

Collective Identity as a Legal Limit to European Integration in Areas of Core State Powers

To what extent does collective identity, as expressed by national constitutions, provide a legal limit to (creeping) European integration in areas of core state powers? This article contrasts the approaches by the EU and national legal orders. While EU law does not allow any area to be a priori carved out of its scope of application, certain national courts consider they can disapply EU law where it too deeply affects areas considered core to the state, in order to guarantee sufficient space for national self-determination so as to sustain national collective identity. Article 4(2) TEU, although touted as a platform to mediate constitutional conflict about the limits of EU powers, has made little difference in this regard. At the same time, the discord should not be overstated: national actors that credibly invoke legitimate interests within the framework of EU law will often find these recognized by the CJEU.

1. Introduction: law, collective identity and self-determination

Law can be considered a tangible expression of collective identity, as well as a factor in shaping it (de Witte 2013). In constitutional terms, collective identity is connected to the very notion of independent statehood. In a mutually reinforcing dynamic, collective identity can be considered to legitimize the constitution of the polity in question, and the constitutionalized polity legitimizes the collective identity of the subjects of the polity. In substantive terms, the fact that a value has been considered important enough by the legitimated majority to entrench it in a binding norm says something about that collective, and exposure to these norms can in turn facilitate collective identity through socialization (Kuhn 2015). National stances on ‘moral questions’ (de Witte 2013) such as bull-fighting, marriage, gambling, religion and soft drugs can be such auto-reinforcing expressions of collective selfhood. These norms may not be constitutionalized at all, but instead subject to ordinary political contestation and change.

Precisely that democratic decision-making power could be considered fundamental to (the expression of) collective identity.¹

Collective identity is thus intrinsically connected to self-determination in constitutional and democratic (resulting in substantive) terms. Such collective self-determination arguably should find its limits in the constitutional protection of individual self-determination, through judicial review on the basis of human rights. The interpretation of these fundamental values and the extent to which they constrain the democratic process is, in turn, itself an important part of collective identity. Furthermore, in federal, multi-level and polycentric polities, various competing and overlapping claims to, and needs for, collective self-determination (on the basis of ethnic, linguistic, religious or other diversity) have to be constitutionally accommodated. A federal constitution will therefore have to provide both the institutional and the substantive infrastructure for *demoicratic* (Nicolaidis 2012) governance, which will notably include the division of competences among the various sites of authority. From a perspective of constitutional democratic self-determination, such competence division is key to ensuring that each collective has the necessary institutional and substantive decision-making power to express and shape its identity: the ‘core powers’ that the collective needs to sustain itself. A polity’s specific ‘competence constellation’, i.e. its federal constitutional settlement, is, again, itself an important part of collective identity.

The dynamic process of a collective’s assertion and development of its identity through self-determination is an invariably difficult exercise even in a homogenous centralized polity, let alone in a legal order such as the EU. Composed of numerous (federated) polities with their own constitution(s) and a high degree of cultural, linguistic, religious and social diversity, the EU contains an unrivaled degree of overlapping and competing expressions of collective identity that have to be mediated and accommodated in legal terms. Perhaps unsurprisingly, in this context, a fundamental conflict has emerged precisely in relation to this special issue’s topic of inquiry of collective identity and the integration of core state powers. The EU legal order, as interpreted by the Court of Justice of the EU

¹ de Witte (2013): ‘The argument from self-determination posits that we need to protect not only the expression of certain moral or ethical values, but also the autonomy of the political forum through which such values are articulated and renegotiated’.

(CJEU), takes a different view from certain national constitutional courts, on to what extent collective identity, as expressed by national constitutions (i.e. national constitutional identity),² provides a legal limit to European integration in areas of ‘core state powers’.

As discussed in Part 2.a., the CJEU has held that Member States have permanently limited their sovereign rights in ‘ever wider fields’ and has refused to acknowledge any ‘nucleus of national sovereignty’ that can be invoked ‘as such’ against the EU (Lenaerts 1990). Any EU law takes precedence over any national law in any area, and Member States need to exercise all their competences concordant with their positive and negative obligations under EU law, regardless of whether the EU’s competence is limited, or even excluded, in that area or whether the issue is considered central to national identity. As we shall see in Part 2.b., this absolutist interpretation can, however, be juxtaposed to the view of a group of national constitutional courts, epitomized by the German Constitutional Court (*Bundesverfassungsgericht*; ‘BVG’). Most specifically, in its *Lisbon* judgment, the BVG reiterated its prior stance that the identity of Germany and its constitution needed to be protected, and held that European unification would thus be unlawful if ‘insufficient space is left to the Member States for the political formation of economic, cultural and social living conditions’, identifying as particularly sensitive fields: (1) criminal law (2) the use of force (3) fiscal decisions (4) the social state, and (5) decisions of particular cultural importance (e.g. related to religion, school, the family).

Introduced by the Maastricht Treaty and strengthened by Lisbon, the principle of national constitutional identity enshrined in Article 4(2) TEU has been touted as a possible platform to mediate such constitutional conflict about the limits of EU powers. It obliges the EU, by virtue of EU law, to respect Member States’ national identities, ‘inherent in their fundamental structures, political and constitutional’ and their ‘essential State functions’ such as ‘ensuring the territorial integrity of the State, maintaining law and order and safeguarding national security’. In Part 3, it will be argued that while Article 4(2) may be relied on in relation to both positive and negative integration, it does not ‘overcome absolute primacy’ as some authors have argued (von Bogdandy and Schill 2011). The CJEU has always

² This article accordingly focuses on national (and European) collective identity. While there are important non-national expressions of identity that also need accommodation in the EU framework, this lies beyond the limited scope of this paper.

sought to accommodate - within the framework of existing derogations and margins of discretion in relation to both the direct application of Treaty provisions and secondary legislation - sensitive interests to which national actors have indicated a deep attachment. Blanket references to core state powers or national identity will however not impress the Court. Article 4(2) does not fundamentally change this approach. In case of a clear rule-conflict between EU and national law, it will not mean that precedence is given to the latter.

Part 4 will consider to what extent collective identity provides a legal limit to competence creep. It reiterates that EU law does not provide effective limits and that while the limitations defined at national level, on the national view³, can be used to limit all manifestations of competence creep within EU law *stricto sensu*, EU law can actually resist such national defiance. In any event, even from a national perspective, the extent to which constitutional identity could be useful in addressing competence creep is, ultimately, rather small: by its nature it is reserved for exceptional situations and can only ever throw incidental counterpunches without providing an effective structural limit. Furthermore, European integration in areas of core state powers may also occur outside EU law *stricto sensu*, through non-binding policy coordination or parallel integration. In these cases, the constitutional configuration is radically different, as any binding norms implementing EU soft law or international law are adopted by the national legislator: bringing them potentially within the full remit of national judicial review. When parallel integration takes the shape of an international Treaty, national constitutional identity may then provide a limit that can be enforced at the national level without offending EU law. In the case of soft law, however, the national ‘implementing’ measures effectively mask their European origin, meaning that they logically escape any constitutional limit placed on European integration in areas of core state powers.

2. European Integration in Areas of Core State Powers....

³ There is no singular ‘national perspective’. The BVG’s view is shared only by a minority of Member States, and there are fundamental variations.

a. ... according to EU law

European integration can take place in areas where no direct legislative competence has been attributed to the EU, including areas that may be upon various definitions be considered ‘core state powers’ such as ‘coercive, fiscal or administrative’ powers as per Genschel and Jachtenfuchs (2018), policy areas of ‘high salience’ following Moravcsik (2002) such as health, education, social security, taxation and law and order, the areas that the Treaty itself states to be ‘reserved’ or ‘retained’ by the Member States (Azoulai 2011, de Witte 2017), i.e. where no competence has been conferred on the Union (Article 4(1) TEU), and that the Treaty considers ‘essential State functions’, such as ‘ensuring the territorial integrity of the State, maintaining law and order and safeguarding national security’ (Article 4(2) TEU). Such ‘competence creep’ (Weatherill 2004), has been said to take place particularly through (i) the adoption of indirect legislation on legal bases in the Treaty relating to other policy areas, (ii) the disapplication of national provisions that the CJEU finds incompatible with the Treaties, such as notably in the internal market, (iii) the limitation of national regulatory autonomy through obligations under international trade agreements concluded by the EU (iv) the limitation of national regulatory autonomy through EU policy coordination, such as European Semester, and (v) parallel action on the borders of the EU framework (Garben 2019a).

The legal explanation of why such competence creep remains possible despite the various iterations in the Lisbon Treaty of the conferral principle, harmonization prohibitions, national autonomy ‘angst clauses’ (von Bogdandy & Bast 2002) and competence reservations, is because these limits generally only apply to direct legislative action by the EU, and not to indirect action (on other legal bases), non-legislative action (such as policy coordination) or action outside the EU framework altogether (such as the ESM Treaty or the Bologna Process). The CJEU has indeed persistently refused to acknowledge any ‘nucleus of national sovereignty’ that can be invoked ‘as such’ against the EU (Lenaerts 1990). Thus, for instance, even where the Treaties state that the EU shall ‘fully [respect] the responsibility of the Member States for the content of teaching and the organisation of education systems’ (Article 165(1) TFEU), that the ‘Treaties shall in no way prejudice the rules in Member States governing the system of property ownership’ (Article 345 TFEU), that in areas of complementary EU competence such as

culture and health ‘legally binding acts of the Union adopted on the basis of the provisions of the Treaties relating to these areas shall not entail harmonisation of Member States' laws or regulations’ (Article 2(5) TFEU) or that ‘national security remains the sole responsibility of each Member State’ (Article 4(2) TFEU), this does *not* preclude the EU from pushing the Member States to introduce competitive mechanisms for higher education funding, from liberalizing economic sectors, from adopting legislation banning tobacco advertisement, or from prohibiting a Member State to expulse a foreign criminal – it can and has done all that.

While we should at the same time be careful to avoid giving the impression that the EU has assumed anything close to full control over sensitive policy areas such as education, sport, criminal law, defense, taxation and welfare, since the majority of the decisions taken in these areas do belong to the Member States, the point is that EU law can intervene in any area in sometimes unpredictable and unforeseen ways, with potentially important disruptive effects, and there is no single policy area or issue that can *a priori* be shielded from these dynamics. In other words, from the viewpoint of EU law, there are no ‘core state powers’ or in any event they are not for that reason carved out of the scope of application of the Treaties. While EU integration in these areas is not unlimited, it is not limited by virtue of these powers being considered ‘core’ to the ‘state’ or essential for self-determination and collective identity on the (sub)national level.

This follows from EU law’s fundamental legal interpretative principle of *effet utile* (effectiveness) coupled with primacy. At all times in all areas, all EU law takes precedence over all national law. Even a trivial, technical provision in an EU Directive enjoys primacy over the most fundamental provision of a national constitution (*Internationale Handelsgesellschaft*). The EU is subject to the conferral principle, but since any EU provision or act may, when interpreted to give it full effect, impact on several policy areas, EU law becomes pervasive and can displace any type of national provision even in areas that have not been conferred on the EU or explicitly reserved by the Member States. The Court often repeats its ‘retained powers formula’ (Azoulai 2013, Boucon 2014) which entails that even where the EU has no direct legal competence to deal with a certain subject, the retained or reserved competence of the Member States is nevertheless constrained by the need to respect legal obligations stemming from EU law (de Witte 2017). Thus, the EU legal order as interpreted by the CJEU reflects, by and

large, a choice for ‘cooperative federalism’, as opposed to ‘dual federalism’ (Schütze 2009). Instead of being autonomous in their own, strictly demarcated, spheres, the EU and national level are both likely to be involved to some degree in the governance of any single issue.

This is true for EU law *stricto sensu*, and new governance in the form of policy coordination further reinforces such cooperative federalism by structurally involving the EU, albeit in ‘softer’ ways than through binding laws, in areas where its direct legislative competence may be lacking. It may thus be that the EU pushes Member States to reform their social security, education and health care systems, even if the Treaties explicitly exclude the organization of these aspects of the welfare state from EU competence. International cooperation in turn, whether through the EU in international trade relations or by the EU Member States (and possibly some EU Institutions) on issues related to the EU but formally speaking outside its legal and institutional framework, adds another concentric circle of governance in this system of multi-level cooperative federalism. Within such a system, ‘core state powers’, exclusive national competences or ‘red lines’ to European integration simply have no place (Weatherill 2004). In fact, it may be that European integration suffers from a waterbed effect: if integration through one mode of governance is limited (for instance prohibiting direct legislation), it will simply lead to a corresponding increase of integration through other modes (e.g. ‘soft’ policy coordination) (Garben 2019a).

It is true that the EU view, absolutist as it is on principle, also attempts to be reconciliatory, in that it uploads national constitutional norms and values to the European level as ‘general principles of EU law’, amalgamating them into a collective European constitutional identity. Within this European constitutional identity, fittingly, a certain degree of diversity is accommodated: within existing frameworks of national discretion under EU law (e.g. under the ‘rule of reason’ in the internal market, justifications to restrictions on rights resulting from EU Citizenship, or within the context of national procedural rules giving effect to EU law) specific national variations on a common European value can be accepted (*Omega*, *Taricco II*). But in case of a direct conflict between an EU and national rule, EU legal doctrine cannot give precedence to the latter, no matter how ‘core’ the issue is to the state. As discussed further below, Article 4(2) TEU’s obligation to respect national constitutional identities and essential state functions has not made much difference in this regard. This could be explained by

considering that the primordial value of European constitutional identity is that of European integration and ‘ever closer union’, which inherently resists the concept of national no-go-zones, as the objective to provide sufficient space for collective European self-determination is considered, generally, more important than protecting national self-determination.

Of course, ultimately, also on the EU’s view, the EU Treaties are determined by the Member States, but they do so collectively as Treaty amendment is unanimous. While this means that a single Member State, in an expression of national collective identity, can veto a further (i.e. in a new EU Treaty) explicit transfer of core state powers, it cannot singlehandedly amend the current competence constellation, and that constellation does not as a matter of principle recognize any core state powers that are protected as such from European integration. Putting it at its most starkly, this leaves a Member State with a single option to unilaterally reclaim core state powers which it considers to have been unduly transferred to the EU through previous Treaties, their interpretation or secondary legislation: invoking Article 50 TEU (Kelemen 2016).

b. ... according to (some) national constitutional law

As legally correct as the foregoing description of cross-cutting, cooperative federalism is from the viewpoint of EU law, there is a counternarrative that is arguably equally valid in different legal terms. Several national constitutional courts, with as their most vocal ‘leader’ the BVerfG, proclaim that European integration in core state areas is, in fact, to be limited, by virtue of the national constitution – regardless of what the EU says. In its *Lisbon* judgment, the BVerfG held more specifically that European unification would be unlawful if ‘insufficient space is left to the Member States for the political formation of economic, cultural and social living conditions’, and identified as particularly sensitive fields: (1) criminal law (2) the use of force (3) fundamental fiscal decisions (4) the shaping of living conditions in a social state, and (5) decisions of particular cultural importance (paras 249, 252 of the judgment).

As various authors have noted (Grimm 2009, Beck 2011, Claes & Reestman 2015), the reasoning is somewhat unclear: these areas are explicitly identified as substantive competences that the German

constitution requires the *Bundestag* to retain upon ratification of an EU Treaty, but it is neither said that these areas are prohibited for EU legislation nor are legal consequences mentioned should the EU become intensively engaged therein; the BVerfGE instead admits that it cannot derive from the constitution ‘a pre-determined number or certain types of sovereign rights [that] should remain in the hands of the state’ (para 248) and recognizes that European integration already occurred in these areas (paras 253 – 260). Thus, the BVerfGE does not consider any EU measure adopted in these areas as necessarily incompatible with the constitution, but will scrutinize such acts and should it consider that the German legislator is left insufficient space, it may refuse to apply the respective EU measure (Claes & Reestman 2015).

Instead, the only immediate consequence attached to the identification of these areas is that the explicit authorization of the *Bundestag* is required for transfer of further powers in these fields under the Treaty’s various adjustment procedures, notably the so-called *passerelles* that allow the EU to move to QMV or to the OLP without Treaty revision. In fact, Halberstam and Möllers (2009) argue that this appears the basis of the BVerfGE’s formulation of areas of core state power, as a ‘a post-hoc argument in support of a preordained result’: wanting to reach this conclusion on the *passerelles*, the BVerfGE devised the ‘sensitive areas’ in relation to those where the Treaty features a special *passerelle*. Thym (2009) summarizes a number of additional postulated reasons behind the BVerfGE’s formulation of core state powers: the judges’ personal convictions and the parties’ arguments, the ‘simple compilation and protection of remaining national powers’, interdisciplinary cross-fertilization by Habermas’ deliberative theory of democracy and Moravcsik’s ‘prominent intergovernmental defence of the European project’.

Whatever the underlying motivation, the BVerfGE’s legal reasoning is ultimately based on Germany’s constitutional identity, as codified in Article 79(3) of the constitution, which comprises the principle of democracy.⁴ It requires that Germany remains a sovereign state and a viable and independent political

⁴ The democracy principle is wider than Germany’s unamendable constitutional identity, entailing requirements that are not covered by the eternity clause. Claes and Reestman 2015 at p. 925 and Grimm 2009 at p. 490.

community (López Bofill 2013): another outcome would require a new constitution (para 216 of the judgment). According to the BVG

‘[a] structural democratic deficit that would be unacceptable pursuant to Article 23 in conjunction with Article 79.3 of the Basic Law would exist if the extent of competences, the political freedom of action and the degree of independent opinion-formation on the part of the [EU] reached a level [...] analogous to that of a [federal] state, because for example the legislative competences, essential for democratic self-determination, were exercised mainly at Union level’.

By virtue of national constitutional identity, the *Bundestag* needs to retain substantial competences in the areas of core state power so that Germany can democratically shape itself. This therefore closely aligns with the idea, outlined in Section 1 above, that collective identity necessitates a sufficient degree of self-determination in constitutional and democratic (resulting in substantive) terms, and can thus be defended theoretically. As to the identification of these areas, in the absence of clear indications in the national constitution, the BVG itself takes the lead. The areas of criminal law, defense, fiscality, socio-economic questions and cultural issues are perhaps not wholly unconvincing proxies for democratic salience (de Witte 2013 ; Garben 2019b). However, whether theoretically convincing or not, it is questionable whether lacking a clear textual basis, these are for a Constitutional Court to devise. All the more, since the European constitution does not recognize these areas as core to the state.⁵

It should be noted that these areas are not ring-fenced from European integration, thus also the BVG rejects a pure dual federalist approach. But European integration in these areas can ultimately be limited (by the BVG) by virtue of these areas being considered ‘core’ to the state, regardless of what EU law says. This is the crux of the theoretical stand-off between the BVG and CJEU for our purposes. In practice, it means that the BVG will review EU law in light of these standards, as it has done most elaborately in the context of the EMU, although no instrument so far has been found in violation. This

⁵ Except, arguably, for the aspects of criminal law and defense that relate to national security, which Article 4(2) considers the ‘sole responsibility’ of the state.

links to a more general point, that while the dogmatic conflict between the CJEU and the BVG is of high relevance in theory, the day-to-day workings of the composite EU legal order remain rather unaffected by it. The *Lisbon* judgment has made the use of the *passerelle* clauses more difficult, in a way that arguably breaches EU law (Niedobitek 2009), but the Treaties were approved and the BVG's subsequent case law has not entered into outright conflict. As Beck argues, '[t]he fact that the unresolved conflict never escalated attests to the pragmatism and political sensibility of both courts' – who, perhaps ironically, rely on each other for their own continued authority. Outright conflicting judgments where EU law would be disapplied would harm the standing and credibility of both institutions. Furthermore, while this analysis focuses on the crucial point of divergence between the two legal systems, it should be stressed that both institutions and the constitutions they defend are committed to openness and dialogue.

In fact, overall, the cooperation between the BVG and CJEU has been better than in some other Member States. Although the instances of outright conflict, where a national court refuses to apply EU law, remain very rare, the past few years have seen several 'adversarial' judgments. In *Slovak Pensions*, the Czech Supreme Court refused to disapply a national provision that prevented granting social security benefits to Slovak citizens which the CJEU had considered incompatible with EU law (Komarek 2012) and in *Ajos* the Danish Supreme Court refused to apply the CJEU's case law on age-discrimination in a dispute between private persons (Holdgaard *et al* 2018). There certainly is a constitutional identity element in these cases, but the judgments are not formulated in terms of comprehensive doctrines limiting European integration akin to the BVG's. Nor is the idea of areas of core state powers explicitly present as a theme. Still, the judgments are relevant to show that national law is increasingly throwing up limits to European integration (although, as discussed below, such judgments in themselves can, under EU law, be dealt with as an infringement and, ultimately, punished by a financial sanction on the Member State).

The BVG itself, in its *Gauweiler* reference (para 30), cited the constitutional (case) law of a group of 10 other Member States⁶ in further support of its claims, and while the degree and intensity of such

⁶ Denmark, Estonia, France, Ireland, Italy, Latvia, Poland, Sweden, Spain, Czechia.

constitutional reservations varies significantly, several courts do maintain for themselves the right to enforce the national constitution against EU law and a red thread in these separate doctrines could indeed be seen as the protection of national (constitutional) identity (Claes and Reesman 2015). They all consider it their ultimate responsibility to protect certain fundamental aspects of the national constitution 'against' the EU, even if most seem to allow the incompatibility to be remedied by an amendment of the national constitution and only a few 'operationalize' this responsibility through a review not only of any new EU Treaty on occasion of its ratification but also of EU legislation (and case law) on a rolling basis, like the BVG does.

As to whether these doctrines also consider the limitation of European integration in areas of core state powers to be an intrinsic requirement of the preservation of national constitutional identity, it appears that only a few agree with the BVG on the conceptual level, and then mostly only in general terms (Steinbach 2010). The Danish Constitutional Court considers that 'no transfer of powers can take place to such an extent that Denmark can no longer be considered an independent state', the Latvian Constitutional Court refers to the right of citizens to decide upon the issues that are substantial for a democratic state, which cannot be affected by a delegation of competences, the Czech Constitutional Court finds that only certain powers may be transferred and cannot go so far as to violate the very essence of the Czech Republic as a sovereign and democratic rule of law-based state, and the Polish Constitutional Court excludes 'essential state functions' from competence transfer, but they have not been as specific as the BVG in defining substantive policy areas (Steinbach 2010, Claes and Reesman 2015).

If any substantive core state power is to be discerned in the doctrines of national constitutional courts, it is fundamental rights. Many national constitutional courts have considered that they retain the ultimate authority to uphold these, if necessary against the EU. Again, there are as many different ways in which this viewpoint is formulated and operationalized, but there is some consensus on the point of principle. This limit is not specific to any policy area and may thus be applied in areas that are considered 'core state powers' or anywhere else. Fundamental rights review itself is thus the one substantive 'core power', or aspect of national (constitutional) identity that is most actively protected 'against' the EU at national level. Moreover, as said, several national constitutional courts maintain for

themselves the right to enforce the national constitution against EU law and in claiming this ultimate judicial authority if only in theory, they position judicial constitutional review as a core state power.

3. Article 4(2) TEU

The Maastricht Treaty introduced a clause demanding the EU to respect Member States' national identity. The Lisbon Treaty drew a closer link with national constitutions and essential State functions:

‘The Union shall respect the equality of Member States before the Treaties as well as their national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government. It shall respect their essential State functions, including ensuring the territorial integrity of the State, maintaining law and order and safeguarding national security. In particular, national security remains the sole responsibility of each Member State’.

In recent years, the clause has become the subject of increasing judicial attention, a flowering literature and a certain measure of disagreement on its precise legal significance (Cloots 2015).

Conceptually, linking back to the discussion in Section 1, it should be noted that Article 4(2) emphasizes the constitutional rather than democratic dimension of national collective identity. Article 4(2) requires respect of independent statehood in terms of internal organizational and institutional autonomy but does not refer to self-determination on substantive issues. The essential state functions, albeit non-exhaustive, are limited to national security and law and order on the national territory. These issues, while highly salient (as also the BVG considers), are more about guaranteeing the pre-conditions of independent statehood⁷ than about the expression of selfhood in substantive terms. And even here, European integration proceeds just like in any other ‘reserved’ domain. In *ZZ v Secretary of State for the Home Department* the exclusive nature of national security as laid down in Article 4(2) TEU was

⁷ Security, order and integrity can be considered as the ‘first political question’ (Williams 2005) which in some ways precedes all other (democratic) decision-making (Scharpf 2017).

invoked, only to meet the CJEU's familiar mantra: 'although it is for Member States to take the appropriate measures to ensure their internal and external security, the mere fact that a decision concerns State security cannot result in European Union law being inapplicable'.

Interestingly, while the text of Article 4(2) ignores the democratic, substantive element of collective identity and self-determination, the CJEU has interpreted Article 4(2) more broadly so as to potentially accommodate such claims, at least in relation to nationally sensitive values (particularly 'moral' considerations, de Witte 2013), where these values are protected by the national constitution (van der Schyff 2012).⁸ Here, the Court has imported its pre-existing case law on derogations from the Treaty's free movement and citizenship provisions. Before Article 4(2) TEU, in the often-cited *Omega* case, the CJEU allowed Germany to derogate from the internal market provisions in the form of a prohibition of commercially exploiting games simulating acts of homicide, on the basis of its specific understanding of human dignity. In another example, the Court upheld the Irish requirement that teachers needed to have command of Gaelic, even if the actual teaching did not entail the use of the language (*Groener*). Since the introduction of Article 4(2) TEU, referring to this provision, the CJEU has allowed - as a derogation from Article 21 TFEU on EU citizenship - a Member State to refuse to one of its nationals the use of a title of nobility as determined in another Member State (*Sayn-Wittgenstein, Bogendorff von Wolffersdorff*), and to refuse amending on the birth and marriage certificates of one of its nationals, the surname and forename of that person in accordance with the spelling rules of another Member State (*Runevic-Wardyn*).

The protection of national identity is thus a legitimate public interest that alongside many others may be invoked as a justification for a *prima facie* restriction of the Treaty provisions concerning the internal market and EU citizenship under the CJEU's well-known 'rule of reason'. In this context, Article 4(2) TEU is certainly not a 'trump card' (Claes 2013) or national competence reserve, as the application of the proportionality test may still mean that the national measure in question is held in breach of EU law and to be disapplied, even legitimately aims to protect national constitutional identity (*Anton Las*).

⁸ Where not protected by the national constitution, such values may still be considered legitimate objectives but will not be dealt with in reference to Article 4(2) TEU.

Article 4(2) TEU is thus seamlessly integrated into the existing case law on derogations from the direct application of Treaty provisions. This shows that EU law does contain avenues (as it did before the introduction of Article 4(2) TEU) to mediate the EU's cultural, linguistic, religious and social diversity in constitutional terms to a certain extent, but not in reference to a range of substantive policy areas as such, and gives no credence to unilateral attempts of national exceptionalism.

As regards EU legislation, the values protected by Article 4(2) TEU will similarly be accommodated within the existing legal framework. This means that national constitutional identity, alongside other principles that the EU legislator needs to respect, can be invoked to challenge the validity, or influence the interpretation, of EU measures (Advocate General Bot in *Melloni*, CJEU in *Torresi*), thereby conditioning the exercise of EU competence (van der Schyff 2012). If the CJEU were to agree that an EU act offends national constitutional identity, the provision or act could be annulled *erga omnes*, or, in an attempt to avoid such a destructive outcome, could be interpreted constructively in light of Article 4(2) TEU (*Remondis v Region Hannover*⁹). Similarly, where an EU measure leaves a degree of discretion to the Member States, the Court may situate a national constitutional (identity) value in the context of that discretion (*Michaniki*). It does not, however, constitute a 'qualification of the rule on the primacy of EU law' (Besselink 2010) that would allow Article 4(2) to be invoked 'as a justification by a Member State for non-compliance with, or derogation from, an obligation under secondary EU law without affecting the legality of the EU measure' as Von Bogdandy and Schill (2011) have argued. If the CJEU were to recognize such a possibility for Member States to act *contra legem europaeum*, i.e. to disobey a clear EU legislative obligation in favor of a conflicting national rule, this would indeed constitute a revolutionary modification of primacy. To date, the Court has not followed this interpretation. Article 4(2) can serve to amplify existing margins of national discretion and derogations from EU primary and secondary law and influence interpretations of the latter, offering those parties that are able to put forward credible substantive arguments about legitimate interests an avenue to see

⁹ The CJEU ruled that 'the division of competences within a Member State benefits from the protection conferred by Article 4(2) TEU, [which] includes internal reorganisations of powers within a Member State', meaning that an agreement between two regional authorities to transfer certain competences to a new public entity did not constitute a 'public contract' under the EU Public Procurement Directive.

these recognized by the CJEU, but the latter will not negotiate on the foundational principles of its legal order. Article 4(2) does not seem to offer a self-standing exemption that can be invoked to immunize a national constitutional rule from the binding and supreme nature of EU law.

In assessing whether a national interest can be relied on against an EU obligation within the existing framework of derogation from directly effective Treaty provisions and the validity and interpretation of secondary legislation, it matters whether Article 4(2) TEU is interpreted with a focus on the common constitutional core shared by the EU and its Member States, or instead on precisely what differentiates a national (constitutional) identity from others. The Court seems to be inclined to follow the first: emphasizing the commonalities in constitutional traditions and principles and uploading these to the common European level (Opinion of AG Cruz Villalón in *OMT*), while allowing for national variation in the extent to which this value is protected (*Taricco II*). Read as such, Article 4(2) TEU provides for a ‘challenge’ to EU obligations on the basis of a value that is turned into a competing, trumping obligation under EU law. The national value is thus Europeanized, and the apparent conflict is transformed (and deflated) from a ‘national norm vs EU norm’ conflict into a ‘EU (secondary legal) norm vs EU (primary legal) norm’ conflict, which the Court can comfortably referee while procuring an outcome acceptable to the national level as well (as their norm, albeit given a European ‘hat’, is saved). While this avenue is open in respect of obligations resulting both from EU primary and secondary law, it would seem that the case is more difficult (though not impossible) in relation to the latter. The CJEU may consider that the EU legislator (in an expression of *the EU’s* collective identity) has already weighed the conflicting interests, including the (Europeanized) national interest, and will be reluctant to fundamentally re-interpret or annul the measure.

4. National Constitutional Identity as a Limit on Competence Creep: Resistance is Futile?

The foregoing assessment has shown that EU law does not provide for effective limits on the creeping integration of areas of core state powers as such, a conclusion to which the notion of national constitutional identity does not make much difference - despite the stipulations of Article 4(2) TEU. EU legislation can be challenged on the basis of Article 4(2) TEU, but the CJEU is unlikely to annul a

measure applicable to the whole EU in light of the constitutional idiosyncrasy of a single Member State. To the extent that the national value in question is shared by other Member States, it may be uploaded to the EU level and become part of the common European constitutional identity: meaning that the substantive interest may be protected but that the autonomy of the Member State as such is nevertheless undermined - it implies in fact a Europeanization of core national values. Moreover, considering its settled case law, the Court is highly unlikely to accept the notion of an area of 'core state powers' as a ground to annul a piece of EU legislation (provided that the legislation effectively serves the aims of its legal basis: *Tobacco Advertising*) it thus does not serve to limit competence creep through indirect legislation as such.

Article 4(2) TEU may be relied on as a justification to a restriction that is *prima facie* caught by a Treaty provision (such as on the internal market and EU citizenship), but while this therefore provides a rare limit applicable to negative integration (Timmermans 2017), it does not by any means serve to carve areas of core state powers out of the scope of the Treaty or constitute a comprehensive legal limit to the negative integration of such areas: it merely allows Member States, in the absence of EU level harmonization, to invoke a national interest to defend a specific national measure, that the CJEU may accept if judged suitable, proportionate and necessary. If anything, it affirms that the EU has jurisdiction over these areas, despite the fact that they are at the core of national identity and/or fall in an area of core state powers.

One may therefore be tempted to conclude that the only effective limitations of European integration on the basis of collective identity in areas of core state power are those defined at national level. Importantly, EU and national law agree that national identity review by national courts can limit a further explicit competence transfer in these areas by a future EU Treaty. Furthermore, on the national view, constitutional identity could be used to limit all manifestations of competence creep within EU law *stricto sensu*: indirect legislation, negative integration and trade agreements. The BVG considers it can refuse to apply any EU (case) law when it interferes too deeply in an area reserved for the Member State. However, leaving aside the fact that it is only the BVG that has (yet) developed its doctrine in this way, the extent to which it can be useful in addressing the bulk of competence creep is, ultimately, rather small: by its nature it is reserved for exceptional situations and can thus only ever throw

incidental, if blunt, counterpunches instead of providing an effective structural limit. Furthermore, EU law possess a counter-counterpunch, in that it can condemn a Member State for such defiance by its judiciary, a judgment which can ultimately be enforced by financial penalties, and the national authorities will be liable for the damages the infringement has caused any individual parties. As such, the only undeniable legal limit that Member States have at their disposal against competence creep under the current Treaty framework, is their right to secede under Article 50.

Furthermore, European integration in areas of core state powers may also occur outside EU law *stricto sensu*. When parallel integration takes the shape of an international Treaty, national constitutional identity may provide a limit on the transfer of domestic competence enforced on the national level without offending EU law. However, when parallel integration is effectuated through soft law, much like in the case of policy coordination or other kinds of soft law within the EU institutional framework, national identity review aiming to protect core state powers is useless. Due to their non-binding nature, these International or European-level ‘norms’ (such as country specific recommendations) are outside the scope of judicial review. When it comes to the national ‘implementing’ measures, these effectively mask their International or European origin, meaning that they logically escape any national constitutional limit placed on external integration in areas of core state powers. For instance, a German law increasing the pensionable age adopted to give effect to a country specific recommendation issued in the context of the European Semester can be fully reviewed by the BVerfG, as it is ordinary national law in legal terms, but that means that it makes no sense to object to the fact that such a law interferes deeply with national decision-making in the social sphere (one of the hands-off areas identified by the BVerfG in its *Lisbon* judgment): it *is* national decision-making in the social sphere. Of course, the problem is that this does not at all capture the reality of soft law. In soft law and non-binding policy coordination, integration is driven not through EU law with primacy and direct effect, but through ‘subtler’ forms of political power that may nevertheless effectively constrain national regulatory autonomy in areas of core state powers (Dawson 2017). The current national doctrines on constitutional identity entirely fail to capture this.

5. Conclusion

This article has assessed to what extent national constitutional identity serves as a legal limit to European integration of core state powers. Another question is whether national constitutional identity *should* effectively limit European integration in such areas. The answer largely depends on one's preference between the national and EU level as the main locus for collective self-determination, and whether one considers that there is, at present, a sufficient degree of collective European identity as a pre-condition for legitimate collective decision-making that will in turn foster that common selfhood. Other contributions to this special issue will delve into the (empirical) question of European identity. Assuming, for argumentation's sake, that the minimum conditions thereof are indeed fulfilled, what in this author's view then matters most is that the collective decision-making takes place in a way that it can foster that collective selfhood, which hinges, ultimately, on the constitutional democratic legitimacy of the EU decision-making process.

The main legitimacy problem of European integration (especially of core state powers) arises when it happens through competence creep. Such integration in the absence of a direct Treaty competence implies a tension with the conferral principle, a lack of transparency and, most importantly, a displacement of both the national and European legislative process that ensues from all the various iterations of competence creep (except indirect legislation which at least benefits from the safeguards inscribed in the EU Community Method). While competence creep should therefore be combatted, it is however doubtful that national constitutional identity is the way to do so. The disruptive, anarchic, incidental and blunt effects of national constitutional identity are too high a price to pay for what can only ever be a small sticking plaster onto a large gaping wound: the notion is by its nature country-specific and exceptional, thereby even in its most effective scenario only ever capable to throw incidental 'counter-punches' to competence creep rather than providing a sustained limit. Instead, it is imperative to ensure that decisions in any area, but especially in those that are considered by citizens as highly salient, are taken through the legislative process, either at national, or, indeed, European level. For that, we may have to expand the EU's competences, including in areas of core state power, but that is for another story to tell.

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