparative law.

All these elements (common and differentiating) are crucial elements and attributed to the laws of their specific individuality and consistent identity. We should also add that the concept of "Identity" is a relative concept that assumes or takes for granted the existence of another subject with which it is possible to make a comparison or involve in a comparison process. This suggests that the legal identity is an attribute that is only in relation to a third order and it is precisely this detail -the existence of another system-, which allows us to distinguish one law from another.\footnote{ibid.}

The previous paragraph refers to the material characteristics that each legal system possesses, but this perspective changes if we analyse the topic from a formal standpoint. From this perspective, the set of legal norms that apply in a particular state are part of the “state legal personality”. In summary, we can affirm that every legal system expresses the
formal identity of its political head, but that does not imply it is considered a legal system with material identity in comparative terms.

The identity is uncertain in the sense that it may or may not occur in relation to other legal systems. It is a phenomenon that supports variables, allowing the existence of jurisdictions extremely protective of their identity; this took place in the case of France or the United Kingdom, just to give some examples. In the first one, France strongly imposed its secularism. This was one of the most important elements when it came to request the removal of any reference or mention to God or any other religious symbols in the various treaties of the European Union. On the other hand, in the case of the UK, the defence of the imperial system of weights and measures, as opposed to the metric system imposed by the European Union, was a case brought before the courts, known as "the Metric Martyrs", where an English tradesman was condemned for selling in pounds and ounces, instead of measuring the goods in grams and kilos, as the EU mandated.

Constitutional identity, according to Núñez Poblete and his analysis on the subject, “expresses some sort of meta-constitution, understood as a set of norms or pre-constitutional principles that define the meaning of other constitutional norms, eventually coinciding, at a textual level, with other norms of different political communities”.

These rules or “meta-constitutional” rules that determine the semantic content of the formal instruments of power limitation have a basic rule governing the meaning of the law. In this sense we have to remember the similarity of concepts and words that Montesquieu identified in "The Spirit of Laws" with “general national spirit” which results from the customs and habits of people. Montesquieu also established the idea that laws do not always seem to produce the same effect or have the same reasons.

4.2 The principle of respect for National Identity in Article 6 TEU

The predecessor to today’s Article 4(2) TEU that is Article 6(3) of the EC Treaty, is of vital importance to see how we have come to the present situation. Hence, to be able to analyse Article 6(3) of said Treaty, we can say that the Article is established in reference to the principles of liberty, democracy, respect for human rights and fundamental freedoms and the

112 ibid.
114 Hartley (n 98) 163-164.
115 Núñez (n 109) 338.
116 ibid.
rule of law as the essential foundations on which European society has to be integrated, as the Union respects the national identities of the Member States.\textsuperscript{117}

The inclusion of a provision of these features in a treaty as the TEU is perfectly consistent and appropriate to its political nature and should be interpreted in conjunction with the other paragraphs of this article and in the context of the Treaties.\textsuperscript{118}

According to the natural meaning of the words, it is understood that the natural goal for the Union is to organise coherent and supportive relationships between members and between their peoples thus finds its starting point in a structure in which the state is considered as a primary and basic element. This implies that you have taken an approach that rules out other entities of social and territorial organisation and also implies that the purpose of development of the integration process can only be carried out by institutions established legitimately and recognised in the constitutions of the Member States as interpreters the general interest of the State social collective orders and structures. Therefore, within the Union and the Communities, only the bodies designated by each State to exercise the functions assigned to the Treaties shall be recognised and be entitled to represent their interests and make commitments on their behalf.

From the point of view of the European Union, the organisational structure of the European Community and of all Member States is basic and necessary to ensure the principle of legal certainty, in the sense that each interested party in the system available has the right to know who is really responsible for every action in the field of the Community.\textsuperscript{119}

The provision of paragraph 3 of Article 6 TEU cannot be understood fully without an intimate connection with the remaining sections of this article. Because that State, to be considered as a basic piece and legitimate representative of the interests of the social group in which it is constituted, must be subjected to the fundamental principles of Article 6.\textsuperscript{120}

Its formulation in the TEU does not constitute a formal declaration statement, but only establishes a guide of the cooperation system. It is a basic requirement which must be completed by all Member States. That means its inclusion in Article 49, where it is stated that respect for the principles set out in paragraph 1 of Article 6 are a condition for applying to become a member of the Union. Similarly one can interpret the content of the wide-ranging

\begin{itemize}
  \item[\textsuperscript{117}] José A. Girón, ‘La Unión Europea, la Comunidad Europea y el derecho comunitario’ (Sevilla: Universidad de Sevilla, 2002) p. 45. ISBN 9788447207213.
  \item[\textsuperscript{118}] ibid.
  \item[\textsuperscript{119}] ibid.
  \item[\textsuperscript{120}] ibid 46.
\end{itemize}
article 7 enables the council to find and punish the existence of a serious and persistent violation by a Member State of any of the principles mentioned in Article 6(1)\textsuperscript{121}

Therefore, the National Identity of the Member State of the Union can never be dissociated from its constitution in accordance with the basic principles laid down in paragraphs 1 and 2 of Article 6 TEU. Any social group that reaches its recognition and legitimacy as a state through a constitutional process established lawfully and grounded in the essential principles of Article 6 may apply to join the European Union.

In this sense, the acceptance of the possibility of a state constitution legitimises a social group through a process that simultaneously enables them to exercise their right to self-determination and respect their commitment to also act in accordance with the basic principles of Art. 6.1, would inscribe in the basic framework of the United Nations Charter and resolution 2625, basic references in this area.\textsuperscript{122}

We can say that the content of Article 6 TEU would not only be a reference framework in the constitution of the European Union but also for the conditions that should govern any action on the internal Member States’ systems that could be considered legitimate, in accordance with the law and recognised as valid for the accession to the integration process.\textsuperscript{123}

Is necessary to know first the background of it, as European legislation does not word the term “National Identity” for the first time with Article 4(2), quite the contrary. The obligation that exists for the European Union to respect National Identity of its Member States was proclaimed in Maastricht Treaty,\textsuperscript{124} in Article F, and then in the Treaties of Amsterdam and Nice, with the same denomination, and without a change in its roots, in Article 6.3. That provision was used in Lisbon Treaty, with a new layout that comes from the failed attempt at a Constitutional text for Europe. This new layout is characterised mainly by an express mention to the fundamental political and constitutional structures, also referring to local and regional autonomy.\textsuperscript{125}

Thus, we can safely say that the first time that the term “National Identity” appeared in the

\textsuperscript{121} Ibid.


\textsuperscript{123} Girón (n 117) 47.


\textsuperscript{125} Francisco Rubio Llorente, ‘Derechos Fundamentales, principios estructurales y respeto por la identidad nacional de los Estados Miembros de la Unión Europea’ [2013] (AFDUAM nº 17, Madrid) p. 521.
European Treaties was February 7, 1992, with the signing of Maastricht Treaty, given that Article F (1) of the Treaty on European Union provided that the Union would “*respect the National Identity of its Member States, whose political systems will be based on democratic principles*”. Hence, the Treaty of Amsterdam, signed October 2nd 1997, only modifies the layout of the Article without modifying its substantial content, although it leaves out any reference to the “democratic principles”, as it predecessor did. Article 6(3) TEU only provides that the Union will respect the National Identity of its Member States.126

We must add that although Article 6(3) does not mention the “democratic principles”, it is not because the legislator does not find it necessary, but rather because those principles under which all the governments of the EU are based would be included independently, together with the freedom principle, in Article 6(1).127

Having said this, it must be noted that the provision concerning the respect to National Identity, held by Maastricht Treaty, has never been subject to the jurisdiction of the ECJ, and it has never played a strong role in jurisprudence. This implies a great difference when it comes to comparing it to Lisbon Treaty, as it increased the importance of the National Identity clause, both institutionally and substantially.128

4.3 The Concept of Constitutional Identity

The concept of Constitutional Identity gets its name from the meaning and functions that are developed within the political community. In this sense, it means that any function or effectiveness has a relation to the constitution, either by development or construction thereof. An example of this is the limiting functions of power or powers more or less identifiable within the phenomenon of globalisation and internationalisation of constitutional law.129

The Constitutional Identity can be defined as the set of features that characterise, in the legal-political level, the basic choices of a community against other states and the international or supranational organisations.130

Meanwhile, in the constitutional discourse of the United States of North America, identity

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126 ibid.
127 Pierre Bon, ‘La identidad nacional o constitucional, una nueva noción jurídica’ [2014] (Dialnet. Revista española de derecho constitucional, n° 34 100) p. 176.
is based on two related principles together: the first is the normativity of Protestant
individualism in all varieties of its name; this means that the recognition of individualism
facilitates the separation of a public sphere, created by state law, and the more autonomous
private sphere. The second is the Anglo American long-established commitment to organise
the political representation of the geography around which governments and their
constituencies is delineated.

When we refer to the European Constitution and its identity, we also notice the fact that it
is very important that the citizens identify themselves with the supranational organisation for
it to become a stable and lasting political community, all within the context of the elaboration
of the Treaty establishing a Constitution for Europe –although it is a known fact that this
attempt failed. Nevertheless, Von Bogdandy points out that for the proper functioning of a
liberal democratic state, it must not disintegrate into irreconcilable groups (whether religious,
ethnic or social).\footnote{ibid.}

Moreover, many authors agree that the concept of Constitutional Identity is closely linked
with that of “constitutional tradition”. Nonetheless, Wojciech Sadurski notes that there are
two basic reasons why the concept of “tradition” has limited use and should be used
carefully. The first is that the concept of constitutional traditions has become a technical legal
term, used to identify the sources of law in force in the European Union and became strictly
related to the legal system itself. The second reason, notes Sadurski, explains that the legal
traditions are strongly related to the past, which qualifies as limited as this concept believes
that it should not be understood “simplistically” as something that belongs exclusively to the
past, but remains in the present as a tradition.\footnote{Wojciech Sadurski, ‘European Constitutional Identity’ [2006] (Sydney Law School Research Paper No. 06/37) p. 6}

The previous idea coincides with Núñez Poblete to ensure that the identity is always
defined in reference to other collective identities.\footnote{Núñez (n 109) 331 – 372.}

Moreover, several key elements of the Constitutional Identity taking place in the European
society, have been identified by Sadurski, as indicated below:\footnote{Sadurski (n 132) 9.}

1. The recognition of the fundamental role of the existence of public life, and the idea
   that the social order is acknowledged and modifiable through deliberate human
   actions.

2. The idea of individual freedom as the fundamental principle governing relations
between individuals.

3. The idea of tolerance of others and refrain from the use of moral disapproval of the ideas, lifestyle or ideas of others as sufficient basis for suppressing them.

4. The idea of democracy, in the sense of autonomy, in the collective life of a society is reflected in the principle of the majority.

4.4 The National Identity

The first judgment of the European Court of Justice that marked a milestone with regard to the issue of National Identity is the judgment Frontini (C-183/1973)\(^{135}\) not so much for using the expression “National Identity”, but because it affirmed that the European construction cannot rise against what constituted the core essence of the Italian Constitutional order.\(^{136}\)

This judgment gave rise to the theory known as the “contralimitti”, or the theory of “counter-limits”. This theory defends the existence of limits established by the Constitution to the sovereignty limits agreed in favour of the EU, or to put it another way, that although a state in the exercise of its powers, decides to hand over to the EU a part of the sovereignty, the Union cannot work against the core fundamental tenets of the state.\(^{137}\)

In the words of Pierre Bon, this would imply that although normally the state cannot control the EU acts, they can when they violate these fundamental principles.\(^{138}\) This idea of counter-limits to the EU Law established jurisprudence, and was used in other judgments such as the Granital case (C-170/1984)\(^{139}\) in which it is once again embodied the idea of the existence of limits to EU Law, especially when touching upon fundamental rights enshrined in the constitution, in this case the Italian constitution.

The doctrine of the constitutional counter-limits had a great relevance, especially in the constitutional case-law of the Member States that have enshrined it in the constitutional text, like Spain has. According to this, some limits to the European integration exist, and are reflected in the constitution (Article 93) but this embodiment of the theory of counter-limits has not only been enshrined in the Member States’ constitutions, but also in the European legislation itself.\(^{140}\) An example of that is article 4(2) TEU that according to some authors


\(^{136}\) Bon, Pierre. ‘The national or the constitutional identity, a new legal notion’ (Revista Española de Derecho Constitucional) (nº 100, Enero/Abril) [2004] p. 170.

\(^{137}\) ibid.

\(^{138}\) ibid.

\(^{139}\) Italian Constitutional Court, 170/1984 Granital [1984].

\(^{140}\) Fernando Micheo and Pedro Villalón, ‘Hacia la europeización de la Constitución española: la adaptación de la
such as Augusto Aguilar, is to be interpreted as a limit to European Union Law, as Article 53 of the Charter of Fundamental Rights of the European Union, which we will not analyse here.\footnote{Augusto Aguilar Calahorro, ‘La primacia del Derecho Europeo y su invocación frente a los Estados: Una reflexión sobre la Constitucionalización de Europa’ [2012] (KOREUROPA n° 1. Rivista elettronica del Centro di Documentazione Europea dell’Università Kore di Enna) p. 26.} The Court has, however, in the case of Melloni\footnote{Case C-399/11 Melloni [2013] ECLI:EU:C:2013:107.} for put some example, in this case the rejected an independent role for Article 4(2) TEU when examining the scope that Article 53 of the Charter allows the Member States to determine level of protection of fundamental human rights in their respective Constitutions.\footnote{Andenæs, Mads, and Duncan Fairgrieve. Courts and comparative law (Oxford, United Kingdom: Oxford University Press, 2015) p. 172 ISBN 978-0198735335.}

It did not take long for a Court from outside the Italian jurisdiction to echo the Frontini judgment, and although we cannot say that the Karlsruhe Court copied the judgment, the truth is that it was inspired to a great extent by the spirit of the limitation of European Union Law against National Law.\footnote{Bon (n 136).}

This case affirmed that the existing limitations concerning the sovereignty, regulated by article 11 of the Italian Constitution, were only applicable for the purposes collected in it, and could not be applied openly to other issues not expressed in the above-mentioned article. Hence, the limitations regarding sovereignty cannot be granted to the organs of The European Economic Community (EEC), as that act would be unacceptable for violating the fundamental principles of Italy’s legal system.\footnote{Gregorio Cámara Villar, ‘Los derechos fundamentales en el proceso histórico de construcción de la Unión Europea y su valor en el Tratado Constitucional’ [2005] (ReDCE, nº 4, Julio-Diciembre) p. 18}

The second Member State High Court that reached a decision concerning the National Identity topic is the Federal Constitutional Court of Germany, in the renowned judgment from 1974 named “Solange I”.\footnote{Alejandro Arnaiz and Carina Llivina. National constitutional identity and European integration (Cambridge: Intersentia, 2013) p. 264. ISBN 9781780681603.} Months after the Frontini judgment, in 1974 the German Court established that Article 24 of the Basic Law for the Federal Republic of Germany – concerning the power transfer to interstate institutions- does not allow the fundamental structure of the constitution that confers them identity to be modified without constitutional amendment and especially by the interstate institutions legislation.\footnote{ibid 171.}

The argument used in the previous paragraph, that is, the theory that the transfer of powers...
does not authorise the modification of the core of the Constitution, is what made famous the judgment known as Solange. This is a judicial decision of the German Federal Constitutional Court in 1974, in which the criteria by which a process on the contradictions between legal norms of the European Communities (EC) and German Constitutional Law judges are established. As a result, the Federal Constitutional Court reserved itself the right to review the compatibility of European with German law in each individual case.

The control exercised by the German Federal Constitutional Court was deemed admissible, even when Article 100 of the German Fundamental Law itself establishes that such control would only happen in light of formal norms “nachkonstitutionelle Gesetze”. The problem with German Law was resolved with the exercise of the provisions. However, what the German Federal Constitutional Court brings up is that the power of the state to enforce the EU regulations must not surpass the basic rights, which means these rights constitute limits to their enforcement (Art. 1, paragraph. 3 GG).

As a matter of fact, one could say that the German Federal Constitutional Court could not - and did not intend to- decide on the validity or invalidity of EU Law, for obvious reasons, as is generally known, that only corresponds to the European Court of Justice, and not to the Member States’ Courts or judges, not even their Constitutional Courts. That said, the German Federal Constitutional Court is competent to decide on the enforcement of EU Law and its effects over National Law, when the EU norm collides or violates a German fundamental right. All of this taking into account Article 234 TCE (now Art. 267 TFEU), that is, the obligation for the national Court to refer the matter to the European Court.

Due to the transfer of sovereign powers under Art. 24 para. 1 GG, EU Law must have a corresponding own bill of fundamental rights, for there to be a reliable guarantee of respect and protection of the rights of individuals.

The primacy enjoyed by European Union Law is limited by the fundamental rights

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148 Even though the judgment does not expressly mention the so-called constitutional hard-core, as it was analysed in the study of the determination of national identity, it refers to the fundamental structure of the Constitution, which is expressly mentioned in the judgment.

149 Case Solange (n 106).


151 Case reference [e.g., BGHZ 56, 163] (engl. translation) in the web site of The University of Texas School of Law. See further <www.utexas.edu/law/academics/centers/transnational/work_new/> accessed 05 November 2014.

152 Including first drop all laws: Acts of Parliament, regulations and statutes, which were adopted after the total 23/05/1949 (entry into force of the Basic Law, Constitution).

153 Not surprisingly Solange jurisprudence decisively pushed the case law of the Court on human rights.

154 Case Solange I (n 106).
enshrined in the Fundamental Law for the Federal Republic of Germany, according to the judgment of the German Constitutional Court. Ultimately, we can say that the German Constitutional Court stated that European Union Law could not infringe the constitutional rights of German citizens, and therefore, it reserved the power to declare European norms unconstitutional. That German ruling challenged the entire legal Community structure.\textsuperscript{155}

The German Constitutional Court in this first statement declares itself competent to review the constitutionality of all acts of law of the European Union that were against a fundamental right enshrined in the German constitution, so that control is exercised until European Union Law itself offered comparable protection.

In 1986, another judgment uses a similar approach to the one mentioned in the foregoing paragraph. It is known as Solange II\textsuperscript{156}, and in this judgment the German Court indicated that Article 24 does not allow to dispose, via the transfer of sovereign powers to interstate institutions, the identity of the Federal German Republic constitutional order, among the inalienable essential elements that are part of the current core constitutional order, where we might include the law principles enshrined in the fundamental law, consecrated to fundamental rights.

In the Solange II judgment The Federal Constitutional Court reversed its jurisdiction to review the compatibility of acts of the European Communities with German constitutional law. Despite the "Solange I" judgment, 1974, the Constitutional Court noted that the new legal protection, German fundamental rights by the institutions of the European Communities, and in particular by the European Court of Justice (ECJ) was sufficient, and therefore Constitutional Court would not normally conduct the review. This had a profound impact on the admissibility of judicial review.\textsuperscript{157}

The crucial step in the decision Solange II was that the German Court renounced to check the conformity of European Union Law with its Constitution as the level of protection of rights within the EU institutions was already satisfactory, leaving that protection in the hands of European international and supranational Judges\textsuperscript{158} Therefore, the Constitutional Court recognised adequate protection of fundamental rights at EU level by the European Court of

\textsuperscript{155} Article 24 of the German constitution permits the transfer of sovereign powers to intergovernmental institutions.

\textsuperscript{156} Case Solange II (n 108).


\textsuperscript{158} ibid.
Concerning the doctrine known as Solange, we could say, in plain terms, that it lays the foundation for exercising a constitutional control over the European norms which violate the constitution, and, even though the theory was watered-down in Solange II, the idea of a constitutional reserve against the primacy of European Union Law still remains. This doctrine was enforced by other Courts and it’s continues to hold in Article 4(2) TEU, where the consequence of this constitutional scenario is the relativisation of the primacy of EU Law.

Since then, the Federal Constitutional Court insofar as Solange II has highlighted the fundamental right Union control acts subject to revolutionary change, has established two more ways to control the acts of the Union in the Basic Law.

Therefore, and taking into account what happened in Solange I and Solange II, we can conclude that the first established a limit to the EU Law primacy principle or better yet, a general exception to the prevalence of EU Law, in connection with fundamental rights, as well as pointing out that the National Court has the competence to protect fundamental rights via exceptions of unconstitutionality, enshrined in Article 100 of the German Law. It must be noted that Solange I took place in a moment when a catalogue of fundamental rights at European level did not exist, as that was created in the year 2000 (Charter of Fundamental Rights of the European Union), and not until December 2009 had it binding legal force, same as the Treaties. Of course, the decision of Solange I would have been different.

In Solange II, as could be expected, the German Court softened what was said in Solange I (without any doubt, due to the stronger protection of fundamental human rights in the EU). In that case, the Court refuses to exercise its jurisdiction over the applicability of EU Law when it collides with fundamental rights, therefore leaving the primacy principle in force.

In that judgment, the Federal Constitutional Court of Germany confirms not only that article 24 of the German Constitution allows the sovereignty transfer to intergovernmental institutions –fact that contributes to the lack of difficulty for the German Courts to accept the

161 Armin (n 51) 530.
163 ibid 277.
supremacy of European Union Law, since it is mentioned in the Constitution itself- but also acknowledges that the problematic arises when it comes to answering if European Union Law could take precedence over the fundamental rights enshrined in the “German Fundamental Law” (Grundgesetz für die Bundesrepublik Deutschland, 1949). Germany’s Federal Constitutional Court declared that it would not give up on the defence of those fundamental rights, even when they opposed any kind of European legislation. Therefore, we can conclude that the Federal Constitutional Court of Germany did not accept the idea of the supremacy of European Union Law over everything, even over the country’s fundamental rights legislation.

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The identity clause in the TEU, as amended by the Lisbon Treaty, must be seen and evaluated positively, as well as its antecedents in the Treaties, after amendments made by Treaty of Amsterdam and the Treaty of Maastricht. What was intended with this text (TEU) was that no matter if the political Union was achieved, or the steps taken towards it, the Union would always respect the National Identity of its Member States.165 The TEU (Amsterdam Treaty) as stated in Article 6(3), while Article F(1) makes it relevant in the EU Treaty (Treaty of Maastricht).166

Article F(1) and subsequently Article 6(3) TEU (Amsterdam). Article 4(2) TEU (Lisbon).

These create a link or a connection between the relevant national authorities and "Fundamental politics and constitutional structures" To be exact, we must mention Article 4(2) TEU, which tells us among other things that historical and linguistic criteria are relevant and turns to the content of domestic constitutional orders.167 This directly corresponds to the concept of national and Constitutional Identity.168

We should point out that there are certain differences in terminology in the Lisbon Treaty, that although unique, exist in several versions (we refer to the language used in it; language versions). To give an illustrative example of such situation we could say that the text in the German language explicitly alludes to National Identity in terms of political and constitutional structure of the Member States. These results the competent national authorities

164 ibid 265.
166 Von (n 130) 11.
167 These aspects were seen by some as being covered by Art. 6(3) TEU (Amsterdam version). Meanwhile the duty to respect cultural and linguistic diversity is contained in Art. 3(3) and (4) TEU, but not in Art. 4(2) TEU.
might pre-exist the constitution.  

The confirmation of this point of view is found in Lissabon-Urteil. The German court understood that “Ensuring the territorial integrity, maintaining law and order and safeguarding national security” was included in the clause of article 4(2) and in the National Identity term. Furthermore, the Court interpreted the words “identity” and “constitution” as synonyms, as the Constitution reflects the identity of the German people.  

Said court gives an example of what can be understood as national identity, as well as an example of the extension of the term. It finds the preservation of national sovereignty included in the clause of national identity. Of course, we must note that this is the Court’s position, but not the one of other states, such as Spain, as we will analyse later on.  

But the French version, as well as the English version (which was the original text, as this treaty was drafted in that language –although as it is known, other languages are also official in the EU, all of them authentic) talk about National Identity as "inherent" in critical political and constitutional structures of Member States. This implies that the Constitution or constitutional principles themselves constitute National Identity.  

We must understand that the term “national identity” can be understood differently, as Courts may provide a different interpretation to the one sought by the European legislator. Some interpretations, such as the German, can be considered as an extensive interpretation of the term. That interpretation is adjusted to the German fundamental rule, and therefore, is correct.  

That said, national identity must always be interpreted jointly. It is worth mentioning that this is not an easy task. The biggest difficulty lies in the fact that the concept is strongly associated with the constitutional elements. Perhaps the most glaring example of it is that the mention to the national identity clause contained in article 4(2) TEU in English, refers to it as “national identities”, in plural, implying, amongst other things, an appreciation of the
importance of said concept by the members of the European Union. Neither the Spanish nor the French versions of the TEU refer to it in plural.\textsuperscript{174}

The European academic literature first understood that the concept or notion that must be taken into account when talking about National Identity in the Treaties comes to light from what European legislation proclaims, and the notion must be interpreted autonomously, regardless of the meaning that must be given to the different legal systems of the Member States of the European Union.\textsuperscript{175}

However, the TEU in Article 4 links the meaning of National Identity with concepts found only within the Member States or each one of them, i.e., the concept of National Identity is found within the domestic constitutional law. That depends on the nuances used to discuss a notion of National Identity. It is a concept of European Union Law but with strong features of the domestic law of the Member States; to some extent, the potentially divergent self-understanding of the Member States. This is because it is noteworthy that Article 4 TEU refers to "National Identity" in plural and this is reinforced when it focuses on the etymology of the concepts of identity and nation.\textsuperscript{176}

Indeed, any attempt at assessment should begin by thinking about the two different meanings that are attached to each other from the root of the word\textsuperscript{177} (Idem), i.e. grammatical or linguistic origin of the word in question. The concept of National Identity tries to visualise and focus on different characteristics or features that many call the essence of a person, a country, a legal system, etc. Or to put it simply, characteristics that are taken into account when assessing what should be understood as National Identity are the essential features, differentiating what makes us unique or different from the rest, but always using the external perspective, with external reference to it as the Country, the nation or how the legal system is perceived from the outside world. The subjectivist branch, however, has its recognition in the writings of Sigmund Freud and focuses the attention on the inner attitudes (in contrast to the previous point which is towards the outside). Identity seen from this point of view, supported by theories of the father of psychoanalysis is a product of mental and spiritual processes that express an affiliation, the belonging to something, the "National identity"\textsuperscript{178}

\begin{thebibliography}{99}
\bibitem{n174} Maria Rodríguez Parareda, ‘Identidad Nacional y supremacía en el Derecho de la Unión Europea’ [2013] (Universitat Pompeu Fabra Barcelona) p. 4 See Further < http://hdl.handle.net/10230/23337> 21 June 2015.
\bibitem{n175} ibid.
\bibitem{n176} Preshova (n 169) 1-10.
\bibitem{n177} Von (n 130) 11.
\bibitem{n178} ibid 12.
\end{thebibliography}
Once we have addressed the different interpretations given to the phrase "National Identity", it must be evaluated what interpretation is given to Article 4(2) of the TEU. It is based on an objectivist standpoint, which does not try to look only at the domestic law of a country, but bases its concept also on the main identity elements of the Member States of the European Union. This is due to the supreme law of the legal systems that is also based on standards that lay in the fundamental principles by which the democratic state of governments of the Member States of the EU are governed.

However, as indicated in the previous paragraph, the goal to understand and comprehend what is meant in Article 4(2) TFEU by identity has to be complemented by a subjective level; and it is applied from a more national level, that is to say, to the state. As it can be concluded, the above-mentioned article speaks from two perspectives, objective and subjective; the dual application of the same is what leads to the concept of National Identity.179

Understanding what is meant when Article 4(2) TEU speaks of identity, we have to echo another terminological notion: “Nation”. This is an ambiguous and difficult-to-catalogue term within the existing legal definitions, despite being a topic addressed throughout many decades by the legal doctrine. The term nation can be approached from an objective point of view, focusing on the historical facts, in common language, ethnicity or the institutions of political character.180 An example of this approach is found in France, where the notion of nation and state are understood practically as synonyms; and in Germany or Italy, the concept of nation has traditionally been based on a conception of culture of the country. But as with the concept of identity, the concept of nation goes through a subjective look in which the focus and more attention to what is provided is in the will of the individuals belonging to the same community, or town.181

In the preceding paragraphs the idea that the concepts of nation and identity overlap is largely apparent, so this gives us the notion that the two concepts go hand in hand: National Identity182. From what was mentioned in the preceding paragraphs, it can be said that Members States of the European Union themselves determine the etymology that constructs the concept of identity, and precise their own national Constitutional Identity; this also plays an important role in determining the objective of protection contained in article 4(2) of the

179 ibid.
180 Von (n 130) 12-13.
181 ibid.
TEU. That is, the above mentioned article does not determine the national identities of the Member States of the European Union, but it does give rise to multiple components of National Identity, so one might say that article 4 draws a direct reference to the domestic constitutional law of the Member States of the European Union\(^{183}\).

### 4.5 National and Constitutional Identity

First, it must be reiterated that the term national identity found in article 4(2) TEU had rather low visibility from the national courts of the member states. They did not study the term until later. Nevertheless, as we have seen previously while analysing the legal antecedents of the term “national identity” by studying the Italian and German judgments, there is a need to respect national identity by protecting the member states’ fundamental laws, normally visible through national Constitutions. We could say that the Constitutional Identity is part of the National Identity, as you cannot understand the first concept as an independent concept but as a concept born of National Identity.\(^{184}\)

Article 4(2) TEU merely plays as a provision of an attempted constitution for Europe (European Constitution 2004), and it is a reproduction of the provision in the Maastricht version of the EU Treaty regarding the national identities of the Member States.

It is still clear that the EU has a duty to respect the National Identity inherent in their fundamental structures, political and constitutional Member States.\(^{185}\)

In the past, the provision was leaner and less clear on the issue of Constitutional Identity, to the extent that it merely stated that “the Union shall respect the national identities of the Member States” (3) Art. 6 TEU), without explicitly mentioning what aspects of identities were relevant. Although it should be noted that the Court had no jurisdiction to apply Article on respect the national identities of the Member States as a standard for review as Article 46 TEU in the version prior to Lisbon excluded this, and the Court rarely spoke of that provision.\(^{186}\)

However, what was mentioned above does not indicate that the European Courts did not

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\(^{183}\) Von (n 130) 13.


\(^{186}\) Case C–473/93 Commission v. Luxembourg [1996] ECR I–3207. About nationality requirement for working like teacher in primary school. In this case Luxembourg understood necessary to protect its national identity. This is the most elaborate reference to article F, TEU in the Maastricht version.
take into consideration the issue of Constitutional Identity of the Member States. A good example is the Groener case which concerned the refusal of exemption from the obligation to know Irish to become a teacher in that country and Article 3.1 of Regulation 1612/68. In the very constitution of Ireland, Article 8 sets Gaelic as the national and first official language, and the law on vocational education says that country's officials must speak it. The claimant -a Dutch- decided to go to Court, which gave prominence to the above-mentioned constitutional provision (Art. 8 Bunreacht na hEireann) judgment that allows us to understand that respect for Constitutional Identity by the European Courts.

As indicated in the previous paragraph the linguistic, cultural and religious phenomenon can be translated into "National Identity" and this in turn translates into political and constitutional structures. These national structures should be translated or reflected in the Community legislation.

Going back to the Groener case as an example of this, one can say that it referred to a translation of the Irish constitutional law (Art. 8 Constitution of Ireland) and its cultural and linguistic policy concomitant with Community law. The Court found that requiring knowledge of the language was compatible with EU law, subject to the principle of proportionality (that is if the requirements did not exceed what was necessary in the case).

Translating the national constitutional law of a Member State of the European legislation is a technique that is used occasionally. For example when it comes to the protection of fundamental rights in formative phase of protection of fundamental rights in the EU (Stauder, Internationale Handelsgesellschaft and Nold II).

We could say that the operation of wanting to transmit or influence European Union Law with national constitutional laws or with those values that are part of the internal structure of any Member State, was facilitated by the fact that it referred to constitutional principles, mainly belonging to a common identity, that is, shared by the Member State. A case in point is the acceptance of the democratic, freedom and equality principles by European Union Law,

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187 In the context of the Member States of the European Union, National Identities are varied expressions ranging from the religious, linguistic and cultural aspects of public life, to the extent which in turn are expressed in political life and constitutional structures, as they are inherent in the fundamental political and constitutional structures.

188 Case C-379/87 Anita Groener v Minister for Education and the City of Dublin [1989] ECR 03967.


190 Art. 8.1: The Irish language as the national language is the first official language.

191 Besselink (n 184) 7.

192 Case C-379/87 Anita Groener v Minister for Education and the City of Dublin [1989] ECR 03967.

193 ibid.
as these principles are already accepted by the Member States in their domestic law. To what extent the identities belonging to Member States can be translated into EU legislation is less apparent. For example, one could say that it was the French constitutional spirit concerning secularity the one that influenced European legislation especially when drafting the Treaties. Still, European integration according to Besselink seemed to rest on the idea of a “unified law to overcome the disunity and conflict”.  

There are several Member States, each with its peculiarities, which are respected by the European legislation as case law shows.

Another example is the well-known Omega case. If due to the special emphasis in Germany on the idea of fundamental rights of human dignity (Article 1 Grundgesetz), this peculiarity established by Germany was retranslated in terms of exceptions to the free movement of services.

This Case aimed to interpret Articles 49 to 55 EC on the freedom to provide services and the free movement of goods. Omega, the German company, was prohibited by order of the Bonn police authority to perform a certain practice by laser technology, that is, the operation of a game that consisted in a “first person shooter”, a game using laser and infrared rays. In this case, the German competent authority forbade its practice because it trivializes violence and undermined the fundamental values of society at that time.

Every remedy filed by Omega was dismissed. The German company filed an appeal alleging breach of European Union Law. The German Court, by means of a preliminary ruling wanted to know whether the prohibition of an economic activity based on the protection of fundamental values enshrined in the national constitution was compatible with European Union Law.

The Court held that European Union Law did not preclude restrictions on an economic activity (consisting of the commercial exploitation of games simulating acts of homicide) from a national prohibition measure adopted on grounds of protecting public order or this activity undermining human dignity.

194 ibid
195 Case C-36/02 Omega [2004] I-09609.
196 Besselink. (n 184) 6-10.
Opinions vary widely on what the Court did in the Omega case. Some understand that the Court was merely applying EU Law, while others argue that German constitutional law in EU legislation was recognised and was complied with.

Without going into what opinion is the most appropriate, it should be noted that the Court stated that it is not essential that a restrictive measure protects an interest of fundamental rights corresponding to a conception shared by all Member States, and referred to its jurisprudence on the free movement of services.

It is precisely this reference to case law on free movement of services which allows us to accept the idea that the Court in the Omega case moved entirely in the field of European Union law.

In conclusion, we could say that the Member States of the European Union can restrict to a different degree of free movement of services depending on the importance of certain particular conceptions of fundamental rights that must be respected by the EU institutions.

4.6 The identity in the Treaties

One of the first formal references to the concept of identity in the context of the European Union appeared in the Declaration on the European Identity. It is necessary to differentiate between National Identity and European Identity. The first one has been widely discussed previously, so we will now focus on the latter, the European Identity.200

The European Identity concept is certainly vague and difficult to describe. This is due to the fact that European citizens, even though they feel as part of the European Union, feel more strongly connected to a certain nationality, that is, being Italian, Danish, or Irish. Generally speaking, this sentiment is connected to the sense of belonging to a certain ethnic or racial group, as well the attachment to a certain cultural or political belief.

In the case of the European Identity Declaration, formulated in 1973, the Identity was based on the principles of the union between nine countries -at the time, the only members of the EU: Belgium, the Federal Republic of Germany, France, Italy, Luxembourg, the Netherlands, United Kingdom, Ireland and Denmark- and its responsibility with the rest of the world, and of course in the dynamic nature of the construction of Europe.

This unity admitted cultural diversity, but is founded under the terms of the declaration of

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1973, in the shared legacy, that is, the same attitudes towards life, destined to build a society that could live up to the needs of individuals, the representative democracy principles, respect to the rule of law, social justice and to human rights.\textsuperscript{201}

It follows from the study of the issue that the construction of a European Identity turns out impossible and non-existent. Nonetheless, European identity does not emerge from principles thought as true and accepted by all citizens, but it is, according to Jurgen Habermas\textsuperscript{202}, a liberal democracy, where the citizens must be loyal and identify themselves not with a common cultural identity, but with some constitutional principles that fully guarantee their rights and freedom.\textsuperscript{203}

Then, in the Maastricht Treaty, in the first paragraph of Article F (that later became Article 6) TEU a brief enigmatic statement was introduced, as we have seen previously, which stated that “The Union shall respect the national identities of its Member States”.\textsuperscript{204}

This so called “generic National Identity” could be understood as referring mainly to national constitutions, and particularly, what distinguishes these constitutions from each other. The implicit reference to constitutions became very explicit in the form of the “Christophersen clause”\textsuperscript{205}, subsequently in Article I-5 of the Constitutional Treaty, and paragraph 2 of Article 4 of the TEU as amended by the Lisbon Treaty,\textsuperscript{206} building on the legacy of the Maastricht Treaty text.\textsuperscript{207}

The term "structures" seems to include, inter alia, the following issues by recognising and protecting the constitutional autonomy of the Member States: written or customary constitution, monarchy or republic, or presidentialism, parliamentarism, proportional or majoritarian electoral system, a centralist, federalist autonomy or territorial organisation, or court exercising or not the function of constitutional control.\textsuperscript{208} As noted by De Witte, it is not just a confirmation of the current situation, but also a renewed emphasis on the fact that


\textsuperscript{203} The European Identity referred at the time to the “Common Market” and “Customs Union” the institutions, the policies and structures for cooperation. The respect for human rights constitute a fundamental element of what European Identity is.

\textsuperscript{204} Lehmann (n 200) 13.

\textsuperscript{205} The Christophersen clause got its name from the Danish government representative Henning Christophersen, who represented his country at the European Convention. He was the president of the Council during the Constitutional Convention.

\textsuperscript{206} Lehmann (n 200) 13.

\textsuperscript{207} ibid.

\textsuperscript{208} ibid.
some functions are essentially individual of states and are associated with the protection of
the national constitutional structures; this can only be interpreted as a strong reaffirmation of
the non-federal nature of the EU.  

Lehmann identifies that National Constitutional Courts, in particular the German, French
and Spanish Courts, interpreted the new article as respect for the identity of the Member
States containing an implied limitation of the primacy of European Union Law in cases where
the law affect national constitutions or at least in their fundamental structures.

As European parliamentary Lehmann eloquently described, the concept of the primacy of
European Union Law over National Law must not be understood in a categorical or absolute
way, as the Member States’ constitutions themselves establish material limits that resist the
application and effectiveness of European Union Law.

This has resulted in the Constitutional Courts of Member States themselves being the main
actor in the relationship between European Union Law and the Member States’ internal law,
all of this taking into account the particularities of each state, as the respect to the
Constitutional Identity, present in Article 4(2) TEU requires an internal examination of each
case separately, to be able to understand the elements that characterise a particular state.

For example, the Constitutional Council first alluded to the concept of identity as specified
in French law, which determined that the application of EU Law were “the norms and
principles inherent to French Constitutional Identity”.

The respect for those constitutional principles is confirmed by the European Court of
Justice, and those constitutional principles are based on traditions and practices. Among
the many dimensions that characterise the systems of the Member States, those listed below may
be particularly useful to distinguish between two groups of countries where the role of the
Constitutional Courts is very different. Leonard Besselink has distinguished between
“historical” and “revolutionary” constitutions; the first type (for example, in the case of the
UK and the Netherlands) show a gradual development over a long period of time; are not
formalistic and have at least the same political basis as it has legal basis. By contrast, the

209 Valerio Volpi, Why Europe will not run the 21st century: reflections on the need for a new European federation
210 Lehmann (n 200) 13.
211 Aguilar (n 141) 28.
212 ibid.
213 Lehmann (n 200) 14.
214 Leonard F. Besselink, Constitutional law of the Netherlands: an introduction with texts, cases, and materials. (Nijmegen:
revolutionary constitutions tend to be rooted in a political or social cataclysm that sets the founding myth that inspired the document. These constitutions have a clear legal basis and are enforceable by Constitutional Courts. Examples of this mode are the constitutions of Ireland, Germany, Italy, France and the United States, as well as most of the constitutions of the new Member States. The latter have endeavoured to adopt legally binding as a result of their experiences during the communist era formal constitutions.\textsuperscript{215}

The “European Constitution” has been compared with the historical British Constitution - highly stratified and deeply rooted in practice and jurisprudence-, as both do not enjoy a formal constitution of sorts, but they do have multiple basic norms that play the role of constitutional norms.\textsuperscript{216} Some known points of controversy between national constitutional courts and the European Union institutions remain that Lehmann Wilhelm sums up in 4 points:

1. Most constitutional courts have formulated their own national version of the effect and primacy of European Union Law in the national legal system, on the basis of an interpretation of the constitution.

2. Some constitutional courts have announced that they could examine the level of protection of fundamental rights in the EU and the protection offered by the ECJ. At the present, it can be said that the problem of the different levels of protection granted by national constitutions and the general principles of EU Law has been solved; the entry into force of the Charter of Fundamental Rights should further clarify the situation.

3. The third point of controversy is the question of who can decide the limits of the powers transferred to the EU (Kompetenz Kompetenz-judicial)\textsuperscript{217}. In the federal systems, the body that ultimately decides on such issues is the Federal Court. However, in the case of the EU, various National Courts (such as Germany, Denmark and Poland) have impugned the claim of supreme jurisdiction of the ECJ.

4. The last aspect that could be the subject of differences, especially after the entry into force of the Lisbon Treaty, has to do with the respect for constitutional values in the

\textsuperscript{215} ibid.
\textsuperscript{216} ibid.
\textsuperscript{217} The full validity of the “kompetenz-kompetenz” principle is reiterated. This principle allows the referees to decide on the matters within their competence, in order to avoid that any of the parties doubt the arbitral decision and/or their competence, to be able to move the controversy over to judicial field.
area of freedom, security and justice as various court decisions on the European arrest warrant have made clear\textsuperscript{218}. Hopefully mutual acquiescence has been achieved in the first pillar and is repeated in the former third pillar.

There is one final aspect of National Identity that played an important role during the referendum campaigns organised by the opponents of the Constitutional Treaty. They criticized the Constitution for "burn[ing] in marble" certain features of the liberal economic regime, supervised by the Commission in its defence of “unfettered competition”. While this current review could be considered critical “social democratic” of European constitutionalism, a second group of rather conservative scholars and courts have made similar statements in this case relating to the recent ECJ case law. In fact, the ECJ has handed down rulings that have been criticised such as rulings limiting the scope for action of trade unions in the Member States. Seen together with the scrutiny of the European Commission of the role of publicly financed radio and television, or German public banks, there was a perception that the barriers required to defend states against globalisation were coming down.\textsuperscript{219}

In a sense, the ECJ rulings are considered to indicate that the Member States are no longer willing to defend an important element of their Constitutional Identity: the defence of fundamental non-economic rights against the invasion of neoliberal EU institutions. As said by a leading advocate of this stance, Dieter Grimm: “The Commission has interpreted the treaties in favour of liberalization and deregulation. This deprives the Member States of the right to decide which activities they leave to market regulation and which they reserve for public service. Of course, the Member States can sue the Commission for an untenable interpretation of the Treaties or even a transgression of its powers. But the Commission can usually count on the backing by the ECJ. [...] For the EU the four economic freedoms enjoy the highest priority”.\textsuperscript{220}

Other observers of the conservative critique of the ECJ judgments and the Lisbon Treaty stressed that apart from the general control of the defence of Constitutional Identity there is another element in the judgments that can be interpreted as a condemnation of the liberalizing ECJ case law. The paragraphs that address the principle of “social state” are very brief and

\textsuperscript{218} Lehmann (n 200) 14.
\textsuperscript{219} ibid 13.
\textsuperscript{220} ibid.
simply conclude that there is no reason to believe that the Member States are deprived of the right and the practical possibilities of principled decisions regarding social security and other matters of employment policy and social policy. Surprisingly, contrary to the tenor and as general critique to the judgment, the TCF appoints for the better decisions of the ECJ on the social citizenship of the EU to support its position.

4.7 National Identity Clause

This clause is articulated in article 4(2) in the following manner: „The Union shall respect the equality of Member States before the Treaties as well as their national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government. It shall respect their essential State functions, including ensuring the territorial integrity of the State, maintaining law and order and safeguarding national security. In particular, national security remains the sole responsibility of each Member State”.

In case C-473/93 (Commission v. Luxembourg) this respect implies a duty for the European Union. It must respect the member states’ national identity. This leads to a different vision of the European Union when exercising its functions, as well as a limitation to the integration process, having to bear in mind that respect of national identity.

Institutionally, it is clear that Article 4(2) TEU is under the jurisdiction of the European Court of Justice, and from the substantial point of view, because as we mentioned earlier, National Identity is what allows the intervention of the Member States’ Constitutional Courts when a reservation against the primacy of European Union Law is established.

Another issue that needs an analysis, due to its importance, is the use that The Treaty establishing a Constitution for Europe (TCE) gives to the term “National Identity”, which is of great relevance as the text intended to consolidate a Constitutional Text for the EU. This Treaty was signed in Rome, 29 October 2004, and it provided, in its Article 1-5 not only the obligation to respect National Identity, but also the express mention to equality between the European Union’s Member States, and associates the term to fundamental political and constitutional, inclusive of regional and local self-government. It shall respect their essential State functions, including ensuring the territorial integrity of the State, maintaining law and order and safeguarding national security”.

221 Consolidated version of the Treaty on European Union. Article 4(2) TEU.
223 Von (n 130) 1-38.
224 ibid.
225 Relations between the Union and the Member States. Article I-5: “The union shall respect the equality of Member States before the constitution as well as their national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government. It shall respect their essential State functions, including ensuring the territorial integrity of the State, maintaining law and order and safeguarding national security”.

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constitutional structures, as well as adding the reference to local and regional autonomy. That is how this particular Treaty makes clear that the “National Identity” term not only talks about a cultural identity, but also refers to a Constitutional Identity.226

Lastly, and looking at the current situation, the Lisbon Treaty, signed 13 December 2007, uses primarily what was established by the Constitutional Treaty, obviously changing certain provisions that mentioned the creation of a Constitution for Europe. Thereupon, the new Article 4(2) TEU only differs from the previous 1-5 in two aspects, neither of them affecting the notion of “National Identity”.

The first difference is that there is no mention concerning the respect of the equality of Member States towards the Constitution, for obvious reasons. Instead, it now referred to equality towards the Treaties. The second difference is that it makes a comment about the issue of national security, making clear that it is the exclusive responsibility of each Member State.227

This article 4(2) TUE can help shape the concept and define the relationship between European Union law and national legislation of the Member States of the European Union - especially when compared to the Maastricht Treaty- and thus help us better understand the positions that the Court of Justice of the European Community has taken. Taking reference positions that support the majority Doctrine and which today is a reference to its applicability, one that understands or sees absolute primacy of the law of the European Union and the constitutional law of the Member States and that largely follows the doctrine of "relative primacy" to accept the primacy of EU Law within certain constitutional limits.228

The first of them refers to the idea of absolute primacy of European Union Law. This causes that in every occasion that there is a discordance between internal Member States’ law (even constitutional law) and European Union Law, the latter prevails. This theory enjoyed a greater relevance in the European doctrine. This principle has been in force for almost 50 years, considered one of the fundamental principles in the European legal system. Its main objective was to secure, among other things, the enforcement of European legislation by all Member States.229

On the other side, there is the idea of “relative primacy”, which is based on the same idea

226 Bon (n 127) 176.
227 ibid 177.
228 Von (n 130) 2.
as absolute primacy, but finding some limits to it in Member States’ constitutional texts.

Article 4(2) TEU is one of main importance, both for this endeavour and to understand globally the problematic of the National Identity and even more to understand the relationship between the Member States of the European Union. Establishing the existing relationship between the European Union Law and the constitutional law of each Member State is a difficult task to achieve and creates great controversy as well as creating new problems within the scope of European Union Law.230

It is important to mention what the Draft Constitutional Treaty was in order to highlight the intention of the European Union Legislator (the Member States); for this reason, this issue will be briefly addressed. When analysing the Lisbon Treaty we can see important differences between this text and the Constitutional Treaty (from now on CT). The first does not refer to the problem of the standing relationship between the National Constitution of the Member States and the European Union itself. The CT in its articles 1 - 6 explicitly addressed this issue. This group of articles can be used –and in fact are used– as a base to argumentation / reasoning before the European Court of Justice, and even in the national courts “Constitutional and Supreme” when speaking about the relationship of the Member States with the European Union; and even better, give structure to the reasoning of the National Sovereignty.231

The writings of Von Bogdandy and Schill about Article 4(2) (the National Identity Clause) previously cited can be of help to frame the current relationship between the European Union Law and the National Constitutional Law and by this, create a view broader than the opinion of the ECJ, which is, for example, the majority doctrine that is in favour of the doctrine of the absolute supremacy of the European Union, against the constitutional internal law of the Member States, ; and also against the doctrine used by the great majority of the Constitutional Courts of the Member States, that says that the supremacy of the European Union Law is relative, due to it being restricted by the constitutional limits of the Member States.232 On the latter, the doctrine holds that the supremacy of European Union Law has certain limitations such as the principle of conferral, the general principles of EU law, international agreements and of course, respect for national identity.233

Article 4(2) TEU breaks and at the same time prohibits the unique perspective of the

230 Von (n 130) p. 3.
231 ibid.
232 ibid.
absolute supremacy of the European Union Law, modifying in this way the traditional hierarchical or pyramidal model of European Union Law. The vision of this article proposes a major vision of the relationship between the European Union Law and the domestic Constitutional Law -marked by current jurisprudence- meaning that the constitutional limit that the Article refers to is not an open limit, but places it in an institutional framework that determines a relationship between the National Constitutional Courts and the European Court of Justice. This article also conceptualizes the integration issue of the relationship between both systems of law; the second provision of this article not only determines the respect of the National Constitutional Identity, but also allows this paragraph to be directly invoked by the Constitutional Courts of the Member States, which turns the Constitution into a limit to the primacy under certain circumstances. This idea is supported by the next paragraph of the same article that establishes the Principle of Sincere Cooperation. This is addressed to create a feeling of respect to both the EU Law and the Constitutional Identity of the Member State.234

The current conceived vision about the existing correlation between the EU Law and the internal law of the Member States continues to have different interpretations, especially of German Law.235 National Identity does not enjoy what is called “absolute protection” by the EU Law, as a glance at article 4 can lead to an erroneous idea of the clause of respect for the National Identity. Extensive jurisprudence of the ECJ determines the equilibrium of that article, starting by the application of the principle of uniform application of EU Law and understands that the National Constitution is part of the system that composes the constitutional jurisdiction.

An additional issue arises when Article 4(2) uses the expression of “Europe’s composite structure”. The main characteristic of the composite structure pointed out by von Bogdandy and Schill is the relationship of cooperation and hierarchy as a basic rule to limit the conduct of the juridical-legislative actors of the EU. This can be designated as “composite constitutionalism” that is opposite to the implicit ideas in which one system is superior to the other, meaning that it replaces the idea of hierarchy with the vision of cooperation; all this framed in the idea of achieving common objectives.236

The idea of composite constitutionalism previously analysed can have its reasoning in the

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234 Pinedo (n 53) 34-36.
235 Von (n 130) 3.
236 ibid 4.
basis of different legal provisions. A clear example can be found in Article 23 of the German Constitution, in which the relationship of Germany inside the European Union in accordance with the core constitutional principle is outlined. Now, from a European Union point of view (not a national point of view), this concept emerges inter alia in Article 6, 7, 48 TEU and 267 TFEU.\(^{237}\)

On the contrary, the Lisbon Treaty boosted the importance of the identity clause and developed its contents. The National Identity Clause has never been subject to the jurisdiction of the Court, before the entry in force of the Lisbon Treaty. The ECJ has referred to the notion of National Identity on different occasions, one worth mentioning is the condition of nationality by the Constitution of Luxembourg to be an employee in the public education system.\(^{238}\) This judgment that can be studied from the current perspective, causes a direct collision with the freedoms recognised and protected by the EU -freedom of movement- and additionally entails a violation of its identity by the State affected. The Court analyses the reservation of the Member State and its National Identity and conceives as legitimate the respect for the EU Judicial System.\(^{239}\)

In this case, it is important to know the reason why Luxembourg uses the “National Identity” argument. The judgment establishes that a sector such as the education cannot justify the safeguarding of National Identity, based on the idea of total exclusion of non-nationals in order to protect their identity. It is worth mentioning that the judgment also establishes that National Identity can be protected through some requisites such as skills, experience, training, or even language skills, none of which violate the freedom of movement principle. The general exclusion is therefore incorrect.\(^{240}\)

That case represents the possibility that Member States are able to restrict one of the fundamental freedoms. Though in the referred judgment, the Tribunal decided that the restriction imposed by its Constitution was not proportionate.\(^{241}\) Another case that worth mentioning is the Ilonka Sayn-Wittgenstein v Landeshauptmann von Wien case,\(^{242}\) in which the Court interpreted Article 4(2) TEU as subjected to the jurisdiction of the ECJ, once

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\(^{237}\) ibid 5.


\(^{239}\) ibid.

\(^{240}\) Case C-379/87 Anita Groener v Minister for Education and the City of Dublin [1989] ECR 03967.

\(^{241}\) Von (n 130) 6.

established by the Lisbon Treaty.\textsuperscript{243} This case is of great importance because it is the first time that the ECJ defines what National Identity is: “it intends to protect the Constitutional Identity of the Republic of Austria and constituted a fundamental decision in favour of the formal equality of treatment of all citizens before the law”. For this reason, the Court interprets as correct the restriction to a fundamental freedom (freedom of movement) based on the National and Constitutional Identity of the state, in this case Austria.\textsuperscript{244}

The National Identity Clause widely referred to in this section is not complemented by the paragraph 1 and 2 of Article 4, but also plays a relevant role in the paragraph 3 of the same Article: “Pursuant to the principle of sincere cooperation, the Union and the Member States shall, in full mutual respect, assist each other in carrying out tasks which flow from the Treaties.” This assimilates the normative pillars of a Federal States, forgetting the hierarchical structure that exists between the European Union and the Member States. This, on the contrary, is based on the sincere cooperation and the respectfulness of the Union and the Member States, with the purpose of achieving a common wellbeing at the supranational level, the idea of the Member States depending on the European Union is created.\textsuperscript{245} It has to be understood that the Member States are original and autonomous when implementing European Union Law, but it is a responsibility of the European Union to create a uniform framework of it.\textsuperscript{246}

From the article that is being analysed in its global context, three principles are going to be outlined:

1. The respect for National Identity.

2. The equality of Member States.

3. The guarantee of the Member States’ essential State functions.

The Clause of National Identity has a meaning particularly relevant respecting the three principles mentioned above. This is due to the Identity Clause being an accurate reflection of the Member States’ will to stand up for them as political actors that hold relevance and reflects their autonomy in reference to the European political processes and mainly to the

\textsuperscript{244} Von (n 130) 8.
\textsuperscript{245} Craig (n 34) 170.
legal procedures. At the same time, the Identity Clause makes a terminological reference concerning the “National Identity”, or even better, to the Sovereignty of the States that form the European Union. It makes visible the depth reached in the European integration. It is important to add to the previous idea that the concept of National Identity has to be constructed, interpreted, and defined in each one of the Members States of the European Union.247

A special analysis must be made when talking about the equality of the Member States before the Treaties and the respect of the Member States, as mentioned by Article 4 TEU. This principle, as it is made by the Identity Clause, goes back to the Christophersen clause248 in which respect by the European Union of the central competences of the Member States is established. These are conceived as out of the powers or competence (subject, material) of the transference of competences of the European Union “Competence Creep”249. At the end of article 4(2) TEU we can verify in situ how that article emphasizes in the National Security and it stresses the responsibility of Member States. This is a result of the Conference in 2007 by which the Lisbon Treaty was created.

In the examination that is being developed with the purpose of getting a better understanding of the Identity Clause in the light of the Constitutional pluralism, this is a new division within constitutional thought that argues sovereignty is no longer the accurate and normatively superior constitutional foundation. It instead replaces this thought with its own foundation. It arises from the basis of contributions by the leading EU constitutionalists and has now become the most dominant branch of European constitutional thought. Its prerogatives have also overstepped the European context, suggesting that it offers historic advantages for further development of the idea of constitutionalism and world order as such.250

The importance and the decisive role that plays in it the Equality Clause, taken into consideration by Article 4(2) TEU, is clear. This equality Clause imposed by the Constitutional Pluralism defined by the European Union lead us to consideration and pay special attention to the constitutional diversity of the different states that conform the European Union; it is clear consequently that relevant particularities are going to be found

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247 Von (n 130) 8.
248 Ibid 10.
249 Ibid.
when analysing constitutional systems that are very different as they can become: monarchies, parliamentary and semi-presidential systems, same as Constitutions of States with Federal Structure and Unitary States. These antagonist differences shape what the European Institutions frames as “United in Diversity”. 251

Finally, it is important to bear in mind that when invoking the protection of national identity clause, the burden of proof lies with the state that feels its national identity has been violated. The proof must be true and strong enough to justify using this clause against European Union Law. Historical background and legal precedents of the alleged violated norm are taken into account to perform the assessment. It is vital to perform it according to the present situation, as for example, in a period of economic uncertainty or crisis, member states could take advantage of said clause to ignore a certain European Union Law, contrary to their interests from an economic point of view, without having anything to do with preserving national identity. 252

4.8 European Court of Justice

Respect for National Identity, enshrined in Article 4(2) TEU involves the Member States' Constitutional Courts and the European legislator, the first as a guarantor of the national constitution and commissioned to delineate the outer limits and characteristics that define National Identity -or to put it another way, the constitutional core-, and the latter with the role of legislator, respecting the National Identity clause. We must not forget the key role played by the European Court of Justice (ECJ) 253, as it is fundamental to be able to understand what must be understood by “National Identity”. 254

The importance of the ECJ lies in the fact that it is responsible for enforcing European Union Law, aside from being the lead interpreter of the treaties, establishing the EU and its institutions material competence limits, and judging the Member States infringements of European Union Law. 255

The European Court of Justice (ECJ) 256 has jurisdictional functions that in comparison with the National Courts are superior and in some cases can be similar to the Constitutional

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252 Cloots (n 1) 147.
253 Also known by its acronym ECJ.
254 Chapter 5 of this paper.
255 Craig (n 34) 63.
256 Also known by its acronym ECJ.
Courts; a perfect example of that situation is the control exerted in the monopoly of the validity of the legislative acts of the European Union.\textsuperscript{257} The European Court of Justice is competent to decide on the validity of EU acts in “actions for annulment” and “requests for a preliminary ruling”. That said it is important to deepen into the question. Some commentators suggest that the ECJ is a constitutional court. Would this claim of competence exclude any intervention of the Member States’ Constitutional Courts?\textsuperscript{258}

On this issue, we will say that while the member states’ Constitutional Courts have as their core mission to establish the constitutional norms outlines that authorize the cession of the exercise of the sovereign powers, the definition of the terms of the reception of that sovereignty corresponds to the European Court of Justice.\textsuperscript{259}

It is necessary to mention the “preliminary rulings” procedure before further examination on the subject. This proceeding is regulated in Article 267 TFEU, and is of great importance to be able to understand the role of the ECJ, as it is one of the most important tasks carried out by the Court.\textsuperscript{260} This is the proceeding through which the Member States’ judicial authorities and organs can approach the ECJ, to formulate questions about the validity or the correct interpretation of any kind of juridical act, adopted by the EU institutions.\textsuperscript{261}

That is to say, by means of this proceeding, any judicial organ of a Member State of the EU, when facing the enforcement of any juridical act, can raise questions to the ECJ, asking for the corresponding assessment, all within the scope of European Union Law.\textsuperscript{262} In short, this proceeding aims to ensure the consistent interpretation of EU Law.\textsuperscript{263}

This leads to the conclusion that this proceeding is really important when it comes to respecting the Member States’ National Identity, and especially in connection with the previously mentioned clause in Article 4(2) TEU.\textsuperscript{264} Through this procedure, Member States can, in some way, enforce their national constitutional identities, by raising questions

\textsuperscript{258} ibid.
\textsuperscript{262} This idea is based on the principle of primacy and direct applicability, ensuring that Member States’ judges must apply directly the European norm.
\textsuperscript{263} Chalmers (n 260) 156.
\textsuperscript{264} ibid 157.
concerning the validity, or correct interpretation of any legal act, as the Court will see if it affects National Identity, and therefore, the clause of Article 4(2) TEU, or if it only affects regular norms, not protected by the previously mentioned provision.

We have to understand that the claims of validity that are part of the national constitutional law have been something that the ECJ has considered to be incorporated into the EU acts, as a legality parameter. This is evident in the case C-465/93 Atlanta Fruchthandelsgesellschaft and other which is the first case-law about the protection of the fundamental rights, in which the relevance given by the Court to the protection of those rights is evident, and involves what is known as “effective judicial protection” against the European Union acts.265 Similarly, the national jurisdictional organ can lawfully suspend temporarily the enforcement of an administrative act based on a EU regulation whose validity is not certain, as well as to adopt precautionary measures against its application.266

Now, going back to the history of the Court, it must be taken into account that Article 2 of the TEU (Article F1 Maastricht Treaty and later 6.1 of TEU) proclaims that the Union is based in the respect of the human liberty, dignity, democracy, rule of law and human rights; as they are considered common values of the European Union, which is characterized by its pluralism, the non-discrimination, tolerance, justice, and solidarity, as well as the belief in the equality between men and women.267

Regarding this topic, article 4(2) of TEU asks for respect of the National Identity of the Member States of the European Union, as does article 6.3 of TEU and before that one, article F1. This body of law not only emphasizes in the National Identity, but also in Constitutional Identity. This Constitutional Identity that has also been referred to in this work, frames what is known as the performance of the essential functions of the State, among which are the guarantee of the territorial identity, National Security and the maintenance of the public order.

In relation to the topic of the fundamental rights given in the European Union, the analysis of the Maastricht Treaty turns out to be key. This is due to the fact that the protection of fundamental rights were not expressly included by any of the treaties, merely having some individual rights such as Article 7 EEC, which banned discrimination based on nationality for

265 Case C-465/93 Atlanta Fruchthandelsgesellschaft and other 1995 ECR I-10423.
266 Chalmers (n 260) 195-197.
the freedom of movement of workers. The first express reference is made in 1993 in the Maastricht Treaty.\textsuperscript{268}

In this way, its article F2 allows the case-law of the Court of Justice to strengthen the idea considered by many an obligation—for example, by the Scientific Spanish Doctrine—that the Union must respect the fundamental rights of the Member States of the European Union, in the same way that it is guaranteed the ECHR, taking into account the constitutional tradition that the Member States have in common (article 6.3 TEU); it is worth of adding to this idea that the post-Lisbon idea of the paragraph 1 of article 6, points out the respect by the European Institution to the Charter of Fundamental Rights proclaimed in Nice and given legal status with the Lisbon Treaty.\textsuperscript{269}

One can say that Constitutional Identity and fundamental rights of Member States are barriers that function as limits to the EU Public Power\textsuperscript{270}, and therefore, can be considered as the base of the prosecution of the acts carried out by the EU institutions.

Concerning fundamental rights, the examination of the Maastricht Treaty, is fundamental, as its article F.2 can be used as a base for the Court of Justice to end up asserting that the European Union must respect the European Convention on Human Rights and therefore, fundamental rights, as it has been done by the Constitutions of the Member States. These fundamental rights can also be understood as a part of the general principles of law (6.3 TEU). Understanding the importance reflected by the European Union of both, the fundamental rights and the Constitutional Identity, it is easy to understand that they limit the European public power and consequently those limits serve as an argument in future prosecution of the acts, besides unpinning from that asseveration of the Court of Justice excludes the intervention of the Constitutional Courts of the Member States.

Now, even when the political environment is not of interest to the present work, which pursues a legal approach, it is important to note that the purpose of the EU norms can be seen as an essential part of European constitutionalism—that has an integrated nature—, it needs from the States to deposit in the European Court of Justice a high level of trust and additionally, Constitutional Tolerance.\textsuperscript{271}

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\textsuperscript{271} ibid.
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As referred to in the previous paragraph, this work will not use the political point of view to nourish the hypothesis of prominence of the European Union Law, and even less, the breach of the fundamental rights and constitutional principles (Constitutional Identity). Therefore, the judgment Solange II will be used. This judgment is similar to the previous, with the difference that this one makes reference to fundamental rights. In the same ways and even more clearly, the Lisbon Judgment expressly admits that the Court of Justice guarantees a level of protection of the fundamental rights similar to the one performed by the judgment of the Fundamental German Law; a doctrine that is assumed as true by other Constitutional Courts.

4.9 Jurisdictional limits between ECJ and National Constitutional Courts

The European Court of Justice is only competent to adjudicate matters related to European legislation, as the standard for review and not the ones related to Member States. Regardless of historic considerations, analysed in the background of this work which helped us understand how the European Union is formed as the domestic law of the Member States could influence when creating legislation, we must understand that the constitutional principles of the States of the European Union have been reflected in the framework of European legislation, we can say that the right to equality in the law established by the European Union regarding its citizens, and the same can be inferred from the equality principle enshrined in multiple constitutions of the Member States. But this does not mean that what the Court seeks is respect and safeguarding of European Union Law and not the law of the Member States.

The direct consequence of this is that the cases can only be considered against the rules of EU Law. This is no different from the national position of the Member States and that Constitutional Courts are generally only competent to review cases against national constitutional legal standards. It would certainly be crazy to expect that the Spanish Constitutional Court applied the Italian rule or try to justify a decision in the German Basic standard.

This happens for example in those exceptional cases where there is a conflict of jurisdiction, in this case a normative conflict is nothing but conflicting rules. Normative conflict is synonymous with antinomy that may result from: the overlap between two

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272 Besselink (n 183) 13.
273 ibid.
274 ibid.
absolutely identical rules reference area; full-overlap between a rule and particular; and descriptions overlap when two incompatible standards solutions partially overlap, but both have areas of self-reference. As far as we are concerned the overlap may arise if a set of rules is integrated into another set. This can be the case if within the set of norms of the EU, the norms that are found within the national legal systems have to be respected and protected.

Undoubtedly the recognition of the Constitutional Identity of the Member States in Article 4(2) TEU can be seen as an area of potential overlap.

Because of this one might think that the constitutional rules of the Member States of the EU are part of their identity, and are therefore not only respected and protected by the institutions of that Member State but also by the institutions of the European Union.

Many lawyers, including Besselink, understand that the translation in the European legal framework of a national constitutional rule constitutes some kind of veto. The European Union Law, in order to respect Constitutional Identity, must be limited either in its legislation or in its enforcement.\footnote{ibid 14.}

This situation can be compared in terms of inter as it resembles a legal version of the dual system in which every international treaty must be transformed before entering into force by the Member State, but in the European case is reversed and that means that the European institution should change its legislation so that it fits into the law of the Member States. So the Constitutional Identity of the Member States of the EU is protected by the actions of National Constitutional Courts.

In Germany, for example, there is talk of transferring European Union Law to Domestic Law, and of German constitutional law playing the role of veto against the EU norm, as the latter must respect the constitutional tenets. Quite the opposite occurs in Spain where instead the law sets the European Union Law as the default and legality of state regulations and of course of administrative acts depend on the compliance with European regulation. Proof of this is the law 29/1998 declaring the nullity of the regulations for violating European Union acts.\footnote{ibid.}

Besselink notes that one should also bear in mind that the ECJ positively respects constitutional principles of the Member States, some examples are the judgments referred to in this work, cases of Omega and Sayn-Wittgenstein and the same can be seen as an expression of a new balance between the constitutional orders of the EU and the Member

\begin{flushright}
  \footnotesize
  \textit{\textsuperscript{275} ibid 14.}
  \textit{\textsuperscript{276} ibid.}
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States, a very different balance of the 1960s to the early 1990s based on the transfer of sovereign powers and hierarchy simple.\textsuperscript{277}

Now, we have analysed the correct action by the ECJ, we also have to keep in mind that in some cases, as in the case Michaniki,\textsuperscript{278} which speaks about the amendment of the Greek constitution forbidding tycoons to dominate or unduly influence the public industry as well as the media. The Court decided not to take it into consideration, and therefore ignored the fact that it was a recent decision of that country's constitution, and the Greek decision declared it incompatible with EU dispositions, and in particular against the principle of proportionality, without even analysing the constitutional situation or context, or the pertinence of said disposition.\textsuperscript{279}

On the other hand in the Greek case it was understood that the disputed matters did not belong to the core of the Greek Constitution and therefore were not under the protection of Article 4(2) TEU as it was not an element of the Constitutional Identity of that country.\textsuperscript{280}

We further note that cases like the Greek one in which Article 4(2) TEU is used and advocates respect for the National Identity of a country. This example occurred in the judgment in Greece but not in the judgment of Sayn-Wittgenstein,\textsuperscript{281} as they had a constitutional development that supported the principle of equality and abolition of the monarchy, explicit mentions to that right to equality and development of legislation on the abolition of the monarchy in the Constitution are part of the basic structure of the constitution and the nation, and therefore National Identity and in particular the Constitutional Identity must be respected and taken into account by the European Courts.\textsuperscript{282}

Echoing what Besselink said about the subject in question "In this trend we arrive at a new equilibrium between the EU and national constitutional orders, in which Mutual Respect and constructive inclusion of Norms essential to the other's legal order prevails over the previous strictly hierarchical conception of these relations as in Internationale Handelsgesellschaft and Simmenthal".\textsuperscript{283}

Therefore it would be correct to conclude that both the internal Courts of the Member

\textsuperscript{277}ibid.

\textsuperscript{278}Case C–213/07 Michaniki [2008] ECR I–9999.

\textsuperscript{279}Besselink (183)14.

\textsuperscript{280}ibid.

\textsuperscript{281}Case C-208/09 Ilonka Sayn-Wittgenstein v Landeshauptmann von Wien [2010] ECR I-13693R.

\textsuperscript{282}Besselink (n 183).

\textsuperscript{283}ibid.
States of the European Union and the ECJ enforce control over Constitutional Identity. And above all it depends on the decision of the Constitutional Court of the EU member country to define the meaning of the rule to determine and conclude whether or not are part of the Constitutional Identity as a step in the If Sayn-Wittgenstein.\textsuperscript{284}

\textbf{4.10 Conclusion}

The terms “national identity” and “constitutional identity” have broadly the same meaning. This is due to the fact that national identity evokes directly to constitutional identity as in the member states’ Constitutions is where the cornerstones of every member state’s society lie. Furthermore, it shows a protection and marks the relevance of norms, rights, and duties of the highest rank within national Law. Therefore we can indistinctly talk about national or constitutional identity, as both words talk about the same idea. They are directly related to article 4(2) TEU. It is important to understand national identity from the point of view of the European legislator and what it meant by that term, in the sense that both its location in the treaty and its antecedents makes us comprehend its importance, and its relationship with the domestic legal systems of the EU member states.

The next chapter will look into the relationship between national identity and the principle of primacy, which, is of great relevance in European Union Law.

\\textsuperscript{284} ibid.
5. National Identity & the primacy principle

5.1 National identity and its relationship with the primacy principle

The National Identity clause, enshrined in Article 4(2) TEU implies respect for National Identity and for the fundamental structures of the state. This implies that the European norm can be enforced uniformly throughout all Member States, but at the same time, it should be able to respect the “constitutional core” of said states, each one of them with peculiarities and different constitutional profiles.285

The idea of European Union Law feeding and forming from the European Comparative Law, that is to say, the EU Member States’ internal laws, and therefore, the creation of a different EU Law can violate the fundamental structure of some State, or its identity, because it is modelled after the spirit of national norms.286 Meanwhile, the existing constitutional plurality and the idea we have about the constitutional core differs depending on what Member State we focus on, and that is why we can find some norms inspired in some Member State internal law (the spirit of democracy, or secularism, to name a few) that when it has to be enforced in another state, it violates its Constitutional Identity.

The issues mentioned in the foregoing paragraph lead us to a disagreement in the European doctrine. Some authors support the idea of the primacy of European Union Law, and therefore, enforcing the Law anyway, even if it violates domestic laws, due to the primacy principle, while other authors would study the issue at hand, attending to the kind of norms in conflict. This way, if the conflict was between European legislation and general domestic laws, European norms would prevail, but if they were national Constitutional norms enshrining National Identity contents, the National Identity clause could be applied.

The relationship between the Primacy Principle and the National Identity clause is logical and obvious when we face the last scenario of the paragraph above. Henceforth, the answer to this problem can be, either to accept the primacy of EU Law, saying that National Identity is not a limit to it or we could support the idea of Constitutional Identity being a limit to the EU Law Primacy Principle. Next, we will analyse the latter, understanding that it is the relevant one.

286 ibid.
5.2 National Identity used for limitation

One of the main functions of the notion of National Identity or Constitutional Identity is to set clear limits to the integration of international society, and more precisely determine the limits of European integration: The latter limits the sovereignty of the state and was moved to the field of EU powers that hitherto fell within the scope of regulatory autonomy of each State; therefore each of its stages may involve a change in national constitutions; but in any case, the substance of this last, its hard core, which constitutes their identity, is untouchable and must remain intangible.²⁸⁷

Under these conditions, it is logical that the concept has been defined primarily by national constitutional courts: the defenders of the constitutional nature have been here as a means of avoiding the latter becoming an empty shell.²⁸⁸ That means, as we have seen above, that we have to take into account how the national constitutional courts interpret the concept, admitting that it may continue to create open constitutional conflict between national constitutional courts on the one hand and the ECJ on the other.

The notion of national or Constitutional Identity may also have another function, that is, to limit the power of constitutional review in the opinion of François-Xavier Millet.²⁸⁹ The Italian Constitutional Court, after stating that European integration cannot go against what constitutes the very substance of the Italian constitutional order (Case 1146/1988 of 18 December 1973)²⁹⁰ widens this requirement to the laws of constitutional revision, such as community events, which cannot contradict the fundamental principles of the Italian constitutional order or the inalienable rights of the human person.²⁹¹

The German Federal Constitutional Court, especially in its 2009 decision regarding the Treaty of Lisbon²⁹², departed Article 79, paragraph 3 of the fundamental law that prohibits any modification of the latter which undermines the principles enshrined in Articles 1 and 20, the first principle is the protection of human dignity, and the obligation for the authorities to respect fully the fundamental rights, in which there is recognition that human dignity is intangible and therefore it must be protected and respected, especially when concerning public authority. Article 1 of the Basic Law for the Federal Republic of Germany establishes

²⁸⁷ Bon (n 127) 180.
²⁸⁸ ibid.
²⁸⁹ ibid.
²⁹⁰ Italian Constitutional Court. Case 170/1984 [1984].
²⁹¹ Blanke (n 12) 219.
an acknowledgement of the inviolable and inalienable human rights as the foundation of every human community, as well as of peace and justice in the world. These fundamental rights are binding for the three state powers, executive, judicial and legislative, and are directly applicable. 293

The second is “the foundation of state order, right of resistance”. In this one, the form of state and government are set (Federal Republic, Federal Democratic and Social State), and the clause that provided that state powers come from the people, and also that the legislative power is subject to constitutional order control. It must be noted that the reason for prohibiting some modifications is due to the existence of a warranty of continuity that prevents the legislator from disposing of the constitutional order identity, as well as preventing the European integration violating its Constitutional Identity. In other words, the warranty of continuity does not end in internal law, but also applies to the relationships between the states and third parties, where these constitutional warranties are still protected.

We also know that the notion of Constitutional Identity appeared in German doctrine long before the beginning of European integration, because at that time it was exclusively linked to the limits of the power of constitutional review. We refer here to the well-known ideas Carl Schmitt on the distinction to be made between Constitution and constitutional law, 294 part of the distinction corresponds to the distinction that goes back to the French Revolution between the original constituent power and instituted constitutional power: while the first, that can only be exercised directly by the people, the second principle is that it is subject to the rules of procedure, provided by the constitution that institutes must respect in any case the identity of the Constitution. 295 In other words, respect for the Constitutional Identity is a limit to the revision of the constitution. 296

Therefore, it seems clear that in these two states, which are, moreover, states which the Constitutional Court considers qualified to review constitutional laws. In a way, it coincides with the notion of supraconstitutional.

However, this does not apply to other states. Thus, in the Spanish Constitution there is no guarantee of continuity. Article 168 simply subjects to a review procedure more demanding than the modification of some of its provisions: If a full review of the Constitution is proposed, or a partial review affecting the Preliminary Title, Chapter Two, Section 1 of Title

293 Bon (n 127) 182.
295 Bon (n 127) 182.
296 ibid 183.
I, or Title II, the provision shall be approved by a two-thirds majority of the members of each House, and the “Cortes” shall be immediately dissolved. Some of these objects are, moreover, elements in the concept of Constitutional Identity identified by the Constitutional Court in its statement 1/2004. This is how the values and principles enshrined in the Constitution. However, as members of the notion of Constitutional Identity constitute a limit to European integration, but are not, in the present state of positive law, oblivious to the possibility of more rigid review.297

In France, there is in a way, a guarantee of durability, as the last paragraph of Article 89 stipulates that republican form of government cannot be reviewed, republican form of government that can be understood both strictly, is the Republic as opposed to the monarchy, as broadly the Republic and the whole republican heritage. However, the Constitutional Council, having left some doubts persist,298 has clearly stated that he refused to control the constitutional laws.299

Under these conditions, we see how the notion of Constitutional Identity could establish limits to the power of revision: in the same way that it is not an absolute limit to European integration as we have seen, the constituent power can always accept a directive violates a rule or a principle inherent in the Constitutional Identity of France, does not seem in any way to limit the power of constitutional review.

It also makes sense, from the perspective of the member states, that the concept has been incorporated into primary Community law since the Treaty of Maastricht. This treaty implied, as we know, important progress of European integration. Fearful of losing a significant portion of competences, some states emphasized the importance of a safeguard clause. Such is the function of what Article F, paragraph 1 TEU once was, according to which the Union Shall Respect, the national identities of its member States, Whose systems of government are founded on the principles of democracy.300 This was an article that appears derived from a UK initiative supported by Denmark and Greece.301

Once incorporated into primary Community law, the notion is clearly within the jurisdiction of the Court. The question remains open whether the ECJ itself is bound by the notion, but it is beyond doubt that the ECJ must take into account the National Identity of the

297 ibid.
298 ibid.
299 ibid.
300 ibid.
301 ibid 181.
Member States as a legitimate aim respected by the Community legal order. That means, that the ECJ may have to interpret and apply the concept in its case law. Sometimes the cases are infringement actions (now Article 258 TFEU), sometimes preliminary rulings (now Article 267 TFEU) and sometimes actions for annulment of EU law or decisions of the EU institutions (now Article 263 TFEU).

An example of the first category (infringement actions) is the ECJ ruling of July 2, 1996, Commission v Luxembourg. In this case the Commission requested the Court to declare an infringement by Luxembourg of Article 48 of the EEC treaty, as well as articles 1 and 7 of Regulation 1612/68 of free movement of workers. Luxembourg had established that only nationals could have access to National Officer Jobs or public sector jobs.

The Luxembourg Government argued that the Constitution, as well as implementing laws developed the idea that certain jobs within the public service and administration required the Luxembourg nationality. That requirement was formulated in general terms and without establishing differences according to the multiple functions, tasks and levels of said jobs.

The Court ruled that there was a violation by Luxembourg as Luxembourg did not simply require Luxembourg nationality for those official or state jobs that involved participation, either direct or indirect in the exercise of public power, but also for other jobs in the public sector, such as posts in research, teaching, health, transport and post and telecommunication. The Court allows the nationality requirement, but only for those ranks that represent a greater relevance for the internal order. This recognition also followed from then Artic 48(4) TFEU as the ECJ has interpreted it to allow public sector jobs that have a special connection to exercise of state power to be reserved for own nationals. The Luxembourg Government argued that it was necessary to reserve posts of teachers to nationals, in order to preserve national identity (paragraph 32), but the Court, while accepting that it could be a legitimate aim, said that this aim could be achieved with less restrictive means to free movement and that it was disproportionate and therefore an infringement of the Treaty (paragraphs 35-36).

In this case, Luxembourg claimed that the definition of public sector jobs falling within the scope of Article 48(4) but the ECJ conformed its jurisprudence, e.g. in Costa v ENEL in 1964, according to which “It follows from all these observations that the law stemming from

the treaty, an independent source of law, could not, because of its special and original nature, be overridden by domestic legal provisions, however framed, without being deprived of its character as community law and without the legal basis of the community itself being called into question”. 305 To put it another way, in terms of which the allegation of violations, either of fundamental rights formulated by the Constitution of a Member State, or the principles of a national constitutional structure cannot affect the validity of a Community measure or its effect in the territory of that State. To the extent that the Court has traditionally asserted the superiority of Community law over National Law, even of a constitutional nature, there is a risk that the solemn affirmation in the Maastricht Treaty of respect by the Union of National Identity of the Member States contradicted this superiority. Also, as we have seen, the Court has only applied to a limited extent this requirement and has never considered an unconditional (has never accepted) exception to the application of EU law, but rather as an element to weight or reconcile, assessing proportionality, with the public interest pursued by the Community rules.

In any case, the fact is that the protection of National Identity, first claimed by the constitutional judges, was later transformed by the Treaty of Maastricht changing its nature because of the community demands. The Constitutional Identity of the Member States rather than merely regulating resistance, resembles a standard convergence between legal systems. To the extent that is both a concept of European Union law and a concept of National Law, is likely to provide an answer to the constitutional conflict. 306

Most of the cases where the ECJ has considered the concept of national identity and Article 4(2) are preliminary rulings proceedings. In these cases the Court sometimes provides interpretation of the concept, and sometimes the question is posed as a challenge to the validity of secondary law, on the grounds that secondary law infringes national identity, as protected in Article 4(2) TEU. Examples of preliminary rulings, where the Court has considered derogations from the free movement of persons (as in the above case, Commission v Luxembourg), on grounds of national identity, include the judgment of 2010 in the case Sayn-Wittgenstein, the first case that cited article 4(2) in relationship with primary law, in this case article 21 TFEU, and domestic law about abolition of noble titles. 307 and

305 Case 6/64 Flaminio Costa v E.N.E.L. [1964] ECR 585. See also Case C-165/08 Commission v Poland [2009] ECR I-6843 where the ECJ did not accept the arguments of the Polish Government that the Polish population objected to genetically modified seeds (for use in agriculture) for precautionary scientific reasons and for ethical reasons.
306 Bon (n 127) 182.
307 Giacomo (n 74) 3.
considered that the national law constituted legitimate interests to justify restrictions of the right of free movement of persons recognized by European Union Law. \(^{308}\)

Mrs. Sayn-Wittgenstein, \(^{309}\) of Austrian nationality and resident of Germany, complained about not being able to register in Austria her current last name, acquired by virtue of an adoption by a German. \(^{310}\)

This measure in question violates one of the freedoms of the European Union - the freedom of movement and residence-, as not allowing a person to change his or her last name can hinder in multiple ways the freedom of movement in the EU. \(^{311}\)

The Austrian constitution does not allow noble titles, and therefore, last names represent a relevant issue. In this case, Austria’s reasoning is upheld, and the refusal to change the last name is found justified by the national law, as it represents a key interest to Austria’s society. \(^{312}\)

Hence, the freedom of movement of an European citizen can be restricted under the national identity clause, as the judgment says: “For the Austrian Government, any restrictions on the rights of free movement which would result for Austrian citizens from the application of the provisions at issue in the main proceedings are therefore justified in the light of the history and fundamental values of the Republic of Austria”. \(^{313}\)

Another similar case is Case C-391/09 Runevič-Vardyn and Wardyn, \(^{314}\) where a Lithuanian citizen, together with her husband of polish nationality complained after the refusal of the civil registry of Vilnius (Lithuania) to register both Runevič-Vardyn’s name and her husband’s last name. The affected citizens argued that there had been discrimination on the grounds of race and invoked the enforcement of article 21 TFEU (Free movement) and the Directive 2000/43. \(^{315}\) The name of the Lithuanian citizen was “Małgorzata and Runiewicz”, but the registry said “Malgożata Runevič”, the Lithuanian version of that last name of polish origin. The aggrieved party belonged to a polish ethnic minority living in

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\(^{311}\) ibid.


Lithuania for years.

In this case, and according to Art 4(2) the Court ruled that the EU should respect national identity of its member states\textsuperscript{316}, including the national official language. The Lithuanian rules could therefore be accepted, even if they restricted the freedom of movement, including this aspect in the state’s national identity and therefore under the protection of the National Identity Clause. However, the assessment should be done under the principle of proportionality, meaning that if the national rules restricted too much the fundamental freedom of movement, then they would have to be set aside.\textsuperscript{317}

The cases mentioned so far help us see that the National Identity Clause can be used as a mechanism for the legitimate derogation from European Union norms, both directives and the fundamental freedoms of EU law, such as free movement.

Cases Michaniki\textsuperscript{318} and Angelidaki\textsuperscript{319} can also be taken as an example. In the first case the Court considered a Directive about public procurement contracts that in its own words, is contrary to the Constitution of Greece.\textsuperscript{320} This covers the issue about the prohibition of awarding public contracts to corporations whose owners, shareholders, partners or managers enjoy the same position in mass media; this Directive added causes of exclusion aiming to guarantee an equal treatment and the transparency and at the end the ECJ decided that the Greek provision was incompatible with the principle of proportionality.\textsuperscript{321} The Greek provision therefore had to be set aside.

The same decision was taken by the Court for the case Angelidaki, which refers to the Directive 199/70\textsuperscript{322} and its incompatibility with article 103 of the Constitution of Greece. In both judgments, a conflict between the Constitutional Law of the Member State and the legislation of the European Union (Constitution vs Directive) can be clearly seen. However, none of the Directives were considered to violate Constitutional Rights of special protection; a proof of that is how article 14.9 mentioned by the first judgment was amended in 2001 by the Parliament of Greece; this is, after the existence of the Directive and article 103 appears after the Directive entered into force.

\textsuperscript{317} C-378/07 Angelidaki and Others [2009] ECR I-03071.
\textsuperscript{318} In Michaniki case the Court considered that the Directive 93/38 about public contracts of construction was contrary to the article 14.9 of the Greek Constitution.
\textsuperscript{321} Besselink (n 72) 47.
At this point, it is important to note the difference between one case and the other, as one can observe how in one case, an infringement of the National Identity is found, while on the other, it is not. That is why it is necessary to understand what is included in the term “national identity” and what is not, because, however paradoxical it may seem, two similar situations having different judicial outcomes – concerning the infringement of national identity – could be justified given that, what could be understood as pertaining to the national identity for one state according to its history or domestic law, could be different for another. Naturally, the European Court of Justice plays a key role in this matter, as it determines whether this clause is applied. This topic will be further studied later in this work.323

The concept and Article 4(2) can affect interpretation of EU law, as we see again in case C-393/10, O’Brien v Ministry of Justice.324 This case is raised after the refusal to pay a pension to Mr. O’Brien, on the grounds of his functions having been temporary and partial, according to the 1971 UK Law on Judicial Power and that would imply not receiving the requested benefits. He argued that it was at odds with Directive 98/23325 applied in correlation with Directive 97/81326 (Framework Directive on part-time work), transposed by the UK.

The United Kingdom did not include judges within the rules applicable to workers and the United Kingdom Government stressed the importance of the character of the Judiciary, and its position in respect of the respect for national law. National courts mention that the judicial function is one of the most longstanding and important roles in national law. The question raised here is who -national or European authorities- must determine if the judges are or are not workers in the sense and context of the European Directive.327

In this case the Court indicated that the directives must be interpreted as meaning that it is for the Member States to define the concept of “workers who have an employment contract or an employment relationship”. That is to say, the national definition will be applied instead of European Union Law, but taking into account the effectiveness of the Directive, and only excluding judges from its scope if the national court found that the relationship between

323 Chapter 5 of this document. Determination of the national identity.
judges and the Ministry of Justice was of a special nature, and was substantially different from the relationship of other employees with the Ministry. The ECJ did, however, not accept the argument, from the Government of Lithuania, intervening in the case, that applying the Directive, and EU law, to the national judiciary would infringe Article 4(2) TEU (para 49).

Another cases worth mentioning is a more recent cases, Case C-58/13 Torresi and C-59/13. In these cases, two Italian citizens, Torresi, had studied law in Italy. It was in Italy where they finished their studies, but then they went to Spain to have their qualification recognized, and join the legal profession in Spain, once they obtained their diploma, and they registered as lawyers for the practice in the Spanish courts. Afterwards, they decide to return to Italy and register as lawyers there, following the implementation of the directive 98/5. The Italian registry rejected the registration on the grounds of abuse of rights or fraud, as they went to Spain to obtain the qualification to practice after they faced difficulties in Italy.

In this case, the free movement of persons and the right granted by the Directive to practice law in another member state is infringed. The Italian Government argued for the enforcement of the national identity clause, as the Italian Constitution states that those who seek to practice the profession of lawyer must have passed a state examination in Italy. In addition, the Italian Government argued that there was abuse of rights in this case.

In this regard, the Court considered that no abuse of rights took place, and that the aim of the Directive was to accommodate these cases. What is important in this case is that, rather than using the concept of national identity to interpret the Directive, the Court considered the question of validity, that is to say, whether the Directive was invalid because it did not respect national identity as protected by Article 4(2). Regarding this issue, the Court established that the Directive did not regulate the access to the Italian legal profession, but provided for a procedure to allow lawyers from other Member States to register and practice under their home degree. The Directive did not entail the non-application of a national norm, and therefore, in no case what the Directive establishes can affect the core political and constitutional structures “or the essential functions of the host Member State within the

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meaning of Article 4(2) TEU”

5.3 Conclusions relating to the ECJ’s case law

For the time being, we can say that the European Court of Justice has ruled on the issue of national identity in very few instances, hampering the understanding of the subject. We can summarize, from the above judgments, that it is the ‘core’ of national identity or constitutional identity that the ECJ considers to be protected, and that in most of the cases where Member States invoke the concept, and Article 4(2) TEU, the Court does not agree that there has been an interference with national identity, as it is protected by Article 4(2).

Nevertheless, the European Court of Justice understands that the respect for national identity is something that falls within the scope of European Union Law, and therefore, it is covered not only by domestic law, but also by European Union Law, and thus protected by it. References are made to the idea of preserving the member states’ national identity even against European principles, as one can observe in the Michaniki case, against the freedom of movement principle.

But what happens in the previously analysed case (C-208/09 Ilonka Sayn- Wittgenstein as the evaluation of what we could call “similar” cases –seeking the same respect for relevant national legislation- have different outcomes by the same Court. Well, to find an answer to this question we must simply analyse what was mentioned in the judgment of case Sayn Wittgenstein, as well as the provisions of the Treaty. It follows that National Identity is not applied uniformly or rigidly, but is instead tailored to the member states. Facts such as the political considerations can make the European Court of Justice to determine if we are really facing an alleged infringement of the respect for national identity or not.

5.4 Conclusion

The primacy principle refers to the position occupied by the EU norm, against National Law, fulfilling the mission to enforce the EU Law in a uniform way throughout the Member States.
of the European Union. That without excepting the action available to Member States to use
the National Identity clause enshrined in Article 4(2) TEU, which not only applies against EU
directives, but also over the primacy principle.

Thus, the defence of what must be considered as “Constitutional Identity” is relevant when
it comes to enforcing EU Law, as well as when it comes to creating it, because it would
pervert the norm created knowing that it is not going to be enforced in all Member States,
violating the equality between Member States principle.

As we cannot define the content of the concepts of national identity and constitutional
identity with certainty, using the case law of the Court of Justice, the next chapter will
suggest an alternative way of inquiring into the meaning of the concepts.
6. Forms of determination of the national Constitutional Identity

6.1. First Approach

To date, there is no specific norm or rule to follow to determine the national Constitutional Identity. One of the reasons for this to happen is because no legal text exists for the European institution to know what can be understood as national Constitutional Identity, and another reason is the different points of view Member States of the European Union have concerning this topic.

As suggested by Grewe, the forms of identification of the fundamental structures inherent in the national constitutions are primarily to be found in both in the constitutional texts and in their interpretation by national courts. In addition, we have to consider how the Court of Justice interprets Article 4(2).

Given that the doctrine does not possess one voice to determine the forms of identification of the National Constitutional Identity. Her analysis on the national Constitutional identity does not draw from absolute premises but she rather makes an analysis of the different situations in the juridical frame that enable the identification of methods for the recognition of the national Constitutional Identity and therefore its application and protection under article 4(2) TEU.

This chapter will not analyse the judgments aiming to determine the forms of identification of the national Constitutional Identity since.

Therefore, without trying to resolve definitively the problematic on the methods of identification of the national Constitutional Identity, we will analyse the methods used in the most important jurisprudence.

6.2 Constitutional Texts

Article 4(2) TEU, although it does not define the Constitutional Identity, it does give a set of guidelines to enable some of its elements. These elements are for example the inherence in their fundamental structures, political and constitutional, respect their essential state functions, including ensuring the territorial integration of the states and the safeguard of


338 ibid.

339 ibid.
national security.\textsuperscript{340}

The elements addressed in the previous paragraph talk clearly about the Member States' constitutions, as well as the similarities between them. But in this chapter I analyse the Member States Constitutions, because that way we can determine what National Identity is, given that it is related with domestic law.

Therefore, it is common to use indiscriminately the terms National Identity and Constitutional Identity, because both refer to the same thing, constitution or domestic law. That is why first we have to study and understand which the method is to identify the national Constitutional Identity by analysing the Member States' Constitution.\textsuperscript{341}

Nevertheless, we must differentiate between the very core of the Constitution and the ordinary so-called constitutional laws. The first define the fundamental structures of the country, which result in the determination of National Identity of the Member States. That is why finding the constitutional core is decisive.

In order to do so, it is necessary to start looking at the different existing ways to determine the constitutional core and that is why it is very important to pay attention to the concepts of amends or the so called “constitutional revision” procedures. In the European comparative law different ways exist for the Member States to change or modify their respective constitutions, but there are three that are more important or widely used.\textsuperscript{342}

The first method is the “substantial” conception (also known as material). In this case the Constitution is considered part of a hierarchy of norms where some of them do not admit the possibility of amendment. That means that some norms cannot be changed or in other words, its change would be equivalent to the abolition of the Constitution. This conception makes it easy to understand, because these rules can be considered as the constitutional core, while the rest of the articulate – those provisions that admit the possibility of amendment- are not.\textsuperscript{343}

One example of material conception in the review of the constitution is article 288 in the Portuguese constitution. In that article we can find the norms whose revision shall be restricted. Constitutional revision laws shall be restricted for example for those norms concerning national independence and the unity of the state or the republican system of government, as well as those norms referring to the rights of workers, workers’ committees and trade unions.

\begin{itemize}
  \item Elke (n 1) 166.
  \item Grewe (n 337).
  \item ibid 40.
  \item ibid 40.
\end{itemize}
Other examples of the explicit limit of Constitutional amendment in the Member States of the European Union can be found in the German Constitution in article 79, paragraph 3 or in the Greek constitution in article 110, paragraph 1.  

The second is the “procedural conception”. This refers to two different ways to amend the constitution: one for a partial reform and the other one for a total revision. Unlike the substantial conception discussed above, this conception is characterized by the reforms’ technical aspect, and not its material features.  

Countries like Spain, Malta, Poland or Austria use this system. In the Spanish constitution, reform under the aggravated procedure is reserved to norms that because of their importance in society have to be protected and have stability, that is to say that the simple change of government do not involve its change, or that a tumultuous period affecting the country does not involve its modification or derogation. That takes place in the preliminary title of the Spanish constitution. Therefore, such protection is given to certain norms, those which occupy a relevant position in domestic law.  

To be more precise the Spanish procedural hurdles are manifold. The provisions that possess this normative status not only are affected when it comes to their development (that is to say, special provisions that require an exhaustive development, for example the “Leyes Orgánicas” in Spain, which have a material reserve) but also upon modification, as a special aggravated procedure must be followed, different from the ordinary procedure, that will require the participation of two different governments. As a matter of fact, once the modification of these norms is approved, the Chambers (Congress and Senate) that accept this modification will be dissolved and new representatives will be chosen, who will vote again and apply the modification, finishing with a referendum.  

The third and last conception of constitutional amendments is the “formal conception”. From a technical viewpoint, there is no difference between the different norms inside the constitution. That means there is only a single procedure for constitutional amendments and that gives the ability to review all norms within the constitution, because it does not create provision, or excludes any article from a possible modification.  

In the words of Constance Grewe “No distinction has to be made between the original and

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344 Entela Hoxhaj and Florian Bjanku, ‘The Basic Principles as Limits of Constitutional Revision in the Constitutional Jurisprudence and Doctrine in Europe’ [2013] (Published by European Centre for Research Training and Development UK) see further <www.ea-journals.org> (Vol.1 No 3, September) p.48

345 Grewe (n 337) 42.
the revised constitutional norms which have the same constitutional value”. On the whole, this reinforces the idea that formal conception does not generate any conclusion concerning the constitutional core.

6.3 The preamble in the constitution

Results of the study about the constitutional core make necessary to study also the introductory provisions of constitutions. As we know, almost all Members states of the European Union enjoy a written constitution, with the exception of the UK, and some of them include what is called a Preamble.347

The preamble of the Constitution can be defined as the solemn declaration of the purposes of the constituent that expresses the standards, principles and needs of a state's population. This is a reformulation of rules and regulations later present in the constitutional text as numbered provisions. The preamble contains the goals, and permanent principles and values of a population with a political awareness and political organisation. With this in mind, we must acknowledge that a preamble always contains ideological content, which will reflect the prevailing ideology in that moment in time, and the cultural and political background of the moment.

The preamble has two principal functions. The first function is that it refers to the historical moment in which the Constitution is developed, as well as expressing the desired future. The second function of the preamble, and the most interesting for this paper is that it evokes the essence of the constitution, or in other words, its core. Henceforth, it makes sense that this last preamble function, as expressed by Constance Grewe, is vital to determine the national Constitutional Identity.

This introductory part in the Constitution contains two different types of provisions. The first refer to the State and of course its institutions, while the second provisions address the constitutionalism and the constitutional substance.

The first of these are the institutional. In this kind of provision subjects like language, capital, territory, political and sovereignty among other the similar characteristics are included. The second are the constitutional provisions. In this case the preamble is more open and makes special reference to democracy and fundamental rights. A pertinent example of that is the Spanish Constitution, which in the preamble establishes the principles of justice,

346 ibid 43.
347 ibid 45.
liberty and security, and the aim to promote the wellbeing of all its members in the exercise of its sovereignty. It also proclaims that it will guarantee democratic coexistence under the Constitution and the law, in accordance with a fair social and economic order.

As can be noted, the Preamble or Introduction in the Constitutional text has a bipolar content. This will require the use of preferences highlighted in the introduction. This means that looking at the special expressions on the text, expressions like “inviolable”, “inalienable”, etc. These adjectives show preference.\textsuperscript{348}

### 6.4 National Constitutional Court

We also need to pay special attention to the case law. To be able to determine the national Constitutional Court, it is important to define the core of the constitution. For the interest of the topic it is really important to understand the opinion of the national court in 3 different scenarios, the constitutional opinion about the substantial revision of the Constitution, the constitutional case law in the case of procedural conception, and the preferences highlighted in the introductions. To analyse this, it would be necessary to do a comparative analysis of all the member states, as it gives us the opportunity to better understand what the opinion of the Constitutional Court is.

The first scenario, the “substantial Constitutional review” takes place in a case explained by Grewe.\textsuperscript{349} It concerns France and Italy. Both countries the Constitutional Courts do not take the written texts into account or in other words, the Constitutional Courts interpret the constitutional text and with that interpretation holds that the constitution making power is sovereign. Regarding France, the Constitutional Council has 2 important judgments that confirm the notion of the Constitutional Council being a constituted power.\textsuperscript{350} The first judgment took place when France needed to ratify the Treaty of Maastricht (9 April 1992 – 92-308 DC. Maastricht II), in these circumstances the Constitutional Council declared "that it would be possible for it to oppose any amendment to the Constitution with fundamental or supra constitutional principles that would be intangible".\textsuperscript{351}

The second of these judgments declared certain provision about the right of asylum of foreigners against the Constitution of France (Decision of 13 August 1994). In this case the

\textsuperscript{348} ibid 46.
\textsuperscript{349} ibid 41.
\textsuperscript{351} ibid.
Constitutional Council declared that incompatibility because certain provisions of an Act were against the Constitutionality Principles. The problematic in this case occurred when the Government obtained for the French Parliament a constitutional amendment for that incompatibility did not take place.

The importance of the second judgment, mentioned in the previous paragraph, is due to the analysis made by the French jurists, because that insight illustrates very clearly that the dominant French doctrine defends that “unconditionally submits the constitutional judge to the constituting power both in its derived form (amendment of the Constitution) and in its primary form (establishment of the constitution)”.352

It can be easily noticed that this part in the constitution represents the most important or relevant in the nation, as we can observe clearly in the Constitution of France or Italy, because both countries forbid the change of the system of government. To be more specific, France believes in the idea of the Constitutional Council not having the competence to amend the constitution, when it affects the system of government.

That makes impossible to try to change the system of government (for example changing from a republic to monarchy) only with a review of the French constitution. This suggests that France's approach to amendments is not substantial, but rather formal.353

Italy, unlike France does not maintain that “the constitution making power is sovereign”. The Italian Constitutional Court and Italian doctrine, add other material limitations, apart from the already existing ones. These kinds of limitations are divided in two, the first make reference to the inviolable right and the second to the fundamental principle. But the similarity between both is the idea of there being implicit and unexpressed or unwritten limits.354

The second scenario is the procedural conception and the opinion of that in the case law of the national court of the Member States is that case law does not give a definitive solution about the existing problematic concerning the procedural conception but confirms the ambivalence of it. Grewe also divides Member States in two groups to be able to explain the situation like she did to explain the procedural conception.355

There are basically two groups of countries. Those belonging to the first group differentiate between the procedures to amend the Constitutional text. This group is also

352 ibid.
353 Grewe (n 337) 41.
354 ibid.
355 ibid 43.
divided in two; the total review and the partial review. In the groups can take the example of Lithuania and Latvia in both countries the Constitutional Courts have been reluctant to any review of the constitutional text and make a really strong differentiation between the partial and total review, this last is almost impossible to amend. This reflects the importance of these precepts.\textsuperscript{356}

To be more precise the Constitutional Court of Latvia has concluded in its judgments that Article 1 of the Constitution includes such general principles of law, principles such as democracy as well as the principle of separation of power because they are explicitly mentioned in article one (1) of the Constitution of the Republic of Latvia, which defines the country as an “independent democratic republic” among other principles.\textsuperscript{357}

And these principles are an important part of the basic state laws, and that is why the amendment procedure to follow is necessarily the total revision process, because these principles are part of the core of the Constitution.

The second group is different from the first, as in this case, there is no relevant difference between the constitution amendment process, whether it is partial or total. This group is characterized by a strong jurisdictional control over the rule to be changed and to the process used to modify it. Austria and Bulgaria are among the countries that use this system.

In Austria for example it is possible to change the Constitution as it allows, in its article 44, paragraph 3 B-VG, total reviews to the Constitutional Text. Austria's Constitution is close to the variant of “formal conception” as the total revision does not represent a more complex process than the partial revision. Grewe concludes that the judicial control always depends on a review of the constitutionality and the formulated in terms of competence and not in terms of substantial inconsistency.\textsuperscript{358}

On these grounds, we can conclude that some limitations to the constitutional amendment exist. These limitations intend to identify and protect the characteristic elements of the Constitutional text, to ensure the preservation and continuation of the legal order and the principles of national Law. This creates an alleged non-derogability of the basic principles of the legal system. It can also be concluded that in this two first scenarios the “uncodified constitution” and the correct acknowledgement is given by the specific study of the case-law

\begin{footnotesize}
\textsuperscript{356} ibid.
\textsuperscript{358} Grewe (n 337) 43.
\end{footnotesize}
and the doctrine of the States and this caused of the some systematic interpretation about “*the implicit limits are not directly expressed in the constitutional text, but they derive from its systematic interpretation and presume the impediment to change some institutes or some principles set as the base or the core of the constitutional text*”.359

In the last scenario it is really interesting to analyse the case-law to be able to see how this is interpreted in the different member states concerning the preferences highlighted in the introductions of Constitutional texts. In this context we can find different points of view. A closer look at the jurisprudence concerning the topic of sovereignty brings us the case of Romanian Constitutional Courts where the Court understood “*the sovereignty is an absolute and exclusive state-attribute to an open constitutional system where sovereignty is limited and shared*”.360 Or the Czech Constitutional Courts, which highlighted the democracy and fundamental rights. Along these lines, France Constitutional Council defined the conditions for the exercise of sovereignty and in the particular case of the Spanish Constitutional Court, which defined the Constitution as a supreme norm in the domestic sphere. This Spanish case will analysed in the next chapter.361

In general it is possible to say that there is no single method for the identification of the constitutional National Identity. It is also possible to endorse the words of Grewe used in her conclusion about this topic, which means that it is necessary to look not only at the Constitution text of the Member State to understand what is part of the national Constitutional Identity but it is also necessary to take into account the case-law, because as could be noted in the examples given in these previous paragraphs, case-law often completes the principle of law in domestic law.

That convergence of the Constitutional text and the case-law seems to represent a varying association between institutional and substantial elements which only apply to each Member State.362

But this values give no clear or absolute definition about what conforms the national Constitutional Identity in the Member States, as it is only a part of the process to determinate that. The active role played by the European Court of Justice is very relevant, because it will decide- in applying European Union Law- what it is the core of the constitutional text in the domestic law.363

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359 Entela (n 344) 56.
360 Grewe (n 337) 47.
361 ibid.
362 ibid 48.
363 The Court of Justice interprets EU Law to make sure it is applied in the same way in all EU countries. See further
7. National Constitutional Identity in Spain

7.1 Approach
In the present work we use the German, French, and Italian case-law repeatedly, to argue the different theories about the issue of National Identity, for obvious reasons. In the present subsection, we will analyse case-law different from the one already studied before, and that is why we will focus on the Spanish scenario, and for that, we will call upon the words of Pérez Tremps.364

The first thing we have to do to be able to better understand the Spanish doctrine and case-law concerning National Identity is analysing what concept concerning the issue of National Identity exists in the country, and above all, observing what use they give to it. We must take into account that Article 4(2) TEU is a new concept in the sense that it can be judicially applicable. There is not a unanimous view about it, and we cannot talk about a definite model in the Spanish case.365

In Spain, the “National Identity” expressed by Article 4(2) TEU is a concept composed of both the ideas the first about what the European Union law considered about this concept and secondly the idea about this concept from the members states. Not only the is taken into account to define National Identity; the Union Treaties are also taken as reference to be able to determine what is or is not National Identity, accepted by European Union Law. Certainly, this dualistic relationship of the concept of National Identity may strike as difficult or complicated. We must add to the already said that the concept of National Identity lies halfway between the concepts of sovereignty and integration. The first of those responds to national sovereignty, and the second to European integration.366

Pérez Tremps states that “National Identity is merely a concept subsumed in the dialectics of protecting the State within the dynamics of integration, and in the national supranational and sovereignty integration debates”.367 From this point of view, National Identity has born with a clear purpose: to preserve those key elements that are a part of the legal structure of a Member State.

365 ibid 263.
366 ibid.
367 ibid.
The second aspect we have to analyse to understand National Identity from the Spanish legal system point of view is the notion of the “basic structure of the legal system”. Thus, we can say that in general terms, those key or fundamental elements of a Member State’s national legal system are gathered in the so-called “cláusulas europeas” (European Clauses), that are found within the Constitution. In other occasions, we must understand these key elements in an implicit way, finding them mainly in the case-law of the state at issue.\textsuperscript{368}

From the previous paragraph point of view, and in the words of Perez Tremps,\textsuperscript{369} it can be said that the difference between the concepts of National Identity and Constitutional Identity is not clear, and in many times both these concepts are mixed or used as synonyms, as occurs in the Spanish case.\textsuperscript{370}

\textbf{7.2 Historical Background}

First of all, we have to understand that practically all the Member States of the European Union accept the supremacy of European Union Law before s. This is evident from the use of the “European Clauses”, also known as “integration clauses” or “fusion clauses”. Nevertheless, this opinion changes when we talk about the existing relationship between European Union Law and the national constitutional law of some Member State. In this case, the supremacy of European Union Law is rejected, or accepted under strong pre-established limits, found in the constitutional principles.\textsuperscript{371}

The idea of the existence of certain elements in national constitutions that cannot be modified, and furthermore, that have to be respected by the European Union, creates, in the words of Pérez Tremps, a “Constitutional Deficit” integrated by terms such as “democracy” and “freedom”.\textsuperscript{372}

But the idea of National Identity not only refers to these principles; it also refers to the fundamental structures of the Member States, understood as the structure that represents a whole country, and is not shared with others, or at least not in a meaningful way. Hence, even though the democracy principle is enshrined by both French and Spanish Law (it can be considered as part of the National Identity), another term, such as the form of government

\textsuperscript{368} Pérez (n 364) 264.

\textsuperscript{369} ibid.

\textsuperscript{370} ibid.


\textsuperscript{372} ibid.
(that can also be considered a key element to the state’s structure), can not only be different, but completely opposed (for example, Republic and Parliamentary Monarchy).

That peculiarity is the one that causes in the Spanish legal system the collision between the idea of National Identity and its defence, and the idea of integration at the European level. That said, Spain has an (at least) peculiar territorial system, and some consequences arise from the fact that many times the collision with the European legislation comes not from the National Identity, but from a territorial identity, of one of the territories within the country. Other times, National Identity and its respect may be ascribed to a certain part of the state, different from the rest. The idea may seem difficult to understand, due to the singularity of the Spanish territorial model.

The Spanish territory is divided into autonomous communities. Although the Constitution establishes equality among all the regions, and uses terms such as “solidarity” to refer to the relationship between them, the truth is that some territories enjoy certain tax advantages while others do not. For example, the Basque Country has these advantages, but it is not the only one, as Navarra does too (for cultural heritage reasons).

This peculiarity collides with the scheme of tax concessions, as the European Union establishes an incompatibility between that kind of concession by the Member States -that distort the competence, favouring certain entities- and the idea of a common market.373

Bearing in mind that the Basque Country enjoys a favourable status different from the one applied to the rest of the autonomies of the State, one might ask if this differentiation collides with European Union Law. The judgment by the ECJ 11 September 2008 C-428/06 (Case Basque Country) sought to resolve this issue. It stated that, just as it happened in the case 88/03 Portugal Republic against the European Communities (Azores case), in the Spanish case, the fiscal singularity responds to historical reasons, as reflected in the Spanish Constitution, and therefore, the tax regime is, in principle, legitimate.374

7.3 National Identity in the context of Spain

As it was stated previously375, the “European Clause” helps us determine the relationship between the Member State and the European Union. In the Spanish case, the integration clause can be found in Article 93 of the Spanish Constitution, and provides that

373 Consolidated Version of the Treaty Establishing the European Community. Article 87.1.
375 Chapter 4 on this paper.
“Authorisation may be granted by an organic act for concluding treaties by which powers derived from the Constitution shall be transferred to an international organisation or institution. It is incumbent on the Cortes Generales or the Government, as the case may be, to ensure compliance with these treaties and with resolutions originating in the international and supranational organisations to which such powers have been so transferred”.

This clause can be interpreted in favour of the integration, because, as Pérez Tremps indicates, Article 93 constitutionalises the European integration. Furthermore, this clause forces the Constitutional Court of Spain to take it into consideration when applying the Constitution. That means that the Constitutional Court interprets the existing relationship between the Spanish State and the European Union, according to Article 93.

That same court established the relationship between the State and the European Union, as well as the interpretation that must be made of Article 93 of the Spanish Constitution, via two decisions. The first of those is the decision about the “Treaty on European Union” (DTC 1/1992), and the second one is about the “Treaty Establishing a Constitution for Europe” (Declaration 1/2004). The latter will be analysed in the next chapter.

The first decision stressed that Article 93 should not be used as an instrument to contradict or oppose mandates or prohibitions present in the fundamental norm, but it indicated that it was in fact conceived as a constitutional mean of integration for the Spanish state in the European Communities. That is why this Article is a key constitutional support for integration.

Now we will analyse the -undoubtedly- most relevant decision by the Spanish Constitutional Court about the issue at hand, the Declaration 1/2004.

7.4 The Spanish Constitutional Court: Declaration of the Spanish Constitutional Court 1/2004

The statement of the Spanish Constitutional Court (DTC). From 2004 was not the first declaration of the High Court on the issue of the compatibility of the Spanish Constitution of 1978 and the Treaty of the European Union. The DTC 1/1992 caused by a possible
incompatibility of the constitutional rule with the Treaty of Maastricht, ended with the Spanish Constitutional Court deciding and declaring the supremacy of the Spanish Constitution against international treaties, which was extended to treaties by which powers derived from the Constitution are transferred, it relied on Article 93 of the constitution.\textsuperscript{382}

The DTC 1/2004 of 13 December 2004 has its origins in the request made by the Spanish government itself to check whether there was any contradiction between the Spanish Constitution and from the dissipations that were included in the treaty establishing a Constitution for Europe was established.

It is therefore of remarkable importance the resolution that the judgment had for both Spain itself and the European community as a possible rightness or wrongness Spanish High Court could see played an important role in the referendum held in Spain on the occasion of the constitution.\textsuperscript{383}

The DTC 2004 addresses multiple issues. In the following lines we will just analyse two aspects relevant to this thesis. The first aspect to be analysed is the special care and dedication that the Spanish High Court has on the thorny issue of constitutional supremacy and rule of law in the European Union. The second issue that will be discussed is the problem of the coexistence of Courts responsible for the protection of fundamental rights in Europe.\textsuperscript{384}

The first subject to address is the source of controversy, that is, the existing conflict between the primacy of European Union Law and Constitutional Supremacy of the Member State of the European Union. Concerning this topic, the DTC takes a particular point of view, establishing that constitutional supremacy is not compromised by acknowledging the primacy of European Union Law. The basis of this very argument lies in the fact that it is the constitution itself (for example, in Article 93 Spanish Constitution) the one that accepts the primacy of European Union Law. Furthermore, the DTC also mentions that such primacy is attributed by the state, and therefore, those competences can be revoked (voluntary withdrawal), the same way they were transferred to the EU in the first place. And finally, we must insist on the fact that the concession of competences is not unlimited, as it has to be compatible with domestic law, and in the case of Spain, with the fundamental principles

\textsuperscript{382} Article 93 of the Spanish constitution.

\textsuperscript{383} The referendum on the Treaty establishing a Constitution for Europe was held in Spain on February 20, 2005, to consult citizens if Spain should ratify the Constitution of the European Union. The result was a victory for the 'yes', with 77\% of votes.

present in the Constitution.385

According to Silva García, the existing problematic between the primacy of European Union Law and Constitutional supremacy lies in the relationship between them, as he understands that the Constitutional Court or its equivalent has the role of defining what the constitutional provisions establish when transferring competences, while the ECJ has the role of defining the terms in which those competences transferred are received, bearing in mind that we are using “transfer of competencies” as a synonym of “transfer of sovereignty”.386

Although the statement has its detractors, in principle it is understood that today the Community rules are adopted by the executive powers of the Member States of the EU and not by a body elected by the citizens, this situation causes on the one hand what is known as a process of integration and acceptance by other Member States, and on the other hand, the constitutionalisation of the EU treaties.387

The situation described in the previous paragraph is known as a “democratic deficit”. It can be defined with the idea that the European Union and its agencies suffer from a democratic deficit.388 This situation entailed the need for the Member States’ Constitutional Courts to speak out about the constitutional deficit, due to the expansive EU doctrine in the legal competence field.

There are two views about the subject. The first one concerns the ECJ, which establishes that European Union Law is an independent and autonomous branch from the Member States’ domestic Law, and that autonomy is the main reason why the primacy principle says that EU Law prevails not only over domestic laws, but also over the constitution. The second view is the one that Constitutional Courts yield, saying that the primacy principle is limited when the norm collides with constitutional principles.389

Therefore, two very different points of view have made clear that the Community system is a new autonomous system of law and for this reason has primacy over national constitutions. This is the view of the European institutions390 and of the Courts of Justice of

386 Garcia (n 259) 259.
387 ibid.
388 See further: <http://europa.eu/legislation_summaries/glossary/democratic_deficit_en.htm> ("Democratic deficit: The democratic deficit is a concept invoked principally in the argument that the European Union and its various bodies suffer from a lack of democracy and seem inaccessible to the ordinary citizen because their method of operating is so complex"). Accessed 04 December 2015.
389 Garcia (n 259) 260.
certain Member States: on the other hand, the German perspective, which we have already analysed in this work as Solange I, Solange II and Maastricht have made it clear that the primacy of European Union law is limited by the supremacy of their constitutions.

The DTC 1/2004 answers the controversial question, namely whether the principle of primacy of EU Law, expressly recognised in the treaty establishing a Constitution for Europe or whether this is or is not contrary to the principle of supremacy of the Spanish Constitution of 1978. The High Court concluded negatively to this statement, it is supported on the following issues, issues which I will detail the importance of them from of point of view of Silva Garcia:391

1) The Treaty establishing a Constitution for Europe expressly arises from the exercise of the powers conferred to the EU.

2) This concession of competences from the Member States to the EU is not unlimited. It is made and is accepted as long as it remains compatible with the guiding principles of the legal system at hand. The DTC establishes that these material limits are expressed within national sovereignty, the basic fundamental structures of the state, and the fundamental principles of the constitutional order. That said, the DTC provides that, while the concession is not unlimited, the treaty that was subject to study at the time (the Treaty establishing a Constitution for Europe) did not collide with Spanish Law. For that matter, the Spanish Constitutional Court said that the Treaty respected said limits.392

3) The said Treaty expressly mentions respect for the identity of the Member States.393

4) The constitutional limits before the Treaty by EU Member States appear proclaimed by the Treaty.

5) The DTC provides that the EU should exercise its non-exclusive competence in accordance with the principles of subsidiarity and proportionality. This results in an obvious limit to the expansion of powers previously held the European Institutions.

6) As earlier pointed out, Article 93 of the Spanish Constitution is the proof that the very Constitution accepts the primacy of EU Law, and, as it has been said before, that primacy refers to a delimited scope.

The second issue addressed in DTC 1/2004 is certainly as an important phenomenon as the previous above, and concerns the existing problems when there is what is called “judicial

391 Garcia (n 259) 259.

392 Article 1 of the Spanish Constitution: “Spain constitutes itself into a social and democratic state of law which advocates liberty, justice, equality, and political pluralism as the superior values of its legal order”.

Something that has been accepted by the European doctrine is that the European Court of Justice is the responsible at the EU level for the protection of fundamental rights, even in the absence of any standard or reference in a treaty of its jurisdiction.

Thus, the DTC 1/2004 dedicated lines to this problem mainly because the Treaty establishing a Constitution for Europe is incorporating the Charter of Fundamental Rights to thereby become binding once the treaty enters into force.

The DTC 1/2004 analyses what was the constitutionality of the system of law that wanted to settle down in that Treaty, since it is easy to imagine that accepting it could cause a delicate situation in law not only at European level but internally member countries of the EU. Spanish High Court understood that what was established by the Treaty was not contrary to the Spanish Constitution of 1978.\footnote{395}

That decision was argued applying Article II-113 of the Treaty which provided that nothing in that Charter should be interpreted as restricting or adversely affecting human rights and basic freedoms as recognised in their respective fields of application, by European Union Law and inter and by International Agreements to Which the Union or all the Member States are party, treats including the European Convention for the Protection of Human Rights and Fundamental Freedoms, and by the Member States' constitutions.\footnote{396}

The court concludes this argument indicating that the role of the European Court of Justice is crucial to understand the process of European integration and the protection of National Identity, as it is the guarantor of such securities.

\section*{7.5 Conclusion}

National identity and its relationship with EU Law is a concept that does not arise nor is developed hand in hand with the doctrine or the Spanish case-law, but rather reproduces it. The Spanish case-law echoes what the foreign case-law has said concerning National Identity, mainly the Italian and German case-law.

The respect for National Identity enshrined in Article 4(2) TEU, as well as the principle of supremacy of EU Law over constitutional laws have not been addressed in practice by national courts. In any case, that has not prevented the Constitutional Court to endorse the

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395 García (n 259) 259.
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396 Ibid.
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concept given previously by the Italian Court about Constitutional Identity, and especially about the relationship between European Union Law and the Constitution, bearing in mind the cases Solange I & II of the German case-law.

Respect for National Identity in the case of Spain addresses the respect for the democratic state, as well as the fundamental rights enshrined in the “Carta magna” (the Constitution). The problematic issues of the Spanish case lie in its peculiar territorial division and the relationship between that division and EU Law, as well as the equality principle between Member States. This problematic still goes on, with no clear way to solve it. Nonetheless, both the National Identity concept and the Constitutional Identity concept are considered synonyms.

Finally, it is worth mentioning that the contribution of the DTC is key to understand the existing relationship between EU Law and Spanish constitutional Law. Even though what the DTC defends the not confrontation between a future Constitution for Europe and the very Constitution of Spain, it addresses certain issues such as the primacy principle limits.
8. Conclusion

The Primacy Principle plays a fundamental role when it comes to understanding the relationship between European Union Law and Member States’ Law. This is not only for the application of norms, as it is beyond dispute the fact that European Union Law takes priority over national Law, for the simple reason that states are the ones that hand over their competencies to the EU. Furthermore, it helps us better understand the mandatory nature of EU provisions.

The direct effect of European Union law, first established by the case Van Gend en Loos is linked with the Primacy Principle. According to this case, we could say that the European Union Law not only creates obligations for Member States but also rights for individuals. It follows from the previous sentence that it is not necessary that all member states enforce the European Union law in their national law for it to have direct effect. This is a complex assessment, which always involves a proportionality analysis, this is because in cases such as Michelinki and Runevic, after a proportionality test the country may have to comply with EU law, so your conclusion must show that you understand that there may be a different outcome in different cases and that even if national identity can be a legitimate ground for derogation, the test of proportionality may mean that the Member State has to comply with EU law in any event.

But that would mean that the Primacy Principle could eventually infringe upon the cornerstones of a society, by enforcing norms contrary to the domestic legal system of some member state. The National Identity Clause was introduced as a mechanism for the defence of the European Union Member State’s national sovereignty. This is in part due to the fact that the European integration process involved, among other aspects, a greater intervention of the European politics in the citizens of the different Member States lives; as well as the fact that the plurality of the countries that form the EU complicated the creation of policies that respond to the same values in all the countries.

The Primacy Principle is established in the famous judgement Costa vs ENEL, confirming the full force of European Law. Said principle plays a key role in the uniform application of European Union law by the member states. It is of great importance because it helps us better understand the way it is implemented and to determine if the Primacy Principle can be considered as absolute.

National Identity, despite not being a novel topic, is a current issue. This is due to the major difficulty of defining what National Identity is. As elaborated in this paper, National
Identity is understood by the Doctrine as “Constitutional Identity”, and this is, in our opinion, the vision that better coincides with the European case-law.

We must not forget that although Article 4(2) has broken into EU Law, National Identity, as well as the term “diversity” both from the regional and national points of view found their place in European Union Law in Maastricht and of course in the so-called “Constitutional Treaty”, though undoubtedly the express mention to the fundamental political and constitutional structures has had far-reaching effects in the way of legislating in the EU.

As we have analysed in the present paper, the National Identity clause plays a key role in the integration process, as its objective is to protect identity, and therefore what makes every Member State different, and not what links them, although in my opinion, the National Identity Clause what really induces is a “halo” of trust and confidence, as the Member States see in that clause a way out of those policies that could be seen as intervening too much, without involving any kind of renouncement to the integration process.

We must note that even though the Primacy Principle means that European Union Law must take precedence over national law, there is an exception: those norms that belong to the “Constitutional Identity”, and therefore must be defended against the European Union Law primacy. In this way, we could conclude that the European Union primacy is not absolute.

Taking into account that we understand National Identity as a simile of National Constitutional Identity, we can comprehend the importance and relevance of the key role played by the Member States’ constitutions in connection with the Clause of National Identity. This situation makes us want to know which tenets are the ones that deserve protection from European Union Law.

Against this background, we have found the so-called “hard core” of the Constitution that in the present paper plays a fundamental role to define what must be understood as National Constitutional Identity, without it being the only factor to be taken into account. We have to look at how the member states interpret the National Identity clause, using the examples of Germany and Spain, among others, which we have studied in this thesis. We can state that there are a number of common points of reference when it comes to determining what must be understood as National Identity. Through the study of those judgements we can arrive at the conclusion that there is a need for the respect to national identity by protecting the fundamental norms of member states, normally visible through their Constitutions. We could say that Constitutional Identity is part of National Identity, as we can only understand the first concept if we consider that it is created from the latter, and therefore not independent.

But as we have noted throughout the current thesis, we have to take into account not only
the opinion of National Courts, but also the opinion of the European Court of Justice, even though there have not been many cases concerning National Identity, which makes it difficult to comprehend. Among the few cases studied by the ECJ we can find cases Frontini and Sayn-Wittgenstein (the first case that mentioned Article 4.2). Both judgements understood that the European Integration could not be carried out by contravening the fundamental core of member states constitutions.

National identity is a complex concept that expresses some kind of meta-constitution, understood as a set of existing norms or constitutional principles that define the significance of other constitutional norms that coincide in a textual level with norms from different political communities. Constitutional Identity can be defined as the sum of those features that characterize in the political-legal point of view, the fundamental options of a community against other states or international or supranational organisations.

Moreover, we also cannot say that a single unique and exact definition exists of the concept of National Identity. Among other reasons, it is because there is not an authority responsible for defining it, as we have argued in the present work: national courts analyse national laws and the ECJ analyses the enforcement and respect for European Union law. The concept of National Identity cannot be associated to just one of them. Thus the idea that the European Union law and constitutional law of member states should be appreciated to understand the definition of national identity is the most accepted theory.

The Primacy Principle refers to the position occupied by the European Union norm, in connexion with National Law, in order to enforce EU law and ensure its uniform application in all Member States of the European Union. That without ruling out the possibility for Member States to use the National Identity clause enshrined in Article 4(2) of the EU Treaty, which applies not only against EU directives, but also over the principle of primacy.

Therefore, the defence of what should be considered as "Constitutional Identity" is relevant when enforcing the EU law, as well as when creating it, because it would pervert the rule created knowing that it will not be enforced in all Member States, violating the principle of equality between Member States.

Concerning the primacy principle and its relationship with the National Identity clause we could say that in fact, National Identity implies an exception to the primacy principle, as it allows the preservation of the Member States’ diversity. That is why we could say that National Identity clause enables Member States to ignore the primacy principle in certain cases such as the Ilonka Sayn-Wittgenstein case, Michaniki case, Runevič-Vardyn case, or Commission v Poland.
Ultimately we could say that the Primacy Principle is not in question and that there is no 
doubt regarding its importance to understand the relationship between European Union law 
and member states’ domestic law. But also this principle cannot be understood as an absolute 
principle with no exceptions and one of those is undoubtedly the exception found in Article 
4(2) TEU. We could surely say that the Primacy Principle prevails over national legislation 
and even over the constitutional law of member states, but that national identity is an 
exception to that principle as EU law may not contravene national identity or constitutional 
states. It gives member states the possibility to ignore the principle of primacy when it 
violates the basis of their identity as a state principles. This not only understood as an 
exception to the Primacy Principle -which among other things is a principle developed by the 
case law- but as a clear exception marked by the TEU itself.
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