ARTICLES

EXPLORING THE CONCEPT OF ESSENTIAL STATE FUNCTIONS ON THE BASIS OF THE CJEU'S DECISION ON THE TEMPORARY RELOCATION MECHANISM

TEREZIE BOKOVÁ*

ABSTRACT: Art. 4(2) TEU stipulating the EU's respect to Member States' national identities seems to be the topic of the day in EU law discussions. However, another part of the provision, obliging the EU to respect the Member States' essential state functions, has received less attention due to which it lacks clarity and is treated ambiguously. This *Article* attempts to address that gap. It suggests that while the essential state function clause is textually separate from the national identity clause, the aim and function of the clause, as well as the way in which some constitutional courts treat it, evidences that essential state functions are not strictly separated from national identity. Using the examples of the CJEU's judgment on the temporary relocation mechanism, the *Article* argues that some Member States' concerns *vis-à-vis* the EU could be based on either essential state functions or national identity. In such a situation, essential state functions might seem attractive because of their perceived more objective appearance than national identity. However, the given example also shows that even essential state functions could cover arguments problematic from the perspective of common EU values (art. 2 TEU).

KEYWORDS: essential state functions – national identity – art. 4(2) TEU – temporary relocation mechanism – migration crisis – Court of Justice of the European Union.

* PhD student, Masaryk University, 407737@mail.muni.cz. This *Article* was written at Masaryk University as a part of the project "Národní a ústavní identity států EU" (National and constitutional identities of EU Member States), number MUNI/A/1257/2020, with the support of the Specific University Research Grant, as provided by the Ministry of Education, Youth and Sports of the Czech Republic in the year 2021. I am grateful to the members of the project team, in particular Zuzana Vikarská and Lenka Křičková, for their sustained effort to make this *Article* better. I would also thank the two anonymous reviewers for their insightful comments. All errors remain mine.

ISSN 2499-8249
doi: 10.15166/2499-8249/599
(CC BY-NC-ND 4.0)

I. The grey zone of art. 4(2) TEU

National identity, a distinct concept of Art. 4(2) TEU,[1] has been for some time an important topic of discussion in EU law. Although it has received a considerable amount of scholarly attention, the other concepts included in art. 4(2) TEU seem to be less developed. In this *Article*, I will focus on essential state functions and explore their contours and relation to national identity. Both national identity and essential state functions provide an "argumentative vehicle" how MSs could raise their particular, national concerns *vis-à-vis* the EU. Yet, essential state functions have been treated in a confusing manner by both the Court of Justice of the European Union (CJEU) and the scholarly literature: the concept is sometimes included in national identity, other times distinguished from it.

First, I illustrate this muddiness by analysing CJEU judgment concerning the dispute over the temporary relocation mechanism addressing the refugee crisis.[2] In this case, *Visegrad* countries[3] challenged the limited-scale relocations of applicants in clear need of international protection that were meant to represent a tangible solidarity gesture in the midst of the refugee crisis, aiming to help Member States (MSs) burdened with the biggest asylum application backlogs (i.e. Italy and Greece). In *Commission v Poland, Hungary and Czech Republic*,[4] CJEU found that the three MSs had infringed EU law by disregarding their obligation to relocate a specified number of applicants, regardless of their counter-argumentation built, *inter alia*, on art. 4(2) TEU's essential state functions. Nevertheless, the claim was broadly understood by the Advocate General (AG), the CJEU and the scholars as a national identity claim.

Second, I explore the concept of essential state functions deeper and attempt to clarify it. I claim that essential state functions encompass predominantly a set of state competences that form a core of the state actions and are distinct from national identity, but the aim and substance of the essential state functions are, in their very core, indeed similar to the national identity. The two concepts could be connected once we consider functions of state as a part of its identity. Therefore, essential state functions and national

[1] Art. 4(2) TEU reads: "The Union shall respect the equality of Member States before the Treaties as well as their national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government. It shall respect their essential State functions, including ensuring the territorial integrity of the State, maintaining law and order and safeguarding national security. In particular, national security remains the sole responsibility of each Member State".

[2] The mechanism was established in two legal acts: Decision 2015/1523 of the Council of 14 September 2015 establishing provisional measures in the area of international protection for the benefit of Italy and of Greece, and Decision 2015/1601 of the Council of 22 September 2015 establishing provisional measures in the area of international protection for the benefit of Italy and Greece (hereinafter the "Council relocation decisions").

[3] Slovakia and Hungary led the legal challenge to the relocations, supported by Poland (joined cases C-643/15 and C-647/15 *Slovakia and Hungary v Council* ECLI:EU:C:2017:631). Later, the infringement proceedings concerned Hungary, Poland and Czech Republic, making all *Visegrad* Group countries somehow involved.

[4] Joined Cases C-715/17, C-718/17 and C-719/17 *Commission v Poland, Hungary and Czech Republic* ECLI:EU:C:2020:257.

identity could, in some situations, cover the same substance of arguments raised by the MSs before the CJEU. The difference between them is thus more in framing then essence. On the face, however, national identity encompasses also features that distinguish a state including features of cultural character as long as they are of constitutional relevance, vulnerable to running contrary to art. 2 TEU, while essential state functions might appear as a more universal concept less open to subjective interpretation, thus less likely to collide with common EU values. Despite that, as the temporary relocation mechanism dispute reveals, essential state functions could also be used in an abusive manner which calls for scrutiny against art. 2 TEU.

I proceed as follows. In section II, I summarize proceedings concerning the temporary relocation mechanism at the CJEU, including the arguments raised and the CJEU's reaction to them. The case shows that in order to bring art. 4(2) TEU into play, the MSs claimed concern for their ability to perform essential state functions. Still, the AG responded as if the claim rested on national identity. In section III, I argue that the Union's obligation to respect essential state functions and to respect national identity are indeed closely related concepts, which explains the AG's approach. The argument rests on three lines of reasoning: discussion of art. 4(2) TEU (section III.1); a brief look into some of the national constitutional courts' identity review case-law (section III.2); and analysis of the CJEU's case-law concerning the concept of essential state functions (section III.3). In section IV, I discuss the consequences of the fact that both national identity and essential state functions could, in some instances, cover the same arguments, asking a question what pragmatic reasons there are to choose essential state functions over national identity. Section V concludes.

II. Highlighting art. 4(2) TEU variability: the CJEU's case-law on the temporary relocation mechanism

While national identity and essential state functions are two distinct concepts, both included in art. 4(2) TEU, their mutual boundaries seem sometimes unclear. One example is the CJEU's judgment in infringement proceeding against three MSs for their failures to implement the temporary relocation mechanism. The mechanism for the relocation of applicants for international protection from buffer-zone states at the EU external border, established by the Council, represented a part of the limited common European response to the refugee crisis.[5] The Council set up the mechanism in two separate decisions, providing for the relocation of, respectively, 40.000[6] and 120.000 applicants.[7] Originally, the latter decision was supposed to benefit Greece, Italy, and Hungary. Despite its designation as a beneficiary, Hungarian government decided to opt out, claiming that it was

[5] For comprehensive outline of EU response to the refugee crisis, see A Niemann and N Zaun, 'EU Refugee Policies and Politics in Times of Crisis: Theoretical and Empirical Perspectives' (2018) JComMarSt 3, 4–13.

[6] Decision 2015/1523 cit.

[7] *Ibid*.

not "a frontline state".[8] Therefore, after the Council adopted decision 2015/1601 by qualified majority (with the Czech Republic, Hungary, Romania, and Slovakia voting against and Finland abstaining[9]), Hungary became a MS of relocation too, being obliged to relocate a certain number of applicants in clear need of international protection from Italy and Greece. The Council relocation decisions seemingly took away control from the Member States on the issue of who would cross their borders in order to seek international protection, making them a highly disputed topic.

The CJEU ruled on the mechanism twice. First, Slovakia and Hungary unsuccessfully challenged the legality of Decision 2015/1601 at the CJEU, claiming that art. 78(3) TFEU provided for emergency non-legislative measures of technical or supportive nature, thus not providing a sufficient legal basis for the adopted decision, which materially constituted a legislative act amending parts of secondary law.[10] The CJEU found this claim unsubstantiated. It also denounced Slovak government's concern for the "sovereign rights of the states" being circumvented by the binding nature of the relocation mechanism. The CJEU focused not on the substance of the claim (i.e. whether any sovereign rights were interfered with and if so, on what legal basis), but rebutted Slovakia's suggestions that "another means of relief" had been available instead.[11]

As has become clear overtime, the temporary relocation mechanism as such did not fulfil its promise. While many reasons contributed to the failure,[12] one of them was the continuing unwillingness of some MSs to play their part. In this context, the Commission identified the three gravest sinners as Poland, Hungary, and the Czech Republic (but notably not Slovakia[13]) and started infringement proceedings against them. The three countries had either not pledged to relocate any applicants, pledged to relocate some applicants but did not fulfil this promise, or relocated only a fragment of the allocated number of applicants and then stopped making any commitments of further relocations.[14] In *Commission v Poland, Hungary and Czech Republic*, the CJEU found all three MSs in breach

[8] D Robinson, 'Why Hungary wanted out of EU's refugee scheme' (22 September 2015) Financial Times www.ft.com.

[9] See Council of EU (Justice and Home affairs), *Minutes of 22 September 2015 meeting of the Council* data.consilium.europa.eu.

[10] *Slovakia and Hungary v Council* cit. paras 47–55 and 85–88.

[11] *Ibid*. paras 235 and following.

[12] B De Witte and E Tsourdi, 'Confrontation on Relocation. The Court of Justice Endorses the Emergency Scheme for Compulsory Relocation of Asylum Seekers within the European Union: Slovak Republic and Hungary v. Council' (2018) CMLRev 1457, 1492.

[13] After the unsuccessful challenge, Slovakia stopped disregarding the decision completely. Instead, it used a strategy of assenting to relocation of only very specific groups of applicants, which led to high rejection rates, and, consequently, slow pace of relocation. See European Commission, *Thirteenth Report on Relocation and Resettlement* www.europeanmigrationlaw.eu.

[14] See European Commission, *Relocation: Commission launches infringement procedures against the Czech Republic, Hungary and Poland (press release)* ec.europa.eu.

of EU law after it rejected their arguments justifying undisputed non-compliance with the relocation decisions as meritless.

It appears the Czech Republic raised similar sovereignty-based arguments as Slovakia in *Slovakia and Hungary v Council*. The CJEU considered it impermissible that a MS would unilaterally assess effectiveness or malfunctioning of the relocation mechanism, even if it affected the MS's internal security, and avoided its obligations arising from the relocation mechanism.[15] Lack of efficiency or need for additional security-related procedural steps should have been resolved in a spirit of mutual cooperation, not serve as an excuse for disregarding legal obligations.[16]

Concerning Hungary and Poland's pleas, the MSs did not succeed with their claim that they were allowed to disapply the relocation decisions on the basis of art. 72 TFEU.[17] The CJEU rejected the idea that art. 72 TFEU served as a rule of "conflict of laws" or as a basis for unilateral derogation from secondary law lying outside of any control of the EU.[18] Because the relocation decision respected MSs' exclusive competence in the area of internal security and provided specific security safeguards, Hungary and Poland could not rely on art. 72 TFEU. They failed to prove that it was necessary to have recourse to such a derogation in order to exercise their responsibilities in terms of the maintenance of law and order and safeguarding of internal security.

As to art. 4(2) TEU read together with art. 72 TFEU, the CJEU merely added that "[t]here is nothing to indicate that effectively safeguarding the essential State functions to which the latter provision refers, such as that of protecting national security, could not be carried out other than by disapplying Decisions 2015/1523 and 2015/1601".[19] This remark is rather mysterious, given that CJEU did not specifically summarize the defendant MS' arguments concerning art. 4(2) TEU.[20]

Let's unpack the claim a little. For the purposes of this *Article*, the written defence of Poland in the infringement proceedings was obtained from the Commission. The pleading shows that the national security issues that concerned Polish government fell into three broad areas. First, due to insufficient possibilities to verify the identity of applicants before relocation there was a possibility that applicants who are criminals, terrorists or extremists would be relocated. Secondly and more generally, Europe was facing a trend of terrorist attacks committed by applicants for or recipients of international protection. Thirdly, the government saw a threat in a wider social and cultural context, referring to other European countries that had experienced destabilized society and social tensions

[15] *Commission v Poland, Hungary and Czech Republic* cit. para. 180.

[16] *Ibid.* paras 181-182.

[17] "This Title shall not affect the exercise of the responsibilities incumbent upon Member States with regard to the maintenance of law and order and the safeguarding of internal security".

[18] *Commission v Poland, Hungary and Czech Republic* cit. paras. 137 and 145-147.

[19] *Ibid.* para. 170.

[20] Paras 134-137 of the judgment focus more on the issue of art. 72 TFEU, without substantive discussion of the impact of art. 4(2) TEU on the legal analysis.

as a result of uncontrolled immigration. Claiming that national security also encompasses "cultural security", the government referred to the possibility that individuals holding beliefs incompatible with the constitutional values of Poland might have been relocated too. That would have promoted reprehensible (and constitutionally incompatible) conduct, such as subordination of women to men, honour killings, antisemitism, violence against atheists or homosexuals, bigamy, child marriages and others. The government also pointed out it did not see Islam as a religion that endangers the national security of Poland per se, but the influence of extremist newcomers would threaten the established Muslim community in Poland in terms of religious and ethnic conflicts arising.

The reference to the "ethnicity" of the relocated applicants had also appeared earlier in the Polish intervention in *Slovakia and Hungary v Council* proceedings. Poland claimed that the binding relocation quota had a disproportionate impact in different MSs according to their ethnic and cultural homogeneity. Countries "virtually ethnically homogeneous, like Poland" bore much greater burden and had to expend greater effort (and money) in order to accommodate culturally and linguistically "unfitting" relocated applicants.[21] In *Slovakia and Hungary v Council*, the CJEU directly rejected the Polish government's argument, even though it could simply disregard it as inadmissible.[22] The CJEU stressed that if relocation had been conditional upon the existence of cultural and linguistic ties, it would have undermined the principle of solidarity (art. 80 TFEU) as a guiding principle of the Common European Asylum System, and consequently, prevented the Council from adopting any effective, i.e. binding, decision. Furthermore, the CJEU added that "considerations relating to the ethnic origin of applicants for international protection cannot be taken into account because they are clearly contrary to EU law and, in particular, to Art. 21 of the Charter of Fundamental Rights of the European Union".[23] Hence it distanced itself from the content of this claim.

Perhaps in response to this previous negative response of the CJEU, the arguments raised in the infringement proceedings (*Commission v Poland, Hungary and Czech Republic*) did not project such ethno-cultural understanding of the state. They were framed in terms of national security as an essential state function as in art. 4(2) TEU that stipulates the Union's respect for *MSs' essential State functions*. Despite that, AG Sharpston in her very brief discussion of the claim referred to case-law pertaining to *national identity*.[24] She summarized that Poland and Hungary relied on art. 72 TFEU read together with art. 4(2) TEU, claiming that these two provisions established their right to disapply the relocation decision in order to "ensure social and cultural cohesion, as well as to avoid potential

[21] *Slovakia and Hungary v Council* cit. para. 302.

[22] *Ibid.* para. 303.

[23] *Slovakia and Hungary v Council* cit. paras 304-305.

[24] Joined Cases C-715/17, C-718/17, and C-719/17 *Commission v Poland, Hungary and Czech Republic* ECLI:EU:C:2019:917, opinion of AG Sharpston.

ethnic and religious conflicts", citing the second and third sentence of art. 4(2) TEU.[25] She only briefly referenced the CJEU's *Commission v Luxembourg*[26] ruling and concluded that even though MSs have a legitimate interest in preserving social and cultural cohesion, in this particular case that interest might have been safeguarded effectively by other and less restrictive means than a unilateral and complete refusal to fulfil their obligations under EU law.[27]

In *Commission v Luxembourg* case, the CJEU reviewed a requirement of Luxembourgish law according to which notaries must have Luxembourgish nationality. The Commission alleged such a nationality requirement was contrary to the freedom of establishment (ex art. 43 Treaty establishing the European Community (TEC), now art. 49 TFEU), while the government claimed that the profession of notaries fell within the exception of the first paragraph of art. 45 EC (now art. 51 TFEU) as an activity which involves a direct and specific connection with the exercise of official authority. The CJEU found no such connection.[28] Activities of notaries were undoubtedly carried out in the public interest, but not in the capacity of public authority.[29] Additionally, though, the government also argued that because Luxemburgish language capability is necessary in the performance of notarial activities, the nationality condition ensures respect for the history, culture, tradition and national identity of Luxembourg, bringing into play the national identity clause (art. 6(3) TEU at the time). The CJEU was not persuaded by this line of reasoning. Acknowledging that the protection of national identity is a legitimate interest recognized by EU law, the CJEU emphasized that it was the nationality, not language, which was at stake. The same aim could have been "effectively safeguarded otherwise than by a general exclusion of nationals of the other Member States".[30] In other words, the CJEU did not raise any principal objections to the claim; it merely noted the MSs' interest could have been safeguarded otherwise, thus failing the necessity part of the proportionality test.

By relying on case-law relating to the interpretation of the Union's obligation to respect national identities, the AG clearly signalled national identity provided the appropriate legal background for assessment of the art. 4(2) TEU claim put forward by the defendant MSs. Notably, she did not distinguish *Commission v Poland, Hungary and Czech Republic* case from *Commission v Luxembourg*. Rather, she treated the essential state function claim and the interest in preserving national language as a part of national identity in the same way.[31] The question is, first, was AG Sharpston's approach to the essential state functions claim grounded in a widely accepted interpretation of art. 4(2) TEU clauses of national identity and essential state functions?

[25] *Ibid.* para. 224.
[26] Case C-51/08 *Commission v Luxembourg* ECLI:EU:C:2011:336.
[27] *Commission v Poland, Hungary and Czech Republic*, opinion of AG Sharpston, cit. para. 227.
[28] *Commission v Luxembourg* cit. para. 92.
[29] *Ibid.* paras 95–96.
[30] *Ibid.* para. 124.
[31] See *Commission v Poland, Hungary and Czech Republic*, opinion of AG Sharpston, cit. paras 225–227.

III. Exploring the concept of essential state functions

III.1. Art. 4(2) TEU, national identities and essential state functions: two clauses, two separate concepts?

To answer the question in short, the AG's approach in *Commission v Poland, Hungary and Czech Republic* was not entirely exceptional. In fact, the relation between national identity and essential state functions seems to be a contested one.

Starting with the Treaty text itself, it is not entirely clear whether we should really speak of one or two concepts. Both the first and second sentence of art. 4(2) TEU open with a similar phrase "[the Union] shall respect". That would suggest the latter sentence does not form a continuum with the former. Were it the opposite, and essential state functions were considered a matter "inherent in" national identity, there would be no need to repeat the opening phrase. Thus, the wording of art. 4(2) TEU implies that the EU is bound to respect the equality, national identity, and essential state functions of the MSs, all three concepts being on equal footing. This understanding seems to be implicitly shared among some scholars who, while discussing national identity, refer only to a part of art. 4(2) TEU consisting of the obligation to respect "national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government" and separate essential state functions.[32] Piquani made that understanding more explicit relying on a historical argument derived from the Treaty Establishing a Constitution for Europe, from which the current wording of art. 4(2) TEU originated, noting that the national identity clause "was worded in a more detailed fashion" and "distinguished from essential functions of the State", which include "ensuring the territorial integrity of the State, maintaining law and order and safeguarding national security".[33] Therefore, one of the possible understandings of art. 4(2) TEU views essential state functions and national identity as separate concepts, hence in two separate clauses.

The above notwithstanding, a number of reasons supports the conclusion that there is no strict borders between the national identity clause and the essential state functions clause. Both clauses are included in the same paragraph of art. 4, Title I of the TEU, named "Common Provisions". Art. 4 TEU lists several fundamental constitutional principles governing the EU competences in pluralistic settings. In art. 4, the respect for national identity and essential state functions of the MSs appears alongside the principle of limited attribution

[32] *See e.g.* A von Bogdandy and S Schill, 'Overcoming Absolute Primacy: Respect for National Identity under the Lisbon Treaty' (2011) CMLRev 1417, 1425. The same approach could be tracked down in case-law, see e.g. case C-213/07 *Michaniki* ECLI:EU:C:2008:544, opinion of AG Maduro, para. 31; or case C-742/19 *Ministrstvo za obrambo* ECLI:EU:C:2021:597 para. 36.

[33] D Piqani, 'In Search of Limits for the Protection of National Identities as a Member State Interest' in M Varju (ed), *Between Compliance and Particularism* (Springer 2019) 21, 26.

of competences,[34] the principle of equality of the MSs, and the principle of sincere cooperation. These principles appear to be logically linked to each other: the article (somewhat redundantly) serves as a reminder as to who (the EU or MSs) carries out the competences, and then specifies how the competences are to be performed by the EU (by treating the MSs equally and with respect to their national identities). Respect for essential state functions plays a twofold role. First, read together with art. 4(1) TEU, it serves as a guarantee that certain central competences still belong to the Member States.[35] Secondly, in analogy to national identity clause, it represents another limit of how the EU competences are to be performed. Finally, art. 4(3) TEU stipulates that within the sphere of the EU competences, the Union and MSs owe each other a duty of sincere cooperation.

The two provisions – respect for national identities and respect for essential state functions – share even more than functional links to the EU competences. The second paragraph of art. 4 TEU could be understood as an acknowledgment of plurality of political and constitutional orders within the EU.[36] MSs share a common core of values (art. 2 TEU) but retain their distinctive self; and despite their diversity, they are entitled to equal treatment. When discussing national identity, most of the attention focuses on the diversity among MSs, i.e. what their distinct national identities consist of. But the national identity clause also serves as a guarantee of the MSs' existence[37] – a guarantee that they would not dissolve if the Union transformed into a full-fledged federal state.[38] Understanding the national identity clause this way reveals the close relationship between the first and the second sentences of art. 4(2) TEU. Once the aim of the national identity clause is to protect the existence of a MS as a state, the question of "what defines a state?" becomes inevitable. To this question, one of the possible answers looks at the functions a state performs. This goes back to the Aristotelian idea of a state characterized by both its technique and its point, suggesting the purpose of a state's very existence is the advancement of its people's well-being.[39] In the end, one of the reasons behind the mythical social contract is achievement of person's good.[40] To achieve this purpose, the state performs a wider or narrower set of functions. Considering that the purpose of the state determines a part of the state's very own nature, the functions the state fulfils in order to achieve that purpose become parts of that nature too. The question of what a state is

[34] A von Bogdandy and S Schill, 'Overcoming Absolute Primacy: Respect for National Identity under the Lisbon Treaty' cit. 1425.

[35] *Ibid.* 1426.

[36] M Claes, 'The Primacy of EU Law in European and National Law' in D Chalmers and A Arnull (eds), *The Oxford Handbook of European Union Law* (OUP 2015) 205.

[37] *Michaniki*, opinion of AG Maduro, cit. para. 31.

[38] M Claes and J-H Reestman, 'The Protection of National Constitutional Identity and the Limits of European Integration at the Occasion of the Gauweiler Case' (2015) German Law Journal 917, 932.

[39] This section was inspired by NW Barber, *The Principles of Constitutionalism* (OUP 2018) 3-10.

[40] S Freeman, 'Social Contract Approaches' in D Estlund (ed), *The Oxford Handbook of Political Philosophy* (OUP, 2012) 135.

and what a state does are thus intimately connected. So are the concepts of national identity and essential state functions.

Furthermore, there is historic evidence that the drafters of the current art. 4(2) TEU did not read the national identity clause and essential state functions clause of said provision in a separate manner, but rather as parts of a two-folded norm.[41] The origins of art. 4(2) TEU lie in art. I-5 of the Treaty establishing a Constitution for Europe. The final report of Working Group V on complementary competencies supports reading the national identity clause and the essential state function clause as having a close relationship, blurring the lines between the two clauses.[42] Under the title "Principles of the exercise of Union competence", the Working Group formulated an aim to clarify the EU "respects certain core responsibilities" of the MSs by "elaborating the fundamental principle" of respect to national identities of the MSs.[43] Afterwards, the Working Group moved to define two areas of core national responsibilities. While doing so, it combined fundamental structures and *essential functions* of a MS into the same category.[44] Moreover, the Working Group's recommendation attempted to enumerate "the essential elements of the national identity", as, *inter alia,* "fundamental structures and essential functions of the Member States, notably their political and constitutional structure, including regional and local self-government; their choices regarding language; national citizenship; territory; legal status of churches and religious societies; national defence and the organization of armed forces",[45] thus merging the categories even further.

III.2. Essential state functions as a part of constitutional identity

The argument that essential state functions are close to discussions of national identity is also evidenced by the approach of some constitutional courts to the issue. Without diving deep into the controversy of the exact relationship between constitutional identity and national identity,[46] it is safe to note that the two concepts are interrelated. Some constitutional courts have connected the issue of constitutional identity with the limits of constitutionally permissible transfers of sovereign state powers to the EU.[47] Whereas

[41] See *Final Report of Working group V* european-convention.europa.eu.

[42] For in-depth analysis, see B Guastaferro, 'Beyond the Exceptionalism of Constitutional Conflicts: The Ordinary Functions of the Identity Clause' (2012) Yearbook of European Law 263, 271–285.

[43] See *Final Report of Working group V* cit. 10.

[44] *Ibid.* 11. See also B Guastaferro, 'Beyond the Exceptionalism of Constitutional Conflicts: The Ordinary Functions of the Identity Clause' cit. 285–286.

[45] See *Final Report of Working group V* cit. 12.

[46] Compare E Cloots, 'National Identity, Constitutional Identity, and Sovereignty in the EU' (2016) Netherlands Journal of Legal Philosophy 82, 93; A von Bogdandy and S Schill, 'Overcoming Absolute Primacy: Respect for National Identity under the Lisbon Treaty' cit. 1427; F Fabbrini and A Sajó, 'The Dangers of Constitutional Identity' (2019) ELJ 457, 461.

[47] D Piqani, 'In Search of Limits for the Protection of National Identities as a Member State Interest' cit. 31.

these courts speak about the transfer of competences, we might also consider *competences* as being a concrete means of how states fulfil certain *functions*.[48] Thus, while limits on the possible transfer of power is a card played by the MSs in the context of respect to their national/constitutional identity, Faraguna noted that "[m]ost of the matters that result in constitutional identity sensitive concerns are comprised in the traditional understanding of *essential State functions* [...]".[49] (emphasis added) Let's further explore this point using two examples – German and Czech Constitutional Courts.

When speaking of national and constitutional identity on the MSs' level, the German Federal Constitutional Court must be mentioned for its leading role in establishing constitutional identity review. Its earlier case-law, subjected to rigorous scholarly scrutiny,[50] would be a prime illustration of the *functions of a state–constitutional identity–national identity* axis. Following the adoption of the Lisbon treaty, the Federal Constitutional Court interpreted art. 4(2) TEU and art. 79(3) of the *Grundgesetz*,[51] stipulating an inviolable core of the constitution, as essentially the same.[52] A part of the inviolable core of the constitution, and hence of German constitutional identity, is the requirement that Germany remains a viable and independent political community. In order for it to stay so, transfer of competences to the EU must remain limited,[53] so that

> "sufficient space is left to the Member States for the political formation of the economic, cultural and social living conditions, [...] in particular the private sphere of their own responsibility and of political and social security, protected by fundamental rights, as well as to political decisions that rely especially on cultural, historical and linguistic perceptions and which develop in public discourse in the party political and parliamentary sphere of public politics".[54]

[48] After all, even EU competencies are partly defined as functions, as B. Guastaferro noted. See B Guastaferro, 'Beyond the Exceptionalism of Constitutional Conflicts: The Ordinary Functions of the Identity Clause' cit. 273.

[49] P Faraguna, 'Taking Constitutional Identities Away from the Courts' (2016) BrookJIntlL 491, 573.

[50] See e.g. M Polzin, 'Constitutional identity, Unconstitutional Amendments and the Idea of Constituent Power: The Development of the Doctrine of Constitutional Identity in German Constitutional Law' (2016) ICON 411.

[51] "Amendments to this Basic Law affecting the division of the Federation into Länder, their participation on principle in the legislative process, or the principles laid down in Articles 1 and 20 shall be inadmissible".

[52] See German Federal Constitutional Court judgment of 30 June 2009 2 BvE 2/08 *Lisbon judgment* para. 240. See alsoJ-H Reestman, 'The Franco-German Constitutional Divide: Reflection on National and Constitutional Identity' (2009) EuConst 374, 375.

[53] M Claes and JH Reestman, 'The Protection of National Constitutional Identity and the Limits of European Integration at the Occasion of the Gauweiler Case' cit. 925.

[54] German Federal Constitutional Court Lisbon judgment cit. para. 249. See also M Claes and J-H Reestman, 'The Protection of National Constitutional Identity and the Limits of European Integration at the Occasion of the Gauweiler Case' cit. 925.

Despite declining the idea that there is "a pre-determined number of types of sovereign rights" that should remain in the hands of the state,[55] the Federal Constitutional Court provided quite an extensive list of essential areas where the democratic principle comes into play,[56] and, moreover, identified five areas of particular sensitivity.[57] As Claes and Reestman explained, these five areas of competences are closely linked to German constitutional identity, making any possible conferral of powers limited by the need to preserve a "democratic reserve competence".[58] From the requirement that a state remains a sovereign and democratic state despite its participation in supranational European integration, it follows that the state is obliged to perform some of its functions, and consequently, it must not confer certain competences to the supranational institution.[59] While the court later departed from its notion that national identity under art. 4(2) TEU and constitutional identity under art. 79(3) *Grundgesetz* go hand in hand,[60] that did not affect the notion of limited transfer of competences.

Inspired by its German counterpart, the Czech Constitutional Court (*Ústavní soud*)[61] used somewhat similar perspective in its EU law-friendly judgments concerning the Lisbon Treaty, albeit it did not refer to constitutional or national "identity".[62] The applicants in two proceedings of *ex ante* constitutional review of the international treaty challenged,

[55] German Federal Constitutional Court Lisbon judgment cit. para. 248.

[56] See *ibid.* para. 249.

[57] German Federal Constitutional Court Lisbon judgment cit. para. 252: (1) decisions on substantive and formal criminal law, (2) the monopoly on the use of force by the police within the state and by the military towards the exterior, (3) fundamental fiscal decisions on public revenue and public expenditure, (4) decisions on the shaping of living conditions in a social state, and (5) decisions of particular cultural importance, for example on family law, the school and education system and on dealing with religious communities.

[58] M Claes and JH Reestman, 'The Protection of National Constitutional Identity and the Limits of European Integration at the Occasion of the Gauweiler Case' cit. 926.

[59] Assuming that "performing a function" inherently entails decision-making capacity, too.

[60] German Federal Constitutional Court order of 14 January 2014 2 BvR 2728/13 *OMT* para. 29.

[61] I use the example of Czech Constitutional Court because it is one of the *Visegrad* Group MSs constitutional courts. At the same time, apart from its *Holubec* ruling (judgment of 31 January 2012 Pl. ÚS 5/12) resulting in pronouncing CJEU's case C-399/09 *Landtová* ECLI:EU:C:2011:415 as an *ultra vires* decision, the Czech Constitutional Court mostly shows a favourable stance towards the EU law. Its independence has not been compromised, unlike Polish and Hungarian Constitutional Courts. For more detailed account of its constitutional identity case-law, see D Kosař and L Vyhnánek, 'Constitutional Identity in the Czech Republic: A New Twist on an Old-Fashioned Idea?' in C Calliess and G van der Schyff (eds), *Constitutional Identity in a Europe of Multilevel Constitutionalism* (CUP, 2019) 85–113.

[62] There were two separate proceedings, initiated by two different applicants' groups. In Czech Constitutional Court judgment of 26 November 2008 Pl. ÚS 19/08, the Czech Constitutional Court laid out its approach to the review. Most importantly, it specified that it would review the treaty's compliance with the constitutional order as a whole, but, nevertheless, ascribed the biggest importance to the "material core of the Constitution" (art. 9(2) of the Constitution; see paras 91-93 of judgment Pl. ÚS 19/08). During delay caused by the president's Klaus refusal to ratify the treaty, another application for constitutional review was filed, resulting in Czech Constitutional Court judgment of 3 November 2009 Pl. ÚS 29/09. The latter judgment draws from the former to a large extent.

among others, that foreseen transfer of competences to the EU would have striped Czechia its sovereignty, in breach of core constitutional principles (art. 1(1) of the Constitution (*Ústava*)). On one hand, the Constitutional Court refused to provide an exhaustive list of competences that must not be transferred to the EU in order to protect state's sovereignty, because that question is of political nature and the court, guided by the principle of judicial self-restraint, did not see itself fit to rule in an abstract, general manner.[63] It declared that, in any case, the transfer has to be a limited one, transferred competences need to be sufficiently clearly specified, and it must be ensured that the characteristics of the state as sovereign, democratic, and based on rule of law and respect to human rights are not affected.[64] Notwithstanding its declared reluctance to provide concrete guidance, the court went on and discussed that, in particular, competences under common defence and security policy do not violate the constitutional characteristics of sovereignty (art. 1(1) Constitution).[65] Hence, the Czech Constitutional Court also concluded that the mere notion of statehood requires a state to perform certain functions and competences, even though it refrained from providing any list, unlike its German counterpart.

III.3. The CJEU's approach to essential state functions

These conceptual links between national identity and essential state functions also find their expression in the CJEU's case-law, as far as could be established. The issue of essential state functions is often not reflected in the CJEU's ruling, but remains discussed only in opinions of advocates general.[66] Overall, it does not seem to be particularly well-developed in the CJEU's case-law.

First, as for the content of essential state functions, the term is usually connected with functions listed in the second sentence of art. 4(2) TEU: territorial integrity of the State, maintaining law and order[67] and safeguarding national security. Frequently mentioned are the element of national security as the sole responsibility of the MSs,[68] sometimes used with a reference to art. 72 TFEU, as in *Commission v Poland, Hungary and Czech Republic*, or to art. 346 TFEU.[69] The language of the essential state functions clause, however, does not rule out the possibility of adding more elements under the term. For instance, in *Sindicatul*

[63] See Czech Constitutional Court judgment Pl. ÚS 19/08 cit., paras 94-111 (see para. 109 for the "political question" quote); *mutatis mutandis* judgment Czech Constitutional Court Pl. ÚS 29/09 cit., paras 111–113.

[64] Czech Constitutional Court judgment Pl. ÚS 19/08 cit., para. 97.

[65] See Czech Constitutional Court judgment P. ÚS 19/08 cit., paras, and Czech Constitutional Court judgment Pl. ÚS 29/09 cit., paras 145 and following.

[66] Examples include case C-137/09 *Josemans* ECLI:EU:C:2010:774; case C-300/11 *ZZ* ECLI:EU:C:2013:363; and case C-601/15 PPU *N.* ECLI:EU:C:2016:84.

[67] E.g. case C-137/09 *Josemans* ECLI:EU:C:2010:433, opinion of AG Bot.

[68] E.g. case C-298/15 *Borta* ECLI:EU:C:2016:921, opinion of AG Sharpston.

[69] Case C-469/17 *Funke Medien NRW* ECLI:EU:C:2018:870, opinion of AG Szpunar.

Familia Constanţa,[70] the CJEU opined that the protection of minors belongs among essential state functions. The preliminary question asked if foster parents, who on the basis of an employment contract with a public authority receive and integrate a child into their home and provide on a continuous basis for the harmonious upbringing and education of that child, are workers within the meaning of Directive 2003/88[71] and fall within the exception of art. 1(3) of Directive 2003/88, read in conjunction with art. 2(2) of Directive 89/391.[72] In essence, whether foster parents belong among workers in certain public services activities, such as armed forces or police, who are for the peculiar character of their work excluded from the health and safety requirements of the directives. Answering in the affirmative, the CJEU held that foster parenting is a public service activity. To be considered a public service worker, it suffices that work is carried out for a private person who performs a task in the public interest, which forms part of the essential functions of the state and does so under the control of the public authorities.[73] Alas, the CJEU did not provide much guidance on why the protection of minors belongs under essential state functions[74] nor whether the concept of essential state functions as used here (i.e. outside art. 4(2) TEU context) is the same as essential state functions under art. 4(2) TEU. In light of *Ministrstvo za obrambo,* which also concerned art. 2 of Directive 89/391 as well as art. 4(2) TEU, it seems likely that the two notions of essential state functions are indeed related.

In *Ministrstvo za obrambo*, the CJEU importantly elaborated on the concept of essential state functions. The case concerned a Slovenian army officer who requested overtime remuneration for seven days per month of uninterrupted guard duty which required that he was contactable and present at all times at the barracks where he was posted.[75] The Slovenian Supreme Court doubted whether the exception provided for in art. 2 of Directive 89/391 applies to members of military personnel in peacetime and workers in the defence sector.[76] The CJEU opened its examination of the issue with the intervening states' objection that organizational arrangements of armed forces of the MSs fall outside the scope of EU law.[77] The principal task of armed forces, i.e. preservation of territorial

[70] Case C-147/17 *Sindicatul Familia Constanţa and Others* ECLI:EU:C:2018:926.

[71] Directive 2003/88/EC of the European Parliament and of the Council of 4 November 2003 concerning certain aspects of the organisation of working time.

[72] Council Directive 89/391/EEC of 12 June 1989 on the introduction of measures to encourage improvements in the safety and health of workers at work. Art. 2(2) of the directive reads: "This Directive shall not be applicable where characteristics peculiar to certain specific public service activities, such as the armed forces or the police, or to certain specific activities in the civil protection services inevitably conflict with it".

[73] *Sindicatul Familia Constanţa* cit. para. 56.

[74] The whole para. 61 of the judgment reads: "Their work therefore contributes to the protection of minors, which is a task in the public interest forming part of the essential functions of the State".

[75] In this period, he received wages for eight hours of working time, but claimed the whole time when he was at his superiors' disposal should be remunerated as working overtime.

[76] *Ministrstvo za obrambo* cit. paras 23, 25.

[77] See case C-186/01 *Dory* EU:C:2003:146 para. 35.

integrity and national security, falls within the essential state functions of art. 4(2) TEU, the court opined.[78] Even though it is up to the MSs "alone to define their essential security interests and to adopt appropriate measures to ensure their internal and external security, including decisions relating to the organisation of their armed forces, the mere fact that a national measure has been taken for the purpose of protecting national security cannot render EU law inapplicable and exempt the Member States from their obligation to comply with that law".[79] Rather, art. 4(2) TEU requires that the application of EU law should not hinder the proper performance of those essential functions. Therefore, rules on the organization of working time must not be interpreted in such a way as to prevent the armed forces from fulfilling their tasks and, consequently, to adversely affect the essential functions of the state (the preservation of its territorial integrity and the safeguarding of national security).[80] As a result, the CJEU suggested delicate distinguishing between actual military operations and operational training,[81] falling outside the scope of EU law, and other army activity. It is apparent the CJEU put emphasis on respect for essential state functions as an interpretive principle of EU law, which can only justify non-applicability of EU law in extraordinary circumstances, when it is impossible to interpret EU law in a way not adversely affecting the performance of essential state functions.

Despite the specific content of essential state functions elaborated by the CJEU, there are two types of visible links between the national identity and essential state functions clauses. First, CJEU's case-law mixes elements protected under national identity and essential state functions. This may be explained by the similarity of the two concepts' aim, as I argued earlier. An example of dual qualification of one issue under both national identity and essential state functions is the internal self-organization of a MS. AG Mengozzi in *Remondis*[82] discussed whether acts effecting transfers of powers between administrative authorities may constitute a public contract and thus be subject to the relevant EU rules. He positioned the issue outside the scope of EU law because self-organization of a MS and internal delegation of powers fall within essential state functions. At the same time, the CJEU considered a related question of the division of competences between *Länder* and the federal state as a matter of national identity, "inherent in their fundamental structures, political and constitutional, including regional and local self-government".[83] Naturally, the difference here could lie in the more specific question at hand: while federalism in Germany is a core issue of national identity (and constitutional identity, see German Federal Constitutional Court above), qualification of internal delegation of powers within the state might not bear national identity significance, yet deserve protection under art. 4(2) TEU's essential state functions clause. It is an open question

[78] *Ministrstvo za obrambo* cit. para. 37.
[79] *Ibid.* para. 40.
[80] *Ibid.* para. 43.
[81] *Ibid.* paras 73-83.
[82] Case C-51/15 *Remondis* ECLI:EU:C:2016:504, opinion of AG Mengozzi, paras 38-39.
[83] Case C-156/13 *Digibet and Albers* ECLI:EU:C:2014:1756 paras 33–34.

whether the CJEU would employ a different standard of proportionality assessment if the claim rested on national identity than on essential state functions.

Therefore, a more telling is the second link, cross-referencing between issues related to essential state functions and national identity. The cross-reference made by AG Sharpston in *Commission v Poland, Hungary and Czech Republic* is not the only one in the records of the CJEU. Similarly, AG Øe in *Ministrstvo za obrambo*[84] resorted to a reference ("by analogy") to AG Kokott's opinion in *G4S Secure Solutions (Achbita),* who reasoned that respect for national identity does not justify limiting the scope of secondary law, but requires that "application of that directive [2000/78] must not adversely affect the national identities of the Member States. National identity does not therefore limit the scope of the Directive as such, but must be duly taken into account in the interpretation".[85] AG Øe relied on the quote in order to argue that just like in national identity cases, application of secondary law must not negatively affect the performance of essential state functions by the MSs.[86]

While other case-law refers solely to essential state functions without making any direct link (be it textual or functional) to national identity,[87] there are, moreover, similarities in the way the CJEU treats both concepts. MSs are free in defining their national security or public order needs, which essentially amounts to defining how to perform some of their essential state functions. However, they must not do so unilaterally, entirely without the supervision of CJEU.[88] Invoking the public order or national security, supported by the essential state functions clause, does not exclude the applicability of EU law as such.[89] On the contrary, the principle of respect for essential state functions speaks more to the manner in which EU law is to be adopted and applied, so that it does not "stand in the way" of the essential state functions.[90] Therefore, a derogation from EU law could be justified only when necessary and proportionate. If – in light of a particular situation – the essential state function could be fully carried out in any other way, the CJEU would not uphold a MS's unilateral derogation from secondary law.[91]

Similarly, a national identity claim does not provide a free ticket for unilateral derogations from EU law and it does not provide an exception to the primacy of EU law.[92]

[84] Case C-742/19 *Ministrstvo za obrambo* ECLI:EU:C:2021:77, opinion of AG Øe, para. 47.

[85] Case C-157/15 *G4S Secure Solutions* ECLI:EU:C:2016:382, opinion of AG Kokott, para. 32.

[86] *Ministrstvo za obrambo*, opinion of AG Øe, cit. paras 46 and 47.

[87] See e.g. *Josemans*, opinion of AG Bot, cit.

[88] Generally e.g. case C-601/15 PPU *N.* ECLI:EU:C:2016:85, view of AG Sharpston, paras 81.82.

[89] Case C-623/17 *Privacy International* ECLI:EU:C:2020:790, para. 44. See also case C-300/11 *ZZ* ECLI:EU:C:2012:563, opinion of AG Bot, paras 66–73; *Ministrstvo za obrambo*, opinion of AG Øe, cit. paras 42-48.

[90] *Ministrstvo za obrambo*, opinion of AG Øe, cit. para. 47.

[91] Case C-808/18 *Commission v Hungary (Accueil des demandeurs de protection internationale)* ECLI:EU:C:2020:1029 para. 262 (referencing Commission v Poland, Hungary and Czech Republic). See also S Progin-Theuerkauf, 'Defining the Boundaries of the Future Common European Asylum System with the Help of Hungary?' (2021) European Papers (European Forum Insight of 29 March 2021) www.europeanpapers.eu.

[92] M Claes, 'The Primacy of EU Law in European and National Law' cit. 205.

Arguments based on national identity should lead to two-way dialogue between national authorities, especially courts, and the CJEU in the role of "the ultimate interpreter" of art. 4(2) TEU.[93] Despite the fact that national identity encompasses only fundamental constitutional provisions, i.e. provisions stipulating "fundamental structures" of a MS,[94] art. 4(2) TEU does not accord them "automatic priority".[95] Instead, a balancing exercise between different interests at stake requires that a restriction should not exceed what is necessary.[96] The manner in which the CJEU treats national identity claims and essential state functions claims thus seem to have significant commonalities.

The CJEU also expressly compared, or even equated, respect to essential state functions to a public policy reservation. In order to justify a restriction on rights and freedoms guaranteed under EU law, including fundamental rights and freedoms protected by the Charter of Fundamental Rights of the European Union,[97] a MS must prove a genuine and sufficiently serious threat to the requirements of public policy affecting one of the fundamental interests of society.[98] That could be again compared to national identity claims, which the CJEU in the pre-Lisbon setting also decided in the framework of public policy reservations.[99] Even post-Lisbon, its approach has not significantly changed in its substance.[100] Consider briefly the well-known *Omega* judgment,[101] labelled as "the most significant" (pre-Lisbon) case, in which the CJEU acknowledged relevance of MSs' constitutional arrangements.[102] In *Omega*, a restriction on the freedom to provide services, or more specifically, to operate a laser-game venue, was imposed for public policy reasons according to art. 55 TEC (now art. 62 TFEU).[103] The CJEU recalled that the concept of "public policy" must be interpreted strictly and within the control of Community institutions, despite the fact that MSs retain a margin of discretion because public policy varies across MSs and time.[104] Considering laser-game to be "a simulated act of violence", the national

[93] D Piqani, 'In Search of Limits for the Protection of National Identities as a Member State Interest' cit. 26.

[94] *Ibid.* 39. See also LFM Besselink, 'National and Constitutional Identity Before and after Lisbon' (2010) Utrech Law Review 36, 49.

[95] A von Bogdandy and S Schill, 'Overcoming Absolute Primacy: Respect for National Identity Under the Lisbon Treaty' cit. 1441.

[96] D Piqani, 'In Search of Limits for the Protection of National Identities as a Member State Interest' cit. 40-41.

[97] See *ZZ*, opinion of AG Bot, cit. on the interference of national security interest with art. 47 of the Charter.

[98] *Josemans*, opinion of AG Bot, cit. para. 116.

[99] Compare the CJEU's reasoning in two well-known cases, namely case C-36/02 *Omega* ECLI:EU:C:2004:614 and case C-208/09 *Sayn-Wittgenstein* ECLI:EU:C:2010:806.

[100] Z Vikarska, *National Identity and EU Internal Market Law* (Master of Philosophy thesis, University of Oxford 2017, on file with the author) 62.

[101] *Omega* cit.

[102] LFM Besselink, 'National and Constitutional Identity Before and after Lisbon' cit. 45.

[103] *Omega* cit. para. 28.

[104] *Ibid.* paras 30-31.

authorities decided it violated human dignity as a fundamental value enshrined in the national constitution, and thus presented a threat to public policy.[105] Finding that the restriction was necessary, and no less restrictive measures were available, the CJEU found it in compliance with the freedom to provide services.[106]

As section III has showed, national identity and essential state functions work side-by-side. Even though textually art. 4(2) TEU contains three clauses – equality, national identity, and essential state functions, with an additionally stressed component of national security – the two latter categories are separate, yet intimately connected as to their aim. Moreover, some national constitutional courts tend to include essential state functions into the constitutional identity which they protect. While the CJEU's case-law is slightly ambiguous regarding what extent to separate national identity and essential state functions, it uses the same methodology in review of both categories, relying on proportionality. In that light, the fact that AG Sharpston dealt with the essential state functions claims concerning Council relocation decisions by quoting national identity case-law, could be justified.

IV. Essential state functions: pushing the concept further

In the last section of this *Article*, I want to stress two consequences of the conclusion that national identity and essential state functions are separate yet closely connected concepts. First, in some instances, arguments of the MSs could rest on any of the two concepts, national identity or essential state functions. Secondly, given this similar nature, intrinsic dangers connected to use — and more importantly misuse — of national identity claims do also apply to essential state functions claims. I again rely on *Commission v Poland, Hungary and Czech Republic*.

IV.1. Understanding national identity

My argument rests on understanding national identity as a wide and open concept. A primary reason why the concept is open-ended one is the ambiguous nature of the term itself, even under the legal framework of art. 4(2) TEU. Bogdandy and Schill stressed that national identity in art. 4(2) TEU became a legal concept, because its established link to the "fundamental political and constitutional structures" of a respective MS.[107] That led them to argue that "only elements somehow enshrined in national constitutions or in domestic constitutional processes can be relevant for art. 4(2) TEU. By contrast, an entirely pre-political or pre-constitutional understanding of national identity is not protected".[108]

[105] *Ibid.* para. 32.

[106] *Ibid.* paras 40-41.

[107] A von Bogdandy and S Schill, 'Overcoming Absolute Primacy: Respect for National Identity Under the Lisbon Treaty' cit. 1427.

[108] *Ibid.* 1430.

Nevertheless, in my opinion, this does not mean national identity is stripped of all cultural content. Faraguna suggests a similar point, while distinguishing between ethnic-centred and civic conception of national identity.[109] He saw the civic conception, which still includes cultural elements, as fitting for art. 4(2) TEU purposes. Even if we accept von Bogdandy and Schill's opinion that the national identity clause in art. 4(2) TEU has an essentially constitutional content, we also have to acknowledge some constitutional norms in fact constitutionalize certain cultural norms. By doing that, they not only make them legally binding, but also elevate them above the ordinary legislation and out of the reach of ordinary legislature. After all, law as a normative system does not draw its content in a vacuum. Fabbrini and Sajó even argued, concerning identity, that "in the deep bosom of the concept lie its cultural roots and such roots may be embedded in a nationalist and even nativist soil".[110] The cultural dimension may be somewhat obscured by the wording of art. 4(2) TEU, which refers to "fundamental structures, political and constitutional". But in the end, national identity's content could be more far reaching than the wording would suggest.

To illustrate the cultural dimension of national identity, the CJEU's case-law provides a number of examples of when the CJEU accepted that some cultural issues belong to the national identity sphere. In fact, some of the most well-known national identity cases fall into this category. National identity may cover the promotion of national language, including the requirement that people in certain positions speak that language;[111] the way citizens spell their name;[112] prohibition of nobility titles motivated by historic developments leading to strong republican appeal;[113] or even standards of family relationships, such as a definition of marriage.[114] All these bear a strong cultural dimension, and in some instances also hide a preference for "us" against "the other". A good example is *Commission v Luxemburg*. In that case, national identity was argued in relation to promoting the use of a national language. This time, unlike in *Groener*, that aim was not pursued by a linguistic knowledge requirement, but directly by the Luxemburgish nationality requirement. Therefore, the CJEU found the public interest could have been effectively safeguarded in other ways than by a general exclusion of nationals of other MSs.[115]

[109] "According to an ethnic-centered reading of 'nation', the concept is related to the existence of common elements in a community: language, history, customs, and ethnicity. In contrast to this view, the civic conception of 'nation' identifies the notion with a subjective sense of belonging to a community, based on very different elements, such as citizenship, law, culture, and religion"; see P Faraguna, 'Taking Constitutional Identities Away from the Courts' cit. 499.

[110] F Fabbrini and A Sajó, 'The dangers of constitutional identity' cit. 471.

[111] Case C-379/87 *Groener v Minister for Education and the City of Dublin Vocational Educational Committee* ECLI:EU:C:1989:599.

[112] Case C-391/09 *Runevič-Vardyn and Wardyn* ECLI:EU:C:2011:291.

[113] *Sayn-Wittgenstein* cit.

[114] Case C-673/16 *Coman and Others* ECLI:EU:C:2018:385.

[115] *Commission v Luxemburg* cit. para. 124.

Indeed, some scholars warned that national identity brings inherent dangers.[116] In order to mitigate them, they have prescribed national identity as vast, but not limitless concept. A wide consensus supports the idea that national identity is not boundless. The point of reference should be art. 2 TEU providing a list of values EU aims to promote and protect. Rodin similarly pointed out that while art. 2 TEU values should become a part of MSs' DNA, the concept of national identity is broader and some of its elements MSs define at the national level independently; but these "regardless of the EU context, still have to comply with the values of Article 2 TEU". Thus, only national identity compliant with art. 2 TEU deserves protection.[117]

It has to be admitted that the opinion of the CJEU on the limits of national identity has so far been less clear. Of course, the CJEU's requirement of proportionality is one factor limiting which national identity arguments succeed (and when).[118] But looking at the content of claims, the CJEU is reluctant to interfere with what a MS pleads as its national identity.[119] The CJEU's hesitance concerning the merits of the claims is understandable. It finds itself in a peculiar position because the content of the national identity claims must be shaped by the MSs', not judges in Luxembourg. Hence, raising any objections towards the content of the national identity claim would amount to walking on thin ice in regard to the legitimacy of the CJEU's action.

Nevertheless, the CJEU has recently showed its willingness to provide more tangible protection of common values of art. 2 TEU in well-known legal challenge to the so called conditionality mechanism.[120] The CJEU recalled that "the European Union is founded on values, such as the rule of law, which are common to the Member States and that, in accordance with Article 49 TEU, respect for those values is a prerequisite for the accession to the European Union of any European State applying to become a member of the European Union".[121] It is a "fundamental premiss [of the EU legal order] that each Member State shares with all the other Member States, and recognises that they share with it, the common values, contained in Article 2 TEU".[122] In even stronger terms, the common values form

[116] See e.g. A von Bogdandy and S Schill, 'Overcoming Absolute Primacy: Respect for National Identity Under the Lisbon Treaty' cit. 1430.

[117] S Rodin, 'National Identity and Market Freedoms after the Treaty of Lisbon' (2011) Croatian Yearbook of European Law and Policy 11, 15.

[118] To this end, see, e.g., case C-202/11 *Las* ECLI:EU:C:2013:239.

[119] M Claes and JH Reestman, 'The Protection of National Constitutional Identity and the Limits of European Integration at the Occasion of the Gauweiler Case' cit. 937. There is an ongoing discussion whether the CJEU should embrace national identity arguments more responsively. See, e.g., S Weatherill, 'Distinctive Identity Claims, Article 4(2) TEU (and a Fleetingly Sad Nod to Brexit)' (2016) Croatian Yearbook of European Law and Policy XI-XII; P Faraguna, 'Taking Constitutional Identities Away from the Courts' cit. 521.

[120] Cases C-156/21 *Hungary v Parliament and Council* ECLI:EU:C:2022:97 and case C-157/21 *Poland v Parliament and Council* ECLI:EU:C:2022:98.

[121] *Poland v Parliament and Council* cit. para. 142.

[122] *Ibid.* para. 143.

"the very identity of the European Union as a common legal order. Thus, the European Union must be able to defend those values, within the limits of its powers as laid down by the Treaties",[123] and the duty of MSs to respect them flows directly from their EU membership.[124] It remains to be seen how this translates into art. 4(2) TEU context.

IV.2. Essential state functions: wider scope brings risks

Let's now compare and contrast essential state functions with national identity. National identity depends, by definition, on the self-perception of a particular MSs. On the contrary, essential state functions make the appearance of a more general and objective concept than national identity. While national identity builds mostly on what is peculiar to the specific MS, and thus perhaps running against the common set of values, functions of state, in particular the essential ones, seem to refer to a more universal concept. It could be assumed that common EU values emerged alongside established notion of essential functions of states, making them appear less likely to be on a collision course with art. 2 TEU. Coupled with fear (and experience) of exploitative national identity claims, essential state functions could appeal to the MSs as a convenient Treaty vehicle for their claims. What adds to their appeal is also the fact that the concept of essential state functions is an open-ended one too. There will be some common ground among MSs in what essential state function entails. Art. 4(2) TEU states some of the essential state functions directly in its text, and we might infer there would be broad consensus on these functions.

However, societies hold different ideas about the role and nature of the state. Hence, essential state functions may differ significantly. Even under the commonly accepted elements of essential state functions, the exact idea about the content, purpose, and state's interest varies a lot among the MSs. As a result, the respect for essential state functions could very well serve as a vehicle for bringing forward claims of varied content and flavour. As showed by the temporary relocation dispute, the scope of essential state functions could be far reaching and encompass also peculiarities more likely to appear under the coat of national identity. The essence of essential functions claim used by Poland in the temporary relocation mechanism (see *supra* section II) was far from universal. Instead, it was heavily laden with cultural content that we could expect rather in national identity claims. Essential state functions thus provide room for interpretation that provides significant flexibility too.

IV.3. Lessons learnt from *Commission v Poland, Hungary and Czech Republic*

It is worth noting that building the claim on essential state functions was in a way surprising, since it was national identity that was used as a figure of speech during the migration

[123] *Ibid.* para. 145.
[124] *Ibid.* para. 169.

crisis, replacing sovereignty as the main argumentative tool. While it has been years since some prominent scholars pronounced the concept of sovereignty outdated,[125] the underlying concerns remained and were transformed into identity-based claims.[126] Nevertheless, if one should name one area where sovereignty has retained its argumentative significance, the choice could well fall on migration and asylum matters. The issue of who can cross the border and settle in a country is still generally considered to be an issue of sovereign competence of a state.[127] Reframing the sovereignty concerns in terms of national identity, let alone essential state functions, was a novel move.

Even though the EU reacted to the refugee crises by adopting a number of asylum policies with a more security oriented and less humanitarian or human rights enhancing perspective,[128] it comes as no surprise that the refugee crisis provided fertile soil for political rhetoric asserting an urgent need to take the policy decision-making back to the nation state level, pointing out the "will of the people" prioritizing their own security over care for unknown "others" because of humanitarian concerns. Such sovereignty claims, Penasa and Romeo argued, found their epicentre in countries of the *Visegrad* Group and were accompanied by visions of homogenous political community, protection of the culture of "own people" and the duty to preserve *the identity* of the state and the nation.[129]

According to De Witte and Tsourdi, the core of the legal challenge to the temporary relocation mechanism (*Slovakia and Hungary v Council*) concerned the extent of MSs' sovereignty in asylum and migration matters.[130] The sovereignty argument in *Slovakia and Hungary v Council* being unsuccessful, the MSs re-framed their concerns into art. 4(2) TEU essential state functions claim. Yet, national identity might have been a more probable vehicle for such a transformation than the essential state function clause. As Bast and Organ suggested, any immigration policies raise the issue of identity "by mirroring not

[125] JHH Weiler, 'In Defence of the Status Quo: Europe's Constitutional Sonderweg' in JHH Weiler and M Wind (eds), *European Constitutionalism Beyond the State* (CUP, 2001) 7–24.

[126] As Wilkinson noted, "it is identity that fills the gap, whether constitutional, cultural, or consumption-oriented". See M Wilkinson, 'Beyond the Post-Sovereign State?: The Past, Present, and Future of Constitutional Pluralism' (2019) CYELS 6, 19.

[127] Judgments of the European Court of Human Rights routinely include a statement that states bound by the European Convention on Human Rights "have the right, as a matter of well-established international law and subject to their treaty obligations, including the Convention, to control the entry, residence and expulsion of aliens". See e.g. ECtHR *Ilias and Ahmed v Hungary* App. no. 47287/15 [21 November 2019], para. 125.

[128] S Penasa and G Romeo, 'Sovereignty-Based Arguments and the European Asylum System: Searching for a European Constitutional Moment?' (2020) European Journal of Migration and Law 11, 26. See also S Lavenex, ''Failing Forward' Towards Which Europe? Organized Hypocrisy in the Common European Asylum System' (2018) JComMarSt 1195.

[129] S Penasa and G Romeo, 'Sovereignty-Based Arguments and the European Asylum System: Searching for a European Constitutional Moment?' cit. 14–17.

[130] B De Witte and E Tsourdi, 'Confrontation on Relocation. The Court of Justice Endorses the Emergency Scheme for Compulsory Relocation of Asylum Seekers within the European Union: Slovak Republic and Hungary v. Council' cit. 1476.

only the qualities that 'we' value in others, but also the essentials that define 'us' as a nation".[131] Questioning identity is, therefore, intrinsically linked to the issue of accepting refugees. Coman and Leconte's research suggested that some Central and Eastern European political leaders had employed the protection of identity alongside a long-established argument that the EU constrains sovereignty and the sovereign rights of the MSs.[132] Leaders such as Orbán had claimed to protect the European identity – incoming migrants had been pictured as a threat to Europe's cultural identity and as a threat to European self-rule.[133] Thus, the firm stance against migration was, in that understanding, a stance for the protection of Europe.[134] Moreover, identity was not only deployed as a figure of political speech. Especially in Hungary, identity as a legal concept of national constitutional law underwent major developments that are directly linked to the relocation mechanism dispute.[135] According to some scholars, the same legal development also evidences the ethno-cultural understanding of a nation, and hence of a national identity.[136] Nevertheless, in *Commission v Poland, Hungary and Czech Republic* the MS did not transform the national identitarian rhetoric and legal developments directly into art. 4(2)

[131] J Bast and L Orgad, 'Constitutional Identity in the Age of Global Migration' (2017) German Law Journal 1587, 1590.

[132] R Coman and C Leconte, 'Contesting EU Authority in the Name of European Identity: the New Clothes of the Sovereignty Discourse in Central Europe' (2019) Journal of European Integration 855, 856.

[133] For interesting insight into the rhetoric of Orbán, see also ES Balogh, 'Viktor Orbán's "Ethnically Homogeneous" Hungary' (1 March 2017) Hungarian Spectrum hungarianspectrum.org.

[134] R Coman and C Leconte, 'Contesting EU Authority in the Name of European Identity: the New Clothes of the Sovereignty Discourse in Central Europe' cit. 862–865.

[135] The development could be described in three major steps, with a prelude in a form of a national consultation on popular opinion about migration. First, the government conducted a (constitutionally problematic) referendum asking whether Hungarians want to allow EU to mandate relocation of non-Hungarians to Hungary. The referendum rendered invalid results due to low number of casted votes. Secondly, the government tried to push an amendment to the Fundamental Law on protection of national identity and restriction of immigration to Hungary. After Orbán failed to secure required majority in order to ratify the amendment, Hungarian Constitutional Court stepped in and delivered its judgment on the request of the Commissioner of Human Rights (ombudsperson) for abstract interpretation of the Fundamental Law in connection with the Council relocation decisions. In the judgment, the Constitutional Court developed its own identity review. For deeper analysis including the national consultation, see e.g. Á Bocskor, 'Anti-Immigration Discourses in Hungary During the 'Crisis' Year: The Orbán Government's 'National Consultation' Campaign of 2015' (2018) Sociology 551; G Halmai, 'Abuse of Constitutional Identity. The Hungarian Constitutional Court on Interpretation of Article E) (2) of the Fundamental Law' (2018) Review of Central and East European Law 23; T Drinóczi and A Bień-Kacała, 'Illiberal Constitutionalism: The Case of Hungary and Poland' (2019) German Law Journal 1140. See also insightful blogposts of G Halmai and R Uitz, 'National Constitutional Identity in the European Constitutional Project: A Recipe for Exposing Cover Ups and Masquerades' (11 November 2016) *Verfassungsblog* verfassungsblog.de.

[136] T Drinóczi and A Bień-Kacała, 'Illiberal Constitutionalism: The Case of Hungary and Poland' cit. 1157. See also K Kovács, 'The Rise of an Ethnocultural Constitutional Identity in the Jurisprudence of the East Central European Courts' (2017) German Law Journal 1703, 1714.

TEU national identity claims but relied on essential state functions, stretching the understanding of the concept.

It has to be emphasized that irrespective of particular legal framing, the nature of the argument would remain deeply problematic. It is true that the "reprehensible conduct" of potentially relocated applicants feared by the Polish government would indeed be considered, depending on the circumstances, illegal or inappropriate by EU MSs' standards. Still, the claim indirectly links any relocations with a threat to national security on the basis that the relocated applicants came from different societies, which makes it more probable that they would hold culturally problematic views. But, in the context of asylum law, such objections hardly trump the need for protection.[137] Admittedly, the government did not play the cultural card directly by suggesting that it perceived such a threat from every applicant, but rather limited it to only some individuals. And those who were indeed problematic could not be properly identified. The government's response to this obstacle – a refusal to relocate anyone – treats the whole group as if they posed the danger. All that suffices for being labelled as "dangerous" is a certain nationality, which is presumed to be linked to the majority culture in the country of origin. So, in the end, what the government was concerned about did not differ that much from "the cultural threat" refused by the CJEU in *Slovakia and Hungary v Council*. Yet, in *Commission v Poland, Hungary and Czech Republic,* the response of the CJEU was significantly less vocal in dismissing the claim as legally impermissible.

Had it decided to respond to the MSs' essential state functions argument openly and comprehensively, the CJEU would have faced the same issues as in national identity cases. The CJEU recognizes MSs are responsible for defining their essential interests, including how to perform their essential state functions such as securing national security. To question the MS's vision of its essential state functions would be a delicate task. Perhaps, that has led the CJEU to a more deferential response to the arguments put forward by Poland: instead of discussing the merits of Polish claims, the CJEU focused on rebutting them on the basis that the unilateral measures had exceeded what had been necessary. Hence, the response of the CJEU was less straightforward than in *Slovakia and Hungary v Council*, when the CJEU bluntly refused to take into account ethnic and linguistic homogeneity as national values worth protecting over the common EU value of solidarity. Perhaps it considered refusal of such an argument as inevitable because it too obviously contradicted the core liberal values that the EU is built upon (art. 2 TEU). Once the argument became more sophisticated and coated as essential state function, the CJEU took a more cautious approach.

Consequently, the temporary relocation mechanism dispute has revealed that the essential state functions could be abused the same way as national identity. Hence the CJEU's less vocal approach towards essential state functions claim, in comparison with

[137] Asylum law is based on an assumption that states would accept refugees irrespective of any cultural or linguistic ties. The 1951 Refugee Convention contains only very narrow reasons for exclusion from receiving protection. See Convention Relating to the Status of Refugees [1951] art. 1(f).

ethnic-centred concerns expressed in earlier proceedings, *should not* be understood as suggesting that essential state functions are a free, limitless concept. Art. 2 TEU stating common EU values, *inter alia,* human dignity, equality, respect for human rights, including the rights of persons belonging to minorities, pluralism, tolerance and solidarity, must be used as a normative framework for assessing essential state function claims, just as in the case of national identity claims. Given the number of similarities between the two concepts, there is no reason to treat essential state functions claims otherwise.

V. Conclusion

Art. 4(2) TEU remains a highly relevant topic that only gains new urgency given the illiberal constitutionalism tendencies in some MSs. Given the prominence of national identity, it comes as a surprise that its art. 4(2) TEU sibling, essential state functions, has so far received limited attention and lacks clarity as to their scope, aim and relation to national identity. In this *Article*, I attempted to address that gap. Analysing the Treaty text, historic context, the CJEU's and selected national constitutional courts' case-law, I concluded that essential state functions are a distinctive legal concept. Nevertheless, they are intrinsically linked to national identity. In that regard, I found the way the CJEU treated the Member States' essential state functions claim in *Commission v Poland, Hungary and Czech Republic*—without any distinguishing from national identity—justified. But the case provides basis for two lessons to be learnt about essential state functions. First, that the concept could be stretched to encompass claims that could potentially, or even more likely be founded on national identity. Secondly, building on the previous conclusion, it has to be emphasized that just like national identity, essential state functions find their substantive limit in art. 2 TEU.