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THE PRELIMINARY RULING PROCEDURE AND THE IDENTITY REVIEW

ABSTRACT

Constitutional identity, as enshrined in Article 4(2) TEU might theoretically open up the possibility for EU Member States to refuse fulfilling certain obligations under EU law by referencing certain, as if yet not clearly defined elements of constitutional identity. Member States' constitutional identity, which is to be respected by the EU does not appear in positive law. Having regard to multilevel constitutionalism, it may be assumed that national constitutional identity will be elaborated in dialogues between national (constitutional) courts and the Court of Justice of the European Union. Based on previous practice however, the national and European interpretations of identity differ significantly. To achieve necessary convergence, the Court of Justice and national courts must cooperate in interpreting the concept of constitutional identity. This raises the necessity of examining whether the procedural prerequisites of this cooperation are given in national and EU public law. The questions to be examined are 1) whether the preliminary ruling procedure has already been used in identity-related cases, 2) what the position of constitutional courts/supreme courts (courts engaged in constitutional interpretation) is regarding the preliminary ruling procedure and 3) whether this may be considered the appropriate procedure when applying Article 4(2) TEU or would it require modification?

Keywords: constitutional identity, identity clause, preliminary ruling, judicial dialogue

1. INTRODUCTION

Constitutional identity, as stipulated in Article 4 (2) TEU, require a dialogue between the CJEU and the constitutional courts of Member States. This dialogue may be the institutionalized form of preliminary ruling procedure. This paper examines the role of preliminary ruling procedure in the application of Article 4 (2) TEU. The apropos of the research is that the German constitutional court turned to the CJEU in 2014, for the first time, with a preliminary ruling request,

and its Hungarian counterparts, when finally delivered a decision on the limits of EU law in November 2016, it has not even mentioned the possibility of the application of the preliminary ruling procedure. For doing so, an overview on the preliminary ruling procedure is offered. A summary on the case law and scholarly views on constitutional identity, the role of this procedure in the European constitutional law of Member States, and its appearance in practice follows. Against this background, a rough assessment can be made regarding its suitability of being a communication channel when Article 4 (2) TEU is applied.

2. THE PRELIMINARY RULING PROCEDURE

As our paper focuses on the possible avenues of judicial dialogue in the EU *vis-à-vis* the concept of national identity, we need to briefly look at the function and characteristics of the only formalised channel of communication between the CJEU and national courts: the preliminary ruling procedure.

2.1. The preliminary ruling procedure in EU law

The preliminary ruling procedure is a crucial element of the functioning of the EU legal order. The procedure enables national courts applying EU law to ask the Court of Justice for a ruling on (a) the interpretation of the Treaties; or (b) the validity and interpretation of acts of the institutions, bodies, offices or agencies of the Union. According to Article 267 TFEU, if such a question is raised before “any court or tribunal of a Member State”, that court or tribunal may request the Court to give a ruling. The national court itself may decide whether it considers that a preliminary ruling on the question is necessary to enable it to give judgment or not. The essential function of the procedure according to the Court of Justice is to prevent the occurrence of divergences in judicial decisions on questions of EU law¹ within the European Union, as this would jeopardise the aims of integration by law, and thus to ensure uniform interpretation of EU law.² Secondly, the procedure also serves as a possibility for reviewing secondary EU law in the light of (written or unwritten) primary EU law, and in some circumstances, international law binding on the European Union.

The importance of the procedure is unquestionable as it served as the means for the Court of Justice not only to interpret EU law, but also to develop it – the ‘constitutionalisation’ of the EU legal order in the Court’s jurisprudence took place

¹ Case 166/73 Rheinmühlen-Düsseldorf v Einfuhr- und Vorratsstelle für Getreide und Futtermittel [1974] ECR 0033.

² Case 283/81 Srl CILFIT and Lanificio di Gavardo SpA v Ministry of Health [1982] ECR 03415

largely (though not exclusively) via preliminary rulings, especially as far as the relationship between national law and EU law is concerned.³ It is important to note that the preliminary ruling procedure does not establish a relationship of subordination between the courts concerned: each judicial institution acts within its own jurisdiction.⁴ The preliminary ruling itself is binding on the referring national court and not a mere opinion.⁵ Preliminary rulings regarding the validity of secondary EU law are binding on the referring court, as the national court is bound to refrain from applying the secondary act in question as a result of a judgment of the Court declaring it to be void – the ruling is directly only addressed to the referring court, however, such a ruling “is sufficient reason for any other national court to regard that act as void for the purposes of a judgment which it has to give.”⁶ National courts themselves on the other hand have no jurisdiction to declare void secondary EU law.⁷ Preliminary rulings regarding the interpretation of EU law (whether primary or secondary) are also binding in the case at hand, and may further be regarded as ‘quasi-precedents’ and can thus be taken into account by national courts. This forms the basis of the *acte éclairé* doctrine; according to the Court, the ‘authority’ of a previous preliminary ruling on interpretation may even absolve the national court from the obligatory initiation of the procedure especially when the “question raised is materially identical with a question which has already been the subject of a preliminary ruling in a similar case.”⁸ The Court even extended the doctrine somewhat by stating that the need to submit references to the Court of Justice may be unnecessary where the Court has already dealt with the point of law in question, irrespective of the nature of the proceedings which led to those decisions, even if the questions at issue are not strictly identical.⁹ By

³ See e.g. Dehousse, R.: *The European Court of Justice: The Politics of Judicial Integration*, Macmillan, London, 1998, pp. 36-45 or Stone Sweet, A.: *The Judicial Construction of Europe*, Oxford University Press, Oxford, 2004, pp. 64-107.

⁴ As the Court of Justice has emphasized, the procedure requires „the national court and the Court of Justice, both keeping within their respective jurisdiction, and with the aim of ensuring that Community law is applied in a unified manner, to make direct and complementary contributions to the working out of a decision.” Case 16/65 *Schwarze v Einfuhr- und Vorratsstelle für Getreide und Futtermittel* [1965] ECR 00877

⁵ „The purpose of a preliminary ruling by the court is to decide a question of law, and that ruling is binding on the national court (...)” Case 52/76 *Luigi Benedetti v Munari* Ellis.a.s [1977] ECR 00163, paragraph 21

⁶ Case 66/80 *SpA International Chemical Corporation v Amministrazione delle finanze dello Stato* [1981] ECR 01191, par. 13-19.

⁷ Case 314/85 *Foto-Frost v Hauptzollamt Lübeck-Ost* [1987] ECR 04199.

⁸ Joined Cases 28-30/62 *Da Costa en Schaake NV, Jacob Meijer NV, Hoechst-Holland NV v Netherlands Inland Revenue Administration* [1963] ECR 00031.

⁹ Case 283/81 *Srl CILFIT and Lanificio di Gavardo SpA v Ministry of Health* [1982] ECR 03415, par. 13-14.

doing so, the Court of Justice invited the national courts – any national court – to refer to and apply its previous rulings.

From the point of view of our more specific topic, it can be stated that as regards its characteristics and effects, the preliminary ruling procedure seems adequate to be applied in the judicial dialogue between national courts and the Court of Justice on questions of national constitutional identity: references may be made to the Court of Justice regarding the validity of secondary EU law which from the point of view of the national court seems to be *ultra vires* and/or contrary to Article 4 (2) TEU, and on the interpretation of Article 4 (2) TEU in general, though only if it is applicable in the case at hand. But are constitutional courts supposed to initiate preliminary ruling procedures?

2.2. The preliminary ruling procedure in the practice of national constitutional courts

The question whether Constitutional Courts may or should submit references for preliminary rulings to the Court of Justice is a debated one even after more than sixty years of European integration. From the point of view of the Court of Justice, the right to submit references is tied to the concept of ‘national courts’: the Treaties do not specify further which courts may or may not submit references, and also does not dwell on what exactly ‘court’ is supposed to mean in this context. That is why the Court of Justice has developed its jurisprudence pertaining to this issue, laying down requirements which an institution needs to fulfil in order to qualify as a ‘court’ in the meaning of Article 267 – namely: (1) is the body established by law; (2) is it permanent; (3) is its jurisdiction compulsory; (4) is its procedure adversarial (*inter partes*); (5) does it apply rules of law; (6) is it independent; and (7) does it give decisions of a judicial nature.¹⁰

Constitutional courts should have no trouble satisfying these criteria – what is more, they would even be considered courts against whose decisions there is no judicial remedy under national law and thus obliged to initiate preliminary ruling procedures according to Article 276 TFEU, sentence 3 – save for the requirement of deciding in an adversarial procedure.¹¹ This criterion is however not of an absolute nature, as the Court of Justice itself notes that the TFEU does not make preliminary references contingent upon the national proceedings in question being

¹⁰ Summarized e.g. in Case C-54/96 *Dorsch Consult Ingenieurgesellschaft mbH v Bundesbaugesellschaft Berlin mbH* [1997] ECR I-04961. For analysis of the criteria see e.g. Kaczorowska-Ireland, A.: *European Union Law* (Fourth Edition), Routledge, Abingdon-on-Thames, 2016, pp. 398-403.

¹¹ For further elaboration see Claes, M., *The National Courts' Mandate in the European Constitution*. Hart Publishing, Oxford, 2006, pp. 438-451.

inter partes.¹² If we look at the Hungarian Constitutional Court for instance, it is debatable whether it would qualify as applying an adversarial procedure: before the latest reform of the HCC in 2011, it was argued that the HCC does not fulfil this criterion¹³, but recent changes imply a shift from ex post abstract review of laws to the adjudication of constitutional complaints, granting remedies in individual cases where fundamental rights of a person are violated (even if the constitutional complaint procedure is not adversarial in the classic sense).¹⁴ Furthermore, depending on the kind of competence under which the constitutional courts proceed, there may arise a question as to whether the decision to be taken by them is of a 'judicial nature' or not (e.g. in the case of an abstract review of constitutionality of a norm). Once again however the practice of the Court of Justice has been unclear about what judicial nature is supposed to mean, the Court has rather emphasized that the decision should *not* be of an administrative nature.¹⁵

In practice, the Court of Justice has to the best of our knowledge never refused a reference from a national constitutional court, perhaps signalling also its readiness to engage in judicial dialogue.¹⁶

Another question is whether constitutional courts themselves are willing to initiate preliminary ruling procedures. In general terms, such courts are less obvious actors in the procedure than national courts as they are not faced directly with individual disputes where the application and/or interpretation of EU law is the question: constitutional courts do not essentially "need" EU law to perform their tasks¹⁷, as they are the institutional safeguards of constitutionality, interpreting their respective national constitutions and ruling on the conformity of laws or ju-

¹² See *inter alia*]Case C-210/06 Cartesio Oktatós Szolgáltató Bt. [2008] ECR I-09641, par. 56-61.

¹³ See Fazekas, F., *A magyar Alkotmánybíróság viszonya a közösségi jog elsőbbségéhez egyes tagállami alkotmánybírósági felfogások tükrében*, University of Debrecen, Debrecen, 2009, pp. 341-344. The author does not however consider the non-absolute nature of the requirement of an adversarial procedure.

¹⁴ Gárdos-Orosz, F., *Preliminary Reference and the Hungarian Constitutional Court: A Context of Non-Reference*, German Law Journal, Vol. 16, No. 06, 2015, p. 1575

¹⁵ Foreexample, courts deciding on the allocation of a surname to a child or the registration of a company have been held not to be in a position to request a preliminary ruling reference, whereas where a court hears an appeal against such a decision, its decision will be considered to be of a judicial nature. Chalmers, D.; Davies, G.; Monti, G., *European Union Law*, Cambridge University Press, Cambridge, 2010, 154.

¹⁶ Though it was noted by Claes that perhaps the Court of Justice didn't even realize when the first ever reference from a constitutional court had reached it from Belgium, initiated by the Belgian constitutional court (which was at the time still called *Cour d'arbitrage*), as neither the Advocate General nor the Court mentioned this no doubt important fact. See Claes, M., Luxembourg, *Here We Come? Constitutional Courts and the Preliminary Reference Procedure*, German Law Journal, Vol. 16, No. 6, 2015, p. 1337.

¹⁷ Stone Sweet, *op. cit.* note 3. p. 81.

dicial decisions therewith. Yet a number of constitutional courts have already initiated preliminary rulings: the Austrian, Belgian, German Lithuanian, and Spanish constitutional courts, the French *Conseil Constitutionnel* and the High Court of Ireland have all submitted such requests, whereas the approach of others (the Polish Constitutional Tribunal, the Slovak and the Czech Constitutional Courts) is less clear.¹⁸ But if and when a request for a preliminary ruling (from whichever court) references national identity, does the Court of Justice seize the opportunity?

Notwithstanding important references to the clause, we are yet to see the identity clause elaborated upon in more general terms and in a broader context by the Court of Justice. Looking at references made by the Court of Justice to Article 4 (2) TEU, the identity clause has been expressly mentioned in nine preliminary rulings, an infringement procedure, and an action for annulment¹⁹ before the General Court.²⁰ Though not explicitly, but the Court of Justice has already demonstrated its willingness to protect Member States' national identity in the Omega case²¹, what is more it has effectively already placed national identity before internal market freedoms in a concrete case in its judgment in the pre-Maastricht Groener case²² (both were preliminary rulings). It is apparent that the majority of references to Article 4 (2) until now stem from preliminary ruling cases, reinforcing the idea that this 'communication channel' between national courts and the Court of Justice has potential to serve as tool in clarifying the scope and true meaning of the identity clause. Until now the Court of Justice however mostly relied on the identity clause as a supporting or subsidiary argument. In the most recent relevant judgment for instance (Bogendorff von Wolffersdorff), the Court of Justice used the identity clause as a subsidiary argument: it held that the German prohibition on titles of nobility should be considered an element of

¹⁸ For an overview see Claes, M., *op. cit.* note 16, pp. 1331-1342.

¹⁹ Case T-529/13 Balázs-Árpád Izsák and Attila Dabis v European Commission [2016] EU:T:2016:282. The application was dismissed, the appeal by the applicant is still pending before the Court of Justice (Case C-420/16 P).

²⁰ Data extracted from the curia.eu database. The identity clause was further mentioned in a Case C-253/12 JS, a reference for a preliminary ruling by the Supreme Administrative Court of the Czech Republic, but the case was deleted from the registry as the referring Czech court withdrew its request for a preliminary ruling [see: Ordonnance du Président de la Première Chambre de la Cour (27 mars 2013), EU:C:2013:212]. A further relevant action for annulment was found to be inadmissible by the General Court [see: Order of 6 March 2012, Case T-453/10 Northern Ireland Department of Agriculture and Rural Development v European Commission [2012] EU:T:2012:106].

²¹ Case C-36/02 Omega Spielhallen- und Automatenaufstellungs-GmbH v Oberbürgermeisterin der Bundesstadt Bonn [2004] ECR I-9609

²² Case C-379/87 Anita Groener v Minister for Education and the City of Dublin Vocational Educational Committee [1989] ECR I-3967 – as noted by Besselink, L. F.M., Case C-208/09, Ilonka Sayn-Wittgenstein v. Landeshauptmann von Wien, Judgement of the Court (Second Chamber) of 22 December 2010, nyr. Common Market Law Review, Vol. 49, 2012, p. 681

the national identity of Germany in the sense of Article 4(2) TEU, which may be taken into account as an element justifying a restriction on the right to freedom of movement of persons recognised by EU law.²³ It would seem from this reasoning that national (constitutional) identity serves as an underlying rationale of justified restrictions on the fundamental freedoms guaranteed by EU law based on public policy; thus serving as one of the possible public policy exceptions. From Article 4(2) TEU itself however it seems more that public policy may be an element of national identity as such, and not vice versa. Article 4(2) TEU should be regarded as possessing independent legal significance: as shown by the wording “shall respect”, Article 4(2) TEU is construed as a legal obligation of the EU, not just a statement of principle with a mere interpretative function.²⁴

In our view, in order for the preliminary ruling procedure to serve as an appropriate channel²⁵ for formalised judicial dialogue regarding national identity, a number of puzzle pieces need to fall into place (apart from the necessary situations having to present themselves of course as the Court of Justice does not rule on hypothetical questions²⁶):

- National constitutional courts need to be willing to submit questions to the Court of Justice on issues related to national constitutional identity²⁷;
- The Court of Justice needs to undertake a more thorough analysis of the content and limits of Article 4 (2) TEU and clarify its place and function in the legal order of the EU;
- The Court of Justice needs to be receptive in principle towards accepting the reasoning of the national constitutional courts;
- National constitutional courts need to accept preliminary rulings as authentic, final and binding interpretations of EU law without any reservations.²⁸

²³ Case C-438/14 *Bogendorff von Wolfersdorff v Standesamt der Stadt Karlsruhe* [not yet reported], par. 64.

²⁴ Von Bogdandy, A; Schill, S.: *Overcoming Absolute Primacy: Respect for National Identity under the Lisbon Treaty*, *Common Market Law Review*, Vol. 48, 2011, p. 27

²⁵ We must note also that the identity clause could have relevance in actions for annulment as well, as member states could potentially use it in their argumentation against an EU norm which is perceived as interfering with national identity – of course, states would have to formulate their reasoning to fit one of the four annulment grounds stipulated by Article 263 TFEU; it seems quite possible however to link identity protection with lack of competence, infringement of the Treaties or of any rule of law relating to their application, or misuse of powers.

²⁶ Case 104/79 *Foglia v Novello* [1980] ECR 00745

²⁷ For a missed opportunity see for example Decision 22/2016. (XII. 5.) of the Hungarian Constitutional Court, reviewed below.

²⁸ For a discussion of the dangers of the relativisation of the legal effects of a preliminary ruling see the

3. CONSTITUTIONAL DIALOGUE, IDENTITY REVIEW, AND THE PRELIMINARY RULING PROCEDURE

3.1. The German practice

The German Court took the lead in employing the identity review. It was this court which, in its OMT reference, for the first time, made an empty promise of using the identity review. It claimed in its petition (2014)²⁹ that even if the CJEU would consider the OMT decision in accordance with the EU law, the constitutional court could examine if it was indeed in conformity with the Grundgesetz (GG) and did not infringe its identity as it is defended by Article 79.3 GG.³⁰ Its reason is that, due to the German Lisbon decision, democracy, thus a constituent element of the identity of the GG would be violated if the Parliament renounced the budgetary autonomy as it ‘could no longer exercise its budgetary autonomy under its own responsibility’.³¹ While the constitutional court, in the Lisbon decision took the position that ‘the guarantee of national constitutional identity under constitutional and under Union law go hand in hand’,³² it emphasized their difference in its OMT reference decision. The CJEU in the Gauweiler case³³ ruled that the OMT decision of the Central Bank was issued within its competence, therefore this particular piece of legal measure was not *ultra vires*. It also noted that the decision of the CJEU in the preliminary ruling procedure is obligatory for the Member State.³⁴ The decision of the CJEU was, however, not followed by the ‘promised’ action of the German Constitutional Court, but on the contrary: it refused a constitutional complaint that was filed against the OMT decision of the Central Bank, and it based its ruling on the Gauweiler decision.³⁵ If it had been the end of the judicial dialogue between the courts, it would have meant that it was the CJEU that had the final say in identity issues. Yet, the CJEU took the requirement of sincere cooperation seriously and engaged in a judicial consti-

Opinion of Advocate General Cruz-Villalon in Case C-62/14 Peter Gauweiler and Others v Deutscher Bundestag. Opinion of Advocate General Cruz Villalón [2015] EU:C:2015:7

²⁹ BVerfG, Jan 14. 2014, 2 BvR 2728/13, URL=https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/DE/2014/01/rs20140114_2bvr272813.html, hereinafter: OMT reference decision. See also Wendel, *op. cit.* note 11, p. 285.

³⁰ OMT reference decision [103], Wendel, *op. cit.* note 11, p. 285.

³¹ OMT reference decision [102]

³² German Lisbon decision, point 5.

³³ Case C-62/14 Peter Gauweiler and Others v Deutscher Bundestag [2015] EU:C:2015:7

³⁴ Case C-62/14 Peter Gauweiler and Others v Deutscher Bundestag [2015] EU:C:2015:7, par.16; Claes, M.; Reestman, J.-H., *The Protection of National Constitutional Identity and the Limits of European Integration at the Occasion of the Gauweiler Case*, German Law Journal Vol.16, No. 4, 2015, p. 918.

³⁵ Judgment of 21 June 2016 - 2 BvR 2728/13, 2 BvR 2729/13, 2 BvR 2730/13, 2 BvR 2731/13, 2 BvE 13/13.

tutional dialogue and lately, it seems that the CJEU is willing to offer an ‘interpretative method’ to the Member States when it comes to the application of the European Arrest Warrant (EAW). At the beginning of 2016, it was to be seen how higher courts of Member States would consider the message the German Constitutional Court had sent in its order of 15 December 2015 when it first applied the constitutional identity test.³⁶ In its order, the Court refused the application of the framework decision on the European Arrest Warrant. It claimed that the application in the concrete case would qualify as disrespect of the constitutional identity of Germany, more precisely, the unchangeable provision on human dignity, stemming from some Articles of the Grundgesetz (Arts. 79.3, 1.1).³⁷ This action generated a judicial constitutional dialogue between national courts and the CJEU. The Aranyosi and Căldăraru case (5 April 2016),³⁸ even though constitutional identity was not mentioned therein, can be seen as a good example. The Higher Regional Court of Bremen, Germany, was uncertain as to the execution of the two European Arrest Warrants issued by Hungary and Romania due to poor prison conditions (overcrowding in prisons) which have already been condemned by, among others, the ECtHR.³⁹ In its decision, in the preliminary ruling procedure, the CJEU apparently offered an alternative interpretative method or another toolkit of legal arguments. Using them would make unnecessary the activation of the national constitutional identity review because the common application of the Charter (Articles 1 and 4) and the ECHR (Article 3) may reach the same goal without jeopardizing the unity and supremacy of EU law. The preservation and respect of human dignity in conjunction with the prohibition of inhuman or degrading treatment or punishment, a right that has utmost importance in, but not exclusively, Germany, could prevail.

3.2. The Hungarian experience

According to the decision 22/2016 (XII.5) of the Constitutional Court, there are two main limits for the conferred or jointly exercised competencies, under Article E) (2): it cannot infringe the sovereignty of Hungary (sovereignty review) and the constitutional identity of Hungary which is based on the historical constitu-

³⁶ 2 BvR 2735/14

³⁷ The subject of the EAW, due to some rules of the Italian criminal proceedings, would not have right to appeal in its case as the sentence was issued in absentia.

³⁸ Joined Cases C-404/15 and C-659/15 PPU Aranyosi and Căldăraru v Generalstaatsanwaltschaft Bremen [2016] EU:C:2016:198

³⁹ Varga and Others v. Hungary, Nos 14097/12, 45135/12, 73712/12, 34001/13, 44055/13 and 64586/13, of 10 March 2015, Voicu v. Romania, No 22015/10; Bujorean v. Romania, No 13054/12; Mihai Laurențiu Marin v. Romania, No 79857/12, and Constantin Aurelian Burlacu v. Romania, No 51318/12

tion (identity review).⁴⁰ The Court, through Article E) (2), based the identity review on Article 4 (2) TEU. Even though the Court holds that the constitutional identity of Hungary does not mean a list of exhaustive enumeration of values, it still mentions some of them. For example: freedoms, the division of power, the republican form of state, respect of public law autonomies, freedom of religion, legality, parliamentarism, equality before the law, recognition of judicial power, protection of nationalities that are living with us. These equal with modern and universal constitutional values and the achievement of our historical constitution on which our legal system rests. According to the Court, the protection of constitutional identity may also emerge in connection with areas which shape the citizens' living conditions, in particular the private sphere of their own responsibility and of political and social security, protected by fundamental rights, and in areas in which the linguistic, historical and cultural involvement of Hungary can be detectable. In the German Lisbon decision, which the Court reproduces without any reference, however, all these are formulated in connection with 'the political formation of the economic, cultural and social living conditions', i.e., the exercise of the state power.⁴¹ The Court holds that the constitutional identity of Hungary is a fundamental value that has not been created but only recognized by the FL and, therefore, it cannot be renounced by an international treaty. The defense of the constitutional identity of Hungary is the task of the Constitutional Court as long as Hungary has sovereignty.

The Court confirms that 'the objects of these tests are not directly the EU law or its validity'.⁴² The question emerges, then, what is the object of the review? How can the Court establish whether a piece of EU legislation infringes the sovereignty or the identity of Hungary, if it does not examine, at least to some degree, the EU law, for which it clearly does not have the competence, and there is no established institutional mechanism in place for initiating a preliminary ruling procedure? The Court has not even noticed it could use the preliminary ruling procedure in this present or any future case.⁴³ It is also unclear, what are the consequences of infringement. Moreover, the identity review as a legal review is settled somewhere else in the German decision.⁴⁴ It is also ambiguous what 'defense of the constitutional identity of Hungary' precisely means, because the Court has not established

⁴⁰ Drinóczi, T.: *The Hungarian Constitutional Court on the Limits of EU Law in the Hungarian Legal System*, URL=<http://www.iconnectblog.com/2016/12/the-hungarian-constitutional-court-on-the-limits-of-eu-law-in-the-hungarian-legal-system/>. Accessed 9 January 2017.

⁴¹ Point 4 of the decision of the Lisbon decision of the German Court, or its marginal note 249.

⁴² Decision [56]

⁴³ This opportunity was only mentioned by Judge István Stumpf in his consenting opinion at paragraph [103] of the decision.

⁴⁴ Point 5 of the decision of the Lisbon decision of the German Court, or its marginal note 240.

any legal consequences of the declaration of a conflict between EU law and national law under any of the reviews and it remains silent regarding the object of the reviews as well. Furthermore, the achievements of our historical constitution are far from clear. It is still a question what steps will the Hungarian state make if its constitutional identity is endangered: continue with non-compliance to EU law, or comply with it despite its conflicting nature with the identity protected in the constitution? Ultimately, the question is whether the referral to constitutional identity provides a constitutional basis for Hungary to exit the EU.

All this will make it difficult for the EU institutions, including the CJEU, to adequately consider the identity of Hungary under Article 4 (2). It also does not help that the preliminary ruling procedure is not mentioned in the decision and there is no legal mechanism available for the Court to use this process. Nevertheless, the ‘European constitutional dialogue’ is a permanent reference in the interpretation of the Court in this case. It seems as if the Court would conceive it as an obligation that must be respected, or as a strong and almost sole legal argument for justifying the reviews created in this decision instead of developing a national constitutional law based reasoning, which is supported by some comparative law oriented justifications.⁴⁵ And yet, it has not considered the possibility of the application of the preliminary ruling procedure in this or regarding any future cases.

4. CONSTITUTIONAL IDENTITY AS APPLIED IN EUROPEAN INTEGRATION: THE IDENTITY OF THE CONSTITUTION

Based on the case law, we apply the following assumption: the ‘constitutional identity’ in the sense of Article 4 (2) TEU means the identity of the constitution.⁴⁶

The German Constitutional Court constantly uses the phrase ‘identity of the GG’ – which is defended by Article 79.3 GG – in its Lisbon decision and OMT reference

⁴⁵ It attributed high importance to the constitutional dialogue within the EU. Therefore it examines the standpoints of Member States concerning the fundamental right-reservation and ultra vires acts. Then, it lists and even quotes several case laws of the national courts (Estonia, France, Ireland, Latvia, Poland, Spain, Czech Republic, England, Wales, UK, and Germany) on the relationship between the EU law and national law. In connection with the UK Supreme Court, it says: in one of its decision, the Supreme Court of the UK – complying with the requirement of constitutional dialogue between the Member States – referred to one of the rulings of the German Constitutional Court. Again, the Court mentions that the CJEU *respects* the competences of the Member States and *considers* their constitutional needs *in the framework of the European constitutional dialogue*.

⁴⁶ German, French case law: 2 BvR 2735/14, Judgment of 21 June 2016 - 2 BvR 2728/13, 2 BvR 2729/13, 2 BvR 2730/13, 2 BvR 2731/13, 2 BvE 13/13 Decision n° 2004-498 DC of July 29th 2004, para. 6.

case.⁴⁷In France, constitutional identity refers to some individual components of the French constitution (and not that of the state) which do not have matching counterparts in EU law. In the decision on the Bioethics Act, the Constitutional Council refused to examine the question of whether or not certain provisions of this Act, which implements a directive, constitute a violation of the Constitution, including the Declaration of Human and Civil Rights of 1789 (freedom of speech). The reason was that the freedom of speech is also 'protected as a general principle of Community Law' via Article 10 of the ECHR.⁴⁸

As for doctrinal views, Biljana Kostadinov⁴⁹ for example sees constitutional identity in Croatia as a special form of national identity which embodies the provisions on the right of the people to decide on and pass the constitution in a free and democratic procedure, i.e., decisions concerning the state structure, the state of government, and the procedure in which these decisions are passed.⁵⁰

It is also obvious that there is a significant gap between the identity concept emerging from the case law of the CJEU, the identity-interpretation of the (constitutional) courts and the opinion of the scholarly literature. The reason is, on the one hand, that there are only a few cases available in which the CJEU acknowledged the invocation of constitutional identity as enshrined in Article 4 (2) TEU by a Member State. On the other hand, it should not be disregarded that, due to the different position and role of the CJEU and national (constitutional) courts, the basis, framework, and scope of their interpretation practice about the nature, content, subject and extent of constitutional/national identity varies. This is true even if the interpretation is about how and why to apply the same treaty provision, Article 4 (2) TEU. In searching for the legally relevant meaning of Article 4 (2) TEU, the national constitutional or high court considers the constituent power and reveals the features and possibilities of the constitution-amending power that is drafted in or shaped by the constitution. As a following step, it examines the challenged competences to see which of them it cannot allow being jointly exercised with others Member States or the EU because it would amount to imperiling the preservation and protection of the identity of the constitution. German constitutional court has been the only one to theorize and apply this approach. Especially in the light of the recent practice of the German constitutional court, scholarly opinions taking the position that Article 4 (2) TEU has to apper-

⁴⁷ See e.g., BVerfG, Jan 14. 2014, 2 BvR 2728/13, URL=https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/DE/2014/01/rs20140114_2bvr272813.html, hereinafter: OMT reference decision. See also Wendel, *op. cit.* note 11, 285.

⁴⁸ Decision n° 2004-498 DC of July 29th 2004, 6.point.

⁴⁹ Kostadinov, B. *Constitutional identity Iustinianus*, *Primus Law Review*, Vol. 3, No. 1, 2012, p. 10.

⁵⁰ *Ibid.*, pp. 10, 17-18.

tain to the most basic elements of national identity, which comprise the form of state, the form of government and ‘a little more’⁵¹ seem to be unfounded. It is also an apparently disputable statement that the ‘structure’ in Article 4 (2) TEU refers to the most significant attributes, among others – beyond those mentioned – the written or unwritten nature of the constitution, the majority or proportionality structure of the electoral system and the nature of the constitutional review.⁵² Nevertheless, these considerations that evolve during the constitutional development of a particular state⁵³ may be the basis of the legal definition of the identity of the constitution under the scope of application of Article 4 (2) TEU.⁵⁴

The following summary can be made of the identity of the constitution.

The practice of interpretation concerning the identity of the constitution is typically integration-friendly, and the identity review barely happens. It can, in certain fundamental rights-related cases, be protected by a general reference to the EU legal order, even without invoking Article 4 (2) TEU. In this way, i.e., when there is a genuine judicial constitutional dialogue,⁵⁵ the constitutional identity, as expressed in Article 4 (2), does not purport to breach the absolute primacy of EU law, or at least, by a proper interpretation exercise, it can be avoided. For this, see point 3 below.

The following are needed for upholding the identity of the constitution. First, the state needs to remain a state. The state can substantively apply competences in which the supreme power is manifested. It means that the exercise of these competences cannot be emptied. See, e.g., the German differentiation regarding the con-

⁵¹ Di Federico, G., *Identifying constitutional identities in the case law of the Court of Justice of the European Union*, p. 47, URL=<http://www.jus.uio.no/english/research/news-and-events/events/conferences/2014/wccl-cmdc/wccl/papers/ws9/w9-federico.pdf>. Accessed 9 January 2017.

⁵² Lehman, W., *European democracy, constitutional identity and sovereignty* Study, July 2010. PE425.618, p. 11, URL=[http://www.europarl.europa.eu/RegData/etudes/note/join/2010/425618/IPOL-AFCO_NT\(2010\)425618_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/note/join/2010/425618/IPOL-AFCO_NT(2010)425618_EN.pdf). Accessed 9 January 2017. The opinion of Besselink, according to which Article 4 (2) TEU does not defend those constitutional revisions, which are not fundamental and as such cannot contribute to the definition of constitutional identity, seems also to be an evasive statement. Besselink, L., ‘National and constitutional identity before and after Lisbon’ *Utrecht Law Review* Vol. 6, No. 3, 2010, p. 48.

⁵³ Jacobsohn, G. J., *Constitutional identity*, Harvard University Press, 2010; Rosenfeld, M., *Constitutional identity*, in Rosenfeld, M. – Sajó, A. eds., *The Oxford Handbook of Comparative Constitutional Law*, Oxford University Press, Oxford, 2011.

⁵⁴ Cf. Grewe, C., *Methods of identification of national constitutional identity*, in Alejandro Saiz Arnaiz and Carina Alcobero Llivina, eds., *National constitutional identity and European integration*, Intersentia 2013, p. 45.

⁵⁵ Besselink holds that there is a need for cooperation between the justices of the CJEU and the constitutional courts of the Member States to determine what constitutional identity is and what it means within the special EU law context. Besselink, *op.cit.* note 52, at p. 45.

trol and the locus of the decision-making competence of the military forces. The German constitutional court distinguishes between the deployment of the army, which is in the exclusive power of the parliament, and as such, it cannot be transferred, and the possible supranational coordination of the armed forces. The competence regarding this latter specific coordination can thus be shared.⁵⁶ Second, the state can differentiate itself from other states due to the ‘constitutionalization’ of its individual and unique values and principles exclusively featuring that particular state that emerged and evolved in the courses of constitutional development or constitutional interpretation. This unique identity of its constitution makes it possible for the state to find its different and distinct markers in a community which is based on common constitutional traditions, values, and principles and which the given state created or, by accepting and complying with the set minimum requirements, joined. The national identity, as the ‘collective identity of the constitutional subject’, which is constructed and re-constructed during constitutional development, is shown in the constitution (identity of the constitution), in the guise of, e.g., the eternity clauses, which renders a unique character for both the constitution and the state itself. These eternity clauses can be altered neither by the common exercise of competences with the EU or the Member States. Third, there are integration-proof decision-making competences among those which specify the principles and the values constituting the identity of the constitution. Invocation of them, however, due to the legal consequences they may trigger, can happen only as a last resort or as an ultima ratio. Fourth, if the Member State takes ‘identity’ in the sense of Article 4 (2) TEU seriously, and if interpretation cannot resolve the conflict between the national and the EU law, it should apply legal consequences. They may be, as stated by the Polish Constitutional Tribunal,⁵⁷ the following: the constitution prevails; constitutional amendment will occur; the EU law will be amended; or the Member State leaves the EU to sustain the identity of the constitution.

It may be concluded thus, that it is necessary to enable dialogue between the CJEU and the national courts, and this seems to be realizing. The decision of 22/2016 (XII. 5) of the Constitutional Court of Hungary, however, due to the lack of

⁵⁶ Lisbon decision of Germany, [254], [255]. This view facilitates to answer the question of some scholars regarding whether national identity (from the perspective of the EU law) and constitutional identity (from the perspective of the Member States) embodies cultural or just legal considerations. The reason for raising this issue was that cultural and linguistic diversity was relocated to Article 3 TEU (see Konstadinies, T., *The constitutionalisation of national identity in EU law and its implications*, 2013, pp. 3-4, URL=<http://ssrn.com/abstract=2318972>, URL=<http://dx.doi.org/10.2139/ssrn.2318972>, URL=<http://uaces.org/documents/papers/1301/konstadinides.pdf>), but one cannot deny the cultural aspects when reading Article 4 (2) TEU (see Besselink, *op.cit.* note 52, pp. 41,44).

⁵⁷ Decision K 18/04, 11 May 2005.

institutional and procedural mechanisms, does not fit in. Despite the commonly detected reluctance of the constitutional courts of the Member States in relation to the use of the preliminary ruling procedure, even the German Constitutional Court turned to the CJEU in 2014, for the first time in its history, regarding the OMT program of the European Central Bank.⁵⁸ As for the others, the Belgian constitutional court used the preliminary ruling procedure for the first time, and it is the most regular user of the procedure. Other constitutional courts which have already been ready for engaging in a formal constitutional dialogue with the CJEU are the Austrian, Lithuanian, Spanish, Italian, French, and Slovenian.⁵⁹ In the Hungarian decision on the limits of the EU law, however, this possibility has not even been mentioned.

5. CONCLUSION

The actual application of the identity review by the German constitutional court has almost occurred twice. It is interesting to see that it asked in its OMT reference decision whether a legal measure of an EU institution was *ultra vires*, but it, due to the CJEU decision, did not deliver any identity review but complied with and applied this preliminary ruling. However, when the Court refused the execution of the EAW because it infringed the constitutional identity of the GG, it did not implement a decision of a Member State that was based on EU law. Since the *Aranyosi and Căldăraru* case, for similar cases and to achieve the same scope, another approach has been available. It is based more on the EU law and its principles and endangers its unity less, as compared to the constitutional law oriented, thus Member State-based reasoning with respect to identity. Against this background, we can observe that, as of today, it seems that 'constitutional identity review' in the case law of the CJEU has a somewhat marginal role while it has a more fundamental mission in the jurisprudence of the national courts. The invocation of constitutional identity against the application of EU legislation, however, is still a theoretical one, as it has only been Germany which actually applied this test and refused the execution of an EAW. It has not remained unnoted by the CJEU which, within the framework of the judicial constitutional dialogue, offered an alternative legal approach towards the protection of human dignity and related prohibitions.

Nevertheless a procedural issue with the preliminary ruling procedure as a channel of judicial dialogue may be raised: following the request for a ruling, the national

⁵⁸ Thiele, A., *Friendly or Unfriendly Act? The "Historic" Referral of the Constitutional Court to the ECJ Regarding the ECB's OMT Program*, German Law Journal Vol. 15, No. 2, 2015, p. 241

⁵⁹ See Claes, M., *op.cit.* note 16, pp. 1331, 1337-1339.

court does not take part in the procedure in any form; the member state of the court is represented by the Government in the procedure, thus the judicial dialogue can easily turn into more of a monologue.⁶⁰ A recent request by the Italian constitutional court⁶¹ brings to mind a further possibility, however: requesting the clarification of a CJEU judgment. According to Article 43 of the Statute of the Court⁶², if the meaning or scope of a judgment is in doubt, the Court of Justice will provide it on application by any party or any institution of the EU establishing an interest therein.⁶³ This possibility could serve a further tool of communication between the courts – perhaps even as a last resort before applying any national constitutional identity-defence mechanism by a Member State constitutional court.⁶⁴

The not always clear criteria applied by the Court of Justice regarding the definition of national courts as bodies entitled to submit preliminary ruling references perhaps also needs reconsideration in light of the growing willingness of constitutional courts to initiate such procedures. As we have seen, some of the criteria are somewhat malleable anyway, and Article 267 TFEU does not define ‘courts’ in a binding way, so the adjustment of the relevant practice to clearly include constitutional courts as possible initiators seems manageable and not explicitly contrary to earlier case law.

⁶⁰ Claes, M., *op. cit.* note 16, p. 1342.

⁶¹ Pollicino, O.; Bassini, M., *When cooperation means request for clarification, or better for “revisitation” – The Italian Constitutional Court request for a preliminary ruling in the Taricco case.* <https://blogs.eui.eu/constitutionalism-politics-working-group/2017/01/29/cooperation-means-request-clarification-better-revisitation-italian-constitutional-court-request-preliminary-ruling-taricco-case/>. Accessed 01 February 2017.

⁶² Protocol No 3 on the Statute of the Court of Justice of the European Union.

⁶³ Such an application for interpretation must be made within two years after the date of delivery of the judgment or service of the order. The Court gives its decision after having given the parties an opportunity to submit their observations and after hearing the Advocate General. See Article 158 of the Rules of Procedure [Rules of Procedure of the Court of Justice of 25 September 2012 (OJ L265, 29.9.2012), as amended on 18 June 2013 (OJ L173, 26.6.2013, p.65) and on 19 July 2016 (OJ L 217, 12.8.2016, p.69).]

⁶⁴ See Pollicino, O.; Bassini, M., *op. cit.* note 61.

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