Master’s Thesis in EU law
30 ECTS

Application of National Identity in EU law

A case-law analysis of the Court of Justice’s application of national identity in the fields of fundamental rights, internal structures and the free movements

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Abstract
The European Union is through Article 4(2) TEU under an obligation to respect the national identities of the Member States. This obligation can potentially conflict with the objective of furthering the integration between the Member States. Such conflicts ultimately need to be solved by the Court of Justice of the European Union. Claims based on national identity have long been rare, but recent years have seen an increase in cases with such claims before the Court of Justice.

The aim of this thesis is to analyse how the Court of Justice has applied Article 4(2) TEU and national identity in its case-law. In order to achieve this aim, the analysis focuses on cases concerning national fundamental rights, national fundamental structures and internal organisation, and national identity limiting the free movements. Special attention is given to recent cases, including case M.A.S., M.B., C-42/17, case Remondis v Region Hannover, C-51/15, and case Coman and Others, C-673/16.

After an examination of cases in the mentioned spheres, it is concluded that the Court of Justice applies Article 4(2) TEU differently depending on the legal context. Even if guidelines and possible rules on the application and the legal consequences of Article 4(2) TEU can be found within the different spheres, these findings cannot be extrapolated into a common and general rule for all cases involving Article 4(2) TEU. The respect for national identity and application of Article 4(2) TEU is therefore found to be a diverse rule with different legal consequences depending on the relevant legal area.
1 Introduction

1.1 Background

Since its beginning, the European Union (EU, or the Union) and its predecessors have strived to an ever closer relationship between its Member States, today expressed as the “process of creating an ever closer union”. However, alongside this progressing integration, Member States also want to safeguard their national interests, some of which have been considered to form part of “national identities”. Since the Maastricht Treaty entered into force, the EU is through an explicit identity clause under the obligation to respect the national identities of its Member States. Since national identity is indeed national, but the EU strives towards integration at Union level, there is a potential tension between this respect for national identity and the creation of an ever closer union. This tension has become more visible during recent years, with national politicians stressing national identity, national courts developing the judicial concept of constitutional identity, and Member States more frequently invoking this concept before the Court of

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1 Cf. Treaty Establishing the European Economic Community of 25 March 1957, Article 2, “La Communauté a pour mission [...] de promouvoir [...] des relations plus étroites entre les États qu'elle réunit”; Treaty on the European Union (TEU), Official Journal of the European Communities (OJ) 92/C 224/01 (Maastricht Treaty), Article A(2) “This Treaty marks a new stage in the process of creating an ever closer union among the peoples of Europe, in which decisions are taken as closely as possible to the citizen”; TEU, OJ 2008/C 115/01 (Lisbon Treaty), Article 1(2) “This Treaty marks a new stage in the process of creating an ever closer union among the peoples of Europe, in which decisions are taken as openly as possible and as closely as possible to the citizen”, currently in force.


3 This obligation came together with new competences for the EU. It has been argued that the Member States accepted the transfer of competences against safeguards for national identity, see Saiz Arnaiz and Alcoberro Llivina, National constitutional identity and European Integration, pp. 6 et seq. Cf. Toniatti, Sovereignty Lost, Constitutional identity regained, pp. 49-73 in Saiz Arnaiz and Alcoberro Llivina, National constitutional identity and European Integration, pp. 54 et seq.


5 Cloots, supra note 2, pp. 1-2.

Justice of the European Union (the Court of Justice, or the Court). The EU has during the last decades changed in ways important for the relevance of national identities; the introduction of qualified majority voting in the Council has together with the codecision procedure reduced the possibilities of individual Member States to halt undesired legislative products, and through its expansion, the Union now includes countries with diverging societal views. Given these two reasons alone, it can be assumed that the interest for legal arguments based on national identity will not disappear from the courtroom in the coming years. It is therefore probable that the Court, even if reluctant, will be faced with this framing of arguments also in the times to come.

1.2 Aim and research questions

The aim of this paper is to analyse the application, role and development of national identity in the case-law of the Court, in order to examine whether a coherent rule on Article 4(2) TEU can be inferred. While in the beginning of the writing process, the intention was to analyse the application of the identity clause taken as a whole, it has during the progression of work become clear that the identity clause is used differently in different contexts. In order to analyse its application, it has therefore been necessary to divide the examination into different parts, depending on the legal area concerned. Initially, we will examine the nature of national identity – what can qualify as belonging to national identity, and to what extent does the Court itself make the final assessment of the content of national identity? Thereafter, the analysis will shift to the Court’s use of the identity clause in three different contexts. These are, firstly, the implications of national fundamental rights in conjunction with national identity, secondly, the respect for national federal structures, local self-government and internal organisation, and, thirdly, the implications of national identity arguments on the free movements. Each of these topics will be considered on its own in order to create a more complete image of

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how the Court has applied national identity. At the end, the conclusions will be considered together, and the legal consequences given to the clause briefly discussed. The questions examined can therefore be summarised as:

1. On a general level, what can qualify as belonging to national identity, and to what extent does the Court evaluate the content of national identity, attributed to the concept by the Member States?
2. How does the Court apply national identity in general, and what are the trends in and possible problems with this application in the contexts of
   a. national fundamental rights,
   b. fundamental structures and internal organisation,
   c. conflicts with the free movements?
3. In the fields examined, what have been the identity clause’s legal consequences?

Even if no general rules can be successfully formulated, the intention of this essay is to come one step closer to such a definition – important to understanding the adjudication of the Court of Justice. The author’s hope is especially that newer case-law can be put into the grander context, thus adding to what has previously been written.

1.3 Delimitations

National identity and the relationship between Union and national law can be considered from a great variety of angles. Some delimitations must therefore be made.

Firstly, the identity clause does not only target the Court of Justice, but the EU as such. It can therefore be assumed that the obligation applies to all EU institutions, and that a full understanding of the identity clause requires an examination of all these institutions.

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12 Previous texts often mention the lack of case-law explicitly referring to the identity clause, cf. for instance Simon, supra note 4, on p. 30, and Cloots, supra note 2, p. 4.
13 For examinations of national identity and previous case-law from the Court, see inter alia Cloots, supra note 2, inter alia, pp. 244-252, 272-287, and 299-316; Millet, supra note 2, pp. 153-234; Saiz Arnaiz and Alcoberro Llivina, supra note 3, inter alia pp. 130-134 and 148-157.
Since this thesis examines only how the Court of Justice has treated and applied national identity, the findings will not paint a full image of the EU’s respect for national identity.

Secondly, national identity is a relatively new and still emerging legal term in the EU and its Member States. Since the notion touches upon the limits of EU law in relation to national law, it has also been used by national courts, which – together with the Court of Justice – take part in an ongoing judicial dialogue. Consequently, it has been advocated that in order to fully grasp national identity as a concept, one has neither to consider only EU law, nor only national law, but both. I agree with this view. However, an in depth exploration of the national side of the concept would drastically extend the ambit of this thesis. Consequently, even though a full understanding of national identity in European law requires also an examination of the national level judgments, this paper focuses on the EU side of the coin.

Connected to this question is to what extent national identity should be considered. This question has a more political side concerning what we want the EU to be, and a more legal one concerning what we can infer from the present Treaties. The legal part of this question will be explored in this thesis, but not the more political angle.

Since the aim of this thesis is to examine how the Court has used national identity in relation to fundamental rights, internal fundamental structures and conflicts with the free movements, some cases fall outside the scope of the examination. Such cases include national identity in relation to the EU institutions, cases concerning citizenship, and other cases falling outside of the mentioned fields. Some of these cases will still be part

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16 Millet, supra note 2, pp. 6-7 and 161-162. Saiz Arnaiz and Alcoberro Llvina, supra note 3, pp. 3 et seq.
18 Millet, supra note 2, p. 12. Grewe, supra note 11, pp. 37-39. For an examination of the national side, see Saiz Arnaiz and Alcoberro Llvina et al., National constitutional identity and European Integration, part III, pages 205-273. For a concrete example of the importance of the national courts, see ibid., p. 2.
19 On this division between political and legal issues, see Claes, supra note 4, p. 110.
22 Case Gauweiler and Others, C-62/14, ECLI:EU:C:2015:400; Case Heinrich Weiss and Others, C-493/17, ECLI:EU:C:2018:1000. Case Hungary v Slovak Republic, C-364/10, ECLI:EU:C:2012:630. Notably also Case Correia Moreira, C-317/18, ECLI:EU:C:2019:499, on a national rule, based on a constitutional provision, in conflict with Council Directive 2001/23/EC of 12 March 2001 on the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of undertakings or businesses. The Court stated in paragraphs 61-62 that Article 4(2) “in an area where Member States have transferred competence to the Union [...] cannot not be interpreted so as to deprive a worker of the protection granted to her by the Union law in force in that area.” Since the relevant directive was adopted under Article 94 TEC in its Amsterdam version, today corresponding to Article 114 TFEU, the case concerns the common market, but not the free movements, and neither fundamental rights, nor fundamental structures were mentioned. Thus, this recent case falls outside the three examined areas.
of the analysis when they shed light on the questions discussed, but they will not form the principal part of the examination. This, of course, also limits the ambit of the conclusions.

1.4 Method applied and material used

The method applied in this essay is a combination of a textual and a systematic approach. Textual sources of legal value will be analysed as forming parts of a coherent legal system, and the state of the law will be deducted from these sources. Where inconsistencies appear and the legal system only with difficulties can be regarded as one, this will accordingly be criticised. The systematic approach delimits the textual one in such a way that the judgments will be analysed from a viewpoint where function prevails over form; the most important aspect is not necessarily what the Court says it does, but how it actually develops the law.

The main material analysed is EU primary law, especially the identity clause and the Charter of Fundamental Rights of the European Union (the Charter).

EU secondary law is only analysed to the extent that it sheds light upon how the Court has interpreted national identity. The analysis is fostered with the use of legal principles. Some of these, such as the principle of proportionality and the principle of conferral, are explicitly mentioned in the Treaties, while others, such as the principle of effectiveness, have their basis in the case-law of the Court. The interpretation of different provisions and principles is deducted from the Court’s judgments, which constitute the main source of interpretative material.

Generally, the Advocate Generals have more willingly than the Court expressed themselves on national identity, which makes their opinions an important source of material. However, the legal value of these opinions depends on the relationship between the opinion and the relevant judgment. In cases where the Court – explicitly or inexplicitly – has followed the view of the Advocate General, the adjacent reasoning of the Advocate General will be given a higher legal value than when the Court has not followed the given opinion. In the latter cases, the opinions will be given a legal value closer to that of legal scholars; they contain reasoned views, but do not necessarily reflect the state of the law.

Academic writing is used in order to systematise and to give further depth to the analysis. However, since the EU is a multinational organisation, with currently 28

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24 See Article 5 TEU. For fundamental rights, see Article 6(3) TEU.
25 On legal principles, see Hettne, Otken Eriksson et al., EU-rättslig metod, pp. 62 et seq. and pp. 75 et seq.
26 Ibid., pp. 116-120.
Member States and 24 official languages, the selection and use of these academic works is limited by the language knowledge of the author. Therefore, sources in English, French, German and Swedish will be used, but no other. The relevant sources are also limited by the access to databases and libraries which is given to students at Uppsala University. Even though some material external to law is used in order to emphasise why national identity is important also on a legal level, such material will not be used in the analysis.

Studying the concept of national identity in EU law poses certain methodological problems. Firstly, since national identity in the TEU is laid down in Title I, *Common provisions*, it can be invoked by the Member States and used by the Court throughout the whole EU legal order.\(^\text{27}\) Still, the obligation to respect the national identities is not thoroughly defined by the Treaties, and national identity as a legal concept is a rather recent development.\(^\text{28}\) Therefore, in order to understand the picture painted by the Court, both the legal fond laid down by the Court in previous landmark judgments, as well as cases not explicitly touching upon national identity, will be analysed in order to evaluate the concept of national identity.\(^\text{29}\) Secondly, national identity is typically invoked where there is a potential conflict between national law and EU law.\(^\text{30}\) However, this thesis does not examine the balancing of EU law and national interests in general.\(^\text{31}\)

**1.5 Structure**

The examination will be divided into the following parts. Firstly, in chapter 2, the identity clause will be explored, together with the nature of national identity and the qualification of what can form part of its content. In chapter 3, we then turn to national identity in conjunction with national fundamental rights. In chapter 4, the respect for national identities in the form of federal structures and internal organisation will be analysed. In chapter 5, national identity in conflict with the free movements will be examined to the extent it has not been covered by the previous sections. Chapter 6 summarises the conclusions, tries to formulate a general rule of application and examines the legal consequences of the identity clause. We now turn to the first of these chapters.


\(^{29}\) On "silent sensitivity" from the Court, see *cf.* Cloots, *supra* note 2, pp. 7 and 74.

\(^{30}\) *Cf.* Millet, *supra* note 2, pp. 13-14.

\(^{31}\) For such an examination, *see inter alia* Schwarze, *supra* note 2.
2 The identity clause and the nature of national identity

A key question when examining the respect for national identity is: what is understood by national identity? When trying to characterise national identity, it is useful to look at the wording of the legal ground: the Treaty article. Although it has been argued that national identity was part of the Community from its very beginning, it has been included in all Treaty versions only since the Maastricht Treaty. The relevant articles have been worded in the following ways:

<table>
<thead>
<tr>
<th>Treaty</th>
<th>Article</th>
<th>Text</th>
</tr>
</thead>
<tbody>
<tr>
<td>TEU, Maastricht Treaty</td>
<td>F(1)</td>
<td>The Union shall respect the national identities of its Member States, whose systems of government are founded on the principles of democracy.</td>
</tr>
<tr>
<td></td>
<td>6(3)</td>
<td>The Union shall respect the national identities of its Member States.</td>
</tr>
<tr>
<td>Constitutional Treaty</td>
<td>I-5(1)</td>
<td>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.</td>
</tr>
<tr>
<td></td>
<td>4(2)</td>
<td>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.</td>
</tr>
</tbody>
</table>

As can be seen, the text has expanded over time, providing more guidance to the meaning of national identity in EU law. In both the Constitutional and the Lisbon Treaties, other Union policies have been added to the article. Therefore, in this thesis, references to Articles I-5(1) and 4(2) of these treaties respectively only concern the phrase “The Union shall respect the [...] national identities [of Member States], inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government.” Another important change introduced with the Lisbon Treaty was the removal of the former Article 46 TEU of the Amsterdam and Nice Treaties, which previously limited the Court’s jurisdiction in the TEU. Any questions concerning the jurisdiction of the Court in relation to the identity clause have therefore been removed.35

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34 Treaty establishing a Constitution for Europe, OJ 2004/C 310/01.
Since the Court applies Article 4(2) TEU, I assume that the identity clause constitutes law.\textsuperscript{36} Thus, Article 4(2) TEU both applies to and can be applied by the Court.\textsuperscript{37}

What is then national identity? That topic has been the subject of scholar debate.\textsuperscript{38} In that debate, it has been proposed that the development of the identity clause from the Maastricht, Amsterdam and Nice Treaties to the Constitutional and Lisbon Treaties has substantially altered the clause, changing the relevant legal concept from “national identity” to “constitutional identity” or “national constitutional identity”.\textsuperscript{39} In this spirit, it has been argued that the previous identity clauses aimed at a more cultural side of national identity,\textsuperscript{40} but that the current article has changed this.\textsuperscript{41} Indeed, the Lisbon version of the clause provides us with a definition, “national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government.” However, for three reasons, I only partially agree with the view that the legal concept has changed. Firstly, from a textual standpoint, it is true that Article 4(2) TEU (Lisbon) gives interpretative guidance, focusing \textit{inter alia} on constitutional structures. Thus, constitutional identity can certainly form part of the EU concept of national identity. Yet, even if the two concepts mainly were to coincide, with constitutional identity consisting of national identity expressed in constitutional law, national identity is a wider concept, not limited to constitutional provisions.\textsuperscript{42} The wording of the Treaty provision also includes \textit{political} structures, and there is nothing suggesting that a more “cultural” side of national identity should be excluded from the

\textsuperscript{36} On this legal-philosophical topic, \textit{cf.} Cloots, \textit{supra} note 2, pp. 35-63, and Toniatti, \textit{supra} note 3, pp. 64 \textit{et seq.}


\textsuperscript{41} von Bogdandy and Schill, \textit{supra} note 37, on pp. 1427 and 1429. Murphy, \textit{Article 4(2) TEU: A Blow to the Supremacy of Union Law}, Trinity C. L. Rev., Vol. 20, pp. 94-121 (2017), on pp. 104-105. See also Claes, \textit{supra} note 4, on p. 117-119, but \textit{cf.} p. 123.

\textsuperscript{42} Konstadinides, \textit{supra} note 14, on p. 130. \textit{See} also Konstadinides, \textit{supra} note 40, pp. 198-199. Claes, \textit{supra} note 4, pp. 123 \textit{et seq.}
concept.\(^{43}\) Indeed, the Treaty still frames the obligation as respect for “national” identity. Secondly, if it is argued that the previous identity clauses aimed at a wider definition of national identity, the Court has through its rulings attributed that interpretation also to Article 4(2) TEU of the Lisbon Treaty.\(^{44}\) Hence, through the Court’s interpretation, the meaning given to Article F(1) Maastricht Treaty is connected to its understanding of Article 4(2) TEU (Lisbon).\(^{45}\) Thirdly, even though constitutional status of a national provision often is the case in matters concerning national identity, it does not appear to be a necessary one. If we examine the judgments in which the Court has acknowledged that there could be a connection between the interest invoked and national identity,\(^{46}\) we see that in a vast majority, the claims have been constitutionally based,\(^{47}\) but that such a basis has been lacking in one case: *Commission v Luxembourg* from 2011.\(^{48}\) The case will be considered more extensively in section 5.1, but it concerned the protection of the Luxemburgish language as part of national identity. The Court considered the claim disproportionate, but nevertheless qualified the interest as part of national identity under Article 4(2) TEU,\(^{49}\) even though the basis for the claim was laid down in ordinary and not constitutional law.\(^{50}\) It can be argued that constitutional identity also can be derived

\(^{43}\) On respect for diversity of European cultures as part of 6(3) TEU in its Nice version, see Opinion of Advocate General Kokott in Case *Unión de Televisoras Comerciales Asociadas (UTECA)*, C-222/07, ECLI:EU:C:2008:468, point 93.

\(^{44}\) In *Commission v Luxembourg*, C-473/93, ECLI:EU:C:1996:263, paragraph 35, the Court made explicit reference to national identity in Article F(1) Maastricht Treaty. The case-law from that case was referenced by the Court in relation to Article 4(2) TEU in Case *Commission v Luxembourg*, C-51/08, ECLI:EU:C:2011:336, paragraph 124.

\(^{45}\) The Court never referred Article 6(3) TEU of the Amsterdam and Nice Treaties, although it was invoked by parties and used by Advocate Generals. The closest the Court came to relying on the identity clause in the former Article 6(3) TEU, was in the abovementioned *Commission v Luxembourg*, C-51/08, where Luxemburg in its pleadings relied on Article 6(3) Nice Treaty, which the Court after the entry into force transformed to a pleading under Article 4(2) TEU (Lisbon).

\(^{46}\) In some cases, the Court has explicitly denied that a connection to national identity is possible, cf. Case *O’Brien v Ministry of Justice*, C-393/10, ECLI:EU:C:2012:110, para 49.


\(^{48}\) Case *Commission v Luxembourg*, C-51/08, ECLI:EU:C:2011:336.

\(^{49}\) Ibid., paras 72 and 124.

\(^{50}\) Ibid., paras 8-12, and the Luxembourg Constitution, consolidated version after amendment Mémorial A – 908 of 16 October 2017, http://legilux.public.lu/eli/etat/leg/recueil/constitution/20171020 (consulted 2019-06-07), in which no references are made to the Luxemburgish language. None of the amendments between this consolidated version and the time of the proceedings in C-51/08 seem to have touched upon language issues, cf. the same Internet site. The Advocate General mentioned “constitutional identity”, but without any invoked constitutional basis, and therefore seemed to have used it more as a synonym to national identity, cf. Opinion of Advocate General Cruz Villalón in Cases *Commission v Belgium*, v *France*,
from case-law from the highest national courts,\(^{51}\) but no such case-law was used as basis for the Court’s statement. Thus, even though a constitutional basis is preferable and certainly a sign of the importance attached to the national provision invoked, I find it difficult to construe Article 4(2) TEU as aiming only at “national constitutional identity”, if the constitutionality of the national rule is not a necessary requirement for applying the article. Due to these three reasons, I find that the relevant concept to examine when analysing Article 4(2) TEU (Lisbon) is the wider concept of national identity, of which constitutional identity certainly can form a part.\(^{52}\)

However, even if we conclude that national identity in a slightly broader sense shall be respected, the Treaties still give little guidance on the nature of national identity itself. Evidently, the content of what can constitute national identity has to be assessed in some way. Even if some cases probably seem clear, we must nevertheless in cases where there are diverging opinions on the matter\(^{53}\) ask ourselves: who is in a position to decide the content of national identity? In academic literature, it has been proposed that national institutions will provide the Court with the national context in which national identity is at stake – which the Court is not in a position to determine – and that it then will be for the Court to rule on the validity and consequences of the argument in EU law.\(^{54}\) If we examine this argument in relation to the case-law of the Court, we find that there are judgments and opinions in which the content of national identity seems to have been assessed also by the Court. The cases will be considered more extensively in later parts of this thesis, but among positive qualifications where the Court has accepted the claims made by the Member States can be found the two cases abolishing tokens of nobility, Sayn-Wittgenstein and Bogendorff von Wolffersdorff, where the Court stated respectively that the abolitions could be taken into account “in the context of Austrian constitutional history [...] as an element of national identity”\(^ {55}\) and “considered in the context of the

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\(^{51}\) Konstadinides, supra note 14, p. 156.

\(^{52}\) On this conclusion, see Grewe, supra note 11, p. 38. Similarly Cloots, supra note 2, pp. 165-175. See also Dobbs, supra note 35, pp. 326-328. See also Opinion of Advocate General Poiares Maduro in Michaniki, supra note 32, point 31. Differently, cf. van der Schyff, supra note 39, p. 232, who interprets constitutional law as including laws outside constitutional documents. Cf. also Martin, supra note 39, pp. 23 and 25, who includes official languages as an element of constitutional identity, but nevertheless considers constitutional identity to be limited to elements consecrated by constitutional law.

\(^{53}\) Konstadinides, supra note 14, p. 165. Faraguna, supra note 17, pp. 1637 et seq. For examples of diverging opinions in a French context, see Rousseau, supra note 6, on p. 96.


\(^{55}\) Sayn-Wittgenstein, supra note 47, para 83.
German constitutional choice [...] as an element of the national identity”.\(^{56}\) Furthermore, in both these cases, the Court expressively stated that the status of a State as a Republic is part of its national identity.\(^{57}\) Thus, in these cases, the Court used the form of government, history and context in order to qualify national identity as expressed in constitutional law.\(^{58}\) These cases can be compared to those where the Court has found the interest not to amount to national identity. Among these are O’Brien, in which the Court – in proceedings concerning remuneration of UK judges – answered an argument from the Latvian Government by stating that “[i]t must be held that the application [...] of Directive 97/81 and the Framework Agreement on part-time work cannot have any effect on national identity”.\(^{59}\) Another example is provided by the Torresi case, where both the Court and the Advocate General found the national identity claim to be unfounded, given a more simple solution to the legal problem.\(^{60}\) As can be inferred from the Opinion in the Torresi case, the national court and the national government had diverging opinions on what constituted national identity,\(^{61}\) and the Court relied on the government’s acknowledgment that the secondary law was not contrary to national identity.\(^{62}\) A similar situation can be seen in Melloni,\(^{63}\) where the Advocate General admitted the importance of national identity but found it not to be present in the case, basing this conclusion on, firstly, that the essence of the right remained contested before the Spanish court, and secondly, that Spain itself had stated at the hearing that the question was not covered by Spanish national identity.\(^{64}\) In Erzberger, the Advocate General similarly “hesitated” to characterise the German employee participation system as an element of national identity since Article 4(2) TEU only had been relied upon by the defendant in the case, and the German Government had neither invoked the identity clause, nor framed its argument in

\(^{56}\) Bogendorff von Wolffersdorff, supra note 47, para 64.

\(^{57}\) Sayn-Wittgenstein, supra note 47, para 92. Bogendorff von Wolffersdorff, supra note 47, para 73.


\(^{59}\) O’Brien, supra note 46, para 49.


\(^{61}\) Opinion of Advocate General Wahl in Torresi, supra note 60, point 101. For a comment concerning such situations, written before the Torresi judgment, cf. Claes, supra note 4, p. 138.

\(^{62}\) Torresi, supra note 60, para 58.

\(^{63}\) Case Stefano Melloni v Ministerio Fiscal, C-399/11, ECLI:EU:C:2013:107.

\(^{64}\) Opinion of Advocate General Bot in Case Criminal proceedings against Stefano Melloni, C-399/11, ECLI:EU:C:2012:600, points 137-141.
terms of national identity.\textsuperscript{65} In that judgment, the Court resolved the legal matter on different grounds and never had to consider the value of the national identity argument.\textsuperscript{66}

The most elaborate attempt to assess the content of national identity has probably been that of Advocate General Bot in his Opinion in \textit{M.A.S.}\textsuperscript{67} The case will be examined extensively in section 3.4, but in its reference for a preliminary ruling, the Italian Corte costituzionale supported its argument with Article 4(2) TEU. The Advocate General replied that the situation did not concern national identity, since “\textit{a concept demanding protection for a fundamental right must not be confused with an attack on the national identity}”, and since the Corte costituzionale had not sufficiently explained why national identity would be compromised.\textsuperscript{68} Relying on those factors and having examined contradictory statements in the Italian Constitution and both case-law and observations from the Corte costituzionale, the Advocate General was not convinced that national identity was compromised.\textsuperscript{69} The Court did not pronounce itself on the matter. In connection to the Opinion, it is however interesting to note that the Advocate General applied, alongside the national constitution, previous case-law and views from the Corte costituzionale in order to argue against the view of that very court. The method used by the Advocate General to value one finding of the national court higher than the other is not entirely clear, but in the light of previous case-law, one could argue that the Italian argument lacked the “context” and “history” from \textit{Sayn-Wittgenstein} and \textit{Bogendorff von Wolffersdorff}. However, since the Court did not follow this Opinion, the legal value of this assessment can be discussed.

Another important reasoning can be found in paragraph 46 of the case \textit{Coman}.\textsuperscript{70} Even though the national identity was formulated by a Member State, the Court narrowed it down, thus redefining its content and scope. Here, we clearly see that the national identity was not defined unilaterally by the Member State. Although it has been argued that it is the task of the Members States to determine their national or constitutional identity, whereas it falls on the Court to assess its normative relevance within EU law,\textsuperscript{71} \textit{Coman} – and possibly the Opinion in \textit{M.A.S.} – shows that the Court not only determines the

\textsuperscript{65} Opinion of Advocate General Saugmandsgaard Øe in Case \textit{Erzberger}, C-566/15, ECLI:EU:C:2017:347, points 101-103 and footnote 80.
\textsuperscript{66} Case \textit{Erzberger} v \textit{TUI AG}, C-566/15, ECLI:EU:C:2017:562, paras 33-36 and 39.
\textsuperscript{67} Opinion of Advocate General Bot in Case \textit{M.A.S.}, M.B., C-42/17, ECLI:EU:C:2017:564.
\textsuperscript{68} Ibid., points 176-180, with the citation being from point 179.
\textsuperscript{69} Ibid., points 181-186.
\textsuperscript{70} Coman, supra note 47.
\textsuperscript{71} von Bogdandy and Schill, supra note 37, on pp. 1447-1448. Besselink, supra note 39, arrives also to that conclusion on p. 45, although he considers the situation “far-fetched”. Cf. slightly differently, Besselink, supra note 58, on p. 688, where he argues that the Court found the situation in \textit{Michaniki} to fall outside of constitutional identity, partly since it concerned secondary law.
meaning of national identity in EU law, but also partly rules on what qualifies as part of its content.\textsuperscript{72} Furthermore, as will be examined in section 5.3, the Court ruled in paragraph 47 of \textit{Coman} that national measures restricting the freedom of movement under Article 21 TFEU only can be justified by national identity if consistent with the Charter. If this is to be construed as more general limit on the possible effects of national identity, it will in practice also be a material limit on the content of national identity.

Thus, from these judgments and opinions we can deduce that in order to successfully invoke national identity, national authorities and courts have to qualify the content of national identity in a way with which the Court agrees. It is possible that consistency with the Court’s interpretation of the Charter in practice constitutes a material limit on the content of national identity. Furthermore, in cases where there is a disagreement between national institutions on the content of national identity, the Court has relied on those differences in order to disregard the claim based on national identity. Moreover, in some cases, the Court has redefined the content of national identity. It is plausible that the Court also on its own could chose not to recognise national qualifications, but in cases where such solutions have been proposed by the Advocate Generals (notably \textit{M.A.S.}, and to some extent \textit{Erzberger}), the Court has solved the legal matter without having to pronounce itself on the content of national identity. The closest the Court has come to unilaterally not recognising the content of national identity is to be found in \textit{O’Brien}, but since that argument not was invoked by the Member State able to define the national identity relevant to those proceedings, the Court’s rejection hardly affected the outcome of the case. Although the Court narrowed down the concept in \textit{Coman}, there is thus no extensive example in the Court’s judgments on how to conduct such a (dis)qualification of national identity.

Given that in a vast majority of cases where national identity has been acknowledged, the national concern has been proven with the constitutions,\textsuperscript{73} and that what constitutes possibly the only exception to this rule is a case concerning the protection of a national language\textsuperscript{74} – a notion itself protected by the Treaties,\textsuperscript{75} deeply connected with national identity\textsuperscript{76} and part of an established line of case-law\textsuperscript{77} – it can be inferred that some sort

\textsuperscript{72} For a similar conclusion, albeit mainly based on constitutional arguments, see Sterck, \textit{supra} note 6, on pp. 288 \textit{et seq}. Similarly, emphasising that the Court also has to consider the national self-understanding, Pernice, \textit{supra} note 15, on p. 215.

\textsuperscript{73} Cf. above, footnote 47, on the case-law where national identity has been explicitly acknowledged.

\textsuperscript{74} \textit{Commission v Luxembourg}, C-51/08, \textit{supra} note 44, para 124.

\textsuperscript{75} Article 3(3) TEU. Reestman, \textit{supra} note 39, on p. 381.

\textsuperscript{76} Opinion of Advocate General Poiares Maduro in Case \textit{Kingdom of Spain v Eurojust}, C-160/03, ECLI:EU:C:2004:817, points 35-36.

\textsuperscript{77} See below, section 5.1.
of constitutional basis is strongly recommended when trying to qualify a concern as an element of national identity. However, according to views of the Advocate Generals, constitutional status of a national provision does not in itself grant the provision the status of national identity. This means that a constitutional basis is recommended but not required when trying to qualify a national trait as part of national identity, and that a constitutional basis not necessarily would lead to the Court accepting that national identity indeed is at play. Nevertheless, by basing its reasoning on context, history and a “constitutional choice”, a Member State would at least linguistically be able to rely on the case-law of the Court when framing its argument. Furthermore, we can note that in all cases where national identity has been successfully invoked, the considerations have been put forth by the Member States – courts or governments, or both. Although this does not necessarily mean that only Member States can rely on the rule, it remains to be seen whether other claimants can be successful.

Having established that the identity clause in its current form can and shall be applied by the Court, and that national identity is the concept that shall be respected, and having determined the outer boundaries of how the content of this identity probably shall be qualified, we now turn to examining the application of the concept in the first of our three different contexts: fundamental rights as part of national identity.

78 See Opinion of Advocate General Poiares Maduro in Michaniki, supra note 32, point 33. See also Opinions of Advocate General Bot in Mellon, supra note 64, point 142, and in M.A.S., supra note 67, points 177 and 179.

79 Cf. in this regard Opinion of Advocate General Poiares Maduro in Spain v Eurojust, C-160/03, supra note 76, point 24, in which the Advocate General argued that Member States primarily are responsible for upholding linguistic diversity under the identity clause. In the Case Heinrich Weiss and Others, C-493/17, ECLI:EU:C:2018:1000, the applicants in the national proceedings argued that various decisions of the ECB were contrary to German constitutional identity, which the national Court rephrased as being contrary to Article 4(2) TEU, however seemingly without support from the German Government and court system. The Court found the relevant question to be hypothetical and thus inadmissible, cf. paras 2, 14, 16 and 159-167 of the judgment. In the Case Gauweiler and Others, C-62/14, ECLI:EU:C:2015:400, a similar concern was raised by the applicants in the national proceedings, but the national court never included national identity in the questions referred, and the Court resolved the legal issues by answering the questions referred, cf. paras 6, 10 and 127 of the judgment.
3 Fundamental rights and national identity

This examination of national identity in relation to fundamental rights consists of five sections. In the first section (3.1), the Union’s interest of unity will be presented. In section two (3.2), cases from the pre-Lisbon period will be examined. In the third (3.3), we analyse cases from the Lisbon period in order to examine the role of the Charter. In section four (3.4), the two cases *Taricco*\(^{80}\) and *M.A.S.*\(^{81}\) are considered together, and the latter is examined extensively. In this part, Article 4(2) TEU is found to be an inexplicit solution to the problems the Court had to solve. In section five (3.5), the findings from the previous sections are discussed together in order to create a more complete image.

3.1 Starting points

Before examining national identities and fundamental rights in relation to the EU legal order, we should consider the basis for the primacy of EU law over national constutions. In paragraphs 3 and 4 of its landmark case on national constutions, fundamental rights and EU law, *Internationale Handelsgesellschaft*,\(^{82}\) the Court stated the following:

3. Recourse to the legal rules or concepts of national law in order to judge the validity of measures adopted by the institutions of the Community would have an adverse effect on the uniformity and efficacy of Community law. The validity of such measures can only be judged in the light of Community law. In fact, the law stemming from the Treaty, an independent source of law, cannot because of its very nature be overridden by rules of national law, however framed, without being deprived of its character as Community law and without the legal basis of the Community itself being called into question. Therefore the validity of a Community measure or its effect within a Member State cannot be affected by allegations that it runs counter to either fundamental rights as formulated by the constitutions of that State or the principles of a national constitutional structure.

4. However, an examination should be made as to whether or not any analogous guarantee inherent in Community law has been disregarded. In fact, respect for fundamental rights forms an integral part of the general principles of law protected by the Court of Justice. The protection of such rights, whilst inspired by the constitutional traditions common to the Member States, must be ensured within the framework of the structure and objectives of the Community. It must therefore be ascertained, in the light of the doubts expressed by the Verwaltungsgericht, whether the system of deposits has infringed rights of a fundamental nature, respect for which must be ensured in the Community legal system.

\(^{80}\) Case *Ivo Taricco and Others*, C-105/14, ECLI:EU:C:2015:555.


The Court thus chose not to allow national fundamental rights to call into question Community law. Instead, an equivalent right within the Community legal system should be searched and, if found, relied on. Yet, this recognition of fundamental rights did not lead to the Community adopting the same position as national law; in the case, the Court found no violation of the principles of freedom of action and of disposition, of economic liberty and of proportionality, which had been invoked by the German national court.\(^{83}\)

This strong stance on the primacy of Union law over national fundamental rights has been followed by other cases. Sometimes, the conflict has been avoided.\(^{84}\) Yet, as we will see, in some cases, the Court has managed to reconcile national and Union interests, whereas in others, the national interests have not prevailed. With some of the cases, it appears that the formulations from *Internationale Handelsgesellschaft* have been altered.

In the following section, cases from the pre-Lisbon period will be analysed. Since the use of national identity emerged fairly recently, these first cases examined do not mention national identity explicitly, but concern fundamental rights from national constitutions in relation to the fundamental freedoms. In this part, the case *Omega*\(^{85}\) has been included. It can be discussed if that case concerns a fundamental right or a constitutional value,\(^{86}\) and it will therefore also be discussed in section 5.3 below. Yet, *Omega* aligns with the case-law on fundamental rights and therefore merits to be explored also in this section.

### 3.2 National fundamental rights in the pre-Lisbon period

In the pre-Lisbon period, we find the first case in which national fundamental rights were invoked by a Member State in order to restrict one of the fundamental freedoms: *Schmidberger*, of 12 June 2003.\(^{87}\) Although national identity was not invoked, the fundamental right was derived from the national constitution and the judgment starts a line of case-law on how to reconcile national fundamental rights with the internal market.

\(^{83}\) *Ibid.*, paras 2, 12, 14-16 and 20.


\(^{87}\) Case *Eugen Schmidberger, Internationale Transporte Planzüge v Republik Österreich*, C-112/00, ECLI:EU:C:2002:437, points 89 and 94.
This case referenced from Austria concerned a conflict between the Community’s free movement of goods and the national constitutional rights of freedom of expression and assembly. Austria had given permission to environmental demonstrations that closed a motorway through the Brenner corridor during almost 30 hours, after which the transport undertaking Schmidberger sought damages. Having found a restriction on the free movement of goods, the Court examined the national authorities’ justifications: fundamental rights in the Austrian Constitution and in the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR). The Court reformulated this to concern the reconciliation of Community fundamental rights and the fundamental freedoms of the Treaty. This was followed by a proportionality test, in which the protection of fundamental rights was considered a legitimate interest. The permission to demonstrate was deemed appropriate for that objective, and no less restrictive measures were found. The Court stated that the Member State enjoyed a wide discretion in the balancing of the interests concerned, and concluded that Austria had acted in a way compatible with the Treaties. In doing so, the Court used the same two-step approach as for traditional grounds of justification.

In this case, the Court thus resolved the problem by interpreting the conflicting rights and freedom, and their respective possible derogations, in order to reconcile them. In this reasoning, the case-law of *Internationale Handelsgesellschaft* echoes; although fundamental rights from the national constitution lie at the bottom, a corresponding right is found within the Community legal order, and that corresponding right is reconciled with the fundamental freedom. Thus, the effect of the national constitutional rights was guaranteed, but the balancing was made between different concepts within Community law. In that way, the uniformity and efficacy of Community law was respected.

The next landmark case concerning fundamental rights is the well-known *Omega* judgment of 14 October 2004. This case, referenced from the German Bundesverwaltungsgericht, concerned proceedings between the Bonn police authority and the German company Omega. Franchising equipment from the British company Pulsar, Omega operated an installation for laser sport, which the police prohibited, considering it a game of “playing at killing people”. By the German courts, the game was deemed contrary to the constitutional principle of human dignity in Paragraph 1(1) of the German Basic Law, but Omega maintained that the prohibition opposed the freedom to

89 As proposed by Advocate General Jacobs in his Opinion to Schmidberger, *supra* note 87, point 95.
90 Schmidberger, *supra* note 87, paras 78-81 and 93-94.
91 Omega, *supra* note 85.
provide services. The Court treated the matter as a restriction based on public policy, which according to case-law only could be relied on in cases of a genuine and sufficiently serious threat to a fundamental interest of society. The Court reiterated, with reference to Schmidberger, that fundamental rights form an integral part of Community law, and found, with reference to the Advocate General, that human dignity is a general principle of law in the Community legal order. Having found a legitimate interest, the Court continued with the proportionality test.\(^{92}\) In paragraphs 37-39, the Court stated:

37. It is not indispensable in that respect for the restrictive measure issued by the authorities of a Member State to correspond to a conception shared by all Member States as regards the precise way in which the fundamental right or legitimate interest in question is to be protected. […]

38. On the contrary, […] the need for, and proportionality of, the provisions adopted are not excluded merely because one Member State has chosen a system of protection different from that adopted by another State […].

39. In this case, it should be noted, first, that, according to the referring court, the prohibition on the commercial exploitation of games involving the simulation of acts of violence against persons, in particular the representation of acts of homicide, corresponds to the level of protection of human dignity which the national constitution seeks to guarantee in the territory of the Federal Republic of Germany. […]

The Court found that the German prohibition did not go beyond what was necessary and that it thus was justifiable.\(^{93}\)

The Court’s reasoning is interesting from three points of view. Firstly, the Court confirmed that the protection of fundamental rights is a legitimate interest which, in principle, justifies a restriction of Union obligations. Secondly, the Court seemingly searched and found a new general principle – the protection of human dignity – in order to reconcile the German restriction with Community law. Even though the Advocate General could infer this general principle from previous case-law of the Court of Justice and the European Court of Human Rights (ECtHR),\(^{94}\) the “invention” of a new general principle seems to have been necessary for the argumentation of the Court.\(^{95}\) Thirdly, the

\(^{92}\) Ibid., paras 3-17, 28, 30 and 33-36.

\(^{93}\) Ibid., paras 39-41.


\(^{95}\) The problems raised by the Advocate General concerning equating human dignity in Community law with that of the German Basic Law were not addressed by the Court. For these problems, see Opinion of Advocate General Stix-Hackl in Omega, supra note 94, points 90 and 92.
Court gave an important modification on the respect for fundamental rights, providing room for a national interpretation regarding how to protect the right concerned, and even cited the interest enshrined in the national constitution. The legitimate interest still needs to be in accordance with Union law and the restriction needs to be proportionate, but Member States are given a considerable margin of discretion on how to perform their protection. By doing this, the Court allowed national law to influence the execution of Union law. The case-law from Internationale Handelsgesellschaft was thus slightly altered; national law was allowed to affect the effect of Community law within that Member State. Even though national identity was not explicitly mentioned, academic scholars have considered the case to touch upon this topic. Both Schmidberger and Omega thus constitute examples of the Court reconciling national fundamental rights with the EU fundamental freedoms.

Following Schmidberger and Omega are two labour law cases concerning the fundamental right to take collective action: Viking and Laval. These cases concerned complex legal questions of sensitive character, with balancing of fundamental right against the fundamental freedoms. The case Viking, judgment of 11 December 2007, concerned the plans of the ferry company Viking to reflag one of its vessels from Finland to Estonia in order to reduce wage costs. The Finnish Seamen’s Union (FSU) and the International Transport Workers’ Federation (ITF) opposed the plans and asked their affiliates to refrain from negotiating with Viking. Viking argued the actions taken by ITF and FSU were contrary to the freedom of establishment, and the case was brought to the Court. The Danish and Swedish governments claimed that the right to take collective action constituted a fundamental right falling outside of the freedom of establishment, to which the Court replied that the right was fundamental but that it was not excluded from the Treaty and that it might be subject to certain restrictions. The Court referred to its case-law on fundamental rights from Schmidberger and Omega, and left it for the national

96 On a similar conclusion, see Dobbs, supra note 35, on p. 309.
99 Case Laval un Parteri Ltd v Svenska Byggnadsarbetarförbundet and Others, C-341/05, ECLI:EU:C:2007:809.
100 Cf. Opinion of Advocate General Poiares Maduro in Case International Transport Workers’ Federation and Finnish Seamen’s Union v Viking Line, C-438/05, ECLI:EU:C:2007:292, point 1, and Opinion of Advocate General Mengozzi in Case Laval un Parteri Ltd v Svenska Byggnadsarbetarförbundet and Others, C-341/05, ECLI:EU:C:2007:291, points 2 and 3. The importance of the two cases and their corresponding interests is implied by the fact that the Opinions were issued on the same day, 23 May 2007.
101 Viking, supra note 98, paras 6-27.
court to determine whether the objectives pursued indeed concerned the protection of workers. This came with two qualifications: the actions of the FSU could not be justified if the jobs or conditions were not jeopardised or under serious threat, and the restrictions on the freedom of establishment resulting from the issued circular could not be objectively justified if the policy resulted in shipowners being prevented from registering their vessels in another Member State.  

One week later, on 18 December 2007, the Court delivered its judgment in the case *Laval*. The company Laval, which had signed collective agreements with the Latvian building sector’s trade union, posted workers in Sweden for the construction of *inter alia* school facilities. The Swedish trade unions demanded Laval to sign a local collective agreement for the working site and to guarantee an hourly wage corresponding to Swedish levels. As no local collective agreement was signed, the Swedish building and public works trade union began blockading the building site, preventing goods, vehicles and Latvian workers from entering the site. Since it was not possible for the company to know what conditions would be imposed in relation to wages, Laval refused to sign any collective agreement. Before the Court, the Danish and Swedish governments argued that the right to take collective action constituted a fundamental right falling outside of the freedom to provide services, and as in *Viking*, the Court replied by recognising the right as fundamental but part of Community law and subject to restrictions. The Court found the situation to restrict the freedom to provide services. Even though ensuring workers terms and conditions of a certain level fell under the overriding reason of public interest of protection of workers, the Court found that collective action linked to the signing of collective agreements could not be justified. Concerning collective actions for minimum wage, the Court stated the following in paragraph 110:

110. However, collective action such as that at issue in the main proceedings cannot be justified in the light of the public interest objective referred to in paragraph 102 of the present judgment [the protection of workers], where the negotiations on pay, which that action seeks to require an undertaking established in another Member State to enter into, form part of a national context characterised by a lack of provisions, of any kind, which are sufficiently precise and accessible that they do not render it impossible or excessively difficult in practice for such an undertaking to determine the obligations with which it is required to comply as regards minimum pay (see, to that effect, *Arblade and Others*, paragraph 43).

103 *Laval*, *supra* note 99, paras 89-94 and 99-100 *et seq*.
Viking and Laval constitute examples of the Court not reconciling national fundamental rights with the fundamental freedoms. The cases follow Internationale Handelsgesellschaft – the derogations had to be based in Union law, and the balancing did not lead to the same outcome as in national law. The Court also confirmed its methodology from Schmidberger and Omega in that fundamental rights constitute legitimate interests, but have to pass a proportionality test. From Viking, it can be inferred that the policy pursued cannot be justified if it results in the fundamental freedom being negated. Concerning national identity, the Court’s statement in Laval is especially interesting: the collective action could not be justified in a “national context characterised by a lack of provisions […] which are sufficiently precise and accessible”. Here, the Court acknowledged that the problem lied within the national context.

These judgments were all given before the Lisbon Treaty entered into force and lacked references to national identity. The national fundamental rights were respected if the Court considered the corresponding Union right to give the same level of protection, but not in cases with national protection surpassing the Union level. Having examined the pre-Lisbon era, we now turn to the period after the Lisbon Treaty’s entry into force.

3.3 Melloni and Åkerberg Fransson – foundations in the Lisbon era
With the Lisbon Treaty, the Charter has through Article 6(1) TEU been attributed the same legal value as the Treaties and thus constitutes primary law. This has opened a new field of dispute between different levels of protection, especially since Article 53 of the Charter lays out the relationship between different legal orders in the following way:

Nothing in this Charter shall be interpreted as restricting or adversely affecting human rights and fundamental freedoms as recognised, in their respective fields of application, by Union law and international law and by international agreements to which the Union or all the Member States are party, including the European Convention for the Protection of Human Rights and Fundamental Freedoms, and by the Member States' constitutions.

It has been stated that Article 4(2) TEU and Article 53 of the Charter “intersect in the field of fundamental rights”. Furthermore, EU harmonisation in the field of criminal law has touched upon topics central to the Member States. It is therefore not surprising that the Court fairly recently has delivered judgments in a series of cases concerning criminal law in connection with national fundamental rights.

105 Torres Pérez, supra note 14, p. 144.
A leading case in this sphere is *Melloni*, judgment of 26 February 2013. This preliminary ruling from the Spanish Tribunal Constitucional concerned the implementation of a European arrest warrant in conflict with a national constitutional provision granting additional judicial protection. In 1996, a Spanish court authorised the extradition of Mr Melloni to Italy. Having fled the Spanish authorities, Mr Melloni could not be extradited to Italy, and he was therefore sentenced *in absentia* by the Italian courts. In 2008, Mr Melloni was arrested by the Spanish police. Opposing surrender to Italian authorities, he requested Spanish constitutional protection on the right to a fair trial since it, under Italian procedural law, was not possible to appeal against sentences imposed *in absentia*. The question therefore arose whether Article 24 of the Spanish Constitution in light of Article 53 of the Charter could add conditions to the arrest warrant, resulting in a higher level of protection. The Court concluded that the Spanish line of argumentation would result in a situation where the implementation of EU law would depend on whether the standard of protection of fundamental rights guaranteed by the Member State’s constitution was higher than the one deriving from the Charter, and in such a way give it priority over EU law. The Court dismissed this argument as undermining the primacy of EU law, and reiterated that “rules of national law, even of a constitutional order, cannot be allowed to undermine the effectiveness of EU law”. Concerning Article 53 of the Charter, the Court stated the following in paragraph 60:

60. It is true that Article 53 of the Charter confirms that, where an EU legal act calls for national implementation measures, national authorities and courts remain free to apply national standards of protection of fundamental rights, provided that the level of protection provided for by the Charter, as interpreted by the Court, and the primacy, unity and effectiveness of EU law are not thereby compromised.

The Court concluded that a Member State could not avail itself of Article 53 of the Charter to make the execution of European arrest warrants conditional upon the possibilities of review in other Member States.

The case thus concerned the relevance of national fundamental rights in EU law, and confirmed the case-law from *Internationale Handelsgesellschaft* in the context of Article 53 of the Charter: even national constitutional rules “cannot be allowed to undermine the effectiveness of EU law”. National identity was not invoked, but the case’s proximity to

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106 Case Stefano Melloni v Ministerio Fiscal, C-399/11, ECLI:EU:C:2013:107.
108 Ibid., paras 55-59.
109 Ibid., para 63.
the concept is revealed by the Advocate General in his Opinion in *Melloni*.110 In this Opinion, the Advocate General noted that both Article 4(2) TEU and the preamble of the Charter mention the respect for national identities, after which he stated that “[a] Member State which considers that a provision of secondary law adversely affects its national identity may therefore challenge it on the basis of Article 4(2) TEU.”111 The Advocate General found that the case did not concern Spanish national identity, basing his conclusion on the essence of the right being contested before the Spanish court, and that the Kingdom of Spain had claimed the situation not to be covered by national identity.112 The application of Article 53 of the Charter and considerations of national identity did therefore not alter the Advocate General’s conclusions, which the Court mirrored without mentioning national identity.113 What can we learn from the case?

The new finding of the Court comes in the cited paragraph 60, where the Court made the application of Article 53 of the Charter conditional upon the primacy, unity and effectiveness of EU law. In paragraph 60, one can almost get the impression that the Court merely cited Article 53. Yet, that article itself has no mentioning of the primacy, unity and effectiveness of EU law. Instead, the article contains a clear reference to the Member States’ constitutions. Does this mean that the Court has altered the meaning of Article 53 of the Charter? Upon a quick reading, that could be seen as the case. However, the article’s mentioning of the “respective fields of application” of Union and national law is crucial for understanding Article 53 of the Charter. This phrase was addressed by the Advocate General, who found that the Charter’s level of protection only applies within the field of application of EU law, whereas outside this field, Member States are free to apply their own levels of protection.114 If we in this light regard paragraph 60 in *Melloni* and its requirement not to compromise the Charter’s level of protection or the primacy, unity and effectiveness of Union law, we see that the Court has not redrafted Article 53 or omitted the importance of national constitutions, but defined what should be the case when EU law applies. Such an understanding of Article 53 would result in the article having two main fields of application: one field (A) where EU law applies, and one field (B) where national law applies. National fundamental rights would have free reign

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111 Ibid., points 138-139.
112 Ibid., points 140-141.
113 Cf. ibid., points 97-98, 136 and 146, with paragraphs 60 and 65 of the *Melloni* judgment, *supra* note 106.
in field B, but would in field A be subject to the conditions laid down in *Melloni*. Concerning field A, paragraph 61 of *Melloni* then tells us the following:

61. However, as is apparent from paragraph 40 of this judgment, Article 4a(1) of Framework Decision 2002/584 does not allow Member States to refuse to execute a European arrest warrant when the person concerned is in one of the situations provided for therein.

In this paragraph, since the particular rule was fully harmonised, the Court did not allow any room for a national higher level of protection. This implies that that field A potentially can be divided into two lots: A1, where the EU rule is fully harmonised and any derogation would threaten the unity of EU law, and A2, the character of which the Court did not pronounce. Can we further determine the characteristics of lot A2, and how shall the scope of the Charter be determined?

Luckily for the answer of these questions, on the same day – 26 February 2013 – the Court delivered another landmark judgment on the Charter: *Åkerberg Fransson*. The case neither concerned Article 53 of the Charter, nor national identity. Instead, it ruled on the application of *ne bis in idem* in relation to value added tax (VAT), where a given infringement had led to both administrative and criminal sanctions proscribed in national law. In that case, the Court found that situations cannot exist where national legislation falls within the scope of EU law without the fundamental rights guaranteed by the Charter being applicable. Interestingly, in that case, the Court referred to paragraph 60 of the then (very) recent *Melloni* judgment, stating that national courts implementing EU law in an area “*not entirely determined by EU law [...] remain free to apply national standards of protection of fundamental rights, provided that the level of protection provided for by the Charter, as interpreted by the Court, and the primacy, unity and effectiveness of European Union law are not thereby compromised*”. From this, we can infer that lot A2 from the reasoning above is characterised by not being “*entirely determined by EU law*”. Since these characteristics also follow *a contrario* from the definition of lot A1, which is characterised by full harmonisation, the rules seem perfectly consistent. With these two cases, *Melloni* and *Åkerberg Fransson*, the relationship between national fundamental rights and Article 53 of the Charter has been clarified. Even though the Court

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115 Case *Åklagaren v Hans Åkerberg Fransson*, C-617/10, ECLI:EU:C:2013:105.
117 Ibid., para 29.
118 In later situation, this has by Advocate General Bobek been interpreted as giving room for national fundamental right standards in situation where Member States “*retain considerable leeway*”. Cf. Opinion of Advocate General Bobek in Case *Teodor Ispas, Anduţa Ispas v Direcţia Generală a Finanţelor Publice Cluj*, C-298/16, ECLI:EU:C:2017:650, point 62, cf. footnote 46.
did not mention national identity, Advocate General Bot’s Opinion in Melloni shows the proximity of the issue. As we will see below, the conclusions from Melloni and Akerberg Fransson are indeed relevant in cases concerning national identity.

3.4 Taricco and M.A.S. – fundamental rights, direct effect and national identity
In the cases Taricco\(^\text{119}\) and M.A.S.,\(^\text{120}\) the relationship between fundamental rights and EU criminal law has been further developed. Since these preliminary rulings concerned the same legal questions – the Italian Corte costituzionale used M.A.S. in order to question Taricco – it is appropriate to examine the two cases together, with focus on M.A.S.

M.A.S. is a complicated case, dealing both with fundamental rights and direct effect. This section will therefore be divided into eight subsections. In the first subsection (3.4.1), the Court’s findings in Taricco and M.A.S. and relevant parts of the Advocate Generals’ Opinions will be expounded. In the second subsection (3.4.2), the outline for analysis of the M.A.S. judgment will be explained. In the third subsection (3.4.3), it will be explained that the principles of equivalence and effectiveness apply to M.A.S. Further arguments for this is found in the fourth subsection (3.4.4), where the case-law on res judicata is analysed due to a reference made by the Court in M.A.S. In the fifth subsection (3.4.5), the principle of effectiveness is applied to M.A.S. In the sixth subsection (3.4.6), the Court’s argument concerning fundamental rights will be analysed, and in the seventh subsection (3.4.7), national identity is considered as a key to the previous problems addressed. The final subsection (3.4.8) summarises the findings.

3.4.1 Taricco and M.A.S. – two cases on the same questions
The circumstances leading up to the situation in Taricco were the following. A number of persons were charged with offences in relation to VAT, punishable under Italian law by terms of imprisonment. These offences included inter alia ‘VAT carousels’, shell companies and false documents, allowing the accused persons to acquire goods VAT free and to sell them below market price, thereby distorting the market. However, the Italian limitation periods could not be extended beyond eight years and nine months from the date on which the offences were committed. Since the judicial proceedings had taken a

\(^{119}\) Case Ivo Taricco and Others, C-105/14, ECLI:EU:C:2015:555.

long time, the offences would likely soon be time-barred, resulting in a *de facto* impunity for the offences and a *de facto* VAT exemption for the goods.\(^{121}\) The national court had doubts as to the compatibility of such an impunity with EU law. The Court found that Member States must ensure that cases of serious fraud are punishable by effective and dissuasive criminal penalties. The Court found that Article 325(1) and (2) TFEU obligates Member States to counter fraud affecting the Union’s financial interests and that those provisions have direct effect since they “impose on Member States a precise obligation as to the result to be achieved that is not subject to any condition regarding application”.\(^{122}\) Thus, if the Italian limitation rules were to exclude punishment in a considerable number of cases, thereby rendering the penalties not effective and dissuasive, the Court found that the national court would have to give full effect to EU law, if need be by disapplying the rules prohibiting extension of the limitation periods.\(^{123}\)

In response to considerations regarding Article 49 of the Charter and the principle of legality, the Court stated that fundamental rights had to be ensured but that the sole consequence of disapplying the national rule probably would be not to shorten limitation periods. The Court further stated and that no one would be convicted for an act that did not constitute a criminal offence at the time when it was committed. Due to the fact that the ECtHR had found such an interpretation to be in accordance with Article 7 of the ECHR, and since Article 49 of the Charter corresponds to that protection, the Court found no breach of Article 49.\(^{124}\) This finding mirrors the one made by the Advocate General, who came to similar conclusions as the Court and who in response to arguments made by the Italian Government stated that provisions on limitation periods are not caught by the principle of the legality of penalties.\(^{125}\) The main finding of the Court was thus that Article 325(1) and (2) TFEU has direct effect, requiring the Member State to give full effect to EU law, if need be by disapplying the national provisions on limitation periods.\(^{126}\)

The saga was soon to continue with *M.A.S.* Following *Taricco*, the Corte costituzionale received questions from two national courts on the compatibility of Italian law with

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\(^{121}\) *Taricco*, supra note 119, paras 22, 24-25 and 34.

\(^{122}\) Ibid., paras 50-51. On this conclusion, Sicurella, *Effectiveness of EU law and protection of fundamental rights: The questions settled and the new challenges after the ECJ decision in the M.A.S. and M.B. case (C-42/17)*, NJECL 2018, Vol. 9(1) 24-30, on p. 25; Viganò, *supra* note 120, paras 27, 34-43, 47, 49 and 52. See also Mele, *supra* note 120, paras 27, 34-43, 47, 49 and 52. See also Opinion of Advocate General Bobek in *Case Spetsializirana prokuratura v Petar Dzivev and Others*, C-310/16, ECLI:EU:C:2018:623, point 52, for the Advocate General’s interpretation of the *Taricco* case in this regard.

\(^{123}\) *Taricco*, supra note 119, paras 18-27, 34-43, 47, 49 and 52.

\(^{124}\) Ibid., paras 53-58.

\(^{125}\) Opinion of Advocate General Kokott in *Case Ivo Taricco and Others*, C-105/14, ECLI:EU:C:2015:293, points 111 and 115.

\(^{126}\) Cf. *Taricco*, supra note 119, paras 49 and 58.
Article 325 TFEU. Limitation periods were in Italy – differently from what is the case in the EU, ECHR and a number of Member States\(^\text{127}\) – not seen as procedural, but substantive. As a consequence, they were in the Italian legal system considered subject to the prohibition against retroactivity. This particular classification of the rules as substantive, even if peculiar from an outside perspective,\(^\text{128}\) made the Corte costituzionale consider that the obligation to disapply national rules on limitation periods was contrary to the constitutional principle of legality.\(^\text{129}\) The national court therefore asked the Court of Justice whether the national rules had to be disapplied, firstly, when there was no sufficiently precise legal basis, secondly, when the limitation periods were part of substantive criminal law, and thirdly, when the disapplication was at variance with overriding principles of the national constitution.\(^\text{130}\) Furthermore, we see in the Opinion of the Advocate General in M.A.S. that the Corte costituzionale invoked Article 53 of the Charter in order to authorise national courts to disapply the obligation in Taricco, and that it considered the national interpretation of the legality principle to form part of Italian national identity under Article 4(2) TEU.\(^\text{131}\) The Court and the Advocate General answered in different ways to the questions referred by the national court. We begin by examining the Opinion of the Advocate General.

In his Opinion in M.A.S., Advocate General Bot replied that Article 325 TFEU required the Italian courts to disapply the absolute limitation periods. He also found, with reference to the ECtHR, that the limitation rules had to be seen as procedural.\(^\text{132}\) Concerning Article 53 of the Charter, the Advocate General replied that the national interpretation of Article 53 could not be accepted since it would allow the national courts to refuse to fulfil the obligation flowing from Taricco to if need be disapply conflicting national rules.\(^\text{133}\) Concerning the respect for national identity, the Advocate General stated that a Member State which considers a provision of primary or secondary law to adversely affect its national identity can challenge it on the basis of Article 4(2) TEU.\(^\text{134}\) The Advocate General developed his thoughts on the implications of national identity by stating that neither fundamental rights from national constitutions, nor national

\(^{127}\) Opinion of Advocate General Bot in Case M.A.S., supra note 67, points 59 and 136-137, and footnotes 13 and 55.

\(^{128}\) On the considerations lying at its basis, see Manacorda, The Taricco saga: A risk or an opportunity for European Criminal Law?, NJECL 2018, Vol. 9(1) 4–11, on pp. 8-9.

\(^{129}\) M.A.S., supra note 120, paras 9-15.

\(^{130}\) Ibid., para 20.

\(^{131}\) Opinion of Advocate General Bot in M.A.S., supra note 67, points 44, 49 and 120-121 and 170.

\(^{132}\) Ibid., points 108-109, 137-139 and 142-143.

\(^{133}\) Ibid., points 144-168.

\(^{134}\) Ibid., points 174-175.
constitutional structures can affect the validity or effect of a Union act. As mentioned in chapter 2, the Advocate General did not find the situation in M.A.S. to concern national identity since the Corte costituzionale had not sufficiently explained why national identity would be compromised and since the protection of a “fundamental right must not be confused with an attack on national identity”.

The Opinion of the Advocate General deserves two comments. Firstly, the Advocate General appears to have developed his reasoning from his Opinion in Melloni, in which he had found that a Member State which “considers that a provision of secondary law adversely affects its national identity may [...] challenge it on the basis of Article 4(2) TEU”. Here, in his Opinion in M.A.S., this formulae changed to “a Member State which considers that a provision of primary law or secondary law adversely affects its national identity may thus challenge it on the basis of [...] Article 4(2) TEU.” This extension from only secondary law to also primary law represents a substantial change, especially since primary law has been agreed upon by all Member States. In academic literature, it has been argued that a Member State can challenge secondary law as unlawful if it is in breach of Article 4(2) TEU. However, since primary law has been agreed upon by the Member States, primary law provisions themselves cannot be rendered unlawful through the use of Article 4(2) TEU. Instead, it seems that the Advocate General meant that a certain interpretation of primary law can be challenged on the basis of the identity clause. Secondly, the Advocate General apparently considered that even though provisions of EU law may be challenged by Member States on the basis of Article 4(2) TEU, national rules cannot affect the validity, nor effect of those acts. Can these two statements be brought into line with each other? I consider the answer to be in the affirmative. The Advocate General could be understood as stating that any national considerations would have to be translated from national law into EU law, as the Court did in Omega and Schmidberger. In such a case, corresponding notions in EU law would have to be found, and these notions could be pleaded in conjunction with Article 4(2) TEU. In such pleadings, national considerations could be added not in order to base the argument legally, but to show the importance in the national context. In that case, the challenge would not primarily rely on national law, but on EU law. Even if it from a national standpoint could seem contradictory that national identity, which supposedly has to be

135 Ibid., points 176-186, with the citation being from point 179.
136 Opinion of Advocate General Bot in Melloni, supra note 64, point 139.
137 Opinion of Advocate General Bot in M.A.S., supra note 67, point 175.
138 von Bogdandy and Schill, supra note 37, on p. 1443. See also Pollicino, supra note 97, on p. 97.
139 On this, see Claes, supra note 4, pp. 137-138.
found within the national context, only can be applied if sources for that claim is found within EU law itself, the interpretation has the merit of reuniting the challenging of EU law with its primacy\textsuperscript{140} and the validity of Union acts.\textsuperscript{141} Such a reading, even if contradictory, has the advantage of defining a method for using Article 4(2) TEU. Yet, the legal value of the Advocate General’s statements can be questioned, as the Court did not follow the Opinion. We therefore now turn to the judgment.

In the \textit{M.A.S.} judgment, the Court replied jointly to the first two questions referred – disapplication in cases lacking sufficiently precise legal basis and in cases of substantive limitation rules – and thereafter did not see any need to answer the third question – compatibility with the national constitutional rules. The Court reiterated that Article 325 TFEU requires Member States to adopt effective and deterrent criminal penalties for serious frauds in relation to VAT. With a reference to paragraph 57 of \textit{Taricco}, which based the interpretation of Article 49 of the Charter on the case-law of the ECtHR, the Court recalled that an extension of limitation periods does not, in principle, infringe the principle that offences and penalties must be defined by law. Yet, the Court then stated that the legal area relevant in \textit{M.A.S.} fell within the shared competence, and that since limitation periods had not been harmonised, Italy was free to provide that the limitation rules were substantive in character. The Court stated that the national courts should ensure observation of fundamental rights and that they could apply national standards if they respected the level of protection provided for by the Charter as well as the primacy, unity and effectiveness of EU law. Since the Court had accepted that the Italian rules on limitations were substantive, EU fundamental rights applied to the rules and the rules became subject to the principle that offences and penalties must be defined by law. The Court left it to the national court’s to decide whether the \textit{Taricco} obligation to disapply national limitation rules would result in uncertainty in the Italian legal system. If such uncertainty were to be the case, the Italian courts were not required to disapply the national provisions. The Court concluded its assessment with a reference to the \textit{res judicata} case \textit{Impresa Pizzarotti},\textsuperscript{142} and stated that the national courts were not obliged to disapply national limitation rules, even it would have allowed a situation incompatible with EU law to be remedied.\textsuperscript{143} Having resolved the matter, the Court did not address the compatibility of \textit{Taricco} with the Italian Constitution.

\textsuperscript{140} \textit{Costa v E.N.E.L.}, Case 6/64, ECLI:EU:C:1964:66; Case \textit{Simmenthal}, 106/77, ECLI:EU:C:1978:49; \textit{Internationale Handelsgesellschaft}, supra note 82.

\textsuperscript{141} \textit{Case Foto-Frost}, 314/85, ECLI:EU:C:1987:452.

\textsuperscript{142} \textit{Case Impresa Pizzarotti & C. SpA v Comune di Bari and Others}, C-213/13, ECLI:EU:C:2014:2067.

\textsuperscript{143} \textit{M.A.S.}, supra note 120, paras 35-36, 41-48, 58-59 and 61.
3.4.2 How shall the cases be understood?
Both *Taricco* and *M.A.S.* constituted a conflict between the effectiveness of EU law and national fundamental rights. Despite their similarities, the cases have different outcomes. What happened between the cases?

The situations in the cases were essentially the same. At the bottom of the conflict in both cases lies the risk for a *de facto* impunity for VAT frauds and the finding that Article 325(1) and (2) TFEU has direct effect. In both cases, the Italian government considered the principle of retroactivity to preclude disapplication of the national rules, and in both cases, the Court stated that a *de facto* prolongation of the limitation periods was in accordance with both EU law and the ECHR. Since EU law in both cases applied without full harmonisation, we can with our allegory from *Melloni* and Åkerberg Fransson place the situation in lot A2: within the boundaries of EU law, but without full harmonisation and therefore with room for national fundamental rights, provided that the level of protection of the Charter and the primacy, unity and effectiveness of EU law are respected. In *Taricco*, it was stated that if the national rules were to prevent effective penalties, those rules would have to be disapplied. From the questions referred by the Corte costituzionale in *M.A.S.*, we see that the national court considered the national rules to preclude such effective penalties;\(^{144}\) a situation which according to the rule in *Taricco* would lead to disapplication of the national provisions. However, in *M.A.S.*, the Court changed its reasoning and allowed a national interpretation of the legality principle to prevail over the effectiveness of Article 325 TFEU. Yet, the only real changes between the cases seem to be in the pleadings from the Italian authorities, these being: firstly, that the Italian rules on limitation periods were substantive, secondly, the mentioning of Article 53 of the Charter, and, thirdly, that the national interpretation of the principle of legality should be considered an element of Italian national identity. In *M.A.S.*, at least one of these three factors made the Court change the outcome.

As will be shown below, both considering the limitation rules of substantive nature to fulfil Article 325(1) and (2) TFEU and the obligations flowing from it (3.4.3, 3.4.4 and 3.4.5), and considering Article 53 of the Charter to allow the national interpretation of the principle of legality (3.4.6), fail on the effectiveness of EU law. In order to align this lack of effectiveness in *M.A.S.* with the previous case-law of the Court, I therefore propose that the Court silently made use of Article 4(2) TEU in order to loosen the effectiveness requirement (3.4.7). This understanding of the case will then be summarised (3.4.8).

\(^{144}\) *M.A.S.*, supra note 120, para 20.
3.4.3 Equivalence and effectiveness – allusions of the Court and possible objections

In the first section of the M.A.S. judgment, the Court explained the rules following from Taricco as obligating Member States to effectively collect full VAT with effective and deterrent penalties, taking the same measures as they would to counter fraud affecting their own financial interests. The Court restated that Article 325(1) and (2) TFEU has direct effect and that the Member States need to give to full effect to that article, if need be by disapplying conflicting national rules on limitation. Thus, we see that the Court formulated a rule according to which the Member States are under an obligation to ensure full collection of VAT – an obligation which has direct effect and which needs both to be effective and to result in the same measures as cases undermining national financial interests. These last two considerations correspond to the principles of effectiveness and equivalence, which form the limits of the principle of national procedural autonomy.145

Is that what the Court was alluding to, direct effect of Article 325(1) and (2) TFEU, executed by Member States under the principles of equivalence and effectiveness? In favor of such a finding speaks the allusions made by the Court. Furthermore, Article 19 TEU obligates the Court to ensure that law is observed in the interpretation and application of the Treaties; an obligation which should entail a duty to guard the boundaries of national implementation. Yet, two objections can be raised against the finding that the principles are relevant to the case.

The first objection is that the Court did not mention the notion of procedural autonomy in M.A.S. However, this does not mean that the principles of equivalence and effectiveness did not apply. The reasoning of the Court is framed with both effectiveness and equivalence, with the equivalence requirement being formulated explicitly in Article 325(2) TFEU. Furthermore, if we read the Opinion of Advocate General Kokott in Taricco, we see that the reasoning of procedural autonomy together with the principles of equivalence and effectiveness was present already in the arguments underlying that case.146 Thus, the silence from the Court is not in itself an argument against the principles.

As a second objection, it should be asked: is the principle of national procedural autonomy, together with the principles of equivalence and effectiveness, applicable in the M.A.S. context? In the Court’s case-law, the principle of procedural autonomy is often


146 Opinion of Advocate General Kokott in Taricco, supra note 125, point 121.
summarised as providing that, in the absence of EU rules on procedural requirements, it is for the domestic legal system of each Member State to determine those requirements, provided that they are not less favourable than those governing similar domestic situations (principle of equivalence) and that they do not render impossible in practice or excessively difficult the exercise of rights conferred by the EU legal order (principle of effectiveness).\textsuperscript{147} Given this definition, we see that the situations in both Taricco and M.A.S. lacked rights conferred upon individuals. Yet, this does not limit the application of the principles of equivalence and effectiveness. In the early case Comet, the Court laid down that a Community provision having direct effect is subject to the principles of equivalence and effectiveness.\textsuperscript{148} From Comet, we can thus see that direct effect entailed the application of these principles. Furthermore, in later case-law, the Court has required Member States to ensure “full effectiveness” of Community provisions with direct effect also in situations where no right could be exercised by the individual.\textsuperscript{149} From this, we can conclude that the principles of equivalence and effectiveness do not in themselves require a right to be exercised, if the provision in question has direct effect.\textsuperscript{150} Also this finding is supported by the fact that Advocate General Kokott in her Opinion in Taricco applied the reasoning of procedural autonomy together with the principles of equivalence and effectiveness.\textsuperscript{151} Since the Court had established in both Taricco and M.A.S. that Article 325(1) and (2) TFEU has direct effect, the principles of equivalence and effectiveness could indeed be applied to the situation in M.A.S.

We can therefore conclude that neither the fact that the Court did not explicitly mention procedural autonomy together with the principles of equivalence and effectiveness, nor how the principles often are formulated in the Court’s case-law, speak against the use of these principles in M.A.S. We can therefore to our two arguments speaking in favour of the principles – the allusion made by the Court and Article 19 TEU – add a third argument: the case-law on \textit{res judicata} mentioned by the Court.

\textsuperscript{147} Cf. INEOS Köln, \textit{supra} note 145, para 42; Danqua, \textit{supra} note 145, para 29; Agrokonsulting, \textit{supra} note 145, paras 35-36.
\textsuperscript{148} Case \textit{Comet BV v Produktchap coor Siergewassen}, 45/76, ECLI:EU:C:1976:191, paras 9-16, especially paras 13 and 16. Even if the Court did not frame the requirements as equivalence and effectiveness, the Court has later interpreted the case as laying out those principles, see Case \textit{Unibet}, C-432/05, ECLI:EU:C:2007:163, para 43; Case \textit{Test Claimants in the FII Group Litigation}, C-446/04, ECLI:EU:C:2006:774, para 203; Case \textit{Levez v Jennings Ltd}, C-326/96, ECLI:EU:C:1998:577, para 18; Case \textit{Ministero delle Finanze v Spac}, C-260/96, ECLI:EU:C:1998:402, para 18.
\textsuperscript{149} Case \textit{Antonio Muñoz y Cia and Others}, C-253/00, ECLI:EU:C:2002:497, paras 27-28, 30-32. Cf. also para 25 of the judgment, where the applicant’s argument was framed with requirements of direct effect, a reasoning which it seems that the Court followed in its application. See Hettne, Otken Eriksson \textit{et al.}, \textit{supra} note 25, pp. 197.
\textsuperscript{150} Hettne, Otken Eriksson \textit{et al.}, \textit{supra} note 25, pp. 196 and 205.
\textsuperscript{151} Opinion of Advocate General Kokott in \textit{Taricco}, \textit{supra} note 125, point 121.
3.4.4 Equivalence and effectiveness – a parallel to the case-law on res judicata

The use of the principles of equivalence and effectiveness becomes more even apparent if we examine the case-law referred to by the Court in paragraph 61 of M.A.S. In that paragraph, the Court concluded that the national court was not obliged to disapply the national limitation rules at issue “even if compliance with the obligation allowed a national situation incompatible with EU law to be remedied”. The case-law referred was paragraphs 58 and 59 of Impresa Pizzarotti,152 a case concerning a related principle within the sphere of legal certainty: res judicata. In paragraph 59 of that case, the Court stated:

59. Therefore, EU law does not require a national court to disapply domestic rules of procedure conferring finality on a judgment, even if to do so would make it possible to remedy a domestic situation which is incompatible with EU law […]).

However, that interpretation of res judicata as a limit to the implementation of EU law was given by the Court after it having stated in paragraph 54:

54. […] [I]n the absence of EU legislation in this area, the rules implementing the principle of res judicata are a matter for the national legal order, in accordance with the principle of the procedural autonomy of the Member States, but must be consistent with the principles of equivalence and effectiveness […]).

That national rules on res judicata are qualified by the principle of procedural autonomy, including the principles of effectiveness and equivalence, is recurring in the case-law of the Court.153 Thus, when the Court summarised its conclusion in M.A.S. with a reference to this case-law, it implied that the principles of effectiveness and equivalence indeed were at play – only this time without a thorough examination of the principles.

The comparison to res judicata is relevant not only because of the applicability of the principles of equivalence and effectiveness and the analogy made in M.A.S., but also since res judicata within procedural autonomy can limit the effectiveness of EU law. If we therefore further examine this part of the case-law on res judicata, we see that in most cases, the principle of res judicata is upheld and allowed to limit the application of EU

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152 Impresa Pizzarotti, supra note 142. Reference made in para 61 of M.A.S., supra note 120.
There are some exceptions to this general rule, and relevant in our case is the one from *Fallimento Olimpiclub*. In that case, which concerned an application of *res judicata* making it impossible to call into question national VAT case-law in breach of EU law, the Court stated that the effect of such a view “would be that [...] those rules would continue to be misapplied for each new tax year, without it being possible to rectify the interpretation.” The Court then continued with the following in paragraph 31:

31. In those circumstances, it must be held that such extensive obstacles to the effective application of the Community rules on VAT cannot reasonably be regarded as justified in the interests of legal certainty and must therefore be considered to be contrary to the principle of effectiveness.

Hence, given those consequences, the Court concluded that the application in *Fallimento Olimpiclub* of the Italian rule on *res judicata* was precluded. This case-law has later been interpreted by Advocate General Saugmandsgaard Øe as being an exception to the general application of *res judicata*. According to the Advocate General, the exception applies where “certain structural features make it in practice impossible or excessively difficult to exercise the rights conferred by EU law”, especially if a national rule has the consequence of imposing *erga omnes* a misinterpretation of EU law that cannot be rectified. Indeed, if we look at paragraph 31 of *Fallimento Olimpiclub*, we see that the Court weighed legal certainty against the principle of effectiveness, and that the extensive obstacles to the latter rendered the principle of *res judicata* non-applicable. Can any similar signs be found in *Taricco* and *M.A.S.*?

An underlying argument in the *Taricco* and *M.A.S.* judgments is that the Italian limitation rules would be contrary to Article 325 TFEU if they prevented effective and dissuasive penalties in a significant or considerable number of cases. These statements seem to address considerations similar to those in *Fallimento Olimpiclub* and the case-law on *res judicata*; even if the application of EU law can be limited in individual cases, a structural misapplication of EU law shall not be accepted. Due to these similarities

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155 *Case Amministrazione dell’Economia e delle Finanze and Others v Fallimento Olimpiclub Srl*, C-2/08, ECLI:EU:C:2009:506


158 Opinion of Advocate General Saugmandsgaard Øe in *Case XC, YB, ZA*, supra note 154, points 58-59.

159 *Taricco*, supra note 119, paras 47 and 58, and *M.A.S.*, supra note 120, paras 40 and 41.
between the situations and the reference made in *M.A.S.*, it would have been appropriate
to distinguish the situation in *Fallimento Olimpiclub* from that in *M.A.S.* If any weighing
was done between the principle of effectiveness and the prohibition on retroactivity, how
was it conducted? As the situations have not been distinguished from one another, one
could consider their implications to be similar; to use the expression used by Advocate
General Saugmandsgaard Øe, they result in an “*erga omnes*” non-application of EU law.

However, if we return to the applicability of procedural autonomy together with the
principles of effectiveness and equivalence, we now see that arguments for its application
can be found in the Court’s allusions in *M.A.S.*, in Article 19 TEU on the Court’s
jurisdiction and in the analogy made in *M.A.S.* to *res judicata*. Since the applicability has
not been undermined by the objections considered, we can therefore conclude that that
the principles of equivalence and effectiveness could and should have applied in *M.A.S.*
Thus, we can now ask: how well does the Court’s application in *M.A.S.* respect the
principles of equivalence and effectiveness?

3.4.5 Substantive character of limitation rules – part of a solution?

It appears that the Court in *M.A.S.* wanted to make the substantive character of the
limitation rules decisive, and that the application of fundamental rights would come as a
consequence.\textsuperscript{160} How well does this national characterisation of the rules match the rule
formulated by the Court and the principles of effectiveness and equivalence?

To begin with, it should be noted that one of the two Italian courts asking questions to
the Corte costituzionale explicitly doubted the compliance of the national legislation with
Article 325(2) TFEU.\textsuperscript{161} Thereby, it also questioned the equivalence of the national
measures. However, there is neither enough material in those questions, nor in the *Taricco*
and *M.A.S.* judgments, to analyse that problem. Due to this lack of information, the
potential problem with the equivalence criterion will not be studied further. The following
parts of this analysis will therefore focus on the principle of effectiveness.

Having concluded that the principle of effectiveness indeed should have been at play,
we can reformulate the Court’s rule in *M.A.S.* as being that Article 325(1) and (2) TFEU
has direct effect, that the *Taricco* obligation to ensure effective and deterrent penalties
should be given force within the principle effectiveness, and that conflicting national rules
otherwise would need to be disappplied. Yet, when the Court applied its rule to the case, it

\textsuperscript{160} *M.A.S.*, *supra* note 120, paras 45 and 58.
\textsuperscript{161} *Ibid.*, paras 11-12.
merely stated that the situation fell within the shared competence with non-harmonised rules on limitation. This was in paragraph 45 followed by:

45. The Italian Republic was thus, at that time, free to provide that in its legal system those rules, like the rules on the definition of offences and the determination of penalties, form part of substantive criminal law, and are thereby, like those rules, subject to the principle that offences and penalties must be defined by law.

Evidently, since the Court at this stage did not examine the compatibility of those substantive limitation rules with the Taricco obligation to ensure effective and deterrent penalties, the Court’s statement in paragraph 45 does not match the rule provided by the Court in the preceding paragraphs. The prior statement that limitation rules had not been harmonised does not alter this; as has been argued, the relevant point was not whether those rules had been harmonised, but that the fight against fraud constituted a field of application of EU law.\textsuperscript{162} The effectiveness problems with the limitation rules were evident after Taricco, but these problems were not addressed by the Court in M.A.S. Instead, when the Court further applied its rules to the case, after having examined the Charter and EU fundamental rights, it stated in paragraph 58:

58. As noted in paragraph 45 above, the requirements of foreseeability, precision and non-retroactivity inherent in the principle that offences and penalties must be defined by law apply also, in the Italian legal system, to the limitation rules for criminal offences relating to VAT.

Thus, it appears that the Court in paragraph 58 of M.A.S. considered its examination of the substantive rules in paragraph 45 to be an implementation of the Taricco rule on effective collection of VAT, and as such subject to the fundamental rights applicable following that implementation. In Taricco, the Court concluded that if the national provisions would lead to impunity, the punishments would not be effective.\textsuperscript{163} How the Court in M.A.S. came to the opposite conclusion concerning this effectiveness is not explained. Still, respecting the principle of effectiveness would have been a necessary requirement for the freedom under the principle of procedural autonomy to apply.

It has been argued that the Court managed to turn M.A.S. into a fundamental rights case, protecting the principle of legality.\textsuperscript{164} I agree with this. Yet, as we know from Article 51(1) of the Charter, the rules in the Charter only apply to the Member States

\textsuperscript{162}Viganò, \textit{supra} note 120, on p. 20.

\textsuperscript{163}Taricco, \textit{supra} note 119, para 47.

\textsuperscript{164}Bonelli, \textit{supra} note 120, on p. 365. \textit{See} also Meyer, \textit{supra} note 120, on p. 306.
when they are implementing EU law. Hence, the application of EU fundamental rights to the Italian limitation periods could only have been the second step in the Court’s assessment. The first step was to conclude that Italy was free to characterise limitation periods as substantive and that those rules constituted an implementation of EU law. As we have seen, that step should have been subject to the principle of effectiveness. Only when this was achieved could EU fundamental rights as a second step be applied to the Italian rules. Even if it is not explicitly mentioned in the judgment, the outline of this two-step analysis can be seen in M.A.S., where paragraph 45 concerned the national freedom to provide rules, and paragraph 58 concerned the applicability of Union fundamental rights to those rules.\textsuperscript{165} Thus, even if the Court eloquently managed to turn M.A.S. into a fundamental rights case, the Court did in that very turn without explanation interpret the principle of effectiveness in a very liberal way. Thus, if we consider the substantive character in conjunction with the fundamental right in M.A.S. to be the only decisive factor, changing the outcome from Taricco, we run into problems with the principle of effectiveness. Either the case has redefined parts of the principle of effectiveness – by prolongation also the boundaries of procedural autonomy – or there was also something else at play. Accepting that the substantive character alone was not decisive, we now turn to the remaining two differences between Taricco and M.A.S.: Article 53 of the Charter and Article 4(2) TEU, both invoked by the Corte costituzionale.

3.4.6 Article 53 of the Charter and the recurring lack of effectiveness
When we apply Article 53 of the Charter to M.A.S., we can conclude that it does not provide the solution to the equation. In M.A.S., the Court referenced its finding in Taricco that the rights in the ECHR, to which Article 49 of the Charter corresponds, are in principle not infringed by an extension of limitation periods. The Court then reiterated its case-law from Melloni and Åkerberg Fransson, according to which the effectiveness of EU law is a key component when applying Article 53 of the Charter. In Taricco, the Court stated that national rules leading to impunity would not be effective.\textsuperscript{166} Departing from these findings, we again run into problems with effectiveness, in the following way.

Since the Court had stated in Taricco that the protection granted by the principle of legality in Article 49 of the Charter did not apply to extension of limitation periods, a

\textsuperscript{165} That two-step analysis is also hinted at in paragraph 52 of M.A.S., supra note 120. In that paragraph, it appears that the Court already had concluded that the substantive rules mentioned in paragraph 45 of M.A.S. constituted an implementation of the Taricco obligation under Article 325 TFEU to ensure full collection of VAT and to apply effective and deterrent penalties.

\textsuperscript{166} Taricco, supra note 119, para 47.
national interpretation that the principle does apply to such rules would result in a higher standard of protection. It follows from Melloni that Article 53 of the Charter allows such higher standards of protection provided that the effectiveness of EU law is not compromised. However, it follows from Taricco that Article 325 TFEU cannot be effectively applied if the national limitation rules were to exclude effective and dissuasive penalties in a significant number of cases, and from the questions referred by the Corte costituzionale in M.A.S., we see that the national court considered the national rules to preclude the punishment of serious frauds in a significant number of cases.\textsuperscript{167} This entails that the situation in M.A.S. did not respect the effectiveness of Article 325 TFEU. Since respect for the effectiveness of EU law is a key component when applying a higher standard of protection under Article 53 of the Charter, and since the effectiveness of Article 325 TFEU was compromised in M.A.S., this means that the requirements for application of Article 53 of the Charter were not fulfilled in M.A.S. Thus, the lack of effectiveness in M.A.S. precluded application of Article 53 of the Charter. Therefore, the article does not provide the answer in M.A.S.

It can seem hard to reconcile the M.A.S. judgment with Melloni.\textsuperscript{168} Indeed, it has been asked whether M.A.S. really is compatible with Melloni or if it is a hidden overruling.\textsuperscript{169} Even if the argument that M.A.S. can be seen as overruling Melloni has some merits, two things can be objected. Firstly, nothing in M.A.S. indicates that the Court considered it to be an overruling of Melloni. Secondly, the Melloni rule was referenced in M.A.S. through a reference to Åkerberg Fransson.\textsuperscript{170} I therefore opt for the possibility that the Court did not overrule Melloni, but rather did something else in M.A.S. We therefore turn to the last remaining difference between Taricco and M.A.S. – the fact that the Corte costituzionale invoked Article 4(2) TEU – in order to examine if that can provide the key for the other problems examined.

3.4.7 National identity – a key to the problem?
That Article 4(2) TEU was invoked in M.A.S. is the last remaining difference between that case and Taricco. In M.A.S., the Court mentioned neither Article 4(2) TEU, nor national identity. Thus, an interpretation that the case concerned national identity is not absolute. Still, by answering the first two referred questions in a way that satisfied the Italian courts, thereby reconciling the findings in Taricco with the Italian constitutional

\textsuperscript{167} M.A.S., supra note 120, para 20.
\textsuperscript{168} See Sicurella, supra note 122, pp. 25 and 28.
\textsuperscript{169} Viganò, supra note 120, pp. 19 et seq.
\textsuperscript{170} M.A.S., supra note 120, para 47, referring to para 29 of Åkerberg Fransson, thus to para 60 of Melloni.
requirements for the principle of legality, the Court solved the situation and could at least pretend to uphold its previous case-law. However, as we have seen, the principle of effectiveness was derogated from without sufficient explanation. This derogation was necessary both for the Court’s reasoning on the Italian freedom to implement the Taricco obligation on full VAT collection, and for allowing a possible national interpretation of fundamental rights. We can therefore see that the effectiveness of EU law is central to the case. How can then the derogation from the effectiveness requirement be explained?

Due to the consequences of a Melloni overruling and the implications of a redefinition of the principle of effectiveness, I find it unlikely that the Court intended M.A.S. to constitute such modifications of its previous case-law. Instead, I find it highly probable that the Court chose to respect the Italian rules. This respect can have two sources: either the Court accepted that the national interpretation of the legality principle constituted part of Italian national identity, or the Court chose to retreat under the threat that the Italian court otherwise would apply its “counter-limits” theory and explicitly question the primacy of EU law.¹⁷¹ Regardless of the reason, the outcome would be the same: a de facto respect for the national rules. Since the Court is bound by Article 19 TEU, such a respect would require a legal tool. The closest instrument available to the Court – at least if it did not want to change its grander case-law on both the principle of effectiveness and Article 53 of the Charter – would have been to apply Article 4(2) TEU. Since there are no other available plausible solutions for the Court maintaining its previous case-law and coming to the outcome it did, I presume this to have been the case. Thus, I conclude that the Court through a silent application of Article 4(2) TEU showed respect for the Italian national identity by lessening the effectiveness requirement in the M.A.S. judgment.

3.4.8 An understanding of the cases

How shall we then understand M.A.S., considered in the light of Taricco? If we depart from the conclusion that the Court silently applied Article 4(2) TEU, and return to our two-step analysis of M.A.S., we see that the Court’s first step was to acknowledge the limitation rules’ substantive character through an effectiveness requirement weakened by Article 4(2) TEU. The Court then turned to the second step, where EU fundamental rights were applied to these rules. Interpreted in this way, M.A.S. is an example of the Court respecting national fundamental rights not by juxtaposing them to the EU fundamental rights under Article 53 of the Charter, but rather by adjusting the requirements for their

application, accepting their consequences for EU law and then integrating them into the Union fundamental right.

Far from surprisingly, M.A.S. has caused academic debate. Meyer has argued that the case only is a victory for constitutional respect to the extent that the Court made the application of the Charter dependent on the views in the Member State. That is true, but to this should be added the concrete implications that Article 4(2) TEU ought to have had for the principle of effectiveness. Indeed, not seeing such a bending of the effectiveness requirement as a possible application of Article 4(2) TEU would entail a narrow understanding of the respect for national identity. Closer to a broad understanding of how respect for national identities can be applied is Cloots, who argues that permitting state-differentiated policies would be the best way apply EU law in a manner sensitive to national identities. The underlying discussion whether Article 4(2) TEU can result in non-application of EU law from national courts, or in other forms of respect, has been debated in academic literature. Given the interpretation here proposed of Taricco and M.A.S., it appears that the Court in M.A.S. through one form of respect tried to avoid a situation where national courts would be inclined to retreat to not applying EU law.

3.5 Conclusions concerning fundamental rights and national identity

It follows from the examination above that the role of national fundamental rights in conflict with EU law has changed since the entry into force of the Lisbon Treaty. These changes depend on multiple factors, notably the status of the Charter and conflicts emerging within EU criminal law. Due to these changes, the Lisbon era case-law seems rather disconnected from the preceding one. However, if we compare the effect of the positions adopted by the Court in the different periods, we can infer some continuing lines. In the more recent case-law, the Court has used its method from Omega, Schmidberger and Internationale Handelsgesellschaft in that it does not rely on the national rights invoked, but instead finds equivalent rights within the EU legal order – only now with the Charter as the point of reference. Reversing this comparison and applying the principles from the Charter and its Article 53 to the previous case-law, we see that the Court in Omega and Schmidberger found the national fundamental right to

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172 See Sicurella, supra note 122; Viganò, supra note 120; Manes, supra note 120; Mitsilegas, supra note 120; Bonelli, supra note 120; Meyer, supra note 120; Manacorda, supra note 128.
173 Meyer, supra note 120, on p. 306.
174 Cloots, supra note 2, on p. 179.
175 Inter alia Claes, supra note 4, pp. 111 et seq; Torres Pérez has asked in what cases Article 4(2) TEU would provide for exceptions from EU law, cf. Torres Pérez, supra note 14, pp. 148 et seq.
176 On such situations, cf. Cloots, supra note 2, pp. 183-184.
correspond to the level of protection provided by Charter. In Viking and Laval, the Court found the national fundamental rights to guarantee a higher level of protection than the Charter within the scope of application of EU law. Hence, in those cases, the Court either questioned that national protection or ruled it incompatible with EU law. Seen in that perspective, the Court’s view on national fundamental rights in Omega, Schmidberger, Viking and Laval is in line with its rule pronounced in Melloni and Åkerberg Fransson. Furthermore, if the rule from Melloni and Åkerberg-Fransson applies also to fundamental rights framed with national identity, which is implied by M.A.S., the success of such claims will in theory depend on how they relate to the level of protection of the Charter and to the primacy, unity and effectiveness of EU law.

Departing from these more general rules on national fundamental rights, the most interesting cases for our examination of national identity are Omega, Laval and M.A.S. In both Omega and M.A.S., the Court granted the Member States leeway in their application of Union law. Even though the cases are too different from one another to form a common line of case-law – resulting respectively in different conceptions of protection and discretion in the proportionality test, and in a loosened effectiveness requirement – the effect of national identity for national fundamental rights can be seen in both cases. Conversely, in Laval, the Court did not grant the Member State this leeway in a situation where the national context was deemed a problem. From a case-law perspective, it would have been interesting if the identity clause had been pleaded in that case. Yet, the Melloni criteria – unless loosened by considerations as in M.A.S. – seem to give a rather limited scope of application for fundamental rights surpassing the level of protection in the Charter. Such a claim in the Laval situation could perhaps be better suited against another background: that of internal organisation. We now turn to examining that context.

4 Federal structures and internal organisation

This chapter is divided into five sections. The first section (4.1) explains why federal structures and internal organisation should be considered and the conflict that needs to be solved. The second section (4.2) explores case-law where the invoked interests were not respected and begins with the first case where federal structures were pleaded together with the identity clause. In the third section (4.3), we analyse later case-law where the national interests of federal and internal organisation were respected, yet without explicit mentioning of the identity clause. In the fourth section (4.4), we examine the latest case-law, beginning with the first case where Article 4(2) TEU was explicitly recognised and used by the Court in this context. In the last section (4.5), the findings are summarised.

4.1 Starting points

Federal structures do not themselves constitute a field of law, and it can therefore be asked why they should be examined. The answer is simple: just as the federal structure itself, references to federal structures do not follow and limit themselves to the different fields of law. Therefore, examining the use of this legal construction is justified.

It is worth to remind oneself of the interests involved. On the one hand, there is the respect for national identity of the Member States, in Article 4(2) TEU of the Lisbon Treaty further defined as “inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government.” On the other hand, there is the “ever closer union” and the coherence of Union law. In this regard, we can return to the formulation used in paragraph 3 of Internationale Handelsgesellschaft:

“[T]he validity of a Community measure or its effect within a Member State cannot be affected by allegations that it runs counter to either fundamental rights as formulated by the constitutions of that State or the principles of a national constitutional structure.”

With these different interests in mind, we now turn to the first part of this examination.

178 See reference to para 3 of Internationale Handelsgesellschaft made by Advocate General Sharpston in her Opinion in the free movements case Government of the French Community, and Walloon Government v Flemish Government, C-212/06, ECLI:EU:C:2007:398, point 101 and footnote 59. That point was referred to by the Court in that judgment, see Case Government of the French Community, and Walloon Government v Flemish Government, C-212/06, ECLI:EU:C:2008:178, para 58. Referring to that very paragraph in a State aid context is Advocate General Kokott in her Opinion in Joined Cases Unión General de Trabajadores de La Rioja (UGT-Rioja) v Juntas Generales del Territorio Histórico de Vizcaya and Others, C-428/06 to 434/06, ECLI:EU:C:2008:262, point 31 and footnote 31.

179 Internationale Handelsgesellschaft, supra note 82.
4.2 Internal structures non-recognised

The first case in which national identity was explicitly argued in relation to federal structure was the *Suckler cow premium* case of 4 March 2004.\(^{180}\) The Commission carried out checks concerning suckler cow premiums in three German Länder, and found breaches that would lead to corrections. The Commission considered these findings to be representative for the whole of Germany unless proven otherwise. Germany brought an action of annulment and pleaded that the Commission had infringed Article 10 EC\(^{181}\) on cooperation in good faith in conjunction with Article 6(3) EU and the respect for German national identity in form of division into autonomous federated states, Länder. The Court interpreted this argument as meaning that the federal constitutional structure of Germany precluded extrapolation of the Commission’s findings from the inspections. The Court stated that the burden of proof between the Commission and the Member States applied irrespectively of the Member State’s internal structure; just as the Commission could not rule on the national allocation of powers, that allocation could not constitute a sufficient reason to restructure the Member State’s obligations towards the Community. The Court dismissed the German pleas.\(^{182}\) Thus, the national identity invoked was not respected.

This case was followed by the State aid case *Azores*, judgment of 6 September 2006, which presented the Court with an opportunity to set up a rule regarding the selectivity criterion in Article 87(1) EC (now Article 107(1) TFEU).\(^{183}\) The Commission had found Portugal being in breach of Treaty provisions on State aid by letting the autonomous Azores Region give tax reductions to all persons subject to income or corporation tax in that region. In its action for annulment of the Commission’s decision, Portugal claimed that the Commission wrongly had used the whole Portuguese territory as reference framework when determining selectivity. The Court opted for a solution proposed by Advocate General Geelhoed, according to which the national tax level did not need to be taken as reference if the autonomous region was sufficiently autonomous.\(^{184}\) The level of autonomy was to be determined from the three criteria of, firstly, constitutional, administrative and institutional autonomy, secondly, procedural autonomy from the central government, and, thirdly, financial autonomy.\(^{185}\) The Court stressed that the

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\(^{180}\) Case *Germany v Commission*, C-344/01, ECLI:EU:C:2004:121.

\(^{181}\) Treaty establishing the European Community, see Consolidated versions of the Treaty on European Union and of the Treaty establishing the European Community (2002), OJ 2002/C 325/01.

\(^{182}\) *Germany v Commission*, supra note 180, paras 1, 15-16, 23, 30-31, 59-60, 68, 77 and 79-82.

\(^{183}\) Case *Portuguese Republic v Commission (Azores)*, C-88/03, ECLI:EU:C:2006:511.


\(^{185}\) *Azores*, supra note 183, para 67. *Cf.* Advocate General Geelhoed’s Opinion in that case, supra note 184, point 54.

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relevant region should not only have the competence to adopt the measure, but also on a political and financial level assume the consequences of it. As the Advocate General, the Court found the autonomous region of the Azores not to be sufficiently autonomous from the central government in its fiscal policy. Thus, the local tax reductions breached the selectivity criterion and were contrary to Union law.

Two things should be noted from the case. Firstly, the solution chosen by the Court gave more leeway for Member States to make arrangements for autonomous regions. In points 50-54 of the Opinion – referred to by the Court in paragraph 63 and 67 of the judgment – the Advocate General outlined three typical cases for tax reductions in a geographical area. The first two cases were states with either central governments or a federal composition, whereas the third case involved parts of the two previous ones: a state with a centralised national tax level, from which at least one region is allowed to derogate. The Court applied this view since the selectivity depends on whether measures constitute an advantage for certain undertakings in comparison with others in comparable situations, and a sufficiently autonomous infra-State body could change the relevant context for this comparison. Acknowledging different compositions of Member States thus allowed the Court to determine the reference for ‘normal’ situations in different states. In that way, the Court admitted that Member States can be composed in a variety of ways whilst still safeguarding Union rules. Secondly, although the Court in essence chose the path proposed by the Advocate General, there is an interesting change of words between the opinion and the judgment. The Advocate General formulated his rule in order to establish whether the regions were “truly autonomous”. When adopting this rule, the Court instead used the words “sufficiently autonomous”, without mentioning this shift. From these two points – the recognition of different state structures and the labelling of the degree of autonomy in a more lenient or even relative way – it can be argued that the Court not only created a rule suitable for Member States of different compositions, but also deliberately chose a path with more respect Member States’ internal structures. Yet, even if this rule was formulated in the case, the Court deemed the situation in the Azores Region to be contrary to Union law. Thus, in the situation in the case, the relevant federal structure was not respected.

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186 Azores, supra note 183, para 68.
187 Ibid., paras 76-78 and 85. Cf. Advocate General Geelhoed’s Opinion in Azores, supra note 184, points 66-72. Cf. also points 68-70, where he found breaches of the procedural autonomy.
188 Opinion of Advocate General Geelhoed’s Opinion in Azores, supra note 184, points 50-54.
189 See Azores, supra note 183, paras 56, 58, 63 and 65-67.
190 Ibid., para 56.
191 Advocate General Geelhoed’s Opinion in Azores, supra note 184, points 54 and 68.
192 Azores, supra note 183, paras 58 and 65-67.
In *Government of the French Community*\(^{193}\) of 1 April 2008, the Court examined the Belgian federal structure in relation to the free movement of workers and the freedom of establishment. The background was a care insurance scheme, introduced by the Flemish Parliament in Belgium in 1999. This scheme covered persons residing in the territory of the Flemish Community and persons pursuing an activity in that territory but residing in another Member State, but excluded persons pursuing an activity in the Flemish territory and residing in other federated entities of Belgium. The Walloon Government and the Government of the French Community therefore questioned the scheme and the matter was referred to the Court. On this delicate matter of internal nature, the Court seemingly tried to strike a balance between applying Community law and respecting the national federal situation. Firstly, the Court concluded that Community law could not be applied to purely internal Belgian situations. Secondly, the Court found that nationals from other Member States working in the Dutch-speaking region but residing in other federated regions would risk losing social security advantages by residing in other parts of Belgium. The Court thus found that the national legislation constituted an obstacle to freedom of movement for workers. The Flemish Government tried to justify this restriction by referring to the division of powers within the Belgian federal structure, particularly since the Flemish Community could not exercise any competence in relation to insurance of persons residing in other territories.\(^{194}\) This justification was not accepted by the Court, which stated that Member States “*cannot plead provisions, practices or situations prevailing in its domestic legal order, including those resulting from the constitutional organisation of that State, to justify the failure to observe obligations arising under Community law.*”\(^{195}\) The Court concluded that the national provision was contrary to Articles 39 and 43 EC (now Articles 45 and 49 TFEU).\(^{196}\)

It has been argued that the case is a good example of the Court taking national federal structures into account.\(^{197}\) I agree only partially. It is true that the Court, in difference from the Advocate General,\(^{198}\) regarded parts of the matter as purely internal, falling outside of the scope of Community law, and that it thus decided not to extend the scope of Articles 17 and 18 EC (now Articles 20 and 21 TFEU) and the citizenship of the Union to the Belgian citizens concerned.\(^{199}\) However, that finding is, irrespectively of the

\(^{193}\) *Government of the French Community, supra* note 178.


\(^{195}\) *Ibid.*, para 58.


\(^{197}\) Millet, *supra* note 2, pp. 219-220.

\(^{198}\) Opinion of Advocate General Sharpston in *Government of the French Community, supra* note 178, points 142-143 and 156.

policies at its basis, technically more related to the principle of conferral and not to the identity clause as such. Nevertheless, another part of the Court’s reasoning testifies of a silent but more direct respect for the situation at hand: the Court did not seem to answer extensively to the questions referred. The national court asked regarding both Regulation No 1408/71\(^{200}\) and the Treaty provisions, which the Court reformulated to in essence concern Articles 18, 39 and 43 EC (now Articles 21, 45 and 49 TFEU). Having found a breach of the Treaty articles for nationals of other Member States, the Court concluded that it did not have to raise the question of infringement of Regulation No 1408/71. That answer is true in relation to citizens from other Member States, but the Court nevertheless remained silent concerning the application of the regulation on the Belgian nationals that it had excluded from application of the Treaty articles.\(^{201}\) If deliberately done, this is a sign of respect through avoidance.\(^{202}\) Yet, the general statement that the federal structure could not justify any restriction on the free movements was far-reaching since it indirectly disqualified the Belgian federal division of powers. It is not certain that the Flemish justification should have passed a proportionality test, but to disqualify the argument without examining it does not appear as a respect for the federal structures.

Two days later, on 3 April 2008, the Court delivered its judgment in Rüffert,\(^{203}\) a case in EU labour law noteworthy for what the Court did not do. The German Land Niedersachsen had for the construction of a prison awarded a contract that required compliance with minimum wage levels from collective agreements. The contractor used a subcontractor established in Poland, which came under suspicion for employing wages under the level from the relevant collective agreement. The contract between Niedersachsen and its contractor was therefore terminated. The Court applied Directive 96/71/EC concerning the posting of workers,\(^{204}\) under which posted workers could be guaranteed minimum pay \textit{inter alia} if laid down by a collective agreement declared universally applicable. The directive defined “\textit{universally applicable}” as an agreement which must be observed by all undertakings in the geographical area and in the profession or industry concerned. Since the local law did not fix minimum payment,\(^{205}\) the Court examined the collective agreement and stated the following in paragraph 29:

\(^{200}\) Regulation (EEC) No 1408/71 of the Council of 14 June 1971 on the application of social security schemes to employed persons and their families moving within the Community, OJ L 149, 05/07/1971 P. 0002 – 0050.

\(^{201}\) Government of the French Community, supra note 178, 14, 24, paras 37-38 and 59.

\(^{202}\) Cf. above, section 3.1, and the case Grogan, mentioned in footnote 84.

\(^{203}\) Case Dirk Rüffert v Land Niedersachsen, C-346/06, ECLI:EU:C:2008:189.


\(^{205}\) Rüffert, supra note 203, paras 3-24.
29. In a context such as that in the main proceedings, the binding effect of a collective agreement such as that at issue here covers only a part of the construction sector falling within the geographical area of that agreement, since, first, the law which gives it such an effect applies only to public contracts and not to private contracts and, second, the collective agreement has not been declared universally applicable.

The Court therefore found that Directive 96/71 precluded the national rule.\textsuperscript{206}

From the judgment, one might get the impression that this application of EU law was inevitable. However, if we read the Opinion of Advocate General Bot in the case, we find a conclusion permitting the law of the federated \textit{Land}.\textsuperscript{207} The Advocate General based his line of reasoning on the directive and the German context, and found the German system to be permitted.\textsuperscript{208} Furthermore, the Advocate General emphasised that unless granted delegated powers, Niedersachsen did not have competence to declare a collective agreement to be universally applicable. In the view of the Advocate General, Niedersachsen had sought within its competence to give mandatory force to the collective agreement applicable at the place where the services were performed.\textsuperscript{209} Thus, from the Opinion of the Advocate General, we see that the Court had been informed on the federated state lacking the general competence, that the Court had been provided with a solution that could reconcile this lack of competence with the directive, but that the Court nevertheless opted for a solution demanding from the federated state what the federated state could not provide. This shows that the Court knowingly applied EU law against the national context of federal structures.

Having examined these four cases, we see that although some of them contain parts where the Court opened for diverging national rules, the rulings went against the Member States. That tendency was soon to change with a more allowing policy.

\section*{4.3 Respect for national structures without the use of the identity clause}

In its judgment \textit{UGT-Rioja} of 11 September 2008,\textsuperscript{210} the Court had once again the possibility to rule on the State aid selectivity criterion in relation to autonomous regions.

A group of Spanish regions complained that the autonomous regions of the Basque Country had infringed rules on State aid by setting corporations taxes lower than the

\textsuperscript{206}Ibid., para 43.

\textsuperscript{207}Opinion of Advocate General Bot in Case \textit{Dirk Rüffert v Land Niedersachsen}, C-346/06, ECLI:EU:C:2007:541, point 136.

\textsuperscript{208}Ibid., points 86-97.

\textsuperscript{209}Cf. ibid., point 129.

\textsuperscript{210}Joined Cases \textit{Unión General de Trabajadores de La Rioja (UGT-Rioja) and Others v Juntas Generales del Territorio Histórico de Vizcaya and Others}, C-428/06 to C-434/06, ECLI:EU:C:2008:488.
general Spanish tax level. In its preliminary ruling, the Court referred to the Azores judgment and stated that in order to determine whether the regional or local authority was sufficiently autonomous, the regional or local authority needed institutional, procedural, and economic and financial autonomy. The Court stressed that the fiscal and political independence of the infra-State body was relevant not only for its competence, but also for it assuming the consequences of its conduct. The Court thus followed its reasoning in Azores on the political and economic environment and the selectivity criterion in Article 87(1) EC (now Article 107(1) TFEU), and did not develop the underlying policy arguments. The Court found the autonomous regions to satisfy the institutional autonomy criterion, and provided, despite some concerns, the national court with guidance on how to determine whether the criteria of procedural and financial autonomy were fulfilled.

In her Opinion in the case, Advocate General Kokott followed the same line of argumentation and applied the Azores criteria. She expanded on the underlying policies and principles by invoking Article 6(3) TEU of the Nice Treaty. According to the Advocate General, the EU “cannot encroach on the constitutional order of a Member State, whether it is centralist or federal, and does not in principle have any influence on the division of competences within a Member State”, after which she referred the coming Article 4(2) Lisbon Treaty with its explicit mentioning of respect for the Member States’ constitutional structures. She juxtaposed that finding to the Court’s conclusion in Government of the French community and Walloon government that “Member States cannot plead provisions, practices or situations prevailing in its domestic legal order, including those resulting from the constitutional organisation of that State, to justify the failure to observe obligations arising under Community law.” The Advocate General then concluded that the Azores judgment struck a reasonable balance between the two interests, as it both respected the autonomy stemming from national constitutions and ensured that the Member State could not hide behind its constitutional order.

The case is the first concerning federal structures in which Article 4(2) TEU is referenced by an Advocate General. The Opinion, issued on 8 May 2008, is just over a month older than the Court’s judgment in Government of the French Community, but it is marked with the interpretative use of the Lisbon Treaty, which did not enter into force.

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211 Ibid., paras 51-52 and 60.
212 Ibid., paras 48-52, 60, 87, 109-110 and 124-140.
213 Cf. Opinion of Advocate General Kokott in UGT-Rioja, supra note 178, inter alia points 41 et seq., point 53 and points 78 et seq.
214 Ibid., point 54.
215 Ibid., point 55.
216 Ibid., points 56-57.
before 1 January 2009. In the arguments of the Advocate General, a criticism towards the Court’s reasoning in Government of the French Community can be felt; Article 4(2) TEU (Lisbon) and the Court’s reasoning in the one month old judgment on Belgian federal structures are seen as the two principles involved, between which a two year old judgment, Azores, managed to strike a balance. Yet, in difference to Azores, the Court left it in UGT-Rioja to the national court to actually decide on the matter. Even if it is not clear if this decision was inspired by the view of the Advocate General, it was in line with her more respectful attitude towards the Member States. Thus, in this case, the identity clause was used by the Advocate General and the Court applied the case-law from Azores in a way which opened for the national structures to be respected.

The following case Coditel, judgment of 13 November 2008, arose in the context of public procurement. The question was whether a Belgian municipality could transfer its cable television to a cooperative society for municipalities, Brutélé, without calling for competition. In 2000, a Belgian municipality had done precisely that, after which the company Coditel lodged a complaint. The Court found that the inter-municipal cooperative society Brutélé did not enjoy a sufficient degree of independence in order to preclude the municipalities from exercising control similar to that exercised over their own departments. Since it was not questioned that Brutélé carried out the essential part of its activities with its members, the Court concluded that there was no need to call for tenders. The Court did not expressively refer to the Advocate General, who came to a similar conclusion. She however supported her view with a more policy based argumentation, in which she underscored that even though “public procurement is and remains one of the most influential policy instruments [...] in the process of European integration”, it cannot be used indiscriminately, but “must be brought into harmony with the values of other policy areas”. One of the facts mentioned by the Advocate General in support for inter-municipal cooperation, self-government and the competences of the Member States was the fact that the Treaty of Lisbon – still not in force – stresses the relevance of regional and local self-governance for national identity. Thus, the case is in line with UGT-Rioja – the Advocate Generals acknowledged national identity in the form of regional and local self-governance, and the Court came to a similar material conclusion without explicitly referring to that interest.

218 Case Coditel Brabant SA v Commune d’Uccle, C-324/07, ECLI:EU:C:2008:621
219 Ibid., paras 8-27, 39 and 41, with reference to Case Teckal, C-107/98, ECLI:EU:C:1999:562, para 50.
221 Ibid., points 77 and 80-87 and footnote 70.
The question of national internal organisation was later raised in the *Horvath* judgment of 16 July 2009. According to Regulation 1782/2003 on common rules for direct support schemes under the common agricultural policy, a failure of a farmer to fulfil minimum requirements for good agricultural and environmental conditions (‘GAEC’) would lead to reduction or cancellation of the farmer’s income support. Regulation 1782/2003 delegated the power to define the minimum GAEC requirements to the national or regional level. The United Kingdom Parliament had delegated this power to Scotland, Wales and Northern Ireland, but remained competent in relation to England. This resulted in different rules being applied in England and in the rest of the UK, with only the English farmers being subject to requirements of not disturbing the exercise of rights of public ways. The English farmer Horvath claimed that the requirements had been unlawfully introduced, and that the different legal situations for farmers in England compared to the rest of the UK amounted to discrimination. The Court stated that when Member States have been conferred power or imposed obligations in order to implement Community law, “the question of how the exercise of such powers and the fulfilment of such obligation may be entrusted by Member States to specific national bodies is solely a matter for the constitutional system of each State.” The Court further stated that the Member States are “free to allocate powers internally and to implement Community acts […] by means of measures adopted by regional or local authorities, provided that that allocation of powers enables the Community legal measures […] to be implemented correctly.” In her Opinion in the case, Advocate General Trstenjak came to the same conclusion, also without mentioning national identity. Both the Advocate General and the Court found that there was no discrimination in the case. Thus, in this case, the national internal structure was respected without any explicit use of Article 4(2) TEU.

In these three cases, we can therefore see that the Court arrived at conclusions which respected national internal structures. In some of the cases, the Advocate Generals relied on the identity clause, but the Court itself never explicitly applied it.

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224 *Horvath*, supra note 222, paras 3-19.


4.4 Article 4(2) TEU explicitly recognised

This inexplicit manner of the Court changed with the case *Digibet and Albers*, judgment of 12 June 2014, in which the Court for the first time acknowledged Article 4(2) TEU in relation to internal structures of the Member States. The case arose in a dispute on the freedom to provide games of chance via the Internet. The German Land Schleswig-Holstein had for a time adopted a more liberal legislation than the other 15 German Länder. The German public lottery company brought action against Digibet, a company registered and holding license in Gibraltar, arguing that Digibet offered games of chance and sport betting in Germany via the Internet and thereby infringed national rules. The Bundesgerichtshof was uncertain whether the liberal approach of Schleswig-Holstein had endangered the consistency of the other Länder’s restrictions, which in that case could have undermined the criterion of appropriateness in the proportionality test.

After having found that the national legislation constituted a restriction on the freedom to provide services, and having both affirmed the specifics of the gambling sector and the wide discretion enjoyed by Member States in that area, the Court turned to the question of competence within the national legal system. The Court reiterated that the fulfilment of obligations and exercise of power is a question for the constitutional system of each Member State. In paragraph 34, it then stated:

34. In the present case, the division of competences between the Länder cannot be called into question, since it benefits from the protection conferred by Article 4(2) TEU, according to which the Union must respect national identities, inherent in their fundamental structures, political and constitutional, including regional and local self-government.

The Court ruled that the restrictions on providing games of chance were proportionate.

Firstly, something must be said about the choice of words. In the judgment, the Court says that the Union “must” respect national identities. This can be compared with the text of Article 4(2) TEU: “[t]he Union shall respect the equality of Member States before the Treaties as well as their national identities[...].” From this, we can note that the Court when citing Article 4(2) TEU in paragraph 34 of *Digibet and Albers* changed the Treaty’s shall to must. Interpreted independently, this could be seen as an enforced modality for the Union obligation. However, does this change, from shall to must, make such a difference? I argue that it does not. Admittedly, there are linguistic differences between

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the language versions of the Treaty article itself; the English and Swedish versions use verbs of modality – “[t]he Union shall respect” and “[u]nionen ska respektera” – whereas the German and French versions do not – “[l]’Union respecte” and “[d]ie Union achtet”. One would presume that the Court, writing its judgment in French, would have used the French version of the Treaties, so a natural first step in the analysis would be to compare the English and French language versions of the judgment, and the French judgment with the French version of Article 4(2) TEU.

The French language version of Digibet and Albers expresses the obligation in a different manner than the English one:

34. En l’occurrence, la répartition des compétences entre les Länder ne saurait être remise en cause, celle-ci bénéficiant de la protection conférée par l’article 4, paragraphe 2, TUE, selon lequel l’Union est tenue de respecter l’identité nationale des États membres, inhérente à leurs structures fondamentales politiques et constitutionnelles, y compris en ce qui concerne l’autonomie locale et régionale.

Thus, we can see that the French version of Digibet and Albers does not mimic the French version of Article 4(2) TEU when expressing the Union obligation – “l’Union respecte” is changed to “l’Union est tenue de respecter”. From the French version, it appears that the Court did not want to pronounce itself of the level of modality, but rather state that there is an obligation to respect the national identities. As all language versions are held equally valid, we can compare the English and French versions of the judgments to other language versions. In this comparison, we notice that the way in which the obligation is expressed in French is mirrored in the German and Swedish language versions, but not in the English one, where the obligation instead is expressed with the enforced modal verb must. From this we can draw the conclusion that what in the English language version of the judgment appears to be a change to must from the Treaty’s shall, actually is nothing more than an unfortunate choice of words in the translation. Admittedly, the formulation “the Union is obliged to respect” would have been closer to the other language versions examined. Thus, the choice of words does not entail any change of the meaning of the Treaty obligation, but rather just reminds us of its existence.

Secondly, concerning the state of the law, one can only conclude that the Court in Digibet and Albers gave a strong protection to the federal structure of the Member States

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233 On this methodological step, see Bernitz and Kjellgren, Europarättens grunder, p. 91.
234 See Case CILFIT v Ministero della Sanità, 283/81, ECLI:EU:C:1982:335, para 18.
235 In German “da sie unter dem Schutz von Art. 4 Abs. 2 EUV steht, nach dem die Union verpflichtet ist, die jeweilige nationale Identität der Mitgliedsstaaten zu achten”, and in Swedish “eftersom denna skyddas av artikel 4.2 EUF, enligt vilken unionen är skyldig att respektera medlemsstaternas nationella identitet".
– it cannot be called into question. This is important since this was the first time that the Court in one of its judgments expressively used Article 4(2) TEU in order to protect the federal structure of the Member States. Since the judgment was given without any opinion of an Advocate General, the Court did not provide any further comments on this landmark case. Nevertheless, the rather formal protection is noteworthy, as its categorical tone implies that if national identity in the form of federal division of competences is involved, a proportionality test in the sense of weighing interests would not be used. Such a finding goes against a previous view in academic literature that the Court in all cases involving fundamental freedoms weighs the applicable freedom against national identity. Yet, from a methodological perspective, it can be noted that national identity and national federal structures were not used in Digibet and Albers as a justification for the derogation, but rather loosened the need for coherency in the proportionality test. The judgment is thereby worded in a way giving stronger protection to national division of competences than what the factual outcome of the case resulted in.

Later the same year, in its judgment of 17 July 2014, Bero and Bouzalmate, the Court ruled on the interpretation of Directive 2008/115/EC on common standards and procedures for returning illegally staying third-country nationals in connection to the German federal structure. The directive stated that third-country nationals should be detained in specialised detention facilities, but that a Member State lacking such specialised facilities could use prison accommodation provided that the third-country nationals were kept separately from prisoners. In Germany, the implementing law obligated each Land to follow this rule, which resulted in a situation where persons were placed in prisons due to lack of special detention facilities in the specific Land. In its observations, the German Government recalled Article 4(2) TEU and the respect for national identities inherent in the constitutional structures of the Member States, and therefore considered that the Länder under the national division of competences should be free to determine whether they must create specialised detention facilities. To this, the Court replied that the directive applied to Member States as a whole, and that the German legislation did not sufficiently transpose the directive. The Court stressed this

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236 Konstadínides, supra note 14, p. 142.
237 See Digibet and Albers, supra note 229, para 36.
240 Bero and Bouzalmate, supra note 238, paras 8, 13 and 21.
241 Opinion of Advocate General Kokott in Joined Cases Bero and Bouzalmate, C-473/13 and C-514/13, and to Case Pham, C-474/13, ECLI:EU:C:2014:295, point 122.
interpretation did not obligate each federated state to set up specialised detention facilities, as the situation could be solved by administrative cooperation between those federated states. Thus, the national interpretation was deemed incompatible with the directive, irrespective of the federal structure.\textsuperscript{242}

Although the Court did not address national identity directly, it becomes apparent that Article 4(2) TEU stood in the centre of the case if the judgment is read together with the Opinion of Advocate General Kokott. The German Government invoked Article 4(2) TEU, to which the Advocate General replied, firstly, that Member States may not invoke national provisions in order to justify failure to fulfil obligations in directives and that the EU institutions not shall take into account or rule on the division of competences by national institutional rules. Secondly, the Advocate General replied that the Member State obligation to ensure fulfilment of Union obligations is shared in Germany between the federal state and the federated states.\textsuperscript{243} Having found already existing administrative cooperation between federated states, the Advocate General concluded that the German federal structure did not preclude observance of the directive.\textsuperscript{244} This solution was subsequently adopted by the Court.\textsuperscript{245} We can therefore conclude that the Court’s reasoning on administrative cooperation in paragraphs 31-32 of \textit{Bero and Bouzalmate} was a response to the national identity argument pleaded by Germany.

What can be inferred from this case? The main structure of the reasoning put forth by Advocate General Kokott approaches that of a proportionality test. The argument that national identity shall be protected and that the federated states not shall be forced to construct special detention facilities is respected, but there are more simple solutions in order to reconcile the interests. Framed as a proportionality test, this would mean that the objective was legitimate, but that there were less restrictive measures. Even if the case does not entail a full proportionality test, it nevertheless shows that national identity cannot be successfully pleaded if there are other solutions to the legal question.

The case \textit{RegioPost}, judgment of 17 November 2015,\textsuperscript{246} provided the Court with the next possibility to rule on federal competences, this time in the context of public procurement. The German Municipality of Landau launched a call for tenders concerning postal services. At the time, no collective agreement or German federal law set any minimum wage. However, a law of the \textit{Land} Rhineland-Palatinate stipulated that

\begin{thebibliography}{99}
\bibitem{242} \textit{Bero and Bouzalmate}, supra note 238, para 28-32.
\bibitem{243} Opinion of Advocate General Kokott in \textit{Bero and Bouzalmate} and \textit{Pham}, supra note 241, points 122 and 143-146.
\bibitem{244} \textit{Ibid.}, points 148-151.
\bibitem{245} \textit{Bero and Bouzalmate}, supra note 238, paras 31-32.
\bibitem{246} Case \textit{RegioPost GmbH & Co. KG v Stadt Landau}, C-115/14, ECLI:EU:C:2015:760.
\end{thebibliography}
undertakings executing public contracts had both to pay a minimum hourly wage of € 8.50, and to guarantee that their subcontractors did. According to the contract notice, any successful tender should comply with that law. The company RegioPost found the requirement to be contrary to public procurement law, and after having been denied the contract, it sought review. The Court concluded that the regional law constituted a restriction on the freedom to provide services, but found the measure justifiable by the objective to protect workers. Contrary to what had been argued by RegioPost and the Commission with reference to *Rüffert*, that the justification could not be accepted since the imposed minimum wage applied only to public and not to private contracts, the Court accepted the justification even though the regional law applied only to public contracts. The Court therefore accepted the regional law under Article 26 of the Public Procurement Directive 2004/18 without going into detail on the federal structure.

The Advocate General argued slightly differently. His line of argumentation was the same as the Court’s: the national measure constituted a restriction, and the national law was an acceptable justification even though it only applied to public contracts. However, the Advocate General laid out an extensive argument on how the view proposed by RegioPost and the Commission would upset the German federal structure since it would exclude or significantly reduce the power of the Länder in the sector. After reiterating that Member States may not rely on their federal structures in order to evade compliance with EU law, the Advocate General stated the following in points 84-85:

84. That requirement presupposes, however, that the powers of those authorities can actually be exercised. To my mind, it is clear from Article 4(2) TEU that EU law cannot prevent a regional or local entity from actually exercising the powers vested in it within the Member State concerned. As the preceding submissions serve to demonstrate, however, that would be the ultimate consequence of RegioPost’s and the Commission’s argument that, in order to be compatible with Article 56 TFEU, the rule laid down in Paragraph 3 of the LTTG for the benefit of workers performing a public contract would have to be extended to workers assigned to the performance of private contracts.

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250 *RegioPost*, *supra* note 246, paras 71-88, especially para 88.
251 Opinion of Advocate General Mengozzi in *RegioPost*, *supra* note 248, points 62, 64-65 and 74-89.
85. It therefore seems to me to be perfectly consistent with the powers exercised by the Land of Rhineland-Palatinate that the scope of Paragraph 3 of the LTTG should be confined to workers performing public contracts.

With this argumentation, the Advocate General did not only rely on the German federal structure in order to validate the protection of workers as justification, but used that structure to interpret Article 26 of the Public Procurement Directive.\textsuperscript{252} For the Advocate General, Article 4(2) TEU thereby became a basis for the interpretation of EU law: in this sphere, there can be a difference between public and private contracts. Nothing in the case implies that this finding concerning Article 26 of the directive is limited to the situation in the actual case, and it can therefore be presumed that the rule applies generally.

Since the Court did not mention the reasoning by the Advocate General, one has to question its legal value. For three reasons, I consider it presumable that the Court was influenced by the Advocate General. Firstly, the similarities of lines of argumentation, with the national rule constituting a restriction on Article 56 TFEU which was justified by the objective of protecting workers and not undermined by the case-law from Rüffert, imply a similar reasoning. Secondly, the similarities on how the first question referred to the Court should be answered speak in favour for the Court being influenced by the Advocate General. Confer that of the Advocate General:

89. In the light of all those considerations, I propose that the first question referred for a preliminary ruling by the national court be answered as follows: Article 26 of Directive 2004/18 is to be interpreted as not precluding the legislation of a regional entity of a Member State which requires tenderers and their subcontractors to undertake, by means of a written declaration to be enclosed with their tender, to pay the staff who will be called upon to perform the work forming the subject-matter of a public procurement contract a minimum hourly wage of EUR 8.70 (gross), fixed by that legislation.\textsuperscript{253}

to that of the Court:

77. In the light of all the foregoing considerations, the answer to the first question is that Article 26 of Directive 2004/18 must be interpreted as not precluding legislation of a regional entity of a Member State, such as that at issue in the main proceedings, which requires tenderers and their subcontractors to undertake, by means of a written declaration to be enclosed with their tender, to pay staff who are called upon to perform the services covered by the public contract in question a minimum wage laid down in that legislation.\textsuperscript{254}

\textsuperscript{252} Ibid., points 63-65, 71-80, 86 and 89.
\textsuperscript{253} Ibid., point 89.
\textsuperscript{254} RegioPost, supra note 246, para 77.
Thirdly, the ruling did not upset the German federal structure, a potential problem brought into daylight by the Advocate General and not answered, but avoided, by the Court. If due to these three reasons the reasoning of the Advocate General can be attributed to the judgment, the background policy argument of respect for the German federal structure is inherent also in the Court’s answer. As stated, I presume this to be the case.

By comparing *RegioPost* and *Rüffert*, a difference can be seen in the Court’s attitude towards national federal systems. As previously seen, Advocate General Bot articulated in *Rüffert* the lacking competence of Niedersachsen and provided the Court with a solution, but the Court nevertheless chose to apply requirements that could not be met by the specific *Land*. In *RegioPost*, the ruling went in the opposite direction and aligned itself with the competence of the German federated state. Even though the Court in *RegioPost* emphasised that the cases touch upon different legal questions – the universal application of a collective agreement, and the application of a national law from a federated state – the Court’s underlying policy choice seems to have changed. Whereas in the first, the Court applied requirements which could not be fulfilled by the federated state, in the second, it did so in a way which did not only respect that competence, but which interpreted material provisions of Union law. Between the two cases we find the entry into force of the Lisbon Treaty and an emerging case-law on the respect for national identity in the form of regional and local self-government. Can that development be the reason for the Court’s shifting positions? I find it probable.

Turning to the most recent case in this line of judgments, we find *Remondis*, judgment of 21 December 2016. This case also arose in the sphere of public procurement. The Region of Hannover and the City of Hannover were under federal law entrusted with waste disposal and treatment tasks in their respective areas. In 2002, the two formed a special-purpose association for waste management. The special-purpose association’s revenues should in the long term cover its costs, but in case that the revenue were not sufficient, the city and the region agreed to pay contributions. In 2011, Remondis, an undertaking providing waste disposal services, took the view that the transfer of tasks constituted a public contract within the meaning of the Public Procurement Directive 2004/18 and made an application for review. The Court stated that “the division of competences within a Member State benefits from the protection conferred by Article 4(2) TEU, according to which the Union must respect national identities, inherent in their

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255 *RegioPost*, supra note 246, paras 73-74.
256 *Case Remondis GmbH & Co. KG Region Nord v Region Hannover*, C-51/15, ECLI:EU:C:2016:985.
fundamental structures, political and constitutional, including local and regional self-government”, after which it referred to the above explored paragraph 34 of Digibet and Albers, where the Court had stated that the division of competences between Länder cannot be questioned. The Court followed this statement by expanding its implications in a situation such as the one at hand, and stated in paragraph 41:

41. [A]s that division of competences is not fixed, the protection conferred by Article 4(2) TEU also concerns internal reorganisations of powers within a Member State, as observed by the Advocate General in points 41 and 42 of his Opinion. Such reorganisations, which may take the form of reallocations of competences from one public authority to another imposed by a higher-ranking authority or voluntary transfers of competences between public authorities have the consequence that a previously competent authority is released from or relinquishes the obligation or power to perform a given public task, whereas another authority is henceforth entrusted with that obligation or power.

The Court then qualified what can be considered an internal organisation measure that comes under the protection of Article 4(2) TEU. According to the Court, such a transfer of competences must include not only the obligation to perform a task, but also the powers that are the corollary thereof. The newly competent public authority has to act autonomously and under its own responsibility for the transfer to really be a transfer of competences, and not just a transfer of certain tasks. The Court however continued by referring to the Advocate General, and stated that the required autonomy did not have to be irreversible or shielded from any influence by other public entities.

The Advocate General relied on previous case-law, on Article 4(2) TEU and on the principle of conferral in Article 5(1) and (2) TEU in order to conclude, in the points referred by the Court, that secondary law cannot interfere with the institutional structure of the Member States as it must be in conformity with primary law. Instead, the act of internal reorganisation of the Member States fall outside the scope of EU law. In this, the Advocate General relied more heavily on the principle of conferral – the boundaries of EU law shall not be touched – than the respect for national identity as such. This view does however not seem to have been shared by the Court, which did not mention the conferral of powers but rather considered that Article 4(2) TEU guaranteed a “freedom of Member States”. The Court’s argumentation in this regard is ambiguous since it relied

258 Remondis, supra note 256, paras 35-40, with the citation being from para 40.
259 Ibid., paras 47-53.
260 Opinion of Advocate General Mengozzi in Remondis, C-51/15, ECLI:EU:C:2016:504, points 38-42.
261 The citation is from Remondis, supra note 256, para 47.
on points 41-42 in the Opinion, but itself attributed the outcome to Article 4(2) TEU and not to the principle of conferral. The result of the two lines of reasoning however coincide: the Member States have the freedom – either granted by Article 4(2) TEU or by the scope of EU law – to manage their internal organisations. Since the Court’s judgment has the higher legal value, the rule set up by the Court concerns the boundaries of internal reorganisations and transfers of competences under Article 4(2) TEU.

It is interesting to note that these requirements for true internal reorganisations align with the requirements from Azores and UGT-Rioja, the former case by Advocate General Kokott found to provide a good balancing between observing the obligations flowing from EU law and the respect for national identities. In Azores, the Court identified three criteria in order to establish whether a regional entity has sufficient autonomy in relation to the central power. As we have seen, these three were, firstly, the constitutional, political and administrative autonomy, secondly, procedural autonomy and whether the central government could intervene as regards the content of a decision adopted by the regional entity, and, thirdly, that the financial consequences of the decision should not be offset by aid or subsidies. These three criteria can be compared to the Court’s reasoning in Remondis. In Remondis, we find that the entity to which the powers are conferred must “have the power to organise the performance of the tasks” and to “draw up the regulatory framework” of its tasks (corresponding to the first Azores criterion on political and administrative autonomy), that the transferring authority no longer can have “any involvement in the actual performance of the tasks coming within the transferred competence” (corresponding to the second Azores criterion, procedural autonomy), and that the new entity “has financial autonomy allowing it to ensure the financing of those tasks” (corresponding to the third Azores criterion, financial autonomy). In both cases, the Court thus focused on whether the entity examined was autonomous and acted under its own responsibility. The cases differ on the criterion of financial autonomy: in Remondis, the Court accepted that the transferring authority reassigned resources to the

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262 Cf. paras 41 and 47.
263 Cf. points 55-56 of Advocate General Kokott’s Opinion in UGT-Rioja, supra note 178, concerning the Court’s reasoning in the Azores case.
264 Azores, supra note 183, para 67, and Advocate General Geelhoed’s Opinion in that case, supra note 184, point 54; UGT-Rioja, supra note 210, para 51.
266 Cf. Remondis, supra note 256, para 51, and Azores, supra note 183, paras 65 and 68, in which the Court focused on the entity assuming the consequences of its measures.
new entity, whereas in *Azores*, it found a constitutional principle of national solidarity resulting in State contributions to undermine the financial autonomy.\(^{267}\)

Can a more general rule be inferred from these cases? Three arguments can be raised against such an extraction: the *Azores* case-law was not cited in *Remondis*, the cases concern the different legal areas of State aid and public procurement and different kinds of internal organisation, and the financial criterion was applied differently. In response to the first counter-argument, that *Azores* was not cited in *Remondis*, it should be noted that an explicit reference from the Court is not in itself a necessary requirement for there to exist similarities between the cases, from which lines of reasoning can be inferred. Thus, that argument does not undermine the cases being part of a potential common rule.

Concerning the second counter-argument, that the cases concern different legal areas and as a consequence also different kinds of internal organisation, we can note that the Court itself uses cross-references between different legal areas when examining fundamental structures. This implies that the applicable rules are not limited to any specific field of law. Furthermore, the fact that the cases concern different types of internal organisation – regional entities in *Azores*, and regional authorities and special-purpose associations in *Remondis* – does not in itself undermine a common rule. Since the potential rule would establish with what criteria to examine national internal organisation in different fields of law, it would be a logic consequence that it applies also to different types of entities. The differences between the legal fields and the entities do therefore not hamper the extraction of a rule. Instead, the way of reasoning can be reversed – the different contexts strengthen the rule, since a common rule on how to examine national internal organisation would apply both in cases such as *Azores* and UGT-Rioja and in cases such as *Remondis*. Thus, this counter-argument does not hold. The third counter-argument, the different application of the financial criterion, can be reformulated as a question: “is the potential rule undermined by the financial criterion being applied in different ways?” I propose that this question should be answered in the negative. However, the observation that it is applied differently shows that the rule has to be applied contextually. *Azores* concerned a local Portuguese tax, which according to the Portuguese government contributed to allocation of the tax burden in accordance with the ability to pay, aiming at redistribution.\(^{268}\) Thus, the sphere of taxes was examined, and the Court found that the regional entity in this very sphere was not financially autonomous. The consequence of

\(^{267}\) Cf. *Remondis*, supra note 256, paras 44-45, and para 50 *a contrario*, and *Azores*, supra note 183, paras 72 and 75-76.

\(^{268}\) *Azores*, supra note 183, para 41.
the tax reduction – less money collected through taxation – was offset by money transfers from the central government, making it evident that the regional entity did not assume the consequences of its own measures. However, in Remondis, the resources transferred were found to already “have been used to perform the tasks associated with the competence”; the transfer of resources was the logical and necessary consequence of the transfer of competences. Whereas in Azores, the measures served a goal that in the end could not be fulfilled without the central government compensating for the measure, in Remondis, the entity’s measures and the aid provided to the entity did not correlate. This constitutes a contextual difference between the cases, which can explain differences in the application of a common financial criterion. The different applications of the financial criterion in the cases do therefore not exclude the finding of a common rule. Due to the similarities between the cases, and since the arguments examined do not exclude the existence of a common rule, I propose that the boundaries of a common rule can be extracted from the cases. For the scope of this proposed rule, it is worth noticing that Azores was given in an action for annulment, whereas both UGT-Rioja and Remondis were delivered as preliminary rulings.

If we thus conclude that the outer limits of a common rule for national division of competences under Article 4(2) TEU can be inferred from Azores, UGT-Rioja and Remondis, how shall that proposed rule be formulated? As seen from Remondis, Article 4(2) TEU guarantees the Member States a freedom in their internal division of powers, which is not fixed but can be reorganised. If the internal organisation is to be considered under Article 4(2) TEU, the entity’s autonomy has to be assessed, in order to determine whether the organisation acts under its own responsibility and assumes the consequences of its measures. That assessment consists of three steps, in which the autonomy is assessed from the points of view of administrative autonomy, procedural autonomy and financial autonomy. These criteria have to be analysed contextually, in order to determine their actual application in the examined situation. Since in Azores, the Court deemed the Azores Region not to be sufficiently autonomous due to a lack of financial autonomy, it follows that all three criteria have to be fulfilled for the rule to apply.

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269 See ibid., para 75.
270 Remondis, supra note 256, para 45.
271 Also considering Azores, UGT-Rioja and Remondis in a common context is Advocate General Hogan in his Opinion in the pending State aid cases UNESA and others v Administración General del Estado, see Opinion of Advocate General Hogan in Joined Cases UNESA and others v Administración General del Estado, C-105/18 to C-113/18, ECLI:EU:C:2019:395, points 99-105 and footnotes 56-58.
4.5 Summary of federal structures and internal organisation

What conclusions can be drawn from this overall examination of national federal structures, internal organisation and regional and local self-government?

Firstly, in *Digibet and Albers*, the Court gave a strong formal protection to the national division of competences, stating that division of competences benefitting from Article 4(2) TEU cannot be called into question. The consequence of this – seen in both *Digibet and Albers* and *Remondis*, and presumably in *RegioPost* – is that the effect of Union measures is affected by internal organisation and national federal structures. This conclusion shows that the Court’s case-law from *Internationale Handelsgesellschaft* is evolving. In order to qualify as falling inside such a formal protection, the relevant entity’s autonomy has to be assessed, based on a contextual consideration of the three cumulative criteria of administrative, procedural and financial autonomy.

Secondly, from *Bero and Bouzalmate*, we can see that internal structures as part of national identity is not a fruitful argument when the national identity interest can be complied with in less intrusive ways.

Thirdly, we can note a general tendency. In academic literature, it has been argued that the Court has not given much room for national arguments based on internal structures.

Through this examination, we can see that this used to be the case, notably in the Suckler cow premium, *Government of the French Community* and Rüffert cases, where the Court did not recognise the national structures. This attitude changed gradually. In some cases, the Court gave more room for national solutions without either the Court or the Advocate Generals referring to the identity clause – *Horvath* and *Azores*. In other cases, the Advocate Generals mentioned the identity clause, and the Court opted for similar lines of reasoning without mentioning national identity – *UGT-Rioja*, *Coditel*, *Bero and Bouzalmate* and *RegioPost*. In later cases, the Court has made explicit references to Article 4(2) TEU – *Digibet and Albers* and *Remondis*. Although these groups of cases overlap, there is a clear tendency that the Court in later case-law more explicitly uses Article 4(2) TEU and shows respect for national identity in the form of internal structures.

Since the recent case-law contrasts with the older, this shift in the Court’s reasoning seems to have changed the state of the law for federal structures and internal organisation.

Having examined national identity in connection both to fundamental rights and to national federal structures and regional self-governance, we now turn to the third and last of the major fields of this examination: national identity claims and the free movements.

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5 National identity and the free movements

Conflicts between national identity claims and the free movements have already been mentioned in cases above, for example in Rüffert, Digibet and Albers and Albers and Viking. Yet, these cases concerned specific kinds of conflicts that have already been examined. We now turn to the remaining cases in which national identity arguments have been used in order to derogate from the free movements.

Examining these remaining cases, we can detract two major lines of case-law: one where national identity has been invoked as the sole ground, and one where it has been combined with public policy. Falling outside both these categories is the case Michaniki.\(^{273}\) Therefore, this chapter will be divided into five sections. In the first section (5.1), we will examine national identity as the sole ground invoked for derogations, notably used in connection to nationality requirements and measures protecting national languages. In the second section (5.2), Michaniki will be considered and it will be asked to what extent the case actually recognised national identity. In the third section (5.3), we will analyse cases concerning public policy in conjunction with national identity as national constitutional values and objectives. In the fourth section (5.4), the case Coman\(^ {274}\) will be considered both in the light of the previous sections and in relation to the overall structure of the TEU. In the fifth section (5.5), the findings will be summarised.

5.1 National identity invoked as the sole ground

The first case in which national identity is mentioned and plays a major role dates back to the time before the Maastricht Treaty. Groener,\(^ {275}\) judgment of 28 November 1989, concerned the compatibility of Irish legislation aiming at the protection and promotion of the Irish language. According to the relevant national legislation, candidates for certain full-time teacher posts had to prove proficiency in Irish. Mrs Groener, a Netherlands national who had been working as an art teacher on part-time basis, applied in 1984 for a permanent full-time post in Dublin. Since she did not possess the required language certificate, and did not pass her Irish examination, she was refused the post. The Court was asked whether this was contrary to Community law, notably Article 3 of Regulation

\(^{273}\) Case Michaniki AE v Ethniko Simvoulio Radiotileorasis and Others, C-213/07, ECLI:EU:C:2008:731. As will be shown, the case concerned a public procurement derogation, possibly in conjunction with constitutional identity. Thus, the case did neither rely solely on national identity, nor invoke public policy.

\(^{274}\) Case Coman and Others v Inspectoratul General pentru Imigrări, C-673/16, ECLI:EU:C:2018:385.

\(^{275}\) Case Groener, C-379/87, ECLI:EU:C:1989:599.
No 1612/68,\textsuperscript{276} according to which national provisions limiting access for or excluding foreign nationals from the employment market should not apply, unless they related to linguistic knowledge required by reason of the nature of the post. The Court found that the teaching of art was conducted essentially in English and that Irish was not required for performing the teaching duties. Yet, the Court took into account the special linguistic situation of Ireland, with – as enshrined in the Irish constitution – Irish as a first official language and English as a second. The Court observed that the obligation imposed on lecturers formed part of a policy of promoting Irish as a means of expressing national identity and culture. The Court found that the EEC Treaty did not prohibit such a policy, as long as its implementation was neither disproportionate or applied discriminatorily, nor encroached “upon a fundamental freedom such as that of the free movement of workers.” Due to the importance of education for such a policy, the Court did not find it unreasonable to require teachers to have some knowledge of the first national language.\textsuperscript{277}

With this case, predating the first identity clause, the Court introduced the recurring theme of language, culture and national identity.\textsuperscript{278} Two things can be inferred from the case. Firstly, the Court relied on the Irish constitution in order to emphasise the importance of the Irish language. The scope of the rule is however limited, with the Court qualifying it as the “protection and promotion of a language of a Member State which is both the national language and the first official language.” Secondly, the Court’s reasoning showed the outer limits of a method also later applied. On the one hand, the Court did seemingly not want to disregard the need for the national language, nor for national identity. On the other hand, the policy risked coming into conflict with the free movements. In order to solve that conflict, the Court created the rule that “the implementation of such a policy must not encroach upon a fundamental freedom such as that of the free movement of workers.” Taken to its extreme, that rule would result in the free movements prevailing over the national policy in any situation of conflict. The Court therefore adjusted its rule, stating that the application of the policy must be applied in a non-discriminatory way and be proportionate in relation to the aim pursued.\textsuperscript{279} Since the Court already had implied that the policy pursued a recognised aim,\textsuperscript{280} the rule can be summarised as that the policy must strive towards a legitimate aim and that it cannot be

\textsuperscript{277} Groener, supra note 275, paras 14-23.
\textsuperscript{278} Shown in the later parts of this examination, and touched upon by Advocate General Poiares Maduro in his Opinion in Spain v Eurojust, supra note 76, point 36.
\textsuperscript{279} Groener, supra note 275, para 19.
\textsuperscript{280} Ibid., beginning of the paragraph.
disproportionate or lead to discrimination against nationals from other Member States. Hence, the Court’s initial rule, that the policy must not encroach upon the fundamental freedoms, was limited – Mrs Groener was indeed denied her employment. Nevertheless, the rule remained under the Court’s assessment of the proportionality together with a requirement of non-discrimination.

The second case mentioning this conflict between national identity and the free movements was Commission v Luxembourg\(^{281}\) (first Luxembourg case), with judgment of 2 July 1996. The Commission claimed that the Grand Duchy had failed to fulfil its obligations for the free movements of workers under Article 48 EEC (now Article 45 TFEU) by maintaining a nationality requirement in relation to posts as civil servants and public employees in several sectors, including teaching. This requirement was laid down by the Luxembourg Constitution. The government maintained that teachers must be Luxembourg nationals in order to transmit traditional values and that the nationality requirement thus was an essential condition for preservation of Luxembourg’s national identity. Despite the specific demographic situation and the considerations relating to the preservation of national identity,\(^{282}\) the Court stated the following in paragraph 35:

35. […] Whilst the preservation of the Member States’ national identities is a legitimate aim respected by the Community legal order (as is indeed acknowledged in Article F(1) of the Treaty on European Union), the interest pleaded by the Grand Duchy can, even in such particularly sensitive areas as education, still be effectively safeguarded otherwise than by a general exclusion of nationals from other Member States. As the Advocate General points out in paragraphs 132 to 141 of his Opinion, nationals of other Member States must, like Luxembourg nationals, still fulfil all the conditions required for recruitment, in particular those relating to training, experience and language knowledge.

This statement is important for four reasons. Firstly, the Court gives the preservation of the Member States’ national identity the status of “legitimate aim”, which in the context means that the Court recognised it as justifying a derogation from the free movements. This determined the nature of the identity clause; the clause did not affect the scope of Community law, but was treated as a legitimate aim to respect. This has later been interpreted as allowing Member States to a certain extent to develop their own legitimate interests.\(^{283}\) Secondly, the Court referred to points 132 to 141 of Advocate General

\(^{281}\) Case Commission v Luxembourg, C-473/93, ECLI:EU:C:1996:263.

\(^{282}\) Ibid., paras 25, 27, 31-32 and 33-35.

\(^{283}\) Opinion of Advocate General Poiares Maduro in Michaniki, supra note 32, point 32. On this finding, see Konstandinides, supra note 14, p. 138.
Léger’s Opinion, in which the Advocate General developed his thoughts on the nature of the free movements. 284 Of particular interest is that the Advocate General referenced Groener. 285 Thus, through the Advocate General, the Court relied on its findings in Groener. Thirdly, the Court relied on Article F(1) of the Maastricht Treaty. With this, the Court linked its findings to the identity clause. Fourthly, the Court qualified the application of the identity clause with a proportionality test, providing an example of where the national provision went too far by being a “general exclusion” or, in the words of the Advocate General, a “negation of the freedom invoked”. 286 These four points summarised, we see that the Court under the identity clause respected and applied its case-law from Groener, treated the clause and national identity as a rule capable of justifying derogations within Community law, and refused to let the clause develop into a carte blanche for Member State derogations. 287

In a second case, Commission v Luxembourg 288 (second Luxembourg case), judgment of 24 May 2011, the Commission brought proceedings against Luxembourg for failure to fulfil obligations under the freedom of establishment. 289 The case concerned a nationality requirement for the profession of notary and even though similar proceedings were initiated against several Member States, 290 only Luxembourg pleaded the identity clause. The Grand Duchy argued that the nationality condition was “intended to ensure respect for the history, culture, tradition and national identity of Luxembourg within the meaning of Article 6(3) EU.” 291 To this, the Court replied in paragraph 124:

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284 Opinion of Advocate General Léger in Case Commission v Luxembourg, C-473/93, ECLI:EU:C:1996:80, points 132-141.
285 Ibid., point 137 and footnote 54.
286 First Luxembourg case, C-473/93, supra note 281, para 35, and Opinion of Advocate General Léger in that case, supra note 284, point 141.
287 Claes has argued that this case is an example of the Court using the identity clause in order to preserve the cultural, not political, identity of a Member State, see Claes, supra note 4, pp. 117 and 122.
288 Case Commission v Luxembourg, C-51/08, ECLI:EU:C:2011:336.
289 It is worth mentioning that the Grand Duchy, between the first Luxembourg case and the second Luxembourg case, was involved in yet another case where Groener was cited by an Advocate General: Case Commission v Luxembourg, C-193/05, ECLI:EU:C:2006:588, concerning language requirements for lawyers. The Advocate General distinguished the situation from that in Groener since lecturers and lawyers had different roles, it not being the task of the latter “to safeguard the language as an expression of national identity and culture”, cf. Opinion of Advocate General Stix-Hackl in Case Commission v Luxembourg, C-193/05, ECLI:EU:C:2006:313, points 47-53, 70 and 79. Even though the Court followed the reasoning of the Advocate General, cf. points 59-70 of the opinion with paras 34-48 of the judgment, the Court did neither address national identity, nor Groener. Since it appears that the Luxembourg authorities did not raise the issue of national identity, the case will not be further analysed.
290 Second Luxembourg case, C-51/08, supra note 288, paras 73-74. Cases Commission v Belgium, C-47/08; Commission v France, C-50/08; Commission v Austria, C-53/08; Commission v Germany, C-54/08; Commission v Hellenic Republic C-61/08.
124. As to the need relied on by the Grand Duchy of Luxembourg to ensure the use of the Luxemburgish language in the performance of the activities of notaries, it is clear that the first head of claim in the present dispute relates exclusively to the nationality condition at issue. While the preservation of the national identities of the Member States is a legitimate aim respected by the legal order of the European Union, as is indeed acknowledged by Article 4(2) TEU, the interest led by the Grand Duchy can, however, be effectively safeguarded otherwise than by a general exclusion of nationals of the other Member States (see, to that effect, Case C-473/93 Commission v Luxembourg [1996] ECR-1-3207, paragraph 35).

The Court therefore found that the requirement constituted discrimination contrary to Article 43 EC (now Article 49 TFEU). Having the Court’s view on nationality requirements from the first Luxembourg case in mind, that finding is hardly surprising. Two conclusions can be made, both of which also have been mentioned in chapter 2. Firstly, the case did not add anything new to the case-law, but confirmed it, which means that the Court through its reference to the first Luxembourg case linked the new identity clause in Article 4(2) TEU of the Lisbon Treaty to the first identity clause in Article F(1) of the Maastricht Treaty. This confirmation of previous case-law is therefore noteworthy. Secondly, the requirement triggering the Court to acknowledge national identity as a legitimate aim did not spring from a constitutional basis, but from an ordinary law. Even though the Court found the measures disproportionate, it seems clear that the Court qualified the situation as one falling under the concept of national identity. This entails that the case is an example of the Court considering national identity without an explicit basis in national constitutional law.

The Court’s next judgment with national identity as the sole basis for a derogation from the free movements was delivered on 12 May 2011: Runevič-Vardyn and Wardyn. This reference for a preliminary ruling concerned Lithuanian rules for the spelling of names. Malgožata Runevič-Vardyn, a Lithuanian national belonging to the Polish minority in Lithuania, married in Vilnius her husband, the Polish national Łukasz Paweł Wardyn. On the Lithuanian marriage certificate, their respective names were spelled Malgožata Runevič-Vardyn and Łukasz Paweł Wardyn, without Polish diacritical marks for any of them and without the use of “W” for Malgožata, being a Lithuanian national. The applicants applied to the Vilnius Civil Registry Division to have their names respelled in their Polish forms: Małgorzata Runiewicz-Wardyn and Łukasz Paweł

292 Second Luxembourg case, C-51/08, supra note 288, para 126.
294 Case Runevič-Vardyn and Wardyn v Vilniaus miesto savivaldybės administracija and Others, C-391/09, ECLI:EU:C:2011:291.
Wardyn. These applications were denied on the basis that it was not possible under national Lithuanian rules. The applicants appealed, arguing that the denial interfered with Articles 18 and 21 TFEU, and the matter was referred to the Court. The Court concluded that the national rules denying a uniform spelling of the surname could constitute a restriction on the freedoms conferred by Article 21 TFEU.\textsuperscript{295} Turning to the justification, the Court referred to observations from the Lithuanian Government that the language formed “a constitutional asset which preserves the nation’s identity”\textsuperscript{296} With reference to Groener, the Court noted that EU law does not preclude policies for the protection of a national and first official language, and stated that Article 4(2) TEU demands the respect for the “national identity of its Member States, which includes protection of a State’s official national language.” From this, the Court concluded that the national rules pursued a legitimate objective and could be taken into account when weighing legitimate interests against rights conferred by EU law.\textsuperscript{297} The Court left it for the national court to decide whether the refusal balanced the interest involved – the respect for the applicants’ private and family life, and the Member State’s legitimate protection of its official national language and traditions. In this connection, the Court instructed the national Court to take into consideration that the Civil Registry had allowed the use of “W” for the Polish national, thus making use of letters not existing in the Lithuanian alphabet.\textsuperscript{298}

Two things can be noted. Firstly, the use of national identity in relation to a language policy as objective justification links the case to Groener. Although the use of national identity as the sole ground for derogation aligns with case-law from the two Luxembourg cases, the Court did not refer to those cases. This implies that the Court considered Runevič-Vardyn and Wardyn to follow the case-law from Groener on national identity and national languages. Secondly, on a methodological level, we can note that national identity was used in relation to the legitimacy of the objective pursued and as such seems to have strengthened the claim of the Member State. However, the Court did not mention national identity in the proportionality test, in which the Court instead seems to have considered the different rules for nationals and non-nationals on the letter “W” as an inconsistency, showing the “disproportionate nature of the refusal”. However, the alternative for the Member State, if it wanted to preclude the letter “W”, would have been to preclude “W” also for nationals of other Member States. It therefore appears that the Court criticised the (in)consistency of a less restrictive measure by comparing it to a more

\textsuperscript{295} Ibid., paras 15-28 and 66-82, notably paras 78 and 82.
\textsuperscript{296} Ibid., para 84.
\textsuperscript{297} Ibid., paras 85-87.
\textsuperscript{298} Ibid., paras 91-93.
restrictive one. Even if the final decision was left to the national court, this argumentation of the Court implies that the identity clause did not give the Member State any extra discretion in the proportionality test.

Two years later, the Court delivered another judgment on national languages with national identity as the sole ground for derogation: the case Las,299 with judgment of 16 April 2013. This case concerned the freedom of movement for workers in a Belgian language context. Mr Las, a Netherlands national resident in the Netherlands, had after signing an employment contract written in English worked for PSA Antwerp in Belgium. Following his dismissal from that company, Mr Las demanded more substantial compensation than the company’s severance payments. He argued that the contract provisions on severance payments were null and void, since the contract, contrary to the Flemish Decree on Use of Languages, had not been drafted in Dutch. The Court found the Flemish Decree to constitute a restriction on the freedom of movement for workers since it would have dissuasive effect on non-Dutch speaking employees and employers from other Member States. Having found this restriction, the Court examined possible justifications. The Belgian government claimed that the national provision promoted the use of one of its official languages. The Court acknowledged, with reference to Groener and to Runevič-Vardyn and Wardyn, that EU law does not preclude a policy for the promotion of one or more official languages of a Member State, and stated that national identity under Article 4(2) TEU “includes protection of the official language or languages” of the Member States. The Court however reiterated that the legislation had to be proportionate. Considering the cross-border situation and that permitting additional contract versions would have been less prejudicial to the freedom of movement, the Court concluded that the legislation went beyond what was strictly necessary.300

Three things can be noted in this case. Firstly, the Court developed its reasoning from Groener and Runevič-Vardyn and Wardyn by changing from protection of “language” to “language or languages”,301 thus opening up for plural in order to adopt to the Belgian context. This shows that the rule has developed from the situation in Groener, which relied on the special linguistic situation in Ireland,302 and that it has become a more

299 Case Anton Las v PSA Antwerp NV, C-202/11, ECLI:EU:C:2013:349.
300 Ibid., paras 9-15, 22-27 and 29-33.
301 Cf. Groener, supra note 275, para 19, and Runevič-Vardyn and Wardyn, supra note 294, para 86.
302 Cf. the Court’s reasoning in para 18 of Groener, supra note 275: “[A]lthough Irish is not spoken by the whole Irish population, the policy followed by Irish governments for many years has been designed not only to maintain but also to promote the use of Irish as a means of expressing national identity and culture. It is for that reason that Irish courses are compulsory for children receiving primary education and optional for those receiving secondary education. The obligation imposed on lecturers in public vocational
general rule for the protection of official national languages. Secondly, we can note that the Court applied a methodological approach similar to that in Runevič-Vardyn and Wardyn: national identity played a role in the evaluation of the objective pursued, but was not mentioned in relation to any level of protection or the necessity of the measures. Thirdly, the Court did not – differently from in Runevič-Vardyn and Wardyn – leave it to the national court to make the final assessment of the proportionality of the national legislation. Instead, the Court itself ruled that the measures were disproportionate.

The five cases examined in this section have all relied on national identity as a sole ground for derogation. From these cases, we can see that the preservation of national identity constitutes a legitimate objective. The use of this objective is divided into two lines of case-law: the protection of national languages, and the use of nationality clauses. The Court accepts policies protecting official national languages, but examines both their proportionality and if they are applied in a discriminatory manner. Nationality requirements result in a general exclusion of nationals from other Member States and are therefore not accepted by the Court.

On a methodological level, we see that the Court has referred to national identity when assessing the objective pursued – giving room for the Member States’ interpretation – but that national identity does not influence the Court’s evaluation of a measure’s necessity. As we will see, the Court makes a different application when it comes to constitutional values. However, before we consider that case-law, we will examine Michaniki.

5.2 Michaniki, constitutional identity gone disproportionate – perhaps?

The well-known case, Michaniki, judgment of 16 December 2008, deserves mentioning. In this Greek public procurement case, the company Michaniki complained on a contract award, claiming that the company awarded the contract should have been excluded under a Greek constitutional provision. This provision prohibited the granting of public contracts to people managing or owning media companies, or to people related to such persons. The national court was uncertain whether that constitutional rule was compatible with Community law. The national court therefore asked the Court whether the exclusion grounds in Article 24 of the public works directive 93/37⁵³⁰³ were exhaustive, and if not, whether the constitutional provision protecting transparency was compatible with the principle of proportionality. The Court replied that the article exhaustively listed the

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education schools to have a certain knowledge of the Irish language is one of the measures adopted by the Irish Government in furtherance of that policy.”

⁵³⁰³ Council Directive 93/37/EEC of 14 June 1993 concerning the coordination of procedures for the award of public works contracts, based on the freedoms to provide services and of establishment, see recital 1.
grounds for exclusion based on objective considerations of professional quality, but that it did not exclude further exclusionary measures implementing the principles of equal treatment and transparency.\textsuperscript{304} In paragraphs 55-56 of the judgment, the Court stated:

55. Against that background, as the Advocate General observed at point 30 of his Opinion, it is appropriate to grant the Member States a certain discretion for the purpose of adopting measures intended to safeguard the principles of equal treatment of tenderers and of transparency, which, as was noted at paragraph 45 of this judgment, constitute the basis of the Community directives on the award of public contracts.

56. Each Member State is best placed to identify, in the light of historical, legal, economic or social considerations specific to it (see, to that effect, \textit{La Cascina and Others}, paragraph 23), situations propitious to conduct liable to bring about breaches of those principles.

In that vein, the Court did not preclude a national rule striving to prevent and avoid a risk that persons active in the media sector would try to interfere in the contract award procedures, especially since such practices could jeopardise transparency and distort competition. Yet, the Court considered it necessary for such a rule be proportionate. Since the national prohibition was automatic and absolute in nature, not affording the person concerned any possibility of showing that no influence over competition should be exercised, the prohibition went beyond what was necessary.\textsuperscript{305} The Court’s conclusions mirror those made by the Advocate General.\textsuperscript{306}

The Court’s reference to point 30 of the Opinion is interesting since the Advocate General in that point motivated the national discretion against a constitutional background. The constitutional aspect is emphasised in the Opinion’s following points, in which the Advocate General developed a more abstract discourse on the Union’s obligation under the identity clause to respect the “\textit{constitutional identity of the Member States}”.\textsuperscript{307} The Advocate General then arrived at the same conclusions as the Court.\textsuperscript{308} Due to the reference to the Opinion and the similar conclusions, it is easy to assume that the national discretion granted by the Court was based on a respect for national identity, as developed in the Opinion. Two objections can be raised against that conclusion.

\textsuperscript{304} \textit{Michaniki}, supra note 273, paras 12-26, 47-49, 54-55.
\textsuperscript{305} Ibid., paras 57-60 and 65-59.
\textsuperscript{306} Opinion of Advocate General Poiares Maduro in \textit{Michaniki}, supra note 32.
\textsuperscript{307} Ibid., points 30-33. This Opinion has been widely referenced by academic scholars, see inter alia Millet, supra note 2, pp. 165-166; Konstandinides, supra note 14, p. 138; von Bogdandy and Schill, supra note 37, p. 1423; Guastaferro, \textit{Beyond the Exceptionalism of Constitutional Conflicts: The Ordinary Functions of the Identity Clause}, Yearbook of European Law, Vol. 31, No. 1 (2012), pp. 263–318, on p. 290.
\textsuperscript{308} See Opinion of Advocate General Poiares Maduro in \textit{Michaniki}, supra note 32, points 35-36.
Firstly, it is not evident that the Court relied on the Advocate General’s theoretical discourse, since the discretion granted by the Court was motivated with a reference to *La Cascina and Others*. In the referenced paragraph of that case, we see that the Court made the national implementation of discretionary exclusion grounds in the public service directive 92/50 dependent on “legal, economic or social considerations prevailing at national level”. Thus, from the Court’s reasoning in *Michaniki*, it appears that the Court transferred its previous case-law on discretionary exclusion grounds to the implementation of principles underlying public procurement, adding “historical” to the list of considerations. It seems that national identity was not necessary for that conclusion.

Secondly, even if we assume that the Court relied upon the reasoning of the Advocate General, his reasoning implies that the constitutional rule should entail only respect of a lesser degree. In point 33 of the Opinion, we can (with emphasis added) read that:

33. […] It is, nevertheless, necessary to point out that that respect owed to the constitutional identity of the Member States cannot be understood as an absolute obligation to defer to all national constitutional rules. […] In the present case, the national constitutional rules can be taken into consideration to the extent that they fall within the discretion available to the Member States in order to ensure the observance of the principle of equal treatment required by the directive. The exercise of that discretion must, however, remain within the limits fixed by the principle and by the directive itself. […]

This reasoning entails that there could be cases where Union law would have to defer to constitutional rules, but not in *Michaniki*, in which the respect for the constitutional identity instead would lead to discretion within principles required by the directive. Thus, if we disregard that the Court’s findings can be explained with its reference to *La Cascina and Others*, and if we thus suppose that the Court based the judgment on the Advocate General’s reasoning on national identity, this would entail only a limited respect. Indeed, it has been questioned if the case actually expressed respect for national identities.

Due to the Court’s reliance on *La Cascina and Others*, I hesitate to see national identity as one of the policies underlying the Court’s *Michaniki* judgment. Yet, if national identity was considered, it resulted in a limited discretion for the Member State. Such a limited discretion can be compared to the greater one granted in *Omega*, which we return to in the following section on fundamental constitutional values and objectives.

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309 Joined cases *La Cascina and Others*, C-226/04 and C-228/04, ECLI:EU:C:2006:94.
311 *La Cascina and Others*, supra note 309, para 23.
5.3 Fundamental constitutional values and objectives

Why examine constitutional values? National constitutions lay down rules and concepts which can be considered fundamental for societies. Values which can be exercised by individuals as rights have been analysed above in chapter 3. However, there are also concepts which are not exercised by individuals against the State or the EU, but which the State itself still has chosen to hold high. The interference of that category with the free movements will be considered in this section.

As was stated in chapter 3, Omega can be considered such a case. Even if the case already has been analysed in section 3.2, it is worth remembering two of the conclusions drawn. Firstly, the Court searched and found a new general principle in order to reconcile EU law with the German constitutional fundamental value of human dignity. Secondly, the Court gave the Member States discretion concerning restrictive measures and on how to protect a fundamental right, not excluding that provisions can be proportionate even if other Member States have chosen a different system of protection. Together, these two conclusions amount to a wide national discretion. Although the case did not explicitly mention national identity, it is of great importance to the following case-law on national constitutional values and objectives.

A landmark case in the tension between national identity and the free movements is Sayn-Wittgenstein, judgment of 22 December 2010, where the Court explicitly mentioned Article 4(2) TEU. The case concerned implications of an Austrian national law on the freedom of movement under Article 21 TFEU. The applicant in the national proceedings was an Austrian citizen who had moved to Germany and there, under German laws, been adopted by a German citizen. Through this adoption, which did not affect her citizenship, she acquired the name Fürstin von Sayn-Wittgenstein. The Austrian authorities registered the new surname in the Austrian civil register. However, after a judgment in 2003, the Austrian Verfassungsgerichtshof held that the Austrian Law on the abolition of the nobility – a law of constitutional status, implementing the principle of equal treatment – precluded Austrian citizens from acquiring surnames including former titles of nobility through adoption. In 2007, the Landeshauptmann von Wien therefore decided to change the applicant’s surname to only Sayn-Wittgenstein. The Court found

313 Omega, supra note 85, paras 11, 32, 34 and 37-38.
314 It is worth noticing that the Court in February 2008, with the Case Dynamic Medien, C-244/06, ECLI:EU:C:2008:85, further developed its Omega case-law into giving Member States the right to have different levels of protection, cf. para 44 of that case. However, there is nothing in the case that suggests that national identity was at play, and the paragraph has never since been cited by the Court in a judgment (search conducted on the website of the Court, http://curia.europa.eu/, consulted 2019-06-01). Accordingly, in this regard, the legal influence of the case Dynamic Medien is limited.
315 Case Sayn-Wittgenstein v Landeshauptmann von Wien, C-208/09, ECLI:EU:C:2010:806.
the refusal to recognise the noble name to constitute a restriction on Article 21 TFEU.\footnote{Ibid., paras 19-35 and 52-71, notably paras 70-71.} Turning to possible justifications, the Court stated:

83. In that regard, it must be accepted that, in the context of Austrian constitutional history, the Law on the abolition of the nobility, as an element of national identity, may be taken into consideration when a balance is struck between legitimate interests and the right of free movement of persons recognised under European Union law.\footnote{Ibid., para 83.}

The Court treated the Austrian justification as a reliance on public policy, which could be capable of justifying the refusal. With reference to Omega, the Court reiterated that the “specific circumstances which may justify recourse to the concept of public policy may vary from one Member State to another and from one era to another”, and that a margin of discretion therefore must be allowed. Since the Austrian law implemented the principle of equality before the law – a principle recognised by the EU – the objective was compatible with EU law. Concerning the necessity of the measure, the Court once again reiterated its case-law from Omega, and stated that, “in accordance with Article 4(2) TEU, the European Union is to respect the national identities of its Member States, which includes the status of the State as a Republic.” The Court therefore concluded that the Austrian measures were proportionate and that they could be accepted under EU law.\footnote{Ibid., para 86-87, and 90-93.}

If compared to the closest predating case in the conflict between national identities and the free movements, the second Luxembourg case, the Court here treated national identity in a different manner. Instead of using the preservation of national identities as a legitimate aim, the Court relied on another legitimate interest: the principle of equal treatment before the law as part of public policy. The consideration of this interest was then affected by national identity in two distinct steps: the legitimacy of the objective pursued, and the necessity of the measures taken.\footnote{Ibid., paras 74-76, 83-84, 88 and 92.} Through the first reference to Omega, the Court let the very specific national situation – already recognised as part of Austrian national identity – affect the national discretion concerning which circumstances could justify the use of public policy. In the context of necessity, through a second reference to Omega, also that in connection to Article 4(2) TEU, the Court emphasised the particularities of the case at hand, “in the present case, it does not appear disproportionate [...]”, and gave the Member State a considerable national discretion.\footnote{Ibid., paras 83, 86-87, and 90-93.}
From the case, we can infer three things. Firstly, national identity can be invoked in conjunction with public policy claims. Secondly, when invoked in this manner, national identity can affect the assessment of both the objective relied upon, and of the necessity of the national measure, resulting in a “thin” proportionality test. Thirdly, the recurrent use of Omega shows that the Court considered that case to be relevant for the conflict examined. Since the use of national identity claims had not yet become common when Omega was delivered, this implies that the Court ex post facto tried to qualify that case as concerning national identity in conjunction with public policy. Indeed, just as in Omega, the national authorities in Sayn-Wittgenstein qualified the concern as a “fundamental value”. In Sayn-Wittgenstein, it seems that the Court translated this into a “fundamental constitutional objective”.

This case was on 2 June 2016 followed by the similar judgment Bogendorff von Wolffersdorff, a preliminary ruling to the Amtsgericht Karlsruhe in Germany. The applicant, born as Nabiel Bagdadi, had changed his names to Nabil Peter Bogendorff, and subsequently, after adoption, to Nabil Peter Bogendorff von Wolffersdorff. In 2001, he moved to the United Kingdom, where he acquired British nationality and changed his names to Peter Mark Emanuel Graf von Wolffersdorff Freiherr von Bogendorff. After moving to Germany, the applicant applied to have his British names registered in Germany, but the application was denied. The national court asked the Court of Justice whether names freely chosen in another Member State had to be accepted under Articles 18 and 21 TFEU, even though the nobility had been abolished by constitutional law and the names in question consisted of tokens of nobility. The Court found the national refusal to recognise the names to constitute a restriction under Article 21 TFEU. It then examined the possible justification that the restriction was based on the equality before the law and on the abolition of privileges. The Court accepted that the German rules in the context of a German constitutional choice could be considered as an “element of national identity of a Member State, referred to in Article 4(2) TEU” which “may be taken into account as an element justifying a restriction on the right to freedom of movement of persons recognised by EU law”. The Court thereafter interpreted the “constitutional choice to abolish privileges and inequalities” as relating to a ground of public policy. With reference to Sayn-Wittgenstein and Omega, the Court stated that public policy must be

321 On this, cf. von Bogdandy and Schill, supra note 37, on pp. 1442 et seq.
322 Besselink, supra note 58, on pp. 683, 689 and 692.
323 See Omega, supra note 85, paras 23 and 32; Sayn-Wittgenstein, supra note 315, paras 32, 75 and 76.
324 Ibid., para 93.
325 Case Bogendorff von Wolffersdorff, C-438/14, ECLI:EU:C:2016:401.
interpreted strictly and not unilaterally be determined by each Member State. The Court however also reiterated that the specific circumstances could vary from one Member State to another and from one era to another. The Court therefore accepted that the national measures implemented the principle of equality before the law. Concerning the necessity of these measures, the Court once again referred to Omega and Sayn-Wittgenstein and stated that different systems of protection can be used in different Member States and that Article 4(2) TEU includes respect for the status of a State as a Republic. The Court differentiated the case from Sayn-Wittgenstein since the German legislation did not entail a full prohibition on titles of nobility, and then stated in paragraph 78:

78. Unlike the case which gave rise to the judgment [...] in Sayn-Wittgenstein [...], the assessment of the proportionate nature of a practice such as that at issue in the main proceedings requires an analysis and weighing-up of various elements of law and fact peculiar to the Member State concerned, which the referring court is in a better position to carry out than the Court.

The Court qualified this weighing-up as an assessment of whether the national court had gone beyond what was necessary to ensure achievement of the fundamental constitutional objective pursued. The Court left it for the national court to make this assessment, and instructed that court to take into account that the applicant had dual citizenship, that one of the German courts had chosen not to consider the registration of the names contrary to public policy, and that the change of names rested on a purely personal choice.

The case can in several aspects be compared with Sayn-Wittgenstein. Firstly, a similar methodology was applied. The Court relied on national identity both in order to establish the legitimate objective pursued, and in order to assess whether the national measures were necessary. Secondly, the Court came back to the formulation “fundamental constitutional objective” from Sayn-Wittgenstein. Thus, it seems that the Court itself considered the cases to form part of such a case-law. Thirdly, the Court differentiated between the cases, making Bogendorff von Wolffersdorff subject to an explicit weighing-up in the proportionality test. In Sayn-Wittgenstein, the Court itself carried out a similar test, albeit quickly: it concluded that the national authorities not had gone too far. Evidently, the Court did not consider the balancing as simple in Bogendorff von Wolffersdorff, a fact probably due to the differences between the Austrian strict

326 Ibid., paras 11-25, 47, 61-64, 67-68 and 73-77.
327 Ibid., para 79-82.
328 Cf. ibid., para 79 and Sayn-Wittgenstein, supra note 315, para 93.
329 Bogendorff von Wolffersdorff, supra note 325, para 78 and Sayn-Wittgenstein, supra note 315, para 93.
prohibition of the nobility and the German more lenient rule, which did not fully prohibit the use or transmission of titles of nobility. Perhaps, that inconsistency could be seen as the reason for the more extensive test applied. However, if that is the case, one can wonder why the inconsistency was not treated in a way similar to that in Runevič-Vardyn and Wardyn, especially since the differences in treatment in Bogendorff von Wolffersdorff concerned nationals of the same Member State and thus in a similar situation.

Having thus established that Sayn-Wittgenstein and Bogendorff von Wolffersdorff, under strong influence from Omega, concerned fundamental constitutional objectives, we can compare this line of cases with the one concerning the protection of national languages. The most striking differences are found in the methodology applied and in the margin of discretion granted. In Groener, Runevič-Vardyn and Wardyn and Las, national identity seems only to have been considered in relation to the objective pursued, whereas national identity in both Sayn-Wittgenstein and Bogendorff von Wolffersdorff also entailed a greater margin of discretion concerning the necessity of the national measures. This difference is emphasised if Sayn-Wittgenstein is compared to Runevič-Vardyn and Wardyn. In the latter case, as we have seen, the Court seemed to find the inconsistency between nationals and non-nationals troubling. However, in a similar way, the rule in Sayn-Wittgenstein applied only to Austrian nationals, and if the Austrian abolition of the nobility had been construed as precluding nationals from other Member States from using their noble names in the country, it is reasonable to assume that the Court would have seen this as too far reaching. Seen from this perspective, it becomes evident that the Court granted greater discretion in Sayn-Wittgenstein than in Runevič-Vardyn and Wardyn. Hence, we see that there are differences between the lines of cases in both the methodology applied and the national discretion granted by the Court.

How can these cases be categorised from a methodological point of view? The first Luxembourg case, Groener, Runevič-Vardyn and Wardyn, Las, Sayn-Wittgenstein, Bogendorff von Wolffersdorff and Omega all based their arguments in national constitutions, whereas the second Luxembourg case did not. All but the two Luxembourg cases were delivered in references for preliminary rulings. Both Sayn-Wittgenstein and Bogendorff von Wolffersdorff concerned the application of Article 21 TFEU, but that was also the case for Runevič-Vardyn and Wardyn, which methodologically is closer related

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330 A sign of this more allowing proportionality test can also be seen in Digibet and Albers. In that case, the measures were considered to form part of a public policy. The Court relied on national identity in the assessment of appropriateness in the proportionality test. Also there the national legislation was examined in a way favorable for the Member State. Cf. Digibet and Albers, supra note 229, paras 22, 34, 36 and 38.

331 For another such comparison, see Dobbs, supra note 35, pp. 321-322.
to Groener and Las. Apparently, these mentioned categorisations do not explain the different applications of national identity. Instead, it appears that the difference between the cases is related to whether they relied on public policy and fundamental constitutional objectives – Omega, Sayn-Wittgenstein and Bogendorff von Wolffersdorff – or whether they relied on national identity as the sole ground for derogation – Groener, Runevič-Vardyn and Wardyn and Las, and the two Luxembourg cases. Thus, it appears that the method applied by the Court was determined neither by the Treaty provision relied upon, nor by the type of proceedings, but depended on the ground for derogation invoked.

Outside of these two groups falls Michaniki. As shown above, it is uncertain if that judgment recognised national identity. Yet, if we presume that it did, we see that the derogation was constitutionally based but did not involve any fundamental constitutional objective or public policy. Instead, the derogation was based in principles from EU public procurement law, and the Member State was given a limited discretion on how to implement those principles. Thus, if national identity was at play, the case can be placed in a third group: national identity considered jointly with another objective not being public policy, with only a limited national discretion. Since the national measure failed on the proportionality test, Michaniki can together with the two Luxembourg cases and Las be seen as cases on national rules which limited the freedoms concerned in a way not accepted by the Court. In either case, the disconnection of Michaniki from the other cases is emphasised by the fact that the Court never has referred to the judgment in this context. This finding implies that the previous conclusion on Michaniki is correct: the judgment in Michaniki cannot be seen as an expression of respect for national identities.

5.4 Coman – limiting the national with the common
Two years after Bogendorff von Wolffersdorff, on 5 June 2018, the Court delivered its long awaited judgment in the case Coman. This case concerned the interpretation of the term “spouse” in Directive 2004/38 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States.335

332 Yet, it has been argued that both the views of influencing existing derogation grounds and of providing a unilateral derogation were present in the Luxembourg cases, see Dobbs, supra note 35, p. 319.
333 A reference can on this point be made to Correia Moreira, mentioned in section 1.3, supra note 22, where that case was deemed to fall outside the scope of this thesis. In that case, the Court ruled that in an area where Member States have transferred competence to the Union, Article 4(2) TEU cannot be interpreted as to deprive a worker of the protection granted by Union law.
335 Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member
Mr Coman, a Romanian and American national, had lived with Mr Hamilton, an American citizen, in New York from 2002 to 2009. Mr Coman began working in Brussels, where they married in 2010. In 2012, the couple contacted the Romanian General Inspectorate for Immigration with a request for information on how Mr Hamilton could obtain the right to reside in Romania as Mr Coman’s family member. The inspectorate replied that such a right could not be obtained since same sex marriages were not recognised in Romania. The Romanian Constitutional Court referred the matter to the Court of Justice, which in its judgment recalled that Mr Coman was a Romanian national and thus, as an EU citizen who had exercised his freedom to move and reside in other Member States, might exercise his rights under Article 21 TFEU against his own Member State. Acknowledging that rules on marriages fall within national competence, the Court reiterated that the Member States must comply with EU law when exercising that competence. Since the national rules denied Mr Coman the possibility of returning to Romania together with his spouse, the Court concluded that the national rules interfered with the rights conferred by Article 21 TFEU.336 Turning to possible justifications, the Court addressed observations from Member States that referred to the fundamental nature of marriage and that some Member States by constitutional law intended to maintain the institution as a union between man and woman. The Latvian Government framed the justification in terms of public policy and national identity under Article 4(2) TEU. The Court acknowledged, with reference both to Article 4(2) TEU and to Bogendorff von Wolffersdorff, that national identity should be respected, and continued with stating that public policy only can be relied on if “there is a genuine and sufficiently serious threat to a fundamental interest of society”.337 In paragraphs 45-47, the Court stated:

45. The Court finds, in that regard, that the obligation for a Member State to recognise a marriage between persons of the same sex concluded in another Member State in accordance with the law of that state, for the sole purpose of granting a derived right of residence to a third-country national, does not undermine the institution of marriage in the first Member State, which is defined by national law and, as indicated in paragraph 37 above, falls within the competence of the Member States. Such recognition does not require that Member State to provide, in its national law, for the institution of marriage between persons of the same sex. It is confined to the obligation to recognise such marriages, concluded in another Member State in accordance with the law of that state, for the sole purpose of enabling such persons to exercise the rights they enjoy under EU law.

336 Coman, supra note 274, paras 9-17, 29, 31-32, 37-38 and 40.
337 Ibid., paras 42-44.
46. Accordingly, an obligation to recognise such marriages for the sole purpose of granting a derived right of residence to a third-country national does not undermine the national identity or pose a threat to the public policy of the Member State concerned.

47. It should be added that a national measure that is liable to obstruct the exercise of freedom of movement for persons may be justified only where such a measure is consistent with the fundamental rights guaranteed by the Charter, it being the task of the Court to ensure that those rights are respected (see, by analogy, judgment of 13 September 2016, Rendón Marín, C-165/14, EU:C:2016:675, paragraph 66).

With reference both to the Charter and to the ECtHR, the Court concluded that the national refusal could not be accepted under Article 21 TFEU.338

Concerning national identity, three things can be inferred from this case. Firstly, the Court referred to Bogendorff von Wolflersdorf, and through that case to Sayn-Wittgenstein, linking Coman to that line of cases – national identity invoked in proceedings concerning public policy. The assessment however differed, as the Court did not consider there to be any threat to public policy or to national identity. By limiting its judgment to only the right of residence, the Court did not have to pronounce itself on the definition marriages inside the Member State. Instead, the Court narrowed down what constituted the core of the national identity consideration invoked. Since that core was not touched, the national identity argument did not play any role in the proceedings. This aligns the case-law on national identity with that on public policy in that it cannot be decided unilaterally by the Member States.339 It can however be noted that the Court formulated itself more cautiously than the Advocate General and pronounced itself on the recognition of marriage “for the sole purpose of granting” a right of residence, not requiring a recognition of the marriage also inside the Member State.340 Thus, the Court’s statements in paragraphs 45 and 46 on the national identity and public policy concerns were strictly speaking limited to the recognition of marriages for the sole purpose of the granting of a right of residence. Secondly, the Court seems to – at least linguistically in paragraph 46 – have treated national identity and public policy as different grounds: “[…) [The] obligation […] does not undermine the national identity or pose a threat to the public policy” (emphasis added).341 That might have to do with the observation submitted

338 Ibid., paras 48-51.
340 Coman, supra note 274, paras 45-46. Cf. Opinion of Advocate General Wathelet in Case Coman and Others, C-673/16, ECLI:EU:C:2018:2, point 41 and footnote 21. For possible consequences of this recognition for the “sole purpose of granting” right of residence, see Tryfonidou, supra note 334.
341 Coman, supra note 274, para 46.
by the Latvian Government, which invoked both grounds. Yet, compared to the more combined assessment in Sayn-Wittgenstein and Bogendorff von Wolffersdorff, the case provides clarification on national identity as a concept. By treating national identity separately, tightly connected to public policy but conceptually distinct, the Court seems to have said that national identity is an independent ground also when invoked in conjunction with public policy. This slightly detaches the concept of national identity from public policy.342

Thirdly, the limits of the Treaty concept of national identity were developed in paragraph 47. Even paragraph 47 did not prima facie concern national identity, it came directly after the paragraphs where the arguments based on national identity had addressed. When Court then linked paragraph 47 to the previous said – “[i]t should be added that a national measure that is liable to obstruct the exercise of freedom of movement” – it was undeniably implied that the rule in paragraph 47 is supposed to touch upon national measures within both national identity and public policy. Assuming this, we see that also within national identity, a measure restricting the freedom of movement can only be justified when it is in accordance with the Charter. Even though the respect for fundamental rights permeates the whole EU legal order,343 this is the first time that the Court has stated this in connection to national identity.344 Limiting the general concept of national identity by reference to the Charter can be criticised, as it defines and possibly alters the nature of the concept. As national identity does not target the scope of EU law, but its application,345 the Coman ruling does not expand the competences of the Union contrary to Article 6(1)(2) TEU. However, the obligation under Article 4(2) TEU is to respect national identities. Simon and Burgorgue-Larsen have argued that identity has two sides: one which is common among the Member States and the Union and which easily can be integrated and absorbed by the Union, and another which distinguishes or even singularises one Member State from the rest.346 Other scholars have similarly

342 For national identity and public policy as two different grounds, see Cloots, supra note 2, p. 176.
343 Articles 2 and 6(3) TEU. Åkerberg Fransson, supra note 115, para 19. See also Walkila, Horizontal Effect of Fundamental Rights in EU Law, p. 76. On the need for Member States to respect fundamental rights also when relying on accepted justifications, see Opinion of Advocate General Jacobs in Schmidberger, supra note 87, points 91-92.
344 Hence the need for an analogy to Case Rendón Marin v Administración del Estado, C-165/14, EU:C:2016:675.
345 Opinion of Advocate General Kokott in Case Samira Achbíta and Others v G4S Secure Solutions, C-157/15, ECLI:EU:C:2016:382, points 31-32. On Article 4(2) TEU as not regulating competence, Konstandinides, supra note 14, on p. 133; Bergström and Hettne, Lissabonfördraget – En grundlag lag EU?, p. 63. See also the travaux préparatoires to the identity clause in Article I-5(1) of the Constitutional Treaty, CONV 375/02 and CONV 375/1/02/REV, where in paragraph 7 it is stated that the clause was not affect the competence of the Union or the Member States as such. See Pernice, supra note 15, on p. 215.
346 Simon, supra note 4, pp. 40-42; Burgorgue-Larsen, L’identité constitutionnelle en question(s), pp. 155-168 in Burgorgue-Larsen, L’identité constitutionnelle saisie par les juges en Europe, on pp. 162 et seq. On
emphasised that identity has two connotations – one which allows identification over time, and one which allows identification of a separate and autonomous individuality.\textsuperscript{347} Concerning the distinctive part of national identity, Millet has argued that if there would have been consensus among the Member States on a given rule or principle, that rule or principle would probably have been integrated into EU law and would not cause any problem.\textsuperscript{348} This argument has strong merits. Indeed, national identity would not have to be invoked in cases where there is consensus concerning a given principle since in such cases, there would be no conflict between what is common in the Union and what is specific to a Member State. However, the Charter is rooted in the constitutional traditions common to the Member States.\textsuperscript{349} The tension between what is specifically national and what is common can therefore be translated into a potential conflict between the Charter and a part of national identity.\textsuperscript{350} If we therefore accept that what is not shared by other Member States at least can form part of national identity, the Court’s innovation in Coman limits what parts of national identity that can be respected. As has been argued by von Bogdandy and Schill, not everything can be protected by the identity clause – a systematic interpretation of the TEU does not allow Member States to diverge from the fundamental values in Article 2 TEU.\textsuperscript{351} However, Article 2 contains only the founding values of the Union and no references to the Charter, which is introduced in Article 6 TEU. It can therefore be questioned whether that systematic approach proposed by von Bogdandy and Schill can be extended to include the whole Charter, especially since Articles 7 and 49 TEU only mention Article 2 TEU and not Article 6 TEU and the

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\textsuperscript{347} Reestman, supra note 39, pp. 377 and 383. See also Faraguna, supra note 17, pp. 1625 et seq. and 1635. Similarly, Martin, supra note 39, pp. 25-29.

\textsuperscript{348} Millet, supra note 2, pp. 13-14. This does however not entail that national identity is based on differences \textit{per se}, cf. Cloots, supra note 2, page 143.

\textsuperscript{349} Cf. the Preamble to the Charter, “[t]his Charter reaffirms, […] the rights as they result, in particular, from the constitutional traditions and international obligations common to the Member States […]” See Meyer, \textit{Charta der Grundrechte der Europäischen Union}, pp. 45-46 and 75-76. For the Court’s use of Preambles to the Treaties and the Charter, see \textit{inter alia} Case Van Gend en Loos v Administratie der Belastingen, 26/62, ECLI:EU:C:1963:1, “the preamble to the Treaty which refers not only to governments but to peoples”, and Case Wightman and Others v Secretary of State for Exiting the European Union, C-621/18, ECLI:EU:C:2018:999, paras 61-62.

\textsuperscript{350} On the identity clause as a counterbalance the commonality in Treaty provisions, \textit{cf.} Claes, supra note 4, on p. 118.

\textsuperscript{351} von Bogdandy and Schill, supra note 37, on p. 1430. Similarly, Konstandinides, supra note 14, on p. 145. On Article 2 TEU as “EU values”, see Dobbs, supra note 35, on p. 311. Pernice argues that the values in Article 2 TEU have become part of the Member States’ national identities, \textit{see} Pernice, supra note 15, on p. 205. van der Schyff argues and Faraguna implies that Article 2 TEU is part of the EU’s constitutional identity, \textit{see} van der Schyff, supra note 39, pp. 236 and 239, and Faraguna, supra note 17, p. 1634.
Nevertheless, it seems that in *Coman*, the Court did precisely that; it created a formal rule according to which national identity cannot be respected in cases where the identity would entail a lower fundamental rights protection. Thus, on a general level, with *Coman*, the Court limited the individual exception with reference to the general, seemingly at odds with the systematic function of a rule which conceptually should guarantee respect for what is national. In the judgment, this limitation of one Treaty concept with the use of another Treaty concept passes without any extensive motivation. It is possible that the Court silently relied on the view proposed by the Advocate General, that the respect for national identity cannot be construed independently of the obligation of sincere cooperation in Article 4(3) TEU, requiring the Member States to ensure fulfilment of Union acts. However, that argument does not convince, as it entails that in the Court’s adjudication, Article 4(2) TEU would have a role to fill only in spheres of pre-existing national discretion or where no EU law applies. Instead, a more persuasive argument leading to the Court’s conclusion would have linked the general obligation in Article 2 to Article 6(1) TEU and to the Charter, and through that link create a more well-founded obligation for the Member States to respect fundamental rights also within their national identities. As no such attempt was carried out, the limitation of the ambit of Article 4(2) TEU deserves criticism. Unless the Court in later case-law modifies this approach, for instance by applying the Charter in the light of national identity – support for which could be found in the preamble to the Charter – the respect for national identity in the freedom of movement for persons under Article 21 TFEU will formally be qualified with the Court’s interpretation of the Charter.

### 5.5 National identity and the free movements – a coherent rule?

From the previous sections of this chapter, we have learnt that Article 4(2) TEU can be applied in different ways when national measures are in conflict with the free movements.

Article 4(2) TEU can form the basis for national derogations and is applied differently depending on whether the clause is applied independently or in conjunction with public policy. When invoked independently, it seems that it can form the basis of a nationally defined ground for derogation. When invoked in conjunction with public policy, the
clause seems to give greater leeway for the Member State’s finding of a legitimate objective, thus approaching the freedom granted when the clause is used independently. Furthermore, when invoked together with public policy and if the objective pursued is accepted, the clause also seems to give greater national discretion concerning the necessity of the measure, an effect lacking when the clause is applied independently. The applicability of the clause is in both cases subject to the principle of proportionality.

Furthermore, national identity arguments need to be in accordance with the Charter, at least when they are applied in order to restrict a freedom under Article 21 TFEU. It remains to be seen whether this rule also applies when national identity is relied upon in order to derogate from other free movements, or if it applies more generally in EU law when Article 4(2) TEU is invoked.

Having examined our three major fields of study, we turn to more general conclusions on the application and legal consequences of national identity under Article 4(2) TEU.
6 Conclusions on a diverging rule with diverse legal consequences

As was stated in chapter 2, the Court is under Article 4(2) TEU obligated to respect national identity. That identity is established by national authorities, but its content and the value of the arguments are under the Court’s scrutiny. This entails that not necessarily all national claims invoking Article 4(2) TEU will be accepted by the Court. Indeed, the Court has shown that it finds itself in the position to evaluate whether national identity is threatened in a given situation.\footnote{O’Brien, supra note 46, para 49; Torresi, supra note 60, paras 54-58; Coman, supra note 274, paras 45-47.} We have also seen that the Advocate Generals do not consider all national provisions of constitutional status to be part of national identity.\footnote{See Opinion of Advocate General Poiares Maduro in Michaniki, supra note 32, point 33. See also Opinions of Advocate General Bot in Melloni, C-399/11, supra note 64, point 142, and in M.A.S., supra note 67, points 177 and 179.}

However, in cases where the Court accepts the national assessment of what constitutes an element of national identity, this national identity needs to be respected in some kind of concrete application. In that regard, what can we conclude from the examinations in chapters 3, 4 and 5?

On a general level, we can conclude that in all our three fields of study, the use of national identity has developed since the entry into force of the Lisbon Treaty. National identity and the identity clause have been invoked more frequently after the entry into force of that Treaty and seemingly result in more room for national derogations and interpretations. Can we infer a more specific rule on the application of the concept?

The emerging image is that Article 4(2) TEU applies differently depending on the context. The most elaborate rule with the most extensive consequences is to be found in the area of national internal division of competences. In this area, Article 4(2) TEU “protects” national internal division of competences, which “cannot be called into question”. In this way, the clause grants Member States an area of “freedom” which is not fixed but can be reorganised. These are strong words used by the Court of Justice, signalling that the Court attributes great importance to this part of national identity. However, in order to qualify as a division of competences under Article 4(2) TEU, the entity examined has to be considered autonomous. That autonomy is assessed in a contextual examination of the three cumulative criteria of administrative, procedural and financial autonomy. Furthermore, this application of Article 4(2) TEU is limited to cases where no other national solutions for Union obligations can give equivalent results.

This use of strong words is not as present within the free movements. Here, national identity can be invoked either as a separate ground or in conjunction with public policy.
In both these cases, the application of the identity clause is subject to the principle of proportionality. However, the choice on how to invoke Article 4(2) TEU has implications for the application of the clause itself. The Court’s case-law on Article 4(2) TEU as the sole ground for derogation has developed into two different lines. The Court has developed its case-law on the protection of national languages into an independent line of case-law, where the promotion and protection of official national languages constitutes a legitimate objective. Assessed in a different way are nationality requirements, which the Court consistently has deemed not permitted. Generally when the identity clause is invoked independently, it seems that the Court has granted national discretion in the identification of the legitimate objective but not in the proportionality test. However, combining national identity and public policy seems to be preferable from a Member State perspective, since this allows the Member States to rely on national identity when considering both the objective pursued and the necessity of the measures, which thus gives more room for national discretion. However, this rule is – at least when applying Article 21 TFEU – limited by the Court’s interpretation of the Charter. Since a growing number of the recent case-law invoking national identity against the free movements has involved this article,\textsuperscript{357} and since it can be presumed that the tension between national identity and the EU is amplified when EU law affects a Member State’s laws on its own citizens, this limitation on national identity is probably of growing importance. It is also possible that this rule will apply when Member States try to derogate from other free movements, but that remains to be seen.

The area with the least case-law is that of fundamental rights. This also makes it harder to formulate a general rule for the application of the identity clause. Article 53 of the Charter has changed the legal landscape, and if the rule from Melloni and Åkerberg Fransson applies also to fundamental rights framed with national identity – which we probably can presume it does – national identity claims will be more successful in areas not entirely harmonised than in those with full harmonisation.\textsuperscript{358} Yet, in the former, the success will still require that the national rules do not compromise the Charter’s level of protection and the primacy, unity and effectiveness of EU law. However, it is possible that the effectiveness requirement can be adjusted in order to respect national identity. Such an adjusted requirement could resolve problems concerning both the procedural autonomy of the Member States and the application of Article 53 of the Charter.

\textsuperscript{357} Sayn-Wittgenstein, Runevič-Vardyn and Wardyn, Bogendorff von Wolffersdorff and Coman.

\textsuperscript{358} However, according to Millet, since national identity is separate from the principles of conferral and subsidiarity, it should – contrary to the principle of subsidiarity – be possible to apply national identity also in cases where the Union has exclusive competence. Cf. Millet, supra note 2, pp. 179 et seq.
Thus, although it is hard to find any extensive lines covering all these areas, three conclusions can be made. Firstly, as seen in free movement cases and implied in fundamental rights cases, the Court does not find itself obligated to respect national identities if the result of such a respect would lead to negations of the free movements. It remains to be seen how that view will be balanced against the formal protection given to national identities as internal division of competences. Secondly, the Charter is important when applying national identity arguments, certainly as a lowest level of protection, but also as a level of highest protection when the effectiveness of EU law has to be guaranteed. Thirdly, in order to successfully invoke Article 4(2) TEU, it is preferable to search for a solution inside of EU law, backed-up with the national identity concern.

Just as its application, the legal effects of the identity clause suffer from disparities. On a general level, the identity clause does not limit the scope of EU law, but affects its application. However, the application of the identity clause can result in different legal effects. Diving further down into the cases, we can group these legal effects of Article 4(2) TEU in four different categories. Firstly, the strong protection given to national division of competences results in EU law being construed in a way consistent with that national division of competences, possibly also aligning material EU law requirements with national considerations. Secondly, national identity has been acknowledged as a legitimate aim which can be relied on by Member States. This opens up for Member States formulating their own legitimate interests. Thirdly, the identity clause can give Member States greater discretion when derogating from EU law under other grounds, such as public policy. Fourthly, in one single case, the clause has influenced how the effectiveness of EU law shall be regarded, thus granting more room for the national legal system. As a fifth, additional category, we can consider the legal consequences that have not been the result of the identity clause. Notably, we can see that the statements of Advocate General Bot – that a Member State can challenge provisions of EU law contrary to its national identity – not seem to have resulted in any corresponding legal effects in the Court’s judgments. The closest to such effects are the one in M.A.S. – which already

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359 Cf. the response of Advocate General Kokott to a French argument, consisting of Article 4(2) TEU affecting the competences conferred on the EU and thus excluding application of contradictory secondary law, in Opinion of Advocate General Kokott in Achbita v G4S Secure Solutions, supra note 345, points 31-32. That the principle of conferral is a different concept than the respect for national identity, is also argued by Millet, cf. Millet, supra note 2, pp. 175 et seq.

360 This could, perhaps, be seen as corresponding to the view previously proposed by several academic scholars, that the Court under Article 4(2) TEU should authorise national courts to set aside EU law on limited grounds based in national constitutions. See inter alia Pollicino, supra note 97, on p. 96.

361 Cf. Opinions of Advocate General Bot in Melloni, supra note 64, point 139, and in M.A.S., supra note 67, point 175.
have been considered extensively – alongside the statements in the _Torresi_ judgment, where the national Italian court argued that a provision of secondary law was contrary to Italian national identity and therefore should be held invalid. Having found that the situation in that case not was capable of affecting national identity, the Court stated that the “examination of the […] question referred has disclosed nothing capable of affecting the validity of Article 3 of Directive 98/5.”\(^{362}\) Evidently, the Court did not say that national identity could not affect the validity or application of the directive. Still, to interpret that statement as meaning that the identity clause can influence the validity of an EU law provision would require a reading _a contrario_, and there is nothing in the case suggesting that such a reading was the Court’s intention. Hence, in this regard, the case provides far from an actual legal consequence. If _M.A.S._ is not to be considered a challenge of EU law, we have thus so far not seen any successful such challenges.

Given that Article 4(2) TEU is emerging as a rule with different legal consequences in different legal areas, it can – on a speculative level – be asked how the Member States should view a rule of that character. As reality is complicated and probably more seldom can be reduced to distinct categories without the double lens of first judicial proceedings and later academic analysis, it is possible that Member States sometimes have a choice on how to plead Article 4(2) TEU. Is it possible that one given situation should fit in all our three major fields of study, with different results depending on how Article 4(2) TEU is pleaded? We can, for the sake of this speculative argument, return to _Laval_ and try that situation in relation to our three different fields of examination. In the actual case, the right of trade unions to take collective action made it less attractive for undertakings from other Member States to carry out constructions in Sweden. The right was therefore seen as a restriction on the freedom to provide services.\(^{363}\) Since the Swedish Government and the defendant trade unions invoked the protection of fundamental rights,\(^{364}\) the case was framed as a situation where national fundamental rights opposed EU fundamental freedoms.\(^{365}\) If a similar situation were to arise today and pleaded as a fundamental rights case in conjunction with Article 4(2) TEU, nothing in this analysis suggests that the outcome would be radically different. The national fundamental right would have to be qualified as an element of national identity, constitutional support for which seem to be rather scarce.\(^{366}\) Should the fundamental right however qualify as part of national identity,

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\(^{362}\) _Torresi_, supra note 60, paras 53-59.

\(^{363}\) _Laval_, supra note 99, para 99.

\(^{364}\) Ibid., para 102.

\(^{365}\) Ibid., paras 90-96 and 102-110.

\(^{366}\) The formal constitutional support does not seem that thorough, _cf_. Chapter 2 paragraph 14 of the main Swedish Basic Law, _Regeringsformen_ (SFS 1974:152).
the Charter would once again be referred to, only this time with its Article 53 and the Melloni rule in full force. Even if the effectiveness requirement were to be lessened as in M.A.S, the assessment would probably be harder as it would concern a fundamental freedom. If instead, in an identical situation, the trade unions’ possibilities to shape the local labour market were to be considered a fundamental constitutional objective, the more lenient rules from Omega, Sayn-Wittgenstein and Bogendorf von Wolffersdorff would apply. Once again, the argument would require that this specific interest qualified as part of national identity. Yet, if successfully invoked, this would entail greater national discretion in regard to both the legitimate aim pursued and the necessity of the measures employed. The outcome of that situation would depend on the grounds invoked and how the Court would view the situation, making the outcome uncertain. However, the hypothetical situation could rotate around an even more interesting argument, namely that of fundamental structures and division of competences. It could be argued that the power exercised by the trade unions forms part of the political and constitutional fundamental structures of Sweden. If accepted, that argument would invoke the more formal protection granted to national division of competences. This argument would probably seem far-fetched as it would invoke a conception of fundamental structures other than that of geographically limited state entities and since it would entail a figurative interpretation of the identity clause’s mentioning of “regional and local self-government”. The closest we come to such a situation in the case-law examined is the special-purpose association in Remondis, but that association was given its competence by regional and local entities. Nevertheless, it is worth noticing that the Court in Viking stated that the trade unions, although not public bodies, exercised legal autonomy conferred inter alia by national law. It has been argued that it was the collective exercise of power, affecting the relevant freedom similarly to the way that public authorities would, that constituted the rationale behind the horizontal direct effect in Viking and Laval. Given a situation approaching that of public power, and that the Court in Laval admitted part of the problem to lie within the national context, could perhaps the legal autonomy conferred to trade unions analogically be equated to the internal division of competences protected in Digibet and Albers and Remondis? Even if the stakes for the Court would be high, probably leading to policy arguments being raised against such an analogy, a well-built

367 In the actual case, see Laval, supra note 99, paras 90-91.
368 Viking, supra note 98, paras 35, 57 and 60. Similarly in Laval, supra note 99, para 98.
argument around this notion would at least make for an interesting judgment. In either case, and irrespectively of the outcomes of these hypothetical cases, this thesis shows that the Member States probably can try to provoke different aspects of Article 4(2) TEU, resulting in different applications of the required respect. This is a legal consequence not of Article 4(2) TEU as such, but a consequence of the diverging applications of the article.

Thus, if we refrain from speculation, it is still hard to digest the case-law on the identity clause and national identity into a more well-defined, common rule of application with predefined legal consequences. Indeed, the various applications and consequences of the clause fit in different ways in what is already stated in Article 4(2) TEU. It is not certain that a common rule for the whole article ever can be inferred, since the respect shall be given throughout the whole EU legal system and for national identities that not necessarily have common traits. However, if we compare how this respect has been applied, and especially its legal consequences, with the Court’s statement in Internationale Handelsgesellschaft that “the […] effect [of a Community measure] within a Member State cannot be affected by allegations that it runs counter to either fundamental rights as formulated by the constitutions of that State or the principles of a national constitutional structure”, we see that Article 4(2) TEU already has taken part in the development of EU law. How that development continues will be the subject for future studies.
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