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À LA RECHERCHE D'UNE COHÉRENCE PERDUE – POSSIBLE ARGUMENTS FOR THE NON-APPLICATION OF EU LAW IN MEMBER STATES

INTRODUCTION

The question of scope of competences lies at the heart of the functioning of every international organization. The problem surrounding the delineation and exercise of competences by the European Union (EU) has always been a central question of its functioning. The Treaty of Lisbon addressed this issue and increased the role of national parliaments over the exercise of competences by the EU insofar as the subsidiarity principle is concerned.¹ These legal changes, as well as the broad jurisprudence on the legality of Treaty of Lisbon, have brought back the discussion on the legitimate scope of EU competences back to centre stage. Perhaps these factors have inspired other national actors – in particular the Constitutional Courts of some Member States – to question whether various EU legal provisions and/or judgments issued by the Court of Justice of the European Union (CJEU) are applicable in their territories. The main argument for their non-application is based on the *ultra vires* nature of certain EU actions.² A new line of argumentation of some national Constitutional Courts also includes references

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¹ Cf. O. Le Bot, *L'application des principes de subsidiarité et de proportionnalité dans les relations entre le Parlement européen et le Parlement français* and K. Wójtowicz, *Le Parlement polonais et le respect du principe de subsidiarité*, [in:] J. Auvret-Finck (ed.), *Le Parlement Européen après l'entrée en vigueur du Traité de Lisbonne*, Larcier, Lisbonne: 2013, pp. 239-252 and 253-264 resp. Cf. also A. Grzelak, J. Łacny, *Kontrola przestrzegania unijnej zasady pomocniczości przez parlamenty narodowe – pierwsze doświadczenia* [Control of compliance with the EU principle of subsidiarity by national parliaments – early experiences], 4 *Zeszyty Prawnicze* 11 (2011).

² A. Dyevre, *Judicial Non Compliance in a Non Hierarchical Legal Order: Isolated Accident or Omen of Judicial Armageddon?*, available at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2084639.

to another element contained in the Treaty of Lisbon – the notion of national identity (Art. 4.2 of the Treaty on the European Union), which is very often intertwined with the notion of constitutional identity, although the latter does not appear in the Treaty. The national identity clause is perceived by some commentators as a new exception to the principle of the supremacy of EU law over national laws.³

There are several reasons for this scepticism shown by national Constitutional Courts within the EU. The main important argument for limiting the scope of EU competences is as old as the first *Solange* judgment of the German Federal Constitutional Court (*Bundesverfassungsgericht*) of 29 May 1974,⁴ which referred to the lack of protection of fundamental rights in the EU (then the EEC). This problem remains actual, as according to Anelli Albi in the struggle to assure the efficiency of EU law some basic human rights are often lost.⁵ Along with this a certain competition between the CJEU and national courts takes place as to who is the efficient guardian of fundamental rights.⁶ While this type of collision over fundamental rights is relatively rare, especially after the Charter of Fundamental Rights of EU became a binding legal act, it still can happen. This is clearly illustrated in the judgment of the Polish Constitutional Court in the case concerning the implementation of the Framework Decision on the European Arrest Warrant (P 1/05),⁷ where the Polish Constitutional Court found it to be in conflict with Art. 55 of the Polish Constitution, that then forbade the expulsion of any Polish citizen to a foreign country. Apart from this old constitutional argumentation, both the failure to ratify the Constitutional Treaty in 2005 and the economic crisis which commenced in 2008 contributed to the growing euro-scepticism in the Member States. A tendency to legislate in sensitive areas, as for example budgetary discipline, has also left to the Member States another argument for taking a negative attitude towards EU activity. Daniel Sarmiento who wrote on this criticism of excessive EU legislative and judicial activity as often cynical and opportunistic, has come up with the formula “*re-nationalization of powers*”.⁸

³ A. von Bogdandy, S. Schill, *Overcoming Absolute Primacy: Respect for National Identity under the Lisbon Treaty*, 48 *Common Market Law Review* 1417 (2011); the same authors: *Zur unionsrechtlichen Rolle nationalen Verfassungsrechts und zur Überwindung des absoluten Vorrangs*, 70 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 701 (2010).

⁴ BverfGE, vol. 37, p. 271.

⁵ A. Albi, *An Essay on How the Discourse on Sovereignty and on the Co-operativeness of National Courts Has Diverted Attention from the Erosion of Classic Constitutional Rights in the EU*, [in:] M. Claes, M. de Visser, P. Popelier, C. Van de Heyning (eds.), *Constitutional Conversations in Europe: Actors, Topics and Procedures*, Intersentia, 2012, pp. 41-70.

⁶ By analogy, for instance, to the competition between the Italian Constitutional Court and ordinary national courts as effective guardians of the protection of fundamental rights, see O. Pollicino, *The Italian Constitutional Court and the European Court of Justice: A Progressive Overlapping between the Supranational and Domestic Dimensions*, [in:] Claes et al., *supra* note 5, p. 102.

⁷ Judgment of the Polish Constitutional Court of 27 April 2005, P 1/05, Z.U. 2005/4A/42, O.J. 2005, No. 77, item 680.

⁸ D. Sarmiento, *Half a case at a time: Dealing with judicial minimalism at the European Court of Justice*, [in:] Claes et al., *supra* note 5, p. 34.

The aim of this article is to identify the main arguments, including those already raised by national Constitutional Courts as well as those that might be raised by them in the future, used to justify exclusions to the application of EU legal provisions at the national level. The text also analyzes what the legal consequences might be if these arguments to exclude the application of EU law were implemented. First, however, the traditional CJEU approach to collisions between EU norms and the national Constitutional norms needs to be briefly examined.

1. TRADITIONAL WAYS OF RESOLVING COLLISIONS BETWEEN EU LAW AND NATIONAL CONSTITUTIONAL NORMS IN THE JURISPRUDENCE OF THE CJEU

The problem of the collision of at least some EU law provisions with the constitutional norms of EU Member States is by no means a new one.⁹ The CJEU seems to have developed two techniques which allow for the relatively peaceful coexistence of national and EU laws, without radical changes on either side (i.e. the EU's or a Member State's), while still recognizing the principle of the primacy of EU law. Both these techniques allow for retaining the concept of the supremacy of EU law without a direct constitutional collision with national solutions. The first technique might be called an "incorporation technique". The national provisions are included (incorporated) into EU law by reference to the general principles of law. The second technique is to invoke an objective justification for an exception to the Treaty rules ("mandatory requirement technique")¹⁰ and generally occurs in the issues concerning the internal market, in particular involving the four freedoms of movement.

Without going into a broader analysis, one can state that the incorporation technique appeared already in 1960s and 1970s and is still in use based on the formula of "general principles of law" (Art. 6.3 TEU). The reference to the general principles, inspired by the common constitutional traditions of Member States, allows for adding a number of constitutional guarantees for individuals to the European legal order.¹¹ It has also allowed for formulating an open catalogue of general principles of a constitutional

⁹ Case 11/70 *Internationale Handelsgesellschaft mbH v. Einfuhr- und Vorratsstelle für Getreide und Futtermittel*, [1970] ECR 1125. On the reception of this jurisprudence by national authorities of the then-Member States, see: P. Craig, G. de Búrca, *EU Law. Text, Cases and Materials*, Oxford University Press, Oxford: 2003, pp. 285-314.

¹⁰ For more on the notion of mandatory requirement, also called imperative reasons, see J. Molinier, N. De Grove-Valderyon, *Droit du marché intérieur européen*, LGDJ, Paris: 2011, pp. 68-71.

¹¹ F. Jacobs, *Human rights in the European Union: The role of the Court of Justice*, 26 *European Law Review* 337 (2001); A. Tizzano, *The Role of ECJ in the Protection of Fundamental Rights*, [in:] A. Arnulf, T. Tridimas (eds.), *Continuity and Change in EU Law*, Oxford University Press, Oxford: 2008, p. 125. Cf. case 11/70 *Internationale Handelsgesellschaft mbH v. Einfuhr und Vorratsstelle für Getreide und Futtermittel*, [1970] ECR 1161.

character that might be perceived as “common” to the EU Member States.¹² Thanks to this “incorporation”, the risk of collision between national and European norms is avoided because the conflict between an EU norm and a national norm becomes a conflict between two EU norms, and such a collision is usually adjudicated for the sake of the general principle.

The other technique, designated for the purpose of this text as the “mandatory requirement technique”, was first used in the *Cassis de Dijon* case.¹³ In this technique, the CJEU has considered some national law provisions as worthy of protection despite the fact that they collided with EU norms. They were considered worth retaining because they protected an important public interest (such as consumer safety, national cultural identity, the right to association etc.). This line of jurisprudence allows for such exceptions mainly in the domain of the internal market, and is applied if three conditions are fulfilled by the national provision in question: 1) the provision protects an important public interest recognized in the Treaties or by the CJEU; 2) the protection is necessary for safeguarding that interest; and 3) the protection is proportional with respect to the protected aim. The most commonly-encountered scenario used in application of this technique is that the exception is deemed *prima facie* acceptable, but its application turns out to be disproportional to the declared aim(s). A good example is the set of cases concerning Luxembourg, in which that country tried to limit access to certain professions to Luxembourg citizens only, invoking the argument of protection of national identity.¹⁴ However, it might also happen that the CJEU finds that an interest is worthy of protection and that this protection is determined to be proportional. The *Omega* judgment constitutes an example of this kind of reasoning. The human dignity protected by the German Constitution (*Grundgesetz*) was found worthy of protection, justifying the acceptance of local norms limiting the sale of games where killing of humans was simulated. The CJEU thus upheld a clear limitation on the free movement of goods and services because there existed sufficient reasons for the particular protection of human dignity in Germany.

These traditional techniques of handling a conflict between the EU and national norms are being gradually replaced by a new line of argumentation appearing in the jurisprudence of some Constitutional Courts in the European Union. While it was developed by the CJEU, the presented arguments come mainly from “below”, i.e. from the Constitutional Courts of EU Member States.

¹² R. Tinière, *L'office du juge communautaire des droits fondamentaux*, Brussels 2008, p. 64. Case 4/73 *J. Nold, Kohlen- und Baustoffgrosshandlung v. Commission*, [1974] ECR 491; case 44/79 *Hauer v. Land Nordrhein Westfalen*, [1979] ECR 3727; case 155/79 *AM&S v. Commission*, [1982] ECR 1575; joint cases 46/87 and 227/88 *Hoechst AG v. Commission*, [1989] ECR 2859.

¹³ Case 120/78 *REWE Zentral AG v. Bundesmonopolverwaltung (Cassis de Dijon)*, [1979] ECR 649.

¹⁴ Case C-36/02 *Omega*, [2004] ECR I-9609; case C-112/00 *Schmidberger*, [2003] ECR I-5659; case C-145/04 *Spain v. United Kingdom*, [2006] ECR I-7917; case C-244/06 *Dynamic Medien*, [2008] ECR I-505. Cf. B. Nabli, *L'identité (constitutionnelle) nationale: limite à l'Union européenne?*, 556 *Revue de l'Union européenne* 214 (2012); G. Martinico, O. Pollicino, *The Interaction between Europe's Legal Systems: Judicial Dialogue and the Creation of Supranational Laws*, Edward Elgar, Cheltenham: 2012, p. 190.

2. THE *ULTRA VIRES* ARGUMENT

According to the principle of conferral of powers, the EU has only those competences transferred to it by its Member States. Thus any action undertaken by the Union outside the scope of its conferred competences may be perceived as an action without a legal basis, and hence void and without legal effect. Literally *ultra vires* means an action beyond competences, outside of competences, or in excess of competences. An *ultra vires* action of the EU might take two forms. It can either consist of: 1) “regulations, directives or decisions that are *ultra vires* to the Treaty articles on which they are based”; or 2) it might take the form of an “*ultra vires* interpretation of the Treaty provisions or rules” by EU courts.¹⁵ Until now it has been mainly the second form of *ultra vires* EU action that has been criticised in the jurisprudence of national Constitutional Courts and in some cases has led to an exclusion of application of such jurisprudence. Both of above mentioned forms of *ultra vires* actions could possibly be scrutinized by the EU courts – the first in an action for annulment (Art. 263 TFEU), and the second via preliminary question proceedings (Art. 267 TFEU). According to Art. 263 TFEU, one of the reasons for invalidity of a legislative act of the EU is lack of competences or an improper legal basis. Since the *Foto-Frost* judgment it is agreed that only EU courts should decide upon the validity of any piece of secondary law.¹⁶ However, the EU courts do not usually invoke the *ultra vires* argument, perhaps due to an excessive reading of EU competences (often described as “competence creep”). This might also be due to the superficial nature of the control over the exercise of competences by the EU.¹⁷ However, it would seem that there are no viable arguments against the control of *ultra vires* actions based on 263 TFEU, therefore this argument might be used in a broader manner by applicants seeking to invalidate the EU secondary acts.

As to the Art. 267 TFEU, theoretically if a question of lack of competences arises, the national courts should make a preliminary reference to the CJEU concerning the validity of the regulation, directive or decision in question. The national courts should not independently adjudicate on the EU competences as defined in the founding Treaties, as this is linked with the question of validity of EU legal acts. This line of reasoning was clearly exposed in the Polish Constitutional Tribunal judgment SK 45/09, where the Tribunal stated that it is the role of the CJEU to verify the validity of secondary acts in accordance with the founding Treaties (at the same time stating firmly that it is a role for the Constitutional Tribunal to verify the conformity of those acts with the Polish Constitution).¹⁸

¹⁵ P. Craig, *The ECJ and ultra vires Action: A Conceptual Analysis*, 48 *Common Market Law Review* 395 (2011). M. Beyer-Katzenberger, *Judicial activism and judicial restraint at the Bundesverfassungsgericht: Was the Mangold judgment of the European Court of Justice an ultra vires act?*, ERA Forum (2010), p. 2

¹⁶ According to Catherine Van de Heyning the control of *ultra vires* should though be “centralized” – C. Van de Heyning, *The European Perspective: From Lingua Franca to a Common Language*, [in:] Claes et al., *supra* note 5, p. 185.

¹⁷ For more on this issue, see Craig, *supra* note 15, pp. 397-400.

¹⁸ SK 45/09 of 16.11.2011, point 2.2 of the motifs.

On the other hand however, the Member States remain the *Herren der Verträge* and are not respecting this centralization of control. Therefore it might come as no surprise that some EU law issues are analyzed at the level of national courts, including issues of EU competences. The question whether an EU action was *ultra vires* was raised by national constitutional courts long before the Lisbon Treaty. The most renowned example remains the *Maastricht* judgment, where the German Federal Constitutional Court claimed the right to review whether the EU institution which issued the act did so within the limits of its competences.¹⁹ The EU Courts have no jurisdiction to invalidate national provisions that are contrary to EU law, however their assessment as to their lack of compatibility with EU law might lead to their non-application. The developing practice of assessment by national constitutional courts of an EU action as *ultra vires* might lead to a similar result (mirroring this reasoning) – the EU act assessed as *ultra vires* would remain valid, but not be applicable within the national jurisdiction so ruling. The growing practice on the part of the CJEU to avoid answering such questions actually posed by national courts (so-called “silent judgments”) might be seen to promote the “nationalist repatriation of EU law.”²⁰ Thus such a development on the part of the CJEU in fact forces national courts to undertake the interpretation of EU law on their own²¹ and might be said to have manoeuvred them into their *ultra vires* line of argumentation. This comes back to the oft-raised problem of lack of sufficient dialogue between the national courts and the CJEU.

However, in reaction to the changes in both the division and exercise of EU competences introduced by the Lisbon Treaty, the references to *ultra vires* arguments have multiplied. Again, the first of the constitutional courts to raise the argument of review of EU acts with respect to whether they were issued *ultra vires* was the German Federal Constitutional Court. In the paragraph 240 of its *Lisbon* judgment of 30 June 2009, the German Federal Constitutional Court presented a very radical version of the *ultra vires* argument. It stated that it might assess secondary EU legislation in light of the German Constitution, and more precisely it might question such a legal act if it does not respect the subsidiarity principle, the principle of conferral of competences, or the very heart (*Kerngehalt*) of the German Constitutional identity.²² It thus returned to the first *Solange* judgment setting the limits on EU activity.²³ In its later *Honeywell* judgment of 6 June 2010 the German Federal Constitutional Court was much more con-

¹⁹ Point 49 of the judgment; D. Thym, *Attack or retreat? Evolving themes and strategies of the judicial dialogue between the German Constitutional Court and the European Court of Justice*, [in:] Claes et al., *supra* note 5, p. 238; Van den Heyning, *supra* note 16, p. 186; Sarmiento, *supra* note 8, p. 14.

²⁰ Sarmiento, *supra* note 8, p. 33.

²¹ As this author puts it: “If all they can expect is a minimalist answer from the ECJ, that leaves the search for a good answer in the hands of national courts anyway” (*ibidem*, p. 34).

²² Pts. 240 and 241 of the judgment.

²³ J. Barcz, *Wybrane problemy związane z wyrokiem niemieckiego Federalnego Trybunału Konstytucyjnego z 30.06.2009 r. na temat zgodności Traktatu z Lizbony z Ustawą Zasadniczą RFN* [Selected problems connected with the judgment of the German Federal Constitutional Court of 30.06.2009 on the Treaty of Lisbon], 9 Europejski Przegląd Sądowy 13 (2009).

ciliatory.²⁴ In this case it was asked to verify if a CJEU judgment in case C-144/04 *Mangold* was issued *ultra vires*. The German Federal Constitutional Court referred to the principle of conferral as a basis for reviewing the actions of the CJEU, underlining that this review should always view EU actions in a “favourable” light. It went on to state clearly that a legal act of the EU is *ultra vires* only when it causes a significant modification in the division of competences between the EU and its Member States. Thus the principle of supremacy is not absolute – an excessive exercise of competences or an action undertaken without competence cannot prevail over national law. In the *Honeywell* case, the German Federal Constitutional Court changed the way the *ultra vires* control test is applied (which was not very clearly defined in the *Lisbon* judgment). It requires an obvious *ultra vires* on the substance (that is, the vertical division of competences among different EU institutions is not considered, only the substantial division of who acts: the State or the EU), and such control can only be exercised once the CJEU has pronounced itself on the matter.²⁵ The “obvious” *ultra vires* action refers by analogy to the conditions of non-contractual liability of Member States for infringements of EU law, as understood in the *Köbler* case.²⁶ In addition, the EU legal act in question should be “manifestly in violation of competences and [the act] is highly significant in the structure of competences between the Member States and the Union with regard to the principle of conferral and to the binding nature of the statute under the rule of law.”²⁷ In this way the German Constitutional Court “allowed the CJEU a margin of error.”²⁸ This margin is certainly to be welcomed, because otherwise it would become very easy to undermine the applicability of various EU legal acts or judgments based only on a presumption of lack of competences.

In addition, the Czech Constitutional Court, in its judgment Pl. ÚS 5/12,²⁹ ruled that the CJEU judgment in the case C-399/09 *Landtová* was *ultra vires*, finding that the object of the case did not fall within the competences transferred to the EU by the Czech Republic. The Czech Constitutional Court found that the CJEU’s *Landtová* judgment (the so-called “Slovak pensions judgment”) was *ultra vires* and gave its own interpretation of Regulation 1408/71.³⁰ The contested CJEU judgment was in the form

²⁴ Thym, *supra* note 19, p. 239.

²⁵ M. Claes, *Negotiating Constitutional Identity or Whose Identity Is It Anyway?*, [in:] M in Claes et al., *supra* note 5, p. 212; M. Payandeh, *Constitutional Review of EU Law after Honeywell: Contextualising the Relationship between the German Constitutional Court and the EU Court of Justice*, 48 *Common Market Law Review* 9 (2011); Thym, *supra* note 19, p. 239.

²⁶ Thym, *supra* note 19, p. 240.

²⁷ Para. 61 of the judgment, also cited in Thym, *supra* note 19, p. 240.

²⁸ Claes, *supra* note 25, p. 212.

²⁹ Judgment Pl. ÚS 5/12 of 31 January 2012 (Slovak Pensions XVII – application of the Agreement between the CR and the SR on Social Security, obligations in international and EU law), available at: <http://www.concourt.cz/view/pl-05-12>. For a short comment, see T. Salvino, *L’ultra-vires-Kontrolle visto dall’est: l’attuazione “degenerativa” della dottrina tedesca*, 13 December 2012, available at www.diritticomparati.it.

³⁰ P. Malek, *The Czech Constitutional Court and the Court of Justice: Between Fascination and Securing Autonomy*, [in:] Claes et al., *supra* note 5, p. 137. J. Komárek, *Playing with Matches: The Czech Constitutional Court’s Ultra Vires Revolution*, available at: www.verfassungsblog.de.

of a preliminary ruling and concerned an allegedly illegal pension supplement (the supplement was to be paid to persons of Czech origin residing in the Czech Republic who were obtaining Slovak retirement pensions according to an international agreement concluded by the Czech Republic and Slovakia after the split-up of Czechoslovakia). The CJEU judgment was used by the Supreme Administrative Court of the Czech Republic to question the case law of the Czech Constitutional Court.³¹ The case was thus more a rivalry between the two Czech supreme jurisdictions that were at the root of the conflict than the contestation of the CJEU jurisprudence. In response to the Supreme Administrative Court's negation of its case law, the Czech Constitutional Court refused to apply the *Landtová* case on the basis that it was *ultra vires ratione temporis* (as it concerned a legal solution that was introduced long before the accession of the Czech Republic to the EU). Not surprisingly, the legal reasoning of the Czech Constitutional Court has been said to be influenced by an "unwise" political idea³² and "motivated by judicial egoism aiming at the preservation of institutional prerogatives placed at peril by the case law of a rival national court."³³ While it can hardly be considered as illuminating on the issue of how to apply the *ultra vires* doctrine in practice, it is significant for having invoked it.

In its judgment of 16 November 2011 (SK 45/09),³⁴ the Polish Constitutional Tribunal agreed to verify the conformity of Regulation 44/2001 with the Polish Constitution. It stated that in cases where such nonconformity be found, the legal consequences would consist of non-application of the EU norms, not in their invalidity.³⁵ The Tribunal clearly stated that the validity of EU norms can only be assessed by EU courts. However, if that Tribunal decided that an EU norm was not in conformity with the Polish Constitution, as it was issued *ultra vires*, it would result in the non-application of that norm in Polish territory. The Polish Constitutional Tribunal underlined that such a result would be difficult to reconcile with the obligations of Poland as a Member State of the EU as it would be against Art. 4.3 TEU. It could as well lead to proceedings instituted against Poland by the European Commission under Art. 258 TFEU. Therefore the Polish Constitutional Tribunal underlined that a judgment finding an act to be *ultra vires* should be an *ultima ratio* and that first all possible interpretations concomitant with EU law should be applied.

The above mentioned Constitutional Courts have thus shown a certain reserved acceptance of the technique of non-application of EU law in cases where such law is perceived as having been issued *ultra vires*. While the Czech Constitutional Court judgment in the Slovak Pensions case seems isolated and unlikely to be influential in other

³¹ Broader: G. Anagnostaras, *Activation of the Ultra Vires Review: The Slovak Pensions Judgment of the Czech Constitutional Court*, 7 German Law Journal 959 (2013).

³² *Ibidem*, p. 970.

³³ *Ibidem*.

³⁴ Cf. generally S. Dudzik, N. Półtorak, *The Court of the Last Word: Competences of the Polish Constitutional Tribunal in the Review of European Union Law*, 15 Yearbook of Polish European Studies 235 (2012).

³⁵ Point 2.7 of the judgment's reasons.

judicial fora, nonetheless it applied for the first time what the German Constitutional Court had proposed as a viable but unused hypothesis. The Polish Constitutional Tribunal also considered this possibility, but it did not apply it in the given case. It listed the reasons for precaution in the use of this doctrine, but did not exclude its application. It should be noted however that the *ultra vires* argument might be strengthened by reference to another concept that has been gaining in importance since the entry into force of Lisbon Treaty – the national identity clause in the TEU.

3. NATIONAL IDENTITY ARGUMENT

The TEU contains a provision (in Art. 4(2)) guaranteeing the protection of the national identity of EU Member States. One can legitimately wonder if the protection of such an identity might constitute a reason for deviating from the general principle of the primacy of the EU law over national law. According to von Bogdandy and Schill, the national identity protection clause might ease the relationship between the CJEU and the national Constitutional Courts, as it codifies the existing practice of questioning the primacy of EU law in the national constitutional courts.³⁶ Martinico and Pollicino find that the national identity clause turns the principle of primacy from an absolute one into a relative one.³⁷ Other authors even consider (and this attitude is shared by this author) that the national identity clause allows for a deeper control over the exercise of EU competences.³⁸ This clause might be perceived as a separate limitation on those competences.³⁹ There are as well opinions questioning the meaning of this clause. Monica Claes presumes that Art. 4(2) TEU does not allow the national courts to unilaterally refuse to apply EU law and it cannot be perceived as a confirmation of the counter-limits of the case law of national constitutional courts. In her opinion, this article does quite the contrary – it “[e]uropeanizes the position of these courts”,⁴⁰ in a way forcing them to include the European perspective in their reasoning.

³⁶ von Bogdandy & Schill, *supra* note 3, pp. 1417 and 1421.

³⁷ Martinico & Pollicino, *supra* note 14, p. 194 speak of an “uncompromising version” and a “compromising version”. These authors also think that the change of attitude towards the primacy principle is partly due to the new accessions to the European Union in 2004 and 2007.

³⁸ K. Kowalik-Bańczyk, *Tożsamość narodowa – dopuszczalny wyjątek od zasady prymatu?* [National identity – a permissible exception to the principle of primacy?], [in:] N. Półtorak, S. Dudzik, *Prawo Unii Europejskiej a prawo konstytucyjne państw członkowskich*, Wolters Kluwer, Warszawa: 2013, pp. 29-50.

³⁹ K. Wójtowicz, *Zachowanie tożsamości konstytucyjnej państwa polskiego w ramach UE – uwagi na tle wyroku TK z 24.11.2010 r. (K 32/09)* [Retaining the constitutional identity of the Polish State within the EU – comments on the judgment of the Polish Constitutional Tribunal of 24.11.2010 (K 32/09)], 11 *Europejski Przegląd Sądowy* 4 (2011); A. Wróbel, *Tożsamość narodowa czyli różnorodność w jednorodności* [National identity or diversity in unity], 8 *Europejski Przegląd Sądowy* 1 (2012).

⁴⁰ Claes, *supra* note 25, p. 221. As she puts it, Article 4.2 contains a “mirroring mechanism”: “determining the content of the duty imposed on the EU presupposes an assessment of ‘national identity’, which can only be provided by the Member States themselves.”

It should be noted that national identity is not a new notion in the TEU. It existed in the Treaty since its creation (first in Art. F, then in Art. 6(3) TEU), but it was never been used in its previous forms. The present version of Art. 4(2) TEU is much more developed and mirrors Article I-5 of the Treaty establishing the Constitution for Europe, which was not ratified in 2005. In its Lisbon version, the national identity clause contains a description of what constitutes the identity of Member States. The change in the wording of the Article referring to national identity may be construed as a sign of the will to change the until-then marginal role of this provision. This provision in its new version might be seen as a “communautarisation” of the preceding practice of Constitutional Courts to set some limits on the legislative activity of the EU (the counter-limits doctrine).⁴¹ The modification of the meaning of this clause is illustrated as well by the change in its placement in the Treaty. Article 4(2) TEU is placed next to other fundamental structural principles: the principle of conferral of competences (Art. 4(1) TEU, Art. 5(1) TEU) and principle of loyal cooperation (Art. 4(3) TEU). Thus the principle of protection of national identity has become a principle defining the relationship between the European Union and its Member States. Whereas its previous position in Art. 6 TEU linked it with the question of protection of fundamental rights, its present placement may indicate that it belongs to the EU’s structural principles, i.e. to setting the scope of the EU’s relationship with its Member States. Such a placement could be an indication that the national identity clause is, along with the principle of conferral and the loyalty clause, a rule both establishing and limiting the activities of the European Union.⁴²

Interestingly, in the English version of the TEU, the expression “national identities” is used in the plural form. In the French and Polish versions, the same expression is in the singular (French: *identité nationale*; Polish: *tożsamość narodowa*), whereas in the German version the phrase “relevant national identity” is used (German: *jeweilige nationale Identität*). A comparison of just these three linguistic versions indicates that there are a variety of “national identities”, corresponding to the variety of Member States. This might cause problems with establishing a clear definition of “national identity” at the EU level, and it might suggest that there are as many national identities as there are Member States.

The (previously-mentioned) introduction in 1993 of the European Union’s obligation to respect the national identity of its Member States was supposed to be a guarantee that the Union would not become a federation of states.⁴³ In the version binding between 1993-2009, providing only for a general obligation to respect national identity, this provision was never applied in the jurisprudence.⁴⁴ This lack of interest

⁴¹ Cf. Martinico & Pollicino, *supra* note 14, pp. 14, 88, 128, 132-134; the first to invoke the *controlimiti* doctrine were the Italian Constitutional Court in case 183/73 *Frontini* and the German Constitutional Court in case *Solange I*. Some Member States have this type of clause in their constitutions: Italy, Germany, Finland, pp. 35, 41, 45.

⁴² S. Platon, *Le respect de l’identité nationale des États membres: frein ou recomposition de la gouvernance?*, 556 *Revue de l’Union européenne* 151 (2012), pp. 152, 153.

⁴³ Nabli, *supra* note 14, p. 211.

⁴⁴ For more on the unused potential of that provision, see L. Besselink, *National and Constitutional Identity before and after Lisbon*, 1 *Utrecht Law Review* 37 (2010). Cf. also Wójtowicz, *supra* note 36,

in the provision might be explained by systemic issues – Art. 6 TEU was placed in a Treaty that in the 1990's was not perceived as containing directly effective rules. There was no practice to invoke the provisions of that Treaty in disputes involving individuals (in opposition to the broad jurisprudence on the direct effect of the provisions of the Treaty establishing the European Community). According to the data of Besselink, the CJEU did not even once refer to Art. 6(3) TEU during this period.⁴⁵ Any efforts to invoke national identity as a basis for deviating from EU rules (as in the *Omega* case) were not based on Art. 6(3) TEU. While the Advocates General referred a few times to Art. 6(3) TEU, it is symptomatic that they did so mainly after the final version of the Treaty of Lisbon was drafted. The Advocates General generally play an important role in defining the role of the national identity principle as a (claimed) possibly legitimate derogation from the principle of supremacy of EU law. Already in 2004 Advocate General Poiares Maduro referred to the national identity clause in the then-Art.6(3) TEU in his opinion for the case *Spain v. Eurojust*,⁴⁶ stating that linguistic diversity constitutes one of the guarantees of respect for the national identities of EU Member States.⁴⁷ In Advocate General Juliane Kokott's Opinion of 8 May 2008 in joined cases C-428/6 and C-434/06 *Unión General de Trabajadores de La Rioja (UGT-Rioja) v. Juntas Generales del Territorio Histórico de Vizcaya and Others*, she clearly stated that:

(54) Under Article 6(3) EU the European Union must respect the national identities of its Member States. This means that the Union cannot encroach on the constitutional order of a Member State, whether it is centralist or federal, and does not in principle have any influence on the division of competences within a Member State. The revision of that provision by the Treaty of Lisbon expressly mentions respect for the constitutional structures of the Member States by the Union.

However, she added:

(55) [...] a Member State 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.⁴⁸

In a similar, or even stronger, vein Advocate General Poiares Maduro in his Opinion of 8 October 2008 in case C-C-213/07 *Michaniki AE v. Ethniko Symvoulío Radio tileorasisi* wrote:⁴⁹

p. 6; Platon, *supra* note 42, p. 156. The same reasoning is visible in the case of 24 May 2011, C-51/08 *Commission v. Luxembourg*, referring to Art. 4.2 TEU.

⁴⁵ Besselink, *supra* note 44, p. 41.

⁴⁶ Case C-160/03 *Kingdom of Spain v. Eurojust*.

⁴⁷ Opinion of 16 December 2004 in the case C-160/03 *Kingdom of Spain v. Eurojust*, pt. 35.

⁴⁸ In particular, *cf.* case C-212/06 *Gouvernement de la Communauté française et Gouvernement wallon v. Gouvernement flamand*, [2008] ECR I-1683, pt 58. Similarly, see the opinion of the Advocate General Juliane Kokott in case C-222/07 *Unión de Televisión Comerciales Asociadas (UTECA)*.

⁴⁹ Case C-213/07 *Michaniki AE v. Ethniko Symvoulío Radio tileorasisi*, [2008] ECR I-9999. On this issue, see Martinico & Pollicino, *supra* note 14, p. 84.

(33) If respect for the constitutional identity of the Member States can thus constitute a legitimate interest which, in principle, justifies a restriction of the obligations imposed by Community law, it can all the more be relied upon by a Member State to justify its assessment of constitutional measures which must supplement Community legislation in order to ensure observance, on its territory, of the principles and rules laid down by or underlying that legislation. 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. Were that the case, national constitutions could become instruments allowing Member States to avoid Community law in given fields.

After the entry into force of the Treaty of Lisbon, the CJEU itself began to refer to Art. 4(2) TEU. In point 92 of its ruling in case C-208/09 *Sayn-Wittgenstein*,⁵⁰ it referred to the national identity of a Member State as including “the status of the State as a Republic”. However, the CJEU did not directly apply Art. 4(2) TEU – it only referred to the public order clause as an allowable exception to Art. 21 TFEU.⁵¹ In its judgment C-391/09 *Runevič-Vardyn*⁵² the CJEU found that national identity also covers the “protection of a State’s official national language” (pt. 86). In the most recent case, C-202/11 *Anton Las v. PSA Antwerp NV*, the CJEU, answering a preliminary question in a dispute between a Belgian employer and a Dutch worker, had to assess if the requirements of the Belgian Decree on Use of Languages were in conformity with Art. 45 TFEU. The CJEU first stated that “the objective of promoting and encouraging the use of Dutch, which is one of the official languages of the Kingdom of Belgium, constitutes a legitimate interest which, in principle, justifies a restriction on the obligations imposed by Article 45 TFEU” (pt. 27), and concluded that “in order to satisfy the requirements laid down by European Union law, legislation such as that in issue in the main proceedings must be proportionate to those objectives” (pt. 29), which it found not to be the case in the case before it.

In all three cases the CJEU treated the provisions of national laws (respectively: Austrian, Lithuanian and Belgian) in the way in Section II of this paper with respect to legitimate derogations to the freedoms of the internal market. It justified an infringement on the free movement of persons by the protection of an important interest, and then it assessed the proportionality of that protection.

For the time being one must conclude that national identity is only partly defined in the jurisprudence. On the basis of Art. 4(2) TEU one can easily state that national identity should cover the constitutional structure of any Member State. The European Union cannot impose any form of government or interfere into the division of competences between, for instance, a federation and its parts (in countries with a federal structure).⁵³ The Union is obliged to be neutral towards such issues. The Member States, on the

⁵⁰ Case C-208/09 *Sayn-Wittgenstein*, [2010] ECR I-13693.

⁵¹ *Ibidem*, pt. 94.

⁵² Case C-391/09 *Runevič-Vardyn*, [2011] ECR I-03787.

⁵³ Platon, *supra* note 42, p. 154; this author indicates that the judgment in case C-344/01 *Germany v. Commission* [2004] ECR I-2081 is no longer actual.

basis of Art. 4(2) TEU are thus free to retain their diversity as to the form of their state (unitary, regional, federal), form of governance (kingdom, republic), or as to its political system (presidential, parliamentary or mixed).⁵⁴ This would link the notion of national identity mainly to the constitutional order of a Member State and would limit it to questions established in national constitutions as to the form of the state. However, this does not exhaust speculation as to what else may be actually covered by the notion of national identity: e.g. specificities of culture, language,⁵⁵ habits, religion, rules setting the relations between the church and the state, principles of social and economic functioning of a country, institutional autonomy of a country, etc.⁵⁶ Thus the notion of national identity remains an open question that is defined both by the European Union (being an expression of the Treaty) and by each Member State. In the case *Melloni* Advocate General Bot stated that the notion of national identity certainly includes the notion of “constitutional identity”,⁵⁷ hence this notion also needs to be explored.

4. CONSTITUTIONAL IDENTITY ARGUMENT

While the Constitutional Courts have not referred much up till now to the notion of national identity, for a number of years they have invoked the “constitutional identity” of their nations as an argument for blocking the primacy of EU law over some Constitutional provisions, mainly with respect to the basic or fundamental principles of those Constitutions.⁵⁸ References to constitutional identity appeared first in the judgments of the German Federal Constitutional Court in the 1970s: both in *Solange I*⁵⁹ and *Solange II*⁶⁰ the Tribunal spoke of the *Verfassungsidentität* of the German state, mainly insofar as the protection of fundamental rights contained in the *Grundgesetz* was concerned. In the EU law doctrine, this notion appeared first in the context of a “counter-limits doctrine”. Already in 1973 in the *Fragd*⁶¹ case, the Italian Constitutional Court stated

⁵⁴ Nabli, *supra* note 14, p. 212.

⁵⁵ Cf. a series of cases started by the Republic of Italy concerning the lack of publication of competition announcements within the EU in the Italian language. Case T-166/07 *Republic of Italy v. Commission*, [2010] ECR II-193; case T-205/07 *Republic of Italy v. Commission*, [2011] ECR II-15; case T-117/08 *Republic of Italy v. Social Economic Committee*, [2011] ECR II-1463. In these cases only the issue of discrimination was raised; the national identity notion was not invoked (Platon, *supra* note 42, p. 153).

⁵⁶ C. Miłk, W. Czapliński, *Traktat o Unii Europejskiej. Komentarz* [Treaty on the European Union. Commentary], KiK, Warszawa: 2005, p. 91; P. Filipek, [in:] K. Lankosz (ed.), *Traktat o Unii Europejskiej. Komentarz*, C.H. Beck, Warszawa: 2003, p. 136; Wójtowicz, *supra* note 36, p. 6.

⁵⁷ Opinion of AG Bot of 12 October 2012 in case C-399/11 *Criminal proceedings against Stefano Melloni*, pt. 137.

⁵⁸ R. Donnarumma Maria, *Intégration européenne et sauvegarde de l'identité nationale dans la jurisprudence de la Cour de justice et des cours constitutionnelles*, 4 RFDC 719 (2010).

⁵⁹ Case *Solange I*, BVerfGE 37 271, pt. 316.

⁶⁰ *Solange II* BVerfGE 22 listopada 1986, BVerfGE 73, 339 (2BvR 197/83).

⁶¹ Corte Costituzionale, Sentenza no. 232/1989 of 21.04.1989; cf. A. Oppenheimer (ed.), *The Relationship between European Community and National Law: the Cases*, vol. I, Cambridge University Press, Cambridge: 1994, p. 653.

that an EC Regulation would be applied in Italian territory if it is not in conflict with the unbreakable principles of the Italian constitutional order.⁶² The French Constitutional Council also referred to constitutional identity while speaking about the protection of fundamental rights in the EU in a case concerning Directive 2001/29.⁶³ The German Federal Constitutional Court, in its *Lisbon* judgment, clearly stated that the application of EU law is limited when it might lead to the loosening of the constitutional identity of Member States (Ger. *Verfassungsidentität*). In that case it also referred to Art. 4(2) TEU.⁶⁴ It repeated its whole argumentation in the *Honeywell* judgment.⁶⁵ It can be presumed that this jurisprudence was an inspiration⁶⁶ for the Polish Constitutional Tribunal, which not only also referred to constitutional identity in the case K 32/09,⁶⁷ but tried to define it. It stated that some state competences cannot be transferred to any other entity, because they form the constitutional identity of the country. It gave a precise list of the competences that cannot be transferred: 1) basic principles of the Constitution, 2) individual rights that define a country's identity, such as human dignity, the principle of rule of law, principle of solidarity; 3) fulfilment of constitutional values; 4) prohibition against the transfer of constitutional competences allowing for definition of a state's regime; 5) prohibition against the transfer of the competence to define the competences (prohibition against resigning from *Kompetenz*).⁶⁸ In order to retain the constitutional identity of Poland, in every case of transfer of state competences the procedure for ratification of international agreements should be applied (not just at the accession).⁶⁹ While this judgment shows clearly how the very notion of constitutional identity can be imprecise and unclear, still the constitutional identity is, according to the Constitutional Courts, a limit beyond which the European Union cannot go. And the Constitutional Courts guard that identity. The Polish Constitutional Court is clearly referring in its *Lisbon* judgment to a certain common position taken by the different Constitutional Courts that have taken a stance on this issue.

⁶² Decision no. 183/1973, stated after: O. Pollicino, *The Italian Constitutional Court and the European Court of Justice: A progressive overlapping between the supranational and the domestic dimensions*, [in:] Claes et al., *supra* note 5, p. 105.

⁶³ Judgment of the Conseil Constitutionnel of 27.07.2006: CC Decision no. 2006-540 DC, pt. 17 – cf. Besselink, *supra* note 44, p. 47.

⁶⁴ BVerG, Urteil des zweiten Senats of 30 June 2009 (2 be 2/08), pt. 219.

⁶⁵ BVerG of 2 March 2010; Payandeh, *supra* note 23, pp. 9-38.

⁶⁶ One can say that the Polish Constitutional Tribunal is building a certain coalition with other constitutional courts. For more on this issue, see K. Kowalik-Bańczyk, *Sending Smoke Signals to Luxembourg – the Polish Constitutional Tribunal in Dialogue with the ECJ*, [in:] M. de Visser, C. Van De Heyning (eds.), *Constitutional Conversations in Europe*, Intersentia, Antwerp: 2012, p. 267.

⁶⁷ Judgment of 24 November 2010 in case K 32/09 (Treaty of Lisbon), Z.U. 2010 / 9A / 108, O.J. 2010, No. 229, item 1506.

⁶⁸ Pt. 2.1 of the judgment's motifs. Cf. K. Wojtyczek, *Przekazywanie kompetencji państwa organizacji międzynarodowym* [Transfer of State Competences to International Organizations], Wydawnictwo Uniwersytetu Jagiellońskiego, Kraków: 2007, p. 284.

⁶⁹ Pt. 2.1. of the judgment's motifs.

It is impossible to give a clear definition of what is covered by the notion of constitutional identity. It can, however, be stated that this notion does not cover the entire Constitution of any Member State, but rather it refers to its central issues. So it is not the whole of the Constitution that defines a nation's constitutional identity.

It is also worth stressing that the notion of national identity and constitutional identity are often intermingled. The distinction between these notions is not very visible in the jurisprudence of national Constitutional Courts, and because of this some authors treat them as synonyms. According to Leonard Besselink, the Treaty of Lisbon brought about a transfer from a notion of national identity to the notion of constitutional identity.⁷⁰ Krzysztof Wójtowicz finds that constitutional identity is the “heart of sovereignty” and “a substantial border for transferring competences”. Paweł Filipek is of the opinion that the constitutional identity consists of “statehood, sovereignty, and constitutional order” and that this identity is included in the broader notion of national identity (which also includes cultural, linguistic, possibly religious issues, etc.). Bélig Nabli, however, finds that the national and constitutional identities are completely different notions as they have different origins. The national identity is set in the TEU and the constitutional identity is identified by each Member State individually in accordance with its constitution. The two notions are like two classes which overlap but do not cover each other. Both notions have, however, the same task – they should constitute a limit for the activity of the European Union.⁷¹ Sébastien Platon also finds that these two notions are distinct concepts. The national identity is broader and it has a purely EU scope as it stems from the treaty on the European Union, while the constitutional identity is defined by the Constitutional Courts only.⁷²

Considering the above, it would seem that constitutional identity should be perceived as an integral element of national identity, albeit narrower than national identity. Apart from the natural elements of constitutional identity, like the state regime and guarantees for individuals, national identity is also defined by some objective elements existing next to the Constitution: language, culture, history; as well as by some subjective elements particular to each society: sense of belonging and patriotic feelings.⁷³

CONCLUSIONS: CONSEQUENCES OF VARIOUS ARGUMENTS FOR THE NON-APPLICATION OF EU LAW

If a national constitutional court finds an EU action (in any of the two above-mentioned forms, i.e. legislative action or legal interpretation) as *ultra vires* or clashing with either national or constitutional identity, the main consequence might be the refusal to apply the contested EU measure. However, the scope of such a refusal might be

⁷⁰ Besselink, *supra* note 44, p. 44.

⁷¹ Nabli, *supra* note 14, p. 210.

⁷² Platon, *supra* note 42, p. 158.

⁷³ Nabli, *supra* note 14, p. 211.

questionable – while it refers to the scope of the Member State whose constitutional court is involved, it leaves open the question if any organ of a different Member State might invoke the same argument (*ultra vires*) to refuse the application of the contested measure.

There is no doubt that the EU as a whole has, under Art. 4(2) TEU, a legal obligation to respect the national identity of its Member States. However, the question of who is to define this identity remains open and might have various consequences. This is mainly important for national courts⁷⁴ – is it possible for national courts to question the application of an EU act or a provision of an EU act because it clashes with national identity? Such a hypothesis seems very dangerous but cannot be excluded.⁷⁵ However, while it is incontrovertible that national identity as a notion contained in an EU treaty should be construed by the CJEU, on the other hand its content is in fact dependent on the particular national context. National identity is thus an EU treaty notion with a national content. According to Art. 19 TEU, the CJEU is not competent to interpret national law, and particularly national Constitutions. This argument would steer toward a position that the CJEU has no powers to define national identity for any particular Member State, and that such definition should remain in the hands of Member States. But in order to determine whether the national identity has been infringed upon, the CJEU would have to define it at some point.⁷⁶ This leads to the practical problem whether a Constitutional Court that presumes there is an infringement of the national identity clause by the EU should refer a preliminary question to the CJEU. The practice of recent years clearly shows that we are in need of a peaceful cohabitation between the CJEU and national Constitutional Courts, not a confrontation.⁷⁷ For this reason it seems that the content of “national identity” is different for each Member State and it will be a treaty notion with a “national content” – stemming both from Constitution and jurisprudence of a particular country (thus covering also a state’s “constitutional identity”) as well as from the total historical and cultural context (or baggage) of a particular country. But even such a broad definition of national identity does not justify the efforts undertaken by some Constitutional Courts (including the Polish one) to limit the legislative activity of the EU by holding that, in cases where EU institutions infringe on a country’s constitutional identity (which by the way might well be perceived as *ultra vires*), the Member States should not be bound by the provisions of EU law or by a CJEU judgment. This would give national Constitutional Courts unusually broad possibilities to assess if a given provision of EU law should be

⁷⁴ Besselink, *supra* note 44, p. 44.

⁷⁵ According to Krzysztof Wójtowicz: “incorporation of constitutional state structures into the notion of national identity [in Art. 4.2 TEU] seems to pass the obligation, or perhaps a privilege of defining this notion to the national constitutional courts” (Wójtowicz, *supra* note 36, p. 6).

⁷⁶ Platon, *supra* note 42, p. 158.

⁷⁷ In the literature one reads of a *relationship of cooperation*, giving as an example the judgment of German Federal Constitutional Court in case *Brunner*: BVerGE 89, 155, of 12 October 1993, 2 BvR 2134, 2159/92; cf. Besselink, *supra* note 44, p. 45.

applied in a particular national legal system. However, in light of the wording of Art. 4(2) TEU, the CJEU should be the final arbiter. Otherwise the EU law risks losing its coherence. It should be up to the CJEU to assess if a given problem is covered by the notion of national identity and state, and whether it is possible to deviate from the application of EU law. The traditional jurisprudence of the CJEU on resolving collisions with important national provisions shows that such a practice has been in place for years, and that the CJEU has already started to define national identity and elaborate the margin of freedom granted to EU Member States.

Invoking these different arguments might be useful for limiting the effects of EU law at two levels. First, invoking *ultra vires* or national identity might be linked with infringement of the principle of conferral and the possibility that the EU has overstepped its competences. Second, the arguments can be invoked to question the exercise of EU competences and to block the application of EU law that infringes on national identity. In each case, national identity marks a limit on European Union action.⁷⁸ Therefore a clear definition of national identity is necessary, but unfortunately at the same time hardly possible.

Using such arguments for blocking the application of EU law or the effects of CJEU judgments might be detrimental to the coherence and unified application of EU law in all Member States. Therefore the developing practice of Constitutional Courts to question – for the time being in a rather limited way – the EU competences to act must be closely observed and assessed in a critical way. Otherwise the coherence of EU law might be called into question.

⁷⁸ Nabli, *supra* note 14, pp. 211-212.