

Sincere Cooperation and Respect for National Identities: The Unitary and the Pluralist Twists of the European integration process

Barbara Guastaferrero

Abstract

This paper explores the connections between two pivotal principles of the European legal order, namely the principle of sincere cooperation, on the one hand, and the principle of respect for national identities, on the other. After analysing the functions performed by the two principles in the European legal order, through the lens of the ECJ case law, I try to show why it is important to study the tension between those two principles, which also the Lisbon Treaty wants to tie together into the same article 4 TEU, revising the legal context of the pre-Lisbon Treaty version. It is submitted that the duty of loyal cooperation, mainly addressed to the Member States, represented the unitary twist, while the duty of respect for national identity, mainly addressed to the Union, represented the pluralist twist of the European integration process. Some concluding remarks will be unravelled on the possible new balance and new wording of Art. 4 TEU provided by the Lisbon Treaty, which could proffer a less integrationist-biased concept of the principle of sincere cooperation, tempered by the principle of respect for national identity.

Keywords: Loyalty, Principle of sincere cooperation, Principle of respect for national identity, ECJ case law, Art. 4 TEU, Federal balance of the EU, Decentralized enforcement of EU law, Pluralism in EU constitutional law

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Sincere Cooperation and Respect for National Identities: The Unitary and the Pluralist Twists of the European integration process*

Barbara Guastaferro

1. Reading Article 4 of the Treaty of the EU in its entirety

This paper explores two principles of the EU law enshrined in Art. 4 of the Treaty on the European Union, namely the principle of sincere cooperation and the principle of respect for Member States' national identities.

The first one is a pivotal and dating one in the European legal order¹, in that it is strongly connected with one of the main feature of this order: the decentralized enforcement of EU law. Loyalty appears crucial for the federal balance of the EU in so far as the European legal order ultimately rests on free obedience of its Member States, and therefore on their loyalty.² If, on the one hand, it is mostly up to the Member States

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1 J.T. Lang, "Community Constitutional Law: Art. 5 EEC Treaty" (1990), *CMLRev*, 645ss.

2 A. von Bogandy, "Constitutional principles". IN: von Bogdandy A., Bast J (eds.) *Principles of constitutional law*, Hart Publishing, Oxford, pp. 3-52.

to give concrete application to EU law³, on the other hand, the principle of sincere cooperation requires Member States to take all actions necessary to implement EU law and fulfill the obligations arising from the treaties. In this respect, sincere (or loyal) cooperation might be defined as a “general constitutional principle governing the decentralized enforcement of European law”⁴, and is enshrined within the European treaties since from the very beginning of the European integration process⁵, although expressly qualified as a “principle” only with the Treaty of Lisbon

By way of contrast, the principle of respect for Member States’ national identities enters the picture only with the Maastricht Treaty⁶, together with the principle of subsidiarity. The integrationist nature of the Maastricht treaty, which provide the EU with new competences in sensitive areas such as the common foreign and security policy and justice and home affairs, is to a certain extent compensated by two new *words*⁷, namely “national identity” and “subsidiarity”, devoted to the constitutional accommodation of national values and interests within the European legal order.⁸ Nevertheless, it is only with the Lisbon Treaty, that respect for national identities become an officially reviewable principle before the Court⁹ (although the Court referred to it in its previous case law) and that the scope of the identity clause is clarified. Art. 4.2 TEU requires the EU to respect Member States’ national identities, “inherent in their fundamental, structures, political and constitutional, inclusive of regional and local self-government”.

3 According to Art. 291(1) TFEU, indeed, “Member States shall adopt all measures of national law necessary to implement legally binding Union acts”, the possibility for the Union to adopt an executive act notwithstanding.

4 R. Schuetze, *European Constitutional Law*, Cambridge University Press 2012, p. 251.

5 See Art. 5 EEC Treaty and Art. 10 EC Treaty.

6 See Art. F(1) of the Maastricht Treaty, later Art. 6(3) TEU.

7 Subsidiarity was qualified as the “word that saved Maastricht” by D.Z. Cass, ‘Thee Word that saves Maastricht? The Principle of Subsidiarity and the Division of Powers within European Community’, 29 *Common Market Law Review* (1992), p. 1107.

8 I have explored the strong connection between the two principles in B. Guastaferrro, “Coupling National Identity with Subsidiarity Concerns in National Parliaments’ Reasoned Opinions”, in *The Maastricht Journal of European and Comparative Law*, Issue 2, 2014.

9 It has been pointed out that since Article 46 TEU of the Nice version of the Treaty outlined the relevant provisions within the TEU over which the CJEU had jurisdiction, the exclusion of the provision on national identity by this positive list, made it not reviewable by the CJEU. The Treaty of Lisbon removal of ex Article 46 TEU enables Art. 4.2 TEU to be reviewed by the CJEU. See Mary Dobbs, *Sovereignty, Article 4(2) TEU and the Respect of National Identities: Swinging the Balance of Power in Favour of the Member States?*, in *Yearbook of European Law* (2014), pp. 1-37, p. 3. YEL 2014.

The possible tension, or even merely connection, between these two principles has been underestimated in scientific literature.¹⁰ This is probably due to the following reasons.

On the one hand, scholars studying the duty of loyal cooperation, while recognizing its integrationist force, have underestimated the *general* foundational and “federal” nature of the principle¹¹, paying more attention to the *specific* obligations upon Member States arising from the principle itself, such as the duty to give full effect to EU law, the duty to provide information to the Commission, the duty not to interfere with Community actions especially in the field of external relationship etc.¹² Moreover, for a long time, it has been argued that loyal cooperation was not likely to be invoked separately as an autonomous legal principle, but it constituted a *lex generalis* expressing principles which are specified further elsewhere in the Treaty.¹³

On the other hand, scholars studying the identity clause, building on the novel Lisbon formulation which sees national identities as being “inherent in the fundamental ...constitutional structure” of the Member States, have proffered a misleading identification of the concept of *national identities* provided by the EU Treaty with the concept of *national constitutional identities* provided by national Constitutional Courts opposing specific limits to primacy. Looking at the duty upon the EU to respect Member States’ national identities as a sort of acknowledgement, at the EU level, of the “controlimiti” doctrine advocated by Constitutional Courts at the national level, scholarly

10 Few exception in Van Elsuwege P, Merket H (2012) “The role of the court of justice in ensuring the unity of the EU’s External Representation”. In: Blockmans S, Wessel RA (eds) Principles and practices of EU external representation. CLEER Working papers 2012/5, 37–57, simply pointing out that the principles that Art. 4 TEU brings together, at pp. 38 – 39. Exploring the possible significance of the Lisbon novelties F. Casolari, *EU Loyalty After Lisbon: An Expectation Gap to Be Filled?*, in F. Casolari and S. Rossi (eds.) *The EU after Lisbon*, Springer 2014, pp. 112-118.

11 But see O. Due, “Article 5 du traité. Une disposition de caractère fédéral?” Frank EMMERT and Academy of European Law (eds), *European Community Law*, Dordrecht/Boston/London, Kluwer Academic Publishers/Martinus Nijhoff Publishers / Florence, Academy of European Law, European University Institute, 1992, *Collected Courses of the Academy of European Law*, 1991, II/1, 15-35

12 An exhaustive list of the duties upon the State stemming by the principle of sincere cooperation is in J. Temple Lang, “The Development by the Court of Justice of the Duties of Cooperation of National Authorities and Community Institutions under Art. 10 TEC”, *Fordham International Law Journal*, Vol. 31, issue 5, Article 13, 2007.

13 This is no longer true according to E. Neframi, “The Duty of Loyalty: Rethinking its Scope through its Application in the Field of External Relations”, *CMLRev* 47: 323–359, 2010, at 323: “The era is definitely over in which eminent specialists of EU law could affirm that the duty of loyalty is a general principle (see Opinion of A.G. Gand in Case 20/64, *Albatros*, [1965] ECR 1.) which is not sufficient to limit national rights (see Opinion of A.G. Mayras in Case 192/73, *Van Zuylen*, [1974] ECR 731) but expresses principles which are specified further elsewhere, and is thus not likely to be invoked separately (Opinion of A.G. Slynn in Case 308/86, *Lambert*, [1988] ECR 4369)”.

literature merely explored the possible tension between respect for national identity, on the one hand, and the supremacy doctrine, on the other.¹⁴ Another reason advocated to read these principle in a “contrapunctual” connection among them, was that the draft Constitutional Treaty enshrined respect for national identities in Art. I-5 and codified the principle of supremacy in the immediately following provision, Art. I-6.

On closer inspection, Art. I-5 of the draft Constitutional Treaty was explicitly dedicated to “The Relationship between the Union and the Member States”, and the principles governing the relationship between the two constitutive parts of the “composite” legal order contemplated by the article were the principle of sincere cooperation, on the one hand, and the principle of respect of national identities, on the other. For this reason, after exploring at the descriptive level, through the lens of the ECJ case law, the functions performed by the two principles in the European legal order (par. 2 and par. 3), I try to show why it is important two study the tension between those two principles, which also the Lisbon Treaty wants to tie together into the same article 4 TEU¹⁵, revising the legal context of the pre-Lisbon Treaty version. It is submitted that the duty of loyal cooperation, mainly addressed to the Member States, represented the *unitary* twist, while the duty of respect for national identity, mainly addressed to the Union, represented the *pluralist* twist of the European integration process (par. 4). Some concluding remarks will be unravelled on the possible new balance provided by the Lisbon Treaty, which could proffer a less integrationist-biased concept of the principle of sincere cooperation (par. 5).

14 See, among others, A. von Bogdandy and S. Schill (2011) “Overcoming absolute primacy: respect for national identity under the Lisbon treaty”, *Common Market Law Rev* 48:1417–1454; Mattias Kumm, “The Jurisprudence of Constitutional Conflict: Constitutional Supremacy in Europe before and after the Constitutional Treaty”, 11 *Eur. L. J.* 262 (2005); Leonard Besselink, “National and Constitutional Identity Before and After Lisbon”, 6 *Utrecht L. Rev.* 44 (2010). I contested this “conventional” reading of the clause in B. Guastafarro, “Beyond the *Exceptionalism* of Constitutional Conflicts: the *Ordinary* Functions of the Identity Clause” (2012), *Yearbook of European Law*, vol. 31, 1, pp. 263-318. For a more nuanced reading of Art. 4(2) TEU (namely not necessarily linked to the “primacy saga”), see also T. Konstadinides, ‘Constitutional Identity as a Shield and as a Sword: The European Legal Order within the Framework of National Constitutional Settlement’ (2011) 13 *Cambridge Yearbook of European Legal Studies* 195; Gerhard van der Schyff, *The Constitutional Relationship between the European Union and its Member States: the Role of National Identity in Article 4(2) TEU*, 37 *Eur. L. Rev.* 563 (2012); Monica Claes, National Identity: Trump Card or Up for Negotiation?, in *National Constitutional Identity and European Integration*, (Alejandro Saiz Arnaiz & Carina Alcoberro Llivina eds., 2013).

15 Respect for national identity is enshrined in Art. 4, par. 2 TEU, and sincere cooperation in Art. 4, par. 3 TEU

2. The principle of sincere cooperation

The principle of sincere cooperation is a pivotal one in EU law, and it is present within the Treaties since from the very beginning, although Art. 5 TCEE did not explicitly mention the principle. Building, as we saw in the introduction, on the decentralized enforcement of EU law, the principle has been often used in the case-law of the Court of Justice in connection with the implementation of EU law, either requiring Member States to put into effect some provisions of the Treaty (by eliminating for instance custom duties) or preventing Member States from using provisions and practices existing within its internal legal system to justify a failure to comply with obligations laid down by Community law.¹⁶ Moreover, it is telling that in one of the first rulings mentioning the principle, the Court emphasized the role of Member States as the intermediaries in the application of EU law. The Court stated that, in so far as the detailed rules of application indispensable to the functioning of the import and export system laid down in a Regulation had not yet be determined by the Community, “the Member States were entitled and, by virtue of the general provisions of Article 5 of the Treaty, *obliged* to do everything in their power to ensure the effectiveness of all the provisions of the regulation” (emphasis added).¹⁷

Enshrining a duty upon Member States to comply with the obligations arising from the Treaty, the principle of sincere cooperation certainly builds upon the general principle of international law *pacta sunt servanda*. Nevertheless, despite being similar to the obligation of good faith inherent in international treaties, the principle of sincere cooperation holds its specificity in the European legal order, entailing also a more general cooperative attitude between Member States and the EU in order to facilitate the achievement of Union's objectives.¹⁸ In this respect the principle of sincere cooperation “expresses the intent of the Member States not only to be bound by the various specific Treaty rules, but also to attempt to achieve the more general purposes stated in the Preamble and in Articles 2 and 3. Article 10 TEC [now Article 4(3) TEU], therefore, affords an additional justification for utilizing the general statements of

16 Case 6/89, *Commission v. Kingdom of Belgium*, [1990] ECR 1595; *Joined Cases 39, 200 and 209/88, Commission v. Ireland, Hellenic Republic and Italian Republic*, [1990] ECR 4271, 4299 and 4313; *Case 374/89, Commission v. Kingdom of Belgium*, [1991] ECR 367; *Case 290/89, Commission v. Kingdom of Belgium*, [1991] ECR 2851; *Case 217/88, Commission v. Federal Republic of Germany*, [1990] ECR 2897.

17 See *Case 30/70, Scheer v. Einfuhr- und Vorratsstelle für Getreide and Futtermittel*, [1970] ECR 1197.

18 V. Constantinesco, *L'art. 5 CEE. De la bonne foi à la loyauté communautaire*, in F. Capotorti, P. Pescatore, *Du droit international au droit de l'intégration: Liber amicorum Pierre Pescatore*, Baden Baden, 1987....

purpose in the Preamble and in Articles 2 and 3 as guides in the interpretation of the rest of the Treaty”.¹⁹

If the Treaty of Lisbon has slightly changed the wording of the principle of sincere cooperation, in the sense that Art. 4(3) TEU adds a first new emphasizing the “mutuality” of the principle, which will be analysed in section 5, the main addressees of the principles remain the Member States. The second and the third paragraphs of Art. 4(3) TEU enshrine principles already expressed in Art. 10 TEC. The second paragraph contains a “positive” obligation upon the Member States: it requires them to “take any appropriate measure ...to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the Union”, namely a duty to act. The second paragraph contains a “negative” requirement: Member States shall “refrain from any measure which could jeopardize the attainment of Union’s objectives”, namely a duty to abstain. While the first paragraph is strictly related to the role of Member States in the execution of Treaty provisions and secondary law, the second paragraph entails a more general duty to cooperate in the achievement of Union's objectives. For the sake of clarity, the case law related to the positive and negative obligations will be treated separately.

2.1 The “positive” obligation upon Member States to ensure the fulfilment of EU law obligations

By inviting Member States to take any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the Treaties, the second paragraph of Article 4(3) TEU requires Member States to ensure the effectiveness of EU law. In this respect, national institutions are required: first, to secure legal certainty for EU law, by publishing both national implementing measures and the EU measure which gave rise to it²⁰, so that citizens can identify the source of their rights²¹; second, to sanction violations of EU law²². Although the provision is generally addressed to the Member

19 P.E. Herzog, ‘Article 4 TEU on Relationship Between the European Union and its Member States’, in *Smith and Herzog on the Law of the European Union*, Matthew Bender

20 Case C-146/11 *Primix*, Judgement of 12 July 2012, quoted in D. Chalmers, G. Davies, G. Monti, *European Union Law*, third edition, CUP, 2014, p. 214.

21 Case C-313/99, *Mulgán and others* [2002] ERC I-5719 quoted in D. Chalmers, G. Davies, G. Monti, *European Union Law*, third edition, CUP, 2014, p. 214

22 See, among others, Case 68/88, *Commission v. Hellenic Republic*, [1989] ECR 2965; Case 186/98, *Nunes and de Matos* [1999] ECR I-4883; Case 167/01, *Inspire Art*, [2003] ECR I-10155; Case 495/00, *Azienda Agricola Visentin*, [2004] ECR I-2993; Case 40/04, *Yonemoto*, [2005] ERC I-7755.

States, the obligation to faithfully cooperate with European institution is attached to the legislator, as well as to the administrative and judicial authorities.²³

As far as national administrative authorities are concerned, the principle of sincere cooperation implies a general duty of care in the execution of the acts of the Union.²⁴ For instance, national authorities are called to control the proper use of EU resources in the field of Structural Funds. They should carry out all the administrative controls necessary to ensure the effectiveness and regularity of the financial transactions of the fund, even in the absence of an express provision in the legislation of the Union.²⁵ National administrations shall also adopt measures to remedy the possible irregularities. For instance, in the case of erroneous disbursement of funds, they shall take immediate action to recover funds improperly granted by the national authorities.²⁶ An obligation of loyal and faithful cooperation may also necessitate the participation in advisory bodies, or the supplying of needed information. For instance, the ECJ ruled that Belgium failed to provide the Commission with sufficient information on the prices of crude petroleum and mineral oil products. Mentioning former Article 5 TEEC, the ECJ deemed that Belgium failed to fulfill its duty of loyal cooperation and assistance because it only complied with a Directive after the threat of an action for failure.²⁷ More recently the Court stressed that Member States are under a duty to notify the Commission if they have any problems in enforcing EU law, and cannot use Commission reservations or objection as a basis for derogating from EU law.²⁸

National administrations play an important role in enforcing the principle of sincere cooperation also because Article 4(3) TEU requires Member States to prevent actions by private individuals impairing the exercise of rights provided for in the Treaty. The ECJ, for instance, following French farmers' attempts to impede the import of Community fruits and vegetables, by attacking trucks carrying such goods, ruled that France's lack of effort to enforce Treaty-based rights in the field of free movement of goods amounted to a violation of the TEC.²⁹ Besides this, "the Court has used Article 10 to define the role of national legislation in implementing rights directly based on

23 See, among others, Case 80/86, *Kolpinghuis Nijmegen*, [1987] ECR 3969; Case 165/91, *van Munster*, [1994] ERC I-4661.

24 Case 14/88, *Italian Republic v. Commission of the European Communities*, [1989] ECR 3677.

25 Case 8/88, *Germany v. Commission*, [1990] ECR I-2321; Case 247/98, *Greece v. Commission* [2001] ECR I-1; Case 157/00, *Greece v. Commission*, [2003] ECR I-153.

26 Case 277/98, *France v. Commission*, [2001] ECR I-8453; Case 201/02, *Wells*, [2004] ECR I-723.

27 Case 374/89, *Commission v. Kingdom of Belgium*, [1991] ECR 367

28 D. Chalmers, G. Davies, G. Monti, *European Union Law*, third edition, CUP, 2014, p. 214, with reference to Case C-105/02, *Commission v. Germany* [2006] ECR I-09659

29 Case 265/95, *Commission v. French Republic*, [1997] ECR I-6959.

Community law. Thus, the Court held that national authorities could not adopt measures diminishing the effect of directly applicable Community law, or concealing its Community nature”.³⁰

As far as judicial authorities are concerned, one of the most important obligation stemming upon them from the duty of loyal cooperation is to ensure the judicial protection of individuals in the case of subjective rights deriving from EU law. This is why sincere cooperation lies at the basis of the well-known case law which established the principle of State liability for damages caused by failure to fulfil obligations incumbent on it by EU law. Notoriously, in the famous *Francovich* case³¹, the CJEU derived also from the principle of sincere cooperation the obligation to pay damages to the individuals whose Community-granted rights were violated. The obligation upon national courts to eliminate the illicit consequences of a breach of Community law would then be considered as one of those “appropriate measure” that Member States are required to take to “ensure fulfilment of the obligations arising out of the Treaties” as per Art. 10 TEC.³² It is a task of the national courts to ensure that “irrespective of how breaches of national law are handled, penalties for breach of EU law are effective, proportionate and dissuasive”.³³

Besides ensuring that Member States repair damage incurred as a result of a breach of Community obligations, judicial authorities are in charge of other duties stemming from the principle of sincere cooperation, such as the duty to interpret national law consistently with EU law, as it is clear from the *Von Colson* case. In the words of the Court, “the Member States’ obligation arising from a directive to achieve the result envisaged by the directive and their duty under Article 5 of the Treaty to take all appropriate measures, whether general or particular, to ensure the fulfilment of that

30 P.E. Herzog, ‘Article 4 TEU on Relationship Between the European Union and its Member States’, in *Smith and Herzog on the Law of the European Union*, Matthew Bender

31 Joined Cases 6/90 and 9/90, *Andrea Francovich and Danila Bonifaci and Others v. Italian Republic*, [1992] ECR I-136-138

32 Also in previous case law, the Court interpreted Article 10 obligation as imposing upon Member States a duty to eliminate all illegal consequences resulting from a breach of EU law. See for instance Case 6/60, *Humblet v. Belgian State*, [1960] ECR 559-569

33 D. Chalmers, G. Davies, G. Monti, *European Union Law*, third edition, CUP, 2014, p. 215. Although expressed in previous case-law (C-68/88, *Dommiwion v. Greece* . [1989] ECR 2965, Case C-326/88 *Hansen* [1990] ECR I-2911; Xse C-167/01 *Inspire Art* [2003] ECR I-10155) the Authors note how Advocate General Kokott as recently specified these qualification by stating that penalties are *effective* where they are framed in such a way that they do not make it practically impossible or excessively difficult to impose to attain the objectives pursued by Community law; are *dissuasive* where they prevent an individual from infringing the objectives of Community law, and are *proportionate* where they are appropriate for attaining the same objectives (see the Opinion in the Joined cases C-387/02, C-391/02 and C-403/02, *Berlusconi et al.*, [2005] ECR I-3565

obligation, is binding on all the authorities of Member States including, for matters within their jurisdiction, the courts. It follows that, in applying the national law and in particular the provisions of a national law specifically introduced in order to implement Directive No. 76/207, national courts are required to interpret their national law in the light of the wording and the purpose of the directive in order to achieve the result referred to in the third paragraph of Article 189³⁴. It was pointed out that “ex Art. 10 EC is the exclusive legal basis for the obligation of Member States to construe national law in the light of the EU Treaty. This has been made clear in the *van Munster* case with regard to ex Article 48 EC...A difference in legislation between retirement schemes for migrant workers and that for non-migrant workers had caused migrant workers to lose a social security advantage. The Court held that this would discourage migrant workers from actually exercising their right to freedom of movement. It therefore ordered the referring national court to strive to interpret its national law in a way so to avoid such outcome”.³⁵

Always basing on the principle of sincere cooperation (and on the deriving duty of consistent interpretation), judicial authorities are also forbidden to interpret national law in a way which could seriously jeopardize the achievement of an outcome pursued by a directive, even before the expiry of the deadline for its transposition.³⁶ The Court stated that “although the Member States are not obliged to adopt those measures before the end of the period prescribed for transposition, it follows from the second paragraph of Article 5 in conjunction with the third paragraph of Article 189 of the Treaty ...that during that period they must refrain from taking any measures liable seriously to compromise the result prescribed”.³⁷ This prohibition has been derived from the duty upon the Member States to refrain from any measure which could jeopardise the attainment of the Union’s objectives (now present in the third sentence of Art. 4.3 TEU), which represents the “negative” side of the principle of loyal cooperation, imposing upon Member States a duty to abstain rather than a duty to act, to which I now turn.

34 Case 14/83, *Sabine von Colson and Elisabeth Kamann v Land Nordrhein-Westfalen*. [1984] ECR 1891, par. 26. Similar principles are envisaged in following case-law. See Case 31/87, *Gebroeders Beentjes BV*, [1988] ECR I-4635; Case 190/87, *Moormann*, [1988] I-4689; Case 91/92, *Faccini Dori*, [1994] ECR I-3325; Case 62/00, *Marks and Spenser*, [2002] ECR I-6325

35 M. Klamert, *The Principle of Loyalty in EU Law*, OUP, 2014, p. 75.

36 Case 212/04, *Adeneler*, [2006] ECR I-6057; Case 364/07, *Vassilakis*, [2008] ECRI-90, Joined cases C-165-167/09 *Stichting Natuur en Milieu* [2011] ECR I-4599

37 **Case C-129/96**. *Inter-Environnement Wallonie* [1997] ECR I-07411

2.2 The “negative” obligation upon Member states to refrain from jeopardising the attainment of Union's objectives

The third paragraph of Art. 4(3) TEU requires Member States to facilitate the achievement of Union tasks. In this respect, the principle of sincere cooperation does not act as a principle driving a correct and effective execution of EU law, but as a more general constitutional principle driving the achievement of Union's objectives. For this reason, the negative obligation requiring Member States to refrain from any measure which could jeopardise the attainment of Union objectives should be interpreted extensively. It does not simply forbid the adoption of national measures in contrast with EU law provisions, but it bans any acts or practice which may compromise the achievement of Union goals.

The negative obligation contemplated by the third paragraph of Art. 4(3) TEU comes to the fore especially when the cooperation between European institutions and Member States is required, namely in the procedures in which State intervention is necessary for the European institution to perform their proper duties. This is for example the case for the supervisory activity on the behaviour of the Member States exercised by the Commission as per art. 17.1 TEU. Member States shall provide the institutions with all the tools needed to ascertain possible violation of EU law.

In this respect, the CJEU envisages a violation of the duty of loyal cooperation when a Member State does not reply to the questions of the Commission exercising its supervisory function without giving reason for this behaviour³⁸, and when a Member States prevents the Commission from acquainting of a national administrative practice in order to verify its consistency with EU law within the framework of infringement procedures.³⁹ Also when the Commission is in charge of the control procedure of state aid, national authorities shall provide all the necessary information to assess national measures and to determine the amount to be recovered.⁴⁰ Along similar lines, the Court ruled that Ireland, Italy and Greece failed to fulfil their obligations under the relevant

38 Case 33/90, *Commission v. Italy*, [1991] ECR 5987

39 Case 192/84, *Commission v. Greece*, 3967, par. 19; Case 10/00, *Commission v. Italy*, I-2537, par. 87-91; Case 478/01, *Commission v. Luxembourg*, 2351, par. 24), sometimes even denying to transmit to the Commission the required documents (Case 35/88, *Commission v. Greece*, I-3125, paragraphs 39-41.

40 Case 400/99, *Italy v. Commission*, I-3057, par. 29-30 and Case 411/06, *Commission v. France*, I-8887, par. 47-52).

EC regulations, by omitting to submit certain information related to the fish market within the stipulated time period.⁴¹

The duty to cooperate as per former Art. 10 EC has been mentioned by the CJEU also in defining the interactions between national and Community competition laws. For instance, the CJEU ruled that Member States shall not introduce measures which may render ineffective the competition rules provided by the Treaty, since those among enterprises.⁴² A duty of cooperation between the European Commission and national authorities in promoting respect of competition rules by enterprises is envisaged also in the Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty. Chapter IV of the Regulation, entitled “cooperation” requires exchange of information and exchange of documents.

The “negative” obligation envisaged by the third sentence of Art. 4(3) TEU was applied also within the context of external relations. In the famous ERTA case⁴³, the CJEU stated that the treaty-making power shifted from the Member States to the Community, not only when the TEC specifically granted such powers to the Community, but also in all other areas in which the Community had developed its own internal policies, according to the so-called principle of parallelism between internal and external competencies of the Community. As it has been argued, “this position ran counter to the frequently stated opinion that the Community possessed only the powers specifically conferred upon it, and the ECJ solved the contradiction in part by reference to Article 10. Article 10 prohibited the Member States from impairing Community achievements through the conclusion of agreements with third countries, thus implicitly leading to the transfer of the treaty-making power to the Community in appropriate instances”.⁴⁴

Again in the field of external relation, the obligation upon Member States to refrain from jeopardising the achievement of Union goals was used to prevent Member States from the power to keep older treaties in effect once they are affected by Community rules. For instance, where certain Member States concluded (or maintained in effect) “open skies” agreements with the United States which were no longer consistent with

41 Case 374/89, *Commission v. Kingdom of Belgium*, [1991] ECR 367. Joined Cases 39, 200 and 209/88, *Commission v. Ireland, Hellenic Republic and Italian Republic*, [1990] ECR 4271, 4299 and 4313; Case 33/90, *Commission v. Italian Republic*, [1991] ECR 5987; Case C-137/91, *Commission v. Hellenic Republic*, [1992] ECR I-4023.

42 Case 267/88, *Eycke v. Aspa*, 1988 ECR 4769

43 Case 22/70, *Commission v. Council*, [1971] ECR 263

44 P.E. Herzog, ‘Article 4 TEU on Relationship Between the European Union and its Member States’, in *Smith and Herzog on the Law of the European Union*, Matthew Bender

Community rules on fares and routes on intra-Community flights, they violated their obligations under Community law.⁴⁵ More recently, the Court stated that the exercise by the Member States of a retained external competence, without consulting with the Commission, while negotiations at Community level had been initiated, constitutes a failure to comply with Article 10 EC (now Art. 4(3) TEU).⁴⁶ In this reading, the mere independent exercise of competence by Member State, which may jeopardize the ongoing exercise of Union action, constitute an infringement of Art. 4(3) TEU.

3. The principle of respect for Member State's national identities

3.1. The Origins of the Identity Clause

The current formulation of the identity clause stems from the works of the European Convention drafting the Treaty establishing a Constitution for Europe. If compared with the ex Art. 6 TEU (Nice Version) which already required the EU to respect national identities of its Member States, Art. 4.2 TEU (Lisbon version) tries to clarify the scope of the concept of national identities, which are deemed to be “inherent” in Member States’ “fundamental structures, political and constitutional, inclusive of regional and local self-government”. In its novel formulation, Art. 4.2 TEU also requires the EU to respect Member States’ “essential State functions, including ensuring the territorial integrity of the State, maintaining law and order and safeguarding national security”.

Indeed, this novel formulation of the identity clause was first proposed by the Chair of working group V on “complementary competence”, Mr. Henning Christophersen – so to be consistently referred to as the “Christophersen clause” in all the working documents of the European Convention. Building on an analysis of the travaux préparatoires of this clause it has been already submitted that “by expanding the concept of “national identities” so as to include Member States’ “fundamental structures” and by introducing a duty to respect “essential State functions” the drafters

45 See, among others, Case 466/98, *Commission v. United Kingdom*, [2002] ECR I-9427; Case 523/04, *Commission v. Kingdom of the Netherlands*, [2007] ECR I-3267.

46 Case 266/03, *Commission v. Luxembourg*, [2005] ECR I-4805; Case C-433/03, *Commission v. Federal Republic of Germany*, [2005] ECR I-6985;

sought to carve out core areas of national sovereignty, as no list of Member States' exclusive powers was eventually included in the Treaties".⁴⁷

The history of the clause shows that the clause was meant to solve a problem that had and still has a great relevance in the everyday life of EU law: to avoid the encroachment of Union action upon Member States' prerogatives in the so-called "complementary competences" areas (e.g. education, culture, and sport).⁴⁸ Notoriously, complementary competences basically include the policy areas—such as culture, education, employment, customs cooperation, vocational training (where Community's role should be limited to supporting, supplementing, or coordinating functions) where Member States are left substantive scope of action. The limited nature of Community power is usually expressed in legal basis which explicitly rule out harmonization measures. This is for example the case of employment, culture, and education where Community can encourage cooperation between Member States; it can—if necessary—support and supplement their action, but at the same time, it cannot harmonize the laws and regulations of the Member States.⁴⁹

Nevertheless, within the EU legal order there has always been a complicated and overlapping relationship between functional and sectoral competencies—i.e. between competence based on aims and competence based on fields. How to avoid that the EU—in exercising a functional power (e.g. under the internal market)—encroaches upon sectoral areas which explicitly exclude or precisely define Community action (e.g. education, culture, public health etc.)?

In order to address this problem of the overlapping between functional and sectoral legal basis—the first allowing a broader scope of action to the EU at the expense of the Member States—one of the proposals suggested by working group V was for example to draw a list of competences exclusive to the Member States. Nevertheless, this proposal was rebuffed since it could have been against the principle of conferral, by conveying the message that it was the Treaty to confer powers to the Member States and not the other way around. Among a set of other proposal, the idea of Mr. Christophersen to take as point of departure art.6, par 3—stating that "the Union shall respect the national identities of its Member States"—and expand it by adding all those sensitive areas related to Member States sovereign powers, was deemed to be a more balanced solution. This is way the final formulation included into the notion of national

47 B. Guastaferrero, "Beyond the *Exceptionalism* of Constitutional Conflicts: the *Ordinary* Functions of the Identity Clause" (2012), *Yearbook of European Law*, vol. 31, 1, pp. 263-318.

48 Complementary competences are now envisaged by Art. 6 TFEU.

49 See respectively, Art. 139 TEC, art. 151(5) TEC, and Art. 149 TEC.

identities the fundamental (political and constitutional) structures and some essential State functions such as national security and the territorial integrity of the State.

3.2 Article 4.2 TEU in the case law of the Court of Justice of the European Union

a) The review of national measures

One of the areas in which the use of the identity clause figures prominently in the case law is the review of national measures constituting a restriction to internal market fundamentals freedoms. Internal market law provides some exceptions to the four freedoms relating to the movement of goods, persons, services and capital, which can be either treaty-based justifications or case law exceptions, the so called “mandatory requirements”. Even before the entry into force of the Treaty of Lisbon the ECJ drew certain conclusions from the obligation imposed on the EU by art. 6.3 TEU to respect the national identities of the Member States, including their constitutions. In the course of proceedings before the ECJ, respect for national identities has been invoked both as an autonomous ground of derogation and as a rule of interpretation of existing justifications, such as public policy.

As to the first aspect, the identity clause can be invoked by Member States as a “legitimate and independent ground of derogation”⁵⁰, i.e. as a justification for a national measure that is found to be prima facie inconsistent with the fundamental freedoms. For instance, the Grand Duchy of Luxembourg sought to rely upon the protection of national identity to justify the exclusion of nationals of other Member States from access to posts in the field of public education⁵¹. In a similar action for failure to fulfill obligations, the Grand Duchy of Luxembourg asserted that, since the use of the Luxembourgish language is necessary in the performance of notarial activities, “the nationality condition at issue is intended to ensure respect for the history, culture, tradition and national identity of Luxembourg within the meaning of Article 6.3 EU”.⁵² The conclusion of the Court was the following:

“As to the need relied on by the Grand Duchy of Luxembourg to ensure the use of the Luxembourgish language in the performance of the activities of notaries, it is clear

50 Opinion of Mr Advocate General Poiares Maduro delivered on 8 October 2008. Case 213/07, *Michaniki AE v EthnikoSymvoulíoRadiotileorasis and YpourgosEpikrateias* [2008] ECR I-09999, para 32.

51 See Case C-473/93, *Commission v Luxembourg* [1996] ECR I-3207, para 35.

52 Case C-51/08, *Commission v Luxembourg*, May 24 2011, para 72.

that... While the preservation of the national identities of the Member States is a legitimate aim respected by the legal order of the European Union, as is indeed acknowledged by Article 4(2) TEU, the interest pleaded by the Grand Duchy can, however, be effectively safeguarded otherwise than by a general exclusion of nationals of the other Member States (see, to that effect, Case C-473/93 *Commission v Luxembourg* [1996] ECR I-3207, paragraph 35).⁵³

In sum, in both cases the Court recognized that the preservation of national identity “is a legitimate aim respected by the Community legal order”, but ruled that the restrictive national measures at issue were disproportionate, since the interest pleaded could be effectively safeguarded by other means.⁵⁴

In other rulings, respect for national identities was regarded as “a legitimate objective” by itself, although enshrining other values protected by the Treaty, such as cultural and linguistic diversity as enshrined in former Art. 149 EC (now Art. 165 TFEU) referring to the Community duty to respect the cultural and linguistic diversity of the Member States. In his Opinion in *Spain v. Eurojust* case, Advocate General Maduro emphasised that “respect for linguistic diversity is one of the essential aspects of the protection granted to the national identities of the Member States, as is apparent from Article 6(3) EU and Article 149 EC”.⁵⁵

Also in a very recent case the Court has linked the respect for national identities to the protection of national languages. In a reference for preliminary ruling from a Lithuanian Court⁵⁶, Art. 4.2 TEU is intertwined with the Treaty provisions enshrining the promotion of cultural and linguistic diversity, and respect for national identities is expressly supposed to include protection of a State’s national official language⁵⁷. The ECJ faced the problem of the possible encroachment on the freedom to move and reside of

53 Case C-51/08, *Commission v Luxembourg*, May 24 2011, para. 124.

54 This is particularly true in Case C-473/93, (para 35) where the Court mentions the AG Opinion, which emphasized that nationals of other Member States must, like Luxembourg nationals, still fulfil all the conditions required for recruitment, in particular those relating to training, experience, and language knowledge. In this respect, if the aim of the restrictive measure was to protect national identity, the demanding conditions required for recruitment where a less restrictive mean than the exclusions of non-nationals.

55 Opinion of Mr Advocate General Poiares Maduro delivered on 16 December 2004 (Case 160/03, *Kingdom of Spain v Eurojust* [2005] ECR I-02077), para 24.

56 Case 391/09, *MalgozataRunevic-Vardyn, LukaszPawel Wardyn v Vilniausmiestosavivaldybe_sadministracija and Others*, 12 May 2011.

57 Ibid. See para 86: ‘According to the fourth subparagraph of Article 3(3) EU and Article 22 of the Charter of Fundamental Rights of the European Union, the Union must respect its rich cultural and linguistic diversity. Article 4(2) EU provides that the Union must also respect the national identity of its Member States, which includes protection of a State’s official national language.’

national rules requiring that the surnames and forenames of natural persons must be entered on certificates of civil status in a form which complies with the rules governing the spelling of the official national language. In the words of the Court, “According to several of the governments which have submitted observations to the Court, it is legitimate for a Member State to ensure that the official national language is protected in order to safeguard national unity and preserve social cohesion. The Lithuanian Government stresses, in particular, that the Lithuanian language constitutes a constitutional asset which preserves the nation’s identity, contributes to the integration of citizens, and ensures the expression of national sovereignty, the indivisibility of the State, and the proper functioning of the services of the State and the local authorities”.⁵⁸ Also in this case the Court deems respect for national identities to be a legitimate aim capable to justify restrictions on the rights of freedom of movement and residence provided for in Article 21 TFEU.⁵⁹

The same line of reasoning has been followed also in a more recent case by Advocate General Jaaskinen, who, by way of contrast, deems the Flemish Decree on Use of Languages to constitute an unjustified impairment of the freedom of movement for workers provided for in Article 45 TFEU in that it uses means which are not appropriate for the attainment of the legitimate objectives relied upon. Indeed, under the Decree of the Flemish Community of the Kingdom of Belgium on the use of languages in relations between employers and employees, where an employer’s established place of business is in the Dutch-language region, use of that language is required in respect of all employment relations in the broader sense. On the one hand, Avocate General states that “the rules of EU law concerning respect for the national identity of the Member States, which, in the case of the Kingdom of Belgium, indisputably includes its division under the constitution into linguistic communities, tend to support the idea that, as the Court has already ruled, a policy of protecting a language is a justification for a Member State having recourse to measures restricting freedom of movement”.⁶⁰ On the other hand, the same AG realizes that the “obligatory use of a Member State’s language by nationals or undertakings of other Member States exercising their fundamental freedoms, as laid down by the legislation at issue, does not really meet that objective. It cannot be argued that the mere drafting of employment contracts of a cross-border nature in a language other than Dutch by some undertakings based in

58 Ibid at para 84.

59 Ibid at para 87.

60 Opinion of Advocate General Jaaskinen, delivered on 12 July 2012, Case 202/11, *Anton Las v PSA Antwerp NV*, para. 60.

Flanders is likely to threaten the established use of Dutch”.⁶¹ If the AG finds the national measure inadequate to achieve the purposed objective, the Court found the national legislation at issue disproportionate. After stating that “in accordance with Article 4(2) TEU, the Union must also respect the national identity of its Member States, which includes protection of the official language or languages of those States”⁶² and 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”⁶³, the Court conclude that a solution less restrictive upon the free movement of workers could have been found. In the words of the Court, “legislation of a Member State which would not only require the use of the official language of that Member State for cross-border employment contracts, but which also, in addition, would permit the drafting of an authentic version of such contracts in a language known to all the parties concerned, would be less prejudicial to freedom of movement for workers than the legislation in issue in the main proceedings while being appropriate for securing the objectives pursued by that legislation”.⁶⁴

In another group of judgments, the preservation of national identities has not been regarded as an autonomous ground of derogation, but has enabled Member States to develop their own definition of a legitimate interest capable of justifying an obstacle to a fundamental freedom. In this respect, Member State do not rely on the protection of national identity itself, but uses national identity, domestic constitutional traditions, cultural values etc. to interpret other treaty-based justifications, such as public policy. The identity clause, then, becomes a rule of interpretation of existing internal market grounds for derogation.

Without expressly mentioning protection of national identities, already in the *Omega* case the ECJ interpreted public policy derogation in the light of fundamental values enshrined in the Constitution of a Member State. Notoriously, in the *Omega* case, a national measure prohibiting the commercial exploitation of games simulating acts of homicide was not regarded as one an unjustified restriction on the freedom to provide

61 Ibid at para. 61

62 Case 202/11, ECJ (Grand Chamber) *Anton Las v PSA Antwerp NV*, 16 April 2013, par. 26.

63 Ibid., par. 27.

64 Ibid., par. 32. It is interesting to note that the Court also consider in its balancing exercise the right of the parties to an informed consent: “parties to a cross-border employment contract do not necessarily have knowledge of the official language of the Member State concerned. In such a situation, the establishment of free and informed consent between the parties requires those parties to be able to draft their contract in a language other than the official language of that Member State” (par.31).

services. In the words of the Court, “The competent authorities took the view that the activity concerned by the prohibition order was a threat to public policy by reason of the fact that, in accordance with the conception prevailing in public opinion, the commercial exploitation of games involving the simulated killing of human beings infringed a fundamental value enshrined in the national constitution, namely human dignity”.⁶⁵

The first rulings mentioning Art. 4(2) TUE following the entry into force of the Treaty of Lisbon can be framed within the outlined cases, due to some similarities. In the well-known *Sayn-Wittgenstein* case⁶⁶, the identity clause enters the picture in the context of a preliminary ruling procedure referred by Austria, concerning the review of a national measure representing potential obstacle to freedom to move and reside as per Art. 21 TFEU. The ECJ states that the national measure which refuses to recognize the surname of an (adult) adoptee, determined in another Member State, in so far as it contains a title of nobility which is not permissible under Austrian constitutional law, is a restriction to the freedom to move and reside in that Member State. Indeed, the discrepancy in names could dispel doubts as to the citizen’s identity in a way that can hinder the exercise of the right which flows from Article 21 TFEU.⁶⁷ Nevertheless, the Austrian Government invokes public policy as a ground for justification. According to the Austrian government, “the provisions at issue in the main proceedings are intended to protect the constitutional identity of the Republic of Austria. The Law on the abolition of the nobility...constitutes a fundamental decision in favor of the formal equality of treatment of all citizens before the law”.⁶⁸ Moreover, “any restrictions on the rights of free movement which would result for Austrian citizens from the application of the provisions at issue in the main proceedings are therefore justified in the light of the history and fundamental values of the Republic of Austria”.⁶⁹ In assessing the proportionality of the national measure concerned, the Court, quoting the principle enshrined in *Omega* according to which the level of protection accorded to a legitimate interest may not be uniform in all Member States, and mentioning *ad audiendum* respect for national identities as provided for by Art. 4(2) TEU, concludes that “it does

65 Case 36/02, *Omega Spielhallen- und Automatenaufstellungs-GmbH v Oberbürgermeisterin der Bundesstadt Bonn* [2004] ECR I-09609, para 32.

66 For a case note, see L.F.M. Besselink, “Respecting Constitutional Identity in the European Union. Case C -208/09, 22 December 2010, *Ilonka Sayn – Wittgenstein v Landeshauptmann Von Wien*”, (2012) 49 Common Market Law Review p. 671. See also, more generally, on Art. 4(2) TEU A. von Bogdandy, S. Schill, *Overcoming absolute primacy: Respect for National Identity under the Lisbon Treaty*, (2011) 48 Common Market Law Review 147.

67 Case 208/09, *Ilonka Sayn-Wittgenstein v Landeshauptmann von Wien*, para 70.

68 *Ibid* at para 74, emphasis added.

69 *Ibid* at para 75, emphasis added.

not appear disproportionate for a Member State to seek to attain the objective of protecting the principle of equal treatment by prohibiting any acquisition, possession or use, by its nationals, of titles of nobility or noble elements which may create the impression that the bearer of the name is holder of such a rank”.⁷⁰

b) The review of EU measures

Respect for national identities could also become to a certain extent a constraint on EU legislator. Some institutions have referred to the clause in some of their non-binding acts, either to emphasize the importance of regional and local self-government⁷¹ or to express a sort of self-commitment in taking into account respecting for national identities while implementing their policies.⁷² Besides entering the discourse of EU institutions, Article 4(2) TEU has been used as a ground for judicial review of EU acts, although in few cases.⁷³

The first case after the entry into force of the Lisbon Treaty is the *Affatato* case.⁷⁴ The Trial Court of Rossano (Italy) referred a question for a preliminary ruling concerning the interpretation of clause no. 5 of the framework agreement on fixed-term work, which is annexed to Directive 1999/70. Clause 5 provides for a set of measures aimed at preventing abuse arising from the use of successive fixed-term employment contracts. Moreover, it allows Member States, where appropriate, to determine under what conditions fixed-term employment contracts shall be deemed to be contracts or relationships of indefinite duration. The referral is aimed at assessing the compatibility with this clause of Art. 36 of Legislative Decree n. 165/2001, which, even where there is abuse arising from the use of successive fixed-term employment contracts or relationships by a public-sector employer, precludes their being converted into contracts

70 Ibid at para 93.

71 Opinion of the Committee of the Regions on the ‘Strategy for the effective implementation of the Charter of Fundamental Rights by the European Union’ [2012] OJ C 9, 11.1.2012, pp 61–4 (para 6). As per Art 4.2 TEU, regional, and local self-government are expressly enshrined in the concept of national identity (and they are also emphasized in the novel formulation of the subsidiarity principle).

72 COM/2011/0173 final, Communication From The Commission To The European Parliament, The Council, The European Economic and Social Committee and The Committee of the Regions, An EU Framework for National Roma Integration Strategies up to 2020. The duty to respect national identities in putting in place a monitoring system to collect data on the situations of Roma in the Member States binds not only the Commission, but also the Fundamental Rights Agency and other Union bodies involved (see para 8).

73 Quote E. Cloots, page 74 of the PhD thesis in which it says that the possible judicial self-restraint in this respect is due to the same reasons that prevented the ECJ from engaging in a subsidiarity scrutiny...

74 Case 3/10, *Franco Affatato v Azienda Sanitaria Provinciale di Cosenza*, Order of the Court (Sixth Chamber) of 1 October 2010.

of indeterminate duration. The judge also asks if –should clause 5 preclude this national legislation—the clause itself infringes upon the fundamental political structure of the Member State, as well as their essential functions, thus violating Art. 4, par. 2 TEU.⁷⁵ The second part of the question stems from the fact that the national legislation forbidding the conversion of fixed-term contracts into contracts of indeterminate duration is based on a provision of the Italian Constitution according to which permanent posts in the public service must be filled on the basis of a public competition.⁷⁶ The interesting aspect of the order for reference submitted by the Italian court is that, in seeking guidance as to the interpretation of EU law, the Trial Court of Rossano also enquires about the legality of an EU measure which could eventually infringe upon Art. 4.2 TEU, thus impliedly asking the ECJ to use the identity clause as a ground of review of the legality of an EU act.

The position of the Court is that the framework agreement neither lays down a general obligation on the Member States to provide for the conversion of fixed-term employment contracts into contracts of indefinite duration nor prescribes the precise conditions under which fixed-term employment contracts may be used. In other words, the agreement gives Member States a significant margin of discretion in the matter.⁷⁷ It follows that clause 5 of the framework agreement must be interpreted as not in principle precluding national legislation which, where there is abuse arising from the use of successive fixed-term employment contracts or relationships by a public-sector employer, precludes their being converted into contracts of indeterminate duration, and that—accordingly—clause 5 does not infringe upon the fundamental structures of the State—political and constitutional—and upon the essential State function of the State as per Art. 4.2 TEU.⁷⁸

There are also two other cases in which the possibility that Art. 4.2 TEU might be used as a ground of review of the legality of EU acts emerges. As a matter of fact, this possibility is envisaged by national courts' referral orders and/or by the Opinion of Advocate Generals, but the issue has not been addressed by the ECJ so far. The first case to be mentioned is the *Melloni* one. The main issue at stake was the interpretation of Art. 53 of the Charter of Fundamental Rights in the light of a case where the Spanish Constitution and EU secondary law provided for different level of protection to the

75 Ibid, para. 36

76 Also the Italian Constitutional Court had ruled that public competitions were the most appropriate means of selecting staff for those positions having regard to the values of impartiality and efficiency of the public service as enshrined in Art. 97 of the Italian Constitution.

77 Ibid, para. 38

78 Ibid, para. 40 e 41

right of defence. On the one hand, the Advocate General is that “the Charter is not designed to replace their national constitution with regard to the level of protection which this guarantees within the scope of national law”. On the other hand, the Advocate General points out that “the Charter cannot undermine the primacy of European Union law since the assessment of the level of protection for fundamental rights to be achieved is carried out within the framework of the implementation of European Union law”⁷⁹. The interesting aspect is that, despite the issue was not raised in the referral order, Advocate General stresses that the European Union is required, as per Article 4(2) TEU, to respect the national identity of the Member States, inherent in their fundamental structures, political and constitutional, which is also pointed out in the preamble to the Charter. In this connection, Advocate General explicitly states that “A Member State which considers that a provision of secondary law adversely affects its national identity may therefore challenge it on the basis of Article 4(2) TEU”.⁸⁰ Nevertheless, while acknowledging that Art. 4.2 TEU may constitute a ground for the judicial review of EU acts, AG Bot concludes that, in the specific situation, the determination of the scope of the rights of the defense in the case of judgments rendered *in absentia* does not affect the national identity of the Kingdom of Spain. The ECJ, by its token, does not even mention national identity in its *Melloni* judgement.⁸¹

More recently, the Consiglio Nazionale Forense (CNF) lodged a request for a preliminary ruling asking if Article 3 of Directive 98/5/EC of the European Parliament and of the Council to facilitate practice of the profession of lawyer on a permanent basis in a Member State other than that in which the qualification was obtained, might be regarded as invalid in light of Article 4(2) TEU. While the Lawyers’ Establishment Directive allows lawyers to practice under their home-country title in other Member States, the CNF refused, on grounds of abuse of rights, to enter in the Bar Register, in the special section for lawyers qualified abroad, Italian nationals who, soon after obtaining their professional title in another Member State (Spain), return to their home Member State. In the CNF’s reasoning, some Italian nationals abused of the possibility provided by EU law in order to profit from more favorable legislation to get the title of lawyer abroad, thus circumventing the Italian rules which make access to the legal profession conditional on passing a State examination. The alleged inconsistency of EU law with respect for national identities as per Art. 4.2 TEU is raised, since the Italian Constitution makes provision for a State examination to become lawyer and since the

79 Advocate General Yves Bot, Opinion delivered on 2 October 2012, Case 399/11, *Melloni*, par. 135.

80 Ibid, para. 139

81 Case 399/11, *Melloni*, Judgement of 26 February 2013 (Grand Chamber)

examination forms part of the fundamental principles safeguarding consumers of legal services and the proper administration of justice. Following the suggestion of the AG⁸², the ECJ has dismissed the invalidity of the Directive in light of Art. 4.2 TEU.⁸³

4. The unitary and pluralist twists of the European integration process

4.1 The unitary twist of the principle of sincere cooperation

Loyalty expresses “the gravitational force of European Union law”, having “the effect of furthering the integration of the Member States as constituent elements of the European Union, of providing the basis for all sorts of duties of cooperation, and of interlocking the legal regimes of the Member States with the Union”.⁸⁴ While ensuring the cohesion of the European legal order, the principle of sincere cooperation might not be “neutral”. Its integrationist force might favour the Union at the expense of the Member States, so that the literature has referred to the principle as a sort of “reverse subsidiarity”.⁸⁵

Indeed, the paragraphs outlining the use of the principle of sincere cooperation by the ECJ show that the principle bears the potential of intruding into Member States’ autonomy. Just to give an example, in the name of the duty of loyal cooperation, the principle of effectiveness has progressively and significantly limited the national procedural autonomy of the Member States. Indeed, some commentators ironically referred to the “not-so-autonomous national procedural autonomy” to highlight that, “in contrast to the *legislative* unification or harmonization of national procedural rules, the *judicial* reach—that is, unification by the case law of the Court – is limitless”.⁸⁶ The

82 Advocate General Nils Wahl, Opinion delivered on 10 April 2014 in Joined Cases 58/13 and 59/13, *Angelo Alberto Torresi and Pierfrancesco Torresi v. Consiglio dell'ordine degli Avvocati di Macerata*.

83 Joined Cases 58/13 and 59/13, *Angelo Alberto Torresi and Pierfrancesco Torresi v. Consiglio dell'ordine degli Avvocati di Macerata*, para.53-59. Judgement of 17 July 2014.

84 M. Klamert, *supra*, n. 35, p. 20.

85 The word has been used by R. Schuetze (*European Constitutional Law*, 2012, p. 218) to indicate the restriction on the exercise of shared powers arising from loyal cooperation in the field of EU external relations, and more generally by Konstadinides, ‘Constitutional Identity’, 207–208, who highlighted that the positive duty upon Member States to avoid conflict, arising from sincere cooperation, might reduce a ‘subsidiarian’ Europe).

86 M. Bobek, *The Effects of EU law in the national legal systems*, in C. Barnard and S. Peers (eds.), *European Union Law*, OUP, 2014, p. 166

case-law on the principle of effectiveness shows that the ECJ shifted from a “negative duty” imposed upon the Member States—entailing the guarantee of the non-possibility of enforcing Community rights within the domestic legal orders—to a “positive duty” upon Member States to provide adequate and appropriate judicial remedies.⁸⁷ This shift from a minimalist approach to a more interventionist approach finds its apex with the creation of a new European remedy before national Courts thanks to the principle of State’s liability for breach of Community law, which, since its first formulation in *Francovich*, finds in the duty of loyal cooperation on of its legal foundation.⁸⁸

Besides national procedural autonomy, also the principle of conferral, notoriously protecting Member States’ competences, could be qualified as a possible “victim” of the integrationist force of the duty of loyal cooperation. The latter, especially in the field of external relation, has acted as a “constitutional safeguard of unitarianism”⁸⁹, limiting Member States’ action in the name of the necessary unity of external representation.⁹⁰ If, differently from pre-emption, the Union interest, as an expression of the duty of cooperation, has been conceived as a “restraint” but not a “denial” of Member States competence⁹¹, the ECJ has based on the sole duty of loyalty an obligation upon the Member State to facilitate the exercise of Union competences, intruding once more on Member States’ autonomy to negotiate and conclude international agreements, during the exercise of their remaining external competence.⁹² A sort of “competence creep through the duty of loyalty” has been conceptualized with regard to the possibility that “Article 4 (3) TEU is slowly turning into an instrument for the Union institutions to achieve a loss of national competence, disguised as restrictions on the Member States’ freedom to exercise their powers”.⁹³

87 See the decreasing level of judicial self-restraint from *Rewe*, to *von Colson*, to *Factorframe* as well explained in R. Schuetze, *European Constitutional Law*, CUP 2012, pp. 389-393.

88 M. Dougan, *The Francovich Right to Reparation: Reshaping the Contours of Community Remedial Competence*, (2000) *European Public Law* 103, S. Drake, *Scope of Courage and the Principle of “Individual Liability” for Damages*, (2006) 31 *European Law Review* 841...

89 R. Schuetze, *European Constitutional Law*, CUP, 2012, p. 213.

90 See in particular opinion 1/94 (*WTO Agreement*), 1994, ECR I-52/77

91 Cremona, “Defending the Community Interest: the Duties of Cooperation and Compliance” in Cremona, de Witte (Eds.), *EU Foreign Relations Law* (Hart Publishing, Oxford, 2008),

92 E. Neframi, *supra* n. 13, p. 349

93 Kristin Reuyter, *Competence creep via the duty of loyalty? : article 4 (3) TEU and its changing role in EU external relations*, EUI PhD Thesis, Department of Law, 2013, <http://cadmus.eui.eu/handle/1814/28050>, The author emphasizes this risk but argues that “instead of pursuing political harmony between the Member States and the Union by way of creeping competence, Article 4 (3) TEU emphasises cooperation, compliance and complementarity in areas where the rigid division of competence would otherwise render the system of external relations ineffective”.

Last, but not least, the principle of sincere cooperation has significantly limited the powers of national judicial authorities, and of their discretionary interpretative function, by prescribing a duty of consistent interpretation of national law with EU law, as long as they can, namely only insofar as this would not result into a *contra legem* interpretation of domestic law. More generally “a vital part of the Court’s constitutionalization of the EC Treaty has depended upon the elaboration, based on Art. 5 EEC and the principle of cooperation of Member States, of increasingly far-reaching obligations on national judges in the context of their Community law mandate”.⁹⁴

More generally, the integrationist function of loyalty is clear in its connections with primacy. In a seminal article, A.G. Mancini wrote that, if the Rome Treaty failed “to state squarely whether Community law is pre-eminent vis-à-vis prior and subsequent Member State law”, it included “some hortatory provisions to the same effect (Art. 5)”.⁹⁵ Similarly, more recently, it has been argued that “despite the absence of an explicit supremacy or conflict clause in the Treaties, loyalty is the rule that was invoked by the Court to settle issues of the relationship between the Community (Union) legal order and these regimes of the Member States”.⁹⁶ This sort of “conflict-avoidance” function of loyalty emerges in *Costa*, where “the abstention obligation *qua* loyalty displaced the public international law principle of *lex posterior derogate priori*”⁹⁷, in the sense that Member States were prohibited from executing Community law in deference to subsequent domestic laws, in that they could jeopardize the attainment of the objectives of the Treaty set out in Art. 5 (2) EEC Treaty, allowing “the executive force of Community law to vary from one state to another”⁹⁸. The same function is even more clear in ERTA, which established an obligation of abstention incumbent on the Member States aimed at the avoidance of conflict between Union objectives or, more precisely, Community rules promulgated for the attainment of those objectives, and international obligations entered into by the Member States.⁹⁹

Against this backdrop, it can be asserted the principle of sincere cooperation provided the European legal order with a strong unitary twist. At risk of simplifying, I would conclude that loyalty push towards *uniformity* lies in the decentralized application of EU law, and in the ECJ necessity to avoid discrepancies between Member States’ national

94 D. Curtin, “The Decentralised Enforcement of Community Law Rights: Judicial Snakes and Ladders”, in D: Curtin and D: O Keeffe (eds.), *Constitutional Adjudication in European Community and National Law* (London: Butterworths, 1992), 33-49. 41, cit. in M. Klamert, *supra*, n. 35, p. 70.

95 G.F. Mancini, “The Making of a Constitution for Europe”, CMLR, 26 (1989), 69-599, 599.

96 M. Klamert, *supra*, n. 35, pp. 69- 70.

97 M. Klamert, *supra*, n. 35, p. 72.

98 *Ibid.*, reporting the words of the Court in *Costa*

99 M. Klamert, *supra*, n. 35, p. 73.

authorities in implementing EU law.¹⁰⁰ On the other hand, loyalty push towards *integration* lies in the strong connection envisaged by the Treaties between sincere cooperation of the objectives of the Treaty, which often required Member States to act as facilitators of Union's tasks. Notoriously, whenever the ECJ has the chance to engage in teleological interpretation of the Treaty, it uses all its margin of manoeuvre to act as an engine of integration at the expense of the Member States.¹⁰¹ As the *effet utile* served the purpose of circumventing the typical international law rule requiring Treaties to be interpreted in the way which less encroaches upon State sovereignty¹⁰², the principle of sincere cooperation not only prevented a restrictive interpretation of some obligations imposed on the Member States, but sometimes formed the legal basis for new Member State's obligation that cannot be derived from other Treaty provisions, but are necessary to attain Treaty's goals.¹⁰³

4.2 The pluralist twist of the duty to respect Member States' national identity

The pluralist twist of the duty upon the EU to respect Member states' national identities is, first of all, in its genetic code. As recalled in the introduction, the concept of national identity was introduced in the Maastricht Treaty, together with the concept of subsidiarity, to express the same kind of concern: how to accommodate national interests and values within the framework of the strong political and integrationist choice of the 1990s. The same concern is also at the basis of the novel formulation of the identity clause provided by the Lisbon Treaty. In clarifying that national identities are inherent in Member States' political and constitutional structures, the drafters wanted to protect national sovereign prerogatives against a possible expansion of Union competences.

Besides its historical origins and besides the intent of the drafters, the pluralist twist of the identity clause is visible also in the political and legislative realms, where

100 It has been argued that "loyalty has 'Europeanized' the Member State administrations. One might assume that, had the Union a general procedural law such as the German *Verwaltungsverfahrensgesetz* or the Austrian *Allgemeines Verwaltungsverfahrensgesetz*, loyalty in the EU would be less interventionist" (Klamert, *supra*, n. 35)

101 See parallel with the use of the "functional clauses" such as Art. 114 TFEU and Art. 352 TFEU.

102 J.H.H. Weiler, *The Transformation of Europe*, *The Yale Law Journal* (1991), 2403-2483, 2416. For an analogous criticism to the *effet utile* doctrine, see F. Snyder, "The Effectiveness of European Community Law: Institutions, Processes, and Tools", *Modern Law Review* (1993).

103 P. Herzog, *supra* n. 19.

respect for national identities is used “as a reason for establishing minimum standards rather than detailed, uniform rules, for preferring gradual over abrupt convergence, for minimal interference with existing domestic measures in the field, and for allowing for national implementation of European legislative acts”.¹⁰⁴ Moreover, always at the political level, national identity started to be used in national parliaments’ reasoned opinions in the context of the early-warning system, possibly paving the way for a reframing of the subsidiarity inquiry from a “comparative-efficiency” test to a test which is more focused the possible encroachment of EU action on Member States’ regulatory autonomy.¹⁰⁵ Subsidiarity and national identity—as “accommodationists” provisions able to counter-balance the “integrationsit provisions” of the Treaty—“demand that the European institutions act with moderation and prudence in the exercise of the powers conferred on them by the Treaties”¹⁰⁶. In this sense, respect for national identities might join subsidiarity as a “constitutional safeguard of federalism”¹⁰⁷ and follows the same direction of those principles behaving as “principles of differentiation” in the European legal order.¹⁰⁸

Last, but not least, in the light of the analyzed case law, the pluralist force of the identity clause lies in its potential legal implications. In the context of the review of national measures, I have already noted that Article 4.2 TEU could afford a broader “margin of appreciation” in justifying national measures which constitute an obstacle to the internal market fundamental freedoms. In this respect, when the identity clause is invoked to strengthen already existing internal market grounds of derogation from fundamental freedoms, the Court could relax its traditionally restrictive interpretation of justifications, dropping, for example, the strict scrutiny which characterizes the proportionality review of national measures (in *Syan-Wittengstein*, for example, the Court deems the restriction to the fundamental freedom as proportionate without requiring a less-restrictive-alternative test). The Court could also allow for more differentiation in the interpretation of expressed derogation in light of its *Omega* jurisprudence. If in *Omega* the Court implied that the standard of protection of the fundamental right or of the legitimate interest concerned can vary from one Member

104 E. Cloots, *National Identity in EU law*, OUP 2015, p. 176

105 For this argument and the empirical evidence supporting it, see B. Guastaferrero, *Coupling National Identity with Subsidiarity Concerns in National Parliaments’ Reasoned Opinions*, in *The Maastricht Journal of European and Comparative Law*, 2/2014.

106 E. Cloots p. 85. e

107 R. Schuetze, *From Dual to Cooperative Federalism*, OUP, 2009, p. 284.

108 Grainne de Burca: “Legal Principles as an Instrument of Differentiation? The Principles of Proportionality and Subsidiarity”, in Bruno de Witte, Dominik Hanf, and Hellen Vos (eds.) *The Many Faces of Differentiation in EU Law* (Intersentia 2001) 134

State to another, in following case the Court confirmed this view by asserting that such a variation could rest upon different “moral and cultural views”.¹⁰⁹ The same Court, when national identity issues are at stake, could endorse a more deferential approach towards the “right of assessment” of national courts referring a preliminary ruling, issuing for example a “deference” rather than an “outcome” judgment.¹¹⁰ Turning to the less frequent review of EU measures, the considered cases suggest that the identity clause can potentially be relied upon to strike down EU measure having excessive pre-emptive effects on Member States’ scope of action. Should this indication be confirmed by subsequent case-law, respect for national identity may entail a duty upon the EU legislature to have due regard to the intensity and form of EU action, which should allow for more discretion in the application of EU law.¹¹¹

I have already suggested that Art. 4(2) TEU should not be interpreted as a European-Treaty based authorization to invoke national constitutional identities against the supremacy of EU law. It should be interpreted as a horizontal clause designed to bolster an interpretation of existing EU law doctrines, provisions and principles which is more favorable to the safeguard of Member States’ discretion, regulatory autonomy, constitutional and cultural diversity.¹¹² Rather than being a silent clause bound to have a say in cases of *exceptional* conflicts between EU law and domestic constitutional

109 Case 244/06, *Dynamic MedienVertriebs GmbH v Avides Media AG* [2008] ECR I-00505. At paragraph 44, the Court states that “it is not indispensable that restrictive measures laid down by the authorities of a Member State to protect the rights of the child, correspond to a conception shared by all Member States as regards the level of protection and the detailed rules relating to it. As that conception may vary from one Member State to another on the basis of, inter alia, moral or cultural views, Member States must be recognized as having a definite margin of discretion”.

110 On the difference between ‘outcome’, ‘guidance’, and ‘deference’ cases see Takis Tridimas, ‘Constitutional Review of Member State Action: The virtues and vices of an incomplete jurisdiction’ [2011] 9(3–4) *ICON* 737–56, at 737. In answering preliminary questions referred by national courts, the ECJ enjoys a broad discretion in determining the level of detail of its answers. According to Tridimas’ classification, the Court indeed ‘may give an answer so specific that it leaves the referring court no margin for maneuver and provides it with a ready-made solution to the dispute (outcome cases); it may, alternatively, provide the referring court with guidelines as to how to resolve the dispute (guidance cases); finally, it may answer the question in such general terms that, in effect, it defers to the national judiciary (deference cases)’.

111 In the *Affatato* order the ECJ ruled out that a framework agreement did not infringe Article 4(2) TEU because it left a certain ‘margin of discretion’ to the Member States in achieving the objective of the agreement. In this sense I have submitted that there are some hints in the *Affatato* order which trigger a normative suggestion to use Article 4(2) TEU as a way to bolster one of the original meanings of the principle of proportionality according to which EU measures should provide Member States with alternative ways to achieve the objective of the measure (Guastaferrero, p. 313). More generally, on the relationship between the ECJ case law and the autonomy of the Member State see *The European Court of Justice and the Autonomy of the Member States*, edited by B. De Witte and H. Micklitz (Intersentia 2012).

112 B. Guastaferrero, *YEL* 2012, p. 316.

law—which, by all means, would be dismissed by the ECJ’ absolute reading of supremacy as a dangerous attempt to rely on national constitutional law to derogate from EU law—Art. 4.2 TEU could have an impact in the *ordinary* functioning of EU law. Indeed, more than a *conflict-resolution* function, the identity clause could play a *conflict-prevention* function, if used, as I suggested, to couple existing concepts of EU law or, simply, to interpret EU law provisions. If, in light of respect for national identities, the EU legislator chose the less preemptive act upon Member States’ scope of action, or, the ECJ mitigates its restrictive interpretation of derogations such as public policy etc., the clause could “help releasing national provisions from their allegations of inconsistency from EU law and then prevent issues of primacy from coming into the fore altogether”.¹¹³ In this reading, “the identity clause should enter the picture at a stage which is preliminary to that of the normative conflict to be solved through the supremacy doctrine” and should inform both Union action and EU law interpretation.¹¹⁴

Along similar lines, a recent study calls for a “nation-sensitive European law-making and interpretation”¹¹⁵ triggered by Art. 4.2 TEU, arguing that the ECJ itself should be bound by respect for national identities¹¹⁶, and studying the techniques available to the ECJ in order to interpret EU law in a way which is sensitive to national identity.¹¹⁷ Against this backdrop, I will now turn to understand, if, and to what extent, it would be possible to have a more national-identity-sensitive reading, or a less integrationist-biased concept of the principle of sincere cooperation in light of the novelties proposed by the Lisbon Treaty.

113 B. Guastaferrero, YEL 2012, p. 315.

114 Ibid.

115 E. Cloots, p. 178. The Author reaches this conclusion looking at four different ways of identity accommodation in political theory, namely autonomy and self-governing; group representation at the central level; group-differentiation, allowing for group sensitive interpretations and applications of central laws or for group specific exemptions from certain laws and policies; and symbolic recognition. The Author then asks if the legal concept of “respect” encompass some of those strategies of accommodation and concludes that, while political autonomy of the Member States and their representation at the central level will be difficult to reach because of the growing expansion of Union competences and the shift from unanimity to qualified majority voting, “the need for nation-sensitive European law-making and interpretation, and for the recognition through multinational symbols and rethoric, will only grow”.

116 E. Cloots, pp. 63-81.

117 Ibid., p. 180. See in particular part II dedicated to the methods of adjudication.

5. Towards a less integrationist–biased concept of loyal cooperation? The new balance provided by the Treaty of Lisbon

The Treaty of Lisbon builds on the draft Constitutional Treaty in devoting—although not expressly—an article to the relationship between the Union and its Member States. Art. 4 TEU, like its ancestor Art. I-5, dedicates one paragraph to the duty upon the EU to respect Member States' national identities, and another paragraph to the principle of sincere cooperation. In this respect, the Lisbon Treaty, differently from the previous treaties, ties together the two principles, confirming the importance of coupling the gravitational and integrationist force of loyalty with a provision able to accommodate national interests and values. Moreover, the Lisbon Treaty introduces other novelties within the same Art. 4 TEU.

The first novelty is that the first paragraph of Art. 4 TEU enshrines the so-called 'principle of presumed Member States competences', according to which competences not conferred upon the EU remain to the Member States. Besides being specular to the principle of conferral, according to which the EU "shall act only within the limits of the competences conferred upon it by the MS in the Treaties"¹¹⁸ this principle presents striking similarities with the clauses existing in some federal orders, such as the 10th amendment to the US Constitution. The second novelty is that paragraph 3 of the article, before spelling out the positive and negative duties arising upon the Member States from the duty of loyalty (with the same wording of the pre-Lisbon version of the treaties), adds a completely new sentence: "pursuant to the principle of sincere cooperation, the Union and the Member States shall, *in full mutual respect, assist each other* in carrying out tasks which flow from the Treaties".

While the duty of loyal cooperation has commonly been addressed to the Member States, the novel formulation requires also the Union to assist Member States in achieving the same goal. Besides the reference to *mutuality*, which stresses that the principle of sincere cooperation binds not only to the Member States, but also to the EU institutions¹¹⁹, the novel reference to the word *respect* is equally important.

118 See Article 5(2) TEU.

119 That the duty of loyalty was also addressed to union institutions was nevertheless already stated by the ECJ. For examples Case 325/85, *Ireland v. Commission*, [1987] ECR 5041, where the obligation to loyally cooperate is extended to the Commission, which is expected to play an active role and Case 2/88, *Zwartveld*, [1990] ECR 3365, where the obligation of loyal cooperation is extended to the Community institutions. In literature, see K. Mortelmans, 'The Principle of Loyalty to the Community (Article 5EC)

Indeed, being already mentioned in paragraph 4.2 TEU on national identities, it assumes a crucial relevance in informing the relationship between the Union and the Member States. It was pointed out that in the context of Art. 4.3 TEU on sincere cooperation, respect goes beyond mutual and reciprocal assistance, to entail that the Union and the Member States must not transgress upon the prerogatives of the other.¹²⁰

Could these two novelties, one related to the legal context and the other to the new wording of Art. 4(3) TEU, together with the general duty upon the ECJ to a national-identity sensitive interpretation of EU law already discussed in the previous section, push towards a less *integrationist-biased* concept of the duty of sincere cooperation?

As far as the new legal context provided by Art. 4 TEU is concerned, it is interesting to note that sincere cooperation¹²¹, a principle which has fostered *unitarianism*, is coupled with both the principle of presumed Member States' competences¹²² and the principle of respect for national identities¹²³, namely two principles which have fostered *pluralism* and that, at least in the drafters' intention, were supposed to defend Member States' sovereign prerogatives.¹²⁴ More specifically, whereas sincere cooperation has solicited the competence creep, the principle of presumed Member States' competences is a *redundant* emphasis of the principle of conferral, and of the idea that Member States are the masters of the Treaties. Along similar lines, whereas sincere cooperation has strongly prevented a restrictive interpretation of some obligations imposed on the Member States¹²⁵, respect for national identities allowed more discretion in derogating from EU law. In my reading, the contradiction is so puzzling that the new legal context cannot be meaningless. I would therefore contest the assertion that "loyalty is not counterbalanced by Article 4(2) TEU on the protection of national identities. Even though this is now placed in close context to loyalty, there is no indication that this

and the Obligations of the Community Institutions', *Maastricht Journal of European and Comparative Law*, 5, 1998, 67-88.

120 Chalmers, Davies, Monti, p. 213.

121 Art. 4.3 TEU

122 Art. 4.1 TEU

123 Art. 4.2 TEU

124 In the working group of the Convention on complementary competences, they were presented as two alternative solutions of the same problem of competence creep. In the end, the Treaty keeps both of them and follows the suggestions of Mr. Farnleitner according to which—beyond the principle of conferred powers—it was necessary to stress the 'general presumption that in case of doubt the competence shall lie with the Member States'.

125 P. Herzog, supra n. 19.

could influence its future scope or effect”.¹²⁶ I think that there are at least some indications that the scope of loyalty might change.

First of all, the new wording of the Lisbon Treaty on Art. 4.3 TEU might be considered perfectly consistent with the new legal context, in the sense that the explicit recognition of the *mutuality* of sincere cooperation, on the one hand, and its coupling with two principles accommodating Member States interests and values, on the other, seem to push towards the same direction: a less integrationist-biased concept of loyalty. Cooperation is not a one-way obligation. It must also inform Union action. Even if the Court of Justice already stated the bi-directional nature of sincere cooperation, where the Court imposed duty of loyalty upon the EU institution, “these were often a reflection and logical extension of distinct duties of cooperation on the part of the Member States”.¹²⁷ For example, in infringement proceedings, the duty of information upon the Member States, is “offset by the requirement that the Commission’s request for information on a specific charge must satisfy conditions of clarity and precision”.¹²⁸ Moreover, even when the Court faced the Commission’s alleged breach of Article 4 (3) TEU, it dismissed the question and “did not seize this opportunity to give further guidance on EU loyalty duties”¹²⁹, with the consequence that—when imposed on Member States—the duty of loyalty entailed specific obligations, whereas—when imposed on Union institutions—it failed to provide a clear picture on the concrete positive or negative measures the Union institutions should carry out. Should the (novel) explicit referral to the mutuality of sincere cooperation be interpreted in the light of the (novel and close) duty upon the EU to respect national identities, a more pluralistic concept of loyalty may arise in the legal order. It is not unrealistic that Member States engaged in acting to give effectiveness to EU law and to facilitate Union goals, may require an analogous form of attention from the EU.¹³⁰ It is up to the Court of justice to clarify what does it mean that “the Union and the Member States shall in full mutual respect, assist each-other in carrying out the task which flows from

126 M. Klamert, *supra*, n. 35, p. 84.

127 *Ivi*, p. 27

128 *Ibid.*

129 F. Casolari, p. 110, the case is ECJ, Case C-45/07 *Commission of the European Communities v Hellenic Republic* [2009] ECR I-00701.

130 Despite endorsing this position, I agree with scholars contesting that a Member State who feels that its national identity has been violated could stop fulfilling the obligation arising from the duty of loyal cooperation (such as M. Klamert). By way of contrast, I disagree with scholars arguing that the duty of loyal cooperation, in asking the Member States to refrain from jeopardizing the implementation of EU law, prevents the possible use of Art. 4.2 TEU to challenge an EU measure (Such as M. Dobbs, *YEL* 2014, p. 20), also because the case-law of the Court of Justice and the Opinions of AG show that respect for national identity is a principle which can be used to scrutinize EU measure.

the Treaty” and if, and to what extent, specific duties of respect of the Member States arise from this novel Treaty formulation entrenched in a novel legal context.

Another element which could endorse the possibility of a more “pluralist” reading of sincere cooperation, lies in the fact that most of its *gravitational* nature of the duty of loyalty, according to me, builds upon its connection with the objectives of the Treaty and upon the misleading identification between the Union’s *objectives* and the Union’s *interests*. At a general level, indeed, it might be argued that the text of the Treaty—requiring Member States to take any appropriate measure to ensure fulfilment of the obligations arising out of the Treaties—is to a certain extent “neutral”, in the sense that it imposes upon Member States a general duty of compliance with EU law. Nevertheless, sincere cooperation also asked the Member States to facilitate the achievement of the Union’s tasks and refrain from any measure which could jeopardise the attainment of the Union’s objectives. What accounted for the unitary twist of the principle of sincere-cooperation is the interpretation of the obligations imposed upon the Member States in the light of a strong *integrationist-biased* reading of the objectives of the Treaty. It is not a case that, on the one hand, the duty of loyalty has played a significant role in the foundational case law asserting supremacy, direct effect, the ERTA principle etc., and, on the other, the referral that the Treaty does to “Union’s objectives” has been too often, both by the ECJ and by the scholarly literature, identified with the “Union’s interests”¹³¹. In my reading, while the Treaty objectives preserve a balance between the constitutive parts of the composite legal order, the Union’s interests are more likely to infringe upon Member States’ interests. Moreover, the objectives of a legal order are subject to dynamic developments, and the current objectives of the Treaty might not necessarily want to push the integration so far as it was both feasible and desirable at the very beginning of the integration process. Just to give an example, Art. 3 TEU, dedicated to the objectives of the Treaty, for the very first time requires the Union to “respect its rich cultural and linguistic diversity”, and to “ensure that Europe’s cultural heritage is safeguarded and enhanced”. If the duty of loyal cooperation requires the Union and the Member States to assist each other in the achievement of Union *objectives*, this absolutely new referral to pluralism in the Treaty objectives might be another reason to interpret loyal cooperation in a less-integrationist manner, more respectful of Member states’ national identities.

131 See for example Neframi (supra n. 13), who argues that the nature of the specific obligations arising from loyalty depend on the particular facet of the Union interest, which may consist in: the effective implementation of common rules, the preservation of their *effet utile*, the facilitation of the exercise of EU competences, and the unity of external representation.

To conclude, a reading of Art. 4 TEU in its entirety is suggested, being the article is so essential and foundational to address the composite nature of the European Union and the complex balance between the Union and the Member States as its constitutive parts. Such reading might foster a more pluralist interpretation of the duty of loyal cooperation which, in the words of Advocate General Sharpston, represented the “glue” which kept “the federal construction together”.¹³²

132 AG Sharpston sees in Art. 4 TEU an “excellent programme” for a conception of federalism which, in the words of US supreme Court, rests on the “counterintuitive insights that freedom is enhanced by the creation of two governments, not one” (See E. Sharpston, “Preface”, in E. Cloots, G. De Baere and S. Sottiaux, *Federalism in the EU*, Oxford, Hart, 2012, p. viii).