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# “NATIONAL IDENTITY” CONSIDERATIONS AND HOW THEY FACTOR INTO THE EU’S VALUES-BASED CONDITIONALITY: EXPLORING A COMPLEX INTERPLAY

by *Iliana Cenevska\**

SUMMARY: 1. Introduction – 2. Hungary and Poland’s Contentious Relationship with the Union’s Values. – 3. The EU’s Unique Brand of Values-Based Conditionality: Do Values and Conditionality Go Together? – 4. The Particularity of “National Identity” Concerns versus the Commonality of the EU’s Shared Values. – 5. Hungary and Poland’s “National Identity” Arguments before the EU Court of Justice. – Balancing Between the Strength of the “Particular” and the Power of the “Shared”. – 5.1. C 156/21 *Hungary v Parliament and Council* and C 157/21 *Poland v Parliament and Council*. – 5.2. C-204/21 *Commission v Poland* (Independence and Private Life of Judges). – 6. A Possible Resolution to the Clash Between EU Values and a Member State’s National Identity. – Enter the Principle of Sincere Cooperation. – 7. Conclusion.

## 1. Introduction

This paper explores the intricate interplay between the EU’s values-based conditionality as a unique type of conditionality exercise, on the one hand, and the Member States’ national identity concerns, on the other. This multi-faceted interaction is a highly complex one, underpinned by a variety of interlocking political, legal, social and cultural factors. The paper zooms in on the rule of law conditionality as a specific subset of value-conditionality applied by the EU internally – concerning its Member States, and externally – in the external relations domain, most notably in the enlargement context. The analysis that follows centers on the internal aspect of the EU’s values-based conditionality exercise, interrogating how and the degree to which the Union takes into account the Member States’ national identity considerations when implementing its values-based conditionality. Furthermore, given that some of the Member States have been known to utilize their national identity interests as leverage against their responsibility to adhere to the Union’s fundamental values articulated in art. 2 TEU, the analysis elucidates the approaches Member States typically employ when raising “national identity” arguments in order to justify or legitimize their failure to respect the Union’s core values.

The enlargement rounds of the past two decades have expanded the EU to a considerable number of Member States while also exposing the vulnerability of its fundamental values to misuse or breaches committed by the former. The rule of law developments happening in Hungary and Poland these past years appear to have marred the EU’s image as a “community of values” and have arguably undermined its credibility as a promoter of values in its external relations. *Inter alia*, one finds a visible discrepancy between how the EU applies its values in its relations with non-member countries holding a Union membership perspective as opposed to the manner in which these values are being enforced internally, in response to the domestic rule of law challenges facing some of the Member States.

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The concept of national identity and its various (legal and other) manifestations in the EU context has been far from underexplored<sup>1</sup> and yet still continues to pique the interest of scholars studying the fields of EU law and EU integration. This paper aims to revisit some of the key threads of “national identity” reasoning that Member States engage in, whereby the “national identity” clause of art. 4, para. 2 TEU is being used as grounds for disregarding their responsibilities of compliance with the EU’s fundamental values. More precisely, the analysis in the paper is preoccupied with the role that the EU’s values-based conditionality plays in reconciling the two (sometimes diverging) rationales: preserving the Member States’ national identities versus safeguarding the Union’s core values. As well as building on the existing academic literature surrounding these issues<sup>2</sup>, the paper gives a unique insight on the connection between the EU’s value conditionality approach and the way in which the Member States’ “national identity” justifications flowing from art. 4, para. 2 TEU are being interpreted and exercised in practice. The paper seeks to achieve this by coupling the theoretical elaboration of the concepts of “national identity” and “values-based conditionality” with a qualitative analysis of relevant EU legal documents and policy papers and the case law of the Court of Justice of the European Union (CJEU).

This paper is organized in five Sections apart from the Introduction and the Conclusion. Section 2 expands on the relationship between the EU, on the one side, and Hungary and Poland, on the other, in respect of these Member States’ past and present systematic breaches of the rule of law as a fundamental Union value. It bears mentioning that the references made regarding the Polish government throughout the paper come with the following caveat: as of December 2023, a new government has come in power in this country, marking a clear shift and change in course in comparison to the previous government<sup>3</sup>. That said, it nevertheless remains that the rule of law issues covered in this paper have and will arguably continue to have far-reaching implications for the Polish

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<sup>1</sup> From the wealth of scholarly literature written on the topic of national and constitutional identity, see e.g.: L. BESSELINK, *National and Constitutional Identity before and after Lisbon*, in *Utrecht Law Review*, No. 6, 2010; F.C. MAYER, *Rashomon in Karlsruhe: A Reflection on Democracy and Identity in the European Union*, in *International Journal of Constitutional Law*, Issue 9, 2011; D. SIMON, *L’identité constitutionnelle dans la jurisprudence de l’Union européenne*, in L. BURGORGUE-LARSEN (ed.), *L’identité constitutionnelle saisie par les juges en Europe*, Paris, 2011; M. CLAES, *National Identity: Trump Card or Up for Negotiation?*, in A. SAIZ ARNAIZ, C. ALCOBERRO LLIVINIA (eds.), *National Constitutional Identity and European Integration*, 2013; F.X. MILLET, *The Respect for National Constitutional Identity in the European Legal Space: An Approach to Federalism as Constitutionalism*, in L. AZOULAI (ed.), *The Question of Competence in the European Union*, Oxford, 2014; E. CLOOTS, *National Identity in EU Law*, Oxford, 2015; A. VON BOGDANDY, S. SCHILL, *Overcoming Absolute Primacy: Respect for National Identity under the Lisbon Treaty*, in *Common Market Law Review*, Vol. 48, 2011; L. BESSELINK, *The Persistence of a Contested Concept: Reflections on Ten Years Constitutional Identity in EU Law*, in *European Public Law*, Vol. 27, Issue 3, 2021.

<sup>2</sup> For some of these academic treatises, see T. KONSTADINIDES, *Dealing With Parallel Universes: Antinomies of Sovereignty and the Protection of National Identity in European Judicial Discourse*, in *Yearbook of European Law*, Vol. 34, 2015, p. 127 ff.; E. CLOOTS, *National Identity, Constitutional Identity, and Sovereignty in the EU*, in *Netherlands Journal of Legal Philosophy*, Vol. 45, Issue 2, 2016; M. VARJU (ed.), *Between Compliance and Particularism: Member State Interests and European Union Law*, Cham, 2019; M. VARJU, *Member State Interests and European Union Law: Revisiting the Foundations of Member State Obligations*, London, 2020; D. FROMAGE, B. DE WITTE, *National Constitutional Identity Ten Years on: State of Play and Future Perspectives*, in *European Public Law*, Vol. 27, Issue. 3, 2021; P. FARAGUNA, *On the Identity Clause and Its Abuses: ‘Back to the Treaty’*, in *European Public Law*, Vol. 27, Issue 3, 2021; G. MARTINICO, *Taming National Identity: A Systematic Understanding of Article 4(2) TEU*, in *European Public Law*, Vol. 27, Issue 3, 2021.

<sup>3</sup> For more on this change in developments and the new policy course of Poland’s current government, see below in Section 2.

judicial and legal system. Section 3 discusses the EU’s unique brand of values-based conditionality, applied in the internal and external context, followed in Section 4 by an exploration of the contentious interplay between the EU’s value conditionality approach (the EU’s Rule of Law Conditionality Regulation being its most prominent manifestation), on the one hand, and its duty to respect the Member States’ national identities, on the other. Section 5 weighs in on three high-profile cases involving Hungary and Poland, decided by the CJEU in 2022 and 2023, in which each of the two governments raised a “national identity” plea in order to justify failing to comply with the requirements emanating from the rule of law as a fundamental EU value. These cases provide a fitting basis for studying the manner in which the EU’s value conditionality approach interacts with the different “national identity” claims put forward by the Member States. Section 6 gages the potential of the principle of sincere cooperation of art. 4, para. 3 TEU as a facilitating device in resolving the instances of conflict between the Union’s values and the Member States’ “national identity” claims. The concluding Section of the paper critically reflects on the place that “national identity” considerations have in the EU’s approach of value conditionality, by considering the option of applying the principle of sincere cooperation in such a way as to pre-empt the possibility for Member States to abuse or misuse the “national identity” clause of art. 4, para. 2 TEU.

## 2. Hungary and Poland’s Contentious Relationship with the Union’s Values

It is a truism that the European Union is composed of States which have freely and voluntarily committed themselves to the common values enshrined in art. 2 TEU and which have undertaken to respect and promote these values<sup>4</sup>. There exists a fundamental presumption that each Member State shares with all the other Member States, and recognises that those Member States share with it, those same values<sup>5</sup>. Art. 2 TEU enumerates the values that the Union is founded on and which are common to all the Member States: respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These fundamental values form the “*identity of the European Union as a common legal order*”<sup>6</sup> and come with the attendant duty for the EU to safeguard those values by acting within the limits of the powers conferred on it by the Union Treaties<sup>7</sup>.

The EU’s common values have been described as attributes of the Union’s “moral identity”<sup>8</sup> which make up its “*institutional ethos*”<sup>9</sup> and which are given concrete expression through principles that contain legally binding obligations for the Member States<sup>10</sup>. In other words, art. 2 TEU does not merely set out policy guidelines or

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<sup>4</sup> As the Court of Justice of the EU underscored in a number of cases – CJEU, Judgment of 27 February 2018, case C-64/16, *Associação Sindical dos Juízes Portugueses*, para. 30; CJEU, Judgment of 10 December 2018, case C-621/18, *Andy Wightman and Others v Secretary of State for Exiting the European Union*, para. 63; CJEU, Judgment of 24 June 2019, case C-619/18, *Commission v Poland*, para. 42; CJEU, Judgment of 20 April 2021, case C-896/19, *Repubblika v Il-Prim Ministru*, para. 62.

<sup>5</sup> *Ibid.*

<sup>6</sup> CJEU, Judgment of 27 October 2021, case C-204/21, *Commission v Poland (Independence and private life of judges)*, para. 67; CJEU, Judgment of 16 February 2022, case C-156/21, *Hungary v Parliament and Council*, para. 232.

<sup>7</sup> CJEU, C-156/21, cit., para. 127.

<sup>8</sup> T. TRIDIMAS, *The General Principles of EU Law* (2<sup>nd</sup> edition), Oxford, 2007, p. 15-16.

<sup>9</sup> For this term coined by Williams, see A. WILLIAMS, *The Ethos of Europe: Values, Law and Justice in the EU*, Cambridge, 2010, p. 10 ff.

<sup>10</sup> CJEU, C-156/21, cit., para. 232; CJEU, C-204/21, cit., para. 67.

intentions<sup>11</sup> – the values it enshrines possess an unquestionable legal quality and as such can be considered as legally enforceable<sup>12</sup>. In addition, complementing art. 2 TEU, are art. 3, para. 5 TEU (which establishes a duty for the Union to uphold and promote these values in its relations with the wider world) and art. 8, para. 1 TEU (pursuant to which the Union undertakes to develop a special relationship with neighbouring countries, thus aiming to create an area of prosperity and good neighbourliness which is to be based on the Union’s values).

It appears that in the previous decades, the Union had not experienced more substantial challenges to its values – at least not on the scale of the current situation. It has been suggested that this is due to the EU mainly functioning within an “internal market” frame at the time, within which the majority of the art. 2 values did not enjoy a priority treatment<sup>13</sup>. The first time the EU’s fundamental values were granted a more serious treatment was in the context of the preparation for the 2004 Eastern enlargement when the Union began to, in effect, enforce its values by way of its pre-accession conditionality policy<sup>14</sup> towards the countries of Central and Eastern Europe (CEE) which have since become its member states (Hungary and Poland being two such CEE countries). Prior to welcoming the CEE countries in 2004, the Union facilitated in these countries the establishment of new or a reform to the existing democratic institutions - reconsolidation of the state of the rule of law being the key objective and main driver of the institutional transformation<sup>15</sup>. Indeed, in the process of their “Europeanization”, these countries went through a unique transformation of their political and legal systems, relying on the principle of the rule of law as one of engines that helped operationalise the change<sup>16</sup>.

The rule of law violations in Hungary and Poland which have been transpiring for the better part of the last decade<sup>17</sup> seem to validate certain authors’ claims over the failings of the EU’s conditionality approach during these countries’ pre-accession period<sup>18</sup>. Have these countries in the past decade truly been “backsliding” on the rule of law standards or is this backsliding laying bare the deficiencies of the EU’s conditionality approach as it had been employed during the pre-accession period? Namely, the Copenhagen criteria and subsequently the Madrid criteria for Union membership, were formulated in anticipation of the CEE countries’ accession to the EU<sup>19</sup>, with the EU’s conditionality approach at the time being fairly rudimentary in comparison to the much more advanced enlargement methodology applied today. By this token, one may be led to question

<sup>11</sup> CJEU, C-156/21, cit., para. 232; CJEU, C-204/21, cit., para. 67.

<sup>12</sup> As such, this provision imposes specific duties (mainly) on the Member States (M. VARJU, *Member State Interests and European Union Law: Revisiting the Foundations of Member State Obligations*, London, 2020, p. 71).

<sup>13</sup> D. KOCHENOV, *EU Law without the Rule of Law: Is the Veneration of Autonomy Worth It?*, in *Yearbook of European Law*, Vol. 34, Issue 1, 2015, p. 16.

<sup>14</sup> ID., p. 16-17, Kochenov finds that highly questionable results were accomplished in the process .

<sup>15</sup> E. DOYLE STEVICK, *How Can Schools Promote Rule of Law Norms in Transitioning Societies? Lessons from Post-Communist Europe*, in *Justice Sector Training, Research and Coordination (JUSTRAC) Research Report*, April 2019, p. 1.

<sup>16</sup> J. PŘIBÁŇ, *From ‘Which Rule of Law?’ to ‘The Rule of Which Law?’: Post-Communist Experiences of European Legal Integration*, in *Hague Journal on the Rule of Law*, Vol. 1, Issue 2, 2017, p. 337.

<sup>17</sup> For those Member States that most often come under scrutiny for breaching the EU values (see M. BONELLI, M. CLAES, B. DE WITTE and K. PODSTAWA (eds.), *Special Section “Usual and Unusual Suspects: New Actors, Roles and Mechanisms to Protect EU Values”*, in *European Papers*, Vol. 7, 2022).

<sup>18</sup> See D. KOCHENOV, *op. cit.*, p. 17. On the perceived shortcomings of the EU’s conditionality approach during the time of its “Big Bang” enlargement of 2004, see ID., *EU Enlargement and the Failure of Conditionality*, 2008.

<sup>19</sup> See, inter alia, J. HUGHES, G. SASSE, C. GORDON, *Europeanization and Regionalization in the EU’s Enlargement to Central and Eastern Europe: The Myth of Conditionality*, London, 2005, p. 10 ff., 165.



whether the assessment surrounding these countries’ level of preparation as regards the state of the rule of law had been sufficiently thoroughly done by the competent EU institutions<sup>20</sup>, and if not, would this in turn have made it easier for these countries to regress over time, prompting the rule of law deficiencies in their national systems to resurface? Relatedly, commentators have questioned whether in its pre-accession conditionality applied to the EU newcomers from the CEE region, the Commission had sufficiently precisely articulated the political criteria for EU membership<sup>21</sup>, for which there is an express reference in art. 49 TEU and of which the rule of law forms part<sup>22</sup>. As a result, if the Commission had indeed been unsuccessful in conveying the true meaning and scope of its fundamental values to Poland, Hungary, and the other CEE countries, leaving them to forge their autonomous understanding of the concepts of democracy and rule of law, then from a present day perspective, it would be difficult to comprehend how the Commission can outright discount the option that as full EU Member States, Hungary and Poland were over time able to develop *their own* interpretation and understanding of these art. 2 TEU values in lieu of a *uniform, EU-specific* one<sup>23</sup>. In this sense, it has been submitted that, while the rule of law is presumed to govern the societies of all of the Member States, at the same time, this concept fails to apply itself to the relationship between the EU and its Member States<sup>24</sup> – producing a certain ambivalence about the strength of the rule of law’s “virtues” as a part of the EU’s institutional ethos<sup>25</sup>.

In recent years, the EU has put into effect a number of mechanisms to confront the rule of law violations taking place in Hungary and Poland. In 2017 and 2018, the Commission and the Parliament, each on their own motion, activated the initial phase of the art. 7 TEU procedure to curb the alleged breaches of the Union’s values committed by these two countries<sup>26</sup>. In December 2017, the Commission adopted a Reasoned Proposal in accordance with art. 7, para. 1 TEU regarding the rule of law in Poland, demanding of the Council of the EU to adopt a Proposal for a Council Decision on the determination of a clear risk of a serious breach by the Republic of Poland of the rule of law<sup>27</sup>. Later on, in September 2018, the Parliament passed a Resolution calling on the Council to determine, pursuant to art. 7, para. 1 TEU, the existence of a clear risk of a

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<sup>20</sup> On the verification of rule of law standards as usually merely technical exercise performed by rule of law promoters and rule of law practitioners who habitually take the simplistic approach of preparing institutional checklists and copying institutional forms and putting a primary emphasis on the judiciary, see T. CAROTHERS, *Promoting the Rule of Law Abroad: The Problem of Knowledge*, in *Democracy and Rule of Law Project Working Paper*, Issue 34, 2003, p. 6, 8 and 13.

<sup>21</sup> R. JANSE, *Is the European Commission a Credible Guardian of the Values? A Revisionist Account of the Copenhagen Political Criteria during the Big Bang Enlargement*, in *International Journal of Constitutional Law*, Vol. 17, Issue 1, 2019, p. 44.

<sup>22</sup> Art. 49 TEU: “Any European State which respects the values referred to in Article 2 and is committed to promoting them may apply to become a member of the Union”.

<sup>23</sup> R. JANSE, *op. cit.*, p. 45; T. DRINÓCZI, A. BIEN-KACAŁA, *Illiberal Legality*, in T. DRINÓCZI, A. BIEN-KACAŁA (eds.), *Rule of Law, Common Values, and Illiberal Constitutionalism: Poland and Hungary within the European Union*, London, 2021, p. 219.

<sup>24</sup> A. WILLIAMS, *op. cit.*, p. 108.

<sup>25</sup> *Id.*, p. 107.

<sup>26</sup> The art. 7 TEU procedure can be activated with respect to a serious and persistent breach by a Member State of the values referred to in art. 2 TEU, or a clear risk thereof. More on the art.7 TEU procedure, see *infra* in Section 3.

<sup>27</sup> European Commission, *Reasoned Proposal in accordance with art. 7(1) of the Treaty on European Union regarding the rule of law in Poland: Proposal for a Council Decision on the determination of a clear risk of a serious breach by the Republic of Poland of the rule of law*, of 20 December 2017, COM (2017) 835 final, 2017/0360(NLE).

serious breach by Hungary of the values on which the Union is founded<sup>28</sup>. Neither of these two initiatives coming from the Commission and the Parliament materialised in a decision by the Council, which only confirms the highly politically sensitive nature of the art. 7 TEU procedure<sup>29</sup>.

In its 2023 *Rule of Law Report Country Chapter on the rule of law situation in Poland*, issued on 5 July 2023, the Commission held that serious concerns persist in relation to the independence of the Polish judiciary<sup>30</sup>. Since then, with the new government assuming power in December 2023, there has been a positive shift in the direction of a gradual overhaul of the problematic reforms to the Polish judicial system. On 6 May 2024, the Commission completed its review on the rule of law situation in Poland in the context of the art. 7, para. 1 TEU procedure, acknowledging Poland's efforts in undertaking a series of legislative and non-legislative measures to address the concerns regarding the independence of the judiciary as well as recognising the primacy of EU law and pledging to implement all judgments of the CJEU and the European Court of Human Rights relating to rule of law, including judicial independence<sup>31</sup>. Based on this visible change in circumstances, the Commission found that there is no longer a clear risk of a serious breach of the rule of law in Poland within the meaning of art. 7, para. 1 TEU, informing the Council and the Parliament of this assessment as well as its intention to withdraw the Reasoned Proposal of 2017. Subsequently, the General Affairs Council held a meeting on 21 May 2024 that confirmed the Commission's findings, upon which, on 29 May 2024, the Commission officially decided to close the art. 7, para. 1 TEU procedure for Poland by withdrawing the reasoned proposal that initially triggered this procedure in 2017<sup>32</sup>.

### 3. The EU's Unique Brand of Values-Based Conditionality: Do Values and Conditionality Go Together?

In order to understand how values, and value conditionality for that matter, operate, it is crucial to adopt a comprehensive approach to examining how the EU implements and practices its fundamental values<sup>33</sup>. The provisions in the Treaties relative to the Union's values serve as the basis for such an examination, but on their own do not fully capture

<sup>28</sup> Resolution of the European Parliament, *on a proposal calling on the Council to determine, pursuant to Art. 7(1) of the Treaty on European Union, the existence of a clear risk of a serious breach by Hungary of the values on which the Union is founded*, of 12 September 2018, 2017/2131(INL), P8\_TA(2018)0340.

<sup>29</sup> See A. WILLIAMS, *op. cit.*, p. 93; D. KOCHENOV, P. BARD, *Against Overemphasizing Enforcement in the Current Crisis: EU Law and the Rule of Law in the (New) Member States*, in M. MATLAK, F. SCHIMMELFENIG, D. KOCHENOV (eds.), *Europeanization Revisited: Central and Eastern Europe in the European Union*, 2018, p. 81.

<sup>30</sup> Communication of the European Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, of 5 July 2023, *2023 Rule of Law Report The rule of law situation in the European Union - 2023 Rule of Law Report Country Chapter on the rule of law situation in Poland*, Brussels, SWD (2023) 821 final.

<sup>31</sup> European Commission Press Release, *Commission intends to close Art. 7(1) TEU procedure for Poland*, 6 May 2024, [https://ec.europa.eu/commission/presscorner/detail/en/ip\\_24\\_2461](https://ec.europa.eu/commission/presscorner/detail/en/ip_24_2461).

<sup>32</sup> *Ibid.*

<sup>33</sup> P.J. CARDWELL, *Is the EU a Values-Led International Actor?*, in F. CASOLARI, L.S. ROSSI (eds.), *Integrating FTAs into the EU Legal Order: Threatening or Mainstreaming the EU Constitutional Identity*, 2024, still to be published, p. 2; Draft chapter available at [https://www.academia.edu/40896272/Is\\_the\\_EU\\_a\\_values\\_led\\_international\\_actor](https://www.academia.edu/40896272/Is_the_EU_a_values_led_international_actor)). See also, I. MANNERS, *Normative Power Europe: a Contradiction in Terms?*, in *JCMS: Journal of Common Market Studies*, 2002, p. 235; I. MANNERS, *Normative Power Europe Reconsidered: Beyond the Crossroads*, in *Journal of European Public Policy*, 2006, p. 182.

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the essence of the values in question nor the way in which they function in practice – it is indispensable that any such analysis takes into consideration the relevant EU legal and policy instruments and practices adopted across various policy sectors<sup>34</sup>. Conversely, it is important to acknowledge that the EU’s system has been able to evolve by keeping pace with the enlargement and other structural political changes occurring within the Union and the Member States, the result of which being that the EU values have not always “clearly, consistently, or coherently” been applied across every policy area<sup>35</sup>. It has been proposed that the EU values can be to a certain extent “differentiated” based on the context (internal or external), circumstances and frame in which they are being applied<sup>36</sup>. Such a differentiation between the EU’s values is indicative of the type of actor the EU is or portrays itself to be: it is one thing for the EU’s discourse to be values-oriented, but translating these values into practice in a manner that is consistent and coherent proves to be much more challenging<sup>37</sup>.

The EU’s projection of its values in the *external* context is directly influenced by how these values are defined and applied internally<sup>38</sup>. The *2016 Global Strategy for the EU Union’s Foreign and Security Policy* views the credibility of the EU’s external engagement as hinging on, among other things, its unity, its effectiveness, the consistency of its policies and the adherence to its values<sup>39</sup>. In other words, it follows that the EU’s consistent observance of its values internally will determine its external credibility and influence<sup>40</sup>. For the EU’s (internal and external) conditionality to be effective and achieve its purpose, there needs to be *credibility* attached to how the EU formulates its conditionality approach, as well as a clear alignment between its internal practices and stated external objectives<sup>41</sup>.

As concerns the value conditionality exercised *internally*, the *Rule of Law Conditionality Regulation (Regulation (EU, Euratom) 2020/2092 on a general regime of conditionality for the protection of the Union budget)*<sup>42</sup> is a particularly important EU conditionality instrument implemented with respect to the Member States<sup>43</sup>. It is the most prominent (legal) mechanism the EU has put into operation to date in order to counter the breaches of the rule of law occurring in the Member States. In force since January 2021, this Regulation lays down rules for the protection of the Union’s budget in case of

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<sup>34</sup> P.J. CARDWELL, *op. cit.*, p. 2; See also, I. MANNERS, *Normative Power Europe Reconsidered: Beyond the Crossroads*, *cit.*

<sup>35</sup> P.J. CARDWELL, *op. cit.*, p. 2.

<sup>36</sup> *Ibidem.*

<sup>37</sup> *Id.*, p. 3.

<sup>38</sup> *Id.*, p. 6.

<sup>39</sup> European External Action Service, *Shared Vision, Common Action: A Stronger Europe - A Global Strategy for the European Union’s Foreign and Security Policy*, June 2016, [https://www.eas.europa.eu/sites/default/files/eugs\\_review\\_web\\_0.pdf](https://www.eas.europa.eu/sites/default/files/eugs_review_web_0.pdf), p. 10.

<sup>40</sup> *Id.*, p. 15; as one author describes it, Europe’s fundamental purpose depends largely on the ability of the EU to uphold its values internally before these values are exported externally (E. HERLIN-KARNELL, *EU Values and the Shaping of the International Legal Context*, in D. KOCHENOV, F. AMTENBRINK (eds.), *The European Union’s Shaping of the International Legal Order*, Cambridge, 2013, p. 89).

<sup>41</sup> For a critical reflection on the need to achieve such alignment, see K.A. NICOLIADIDES, R.L. HOWSE, *This is My EUtopia... Narrative as Power*, in *Journal of Common Market Studies*, Vol. 40, Issue 4, 2002, p. 767; E. HERLIN-KARNELL, *op. cit.*, p. 98.

<sup>42</sup> Regulation (EU, Euratom) 2020/2092 of the European Parliament and of the Council, *on a general regime of conditionality for the protection of the Union budget*, of 16 December 2020, in OJ L 433I, of 22 December 2020.

<sup>43</sup> On the different ways in which the EU has thus far used the approach of rule of law conditionality, see I. STAUDINGER, *The Rise and Fall of Rule of Law Conditionality*, in *European Papers*, Vol. 7, No. 2, 2022, pp. 721-737.

generalised deficiencies as regards the rule of law in the Member States<sup>44</sup>, establishing a conditionality mechanism that would protect the Union budget in case of breaches of the principles of the rule of law<sup>45</sup>. Even before the Regulation was adopted, the Member States were required to ensure that their national regulatory frameworks for financial management are robust, that the relevant EU rules are being correctly implemented, and that the necessary administrative and institutional capacities are put into place<sup>46</sup>. In this sense, the rule of law conditionality mechanism serves to further *reinforce* the cooperation between the Member States in areas where economies of scale or externalities are significant, with the respect for the rule of law acting as a prerequisite for the spending of the EU budget by the Member States to be considered sufficiently protected<sup>47</sup>. The Regulation envisages the adoption of appropriate measures in instances where it has been found that breaches of the principles of the rule of law in a Member State affect or seriously risk affecting the sound financial management of the Union budget or the protection of the Union’s financial interests “in a sufficiently direct way”<sup>48</sup>. Art. 6 of the Regulation lays down the procedural steps necessary for the implementation of the conditionality mechanism, entrusting the Commission with the key role in operationalising the rule of law conditionality mechanism – based on its findings of violations of the rule of law, the Commission can decide to follow through by submitting to the Council a proposal for an implementing decision prescribing the appropriate measures<sup>49</sup>.

Unsurprisingly, the Regulation’s conditionality mechanism had been met with resistance from the Hungarian and Polish governments. Their pushback against the adoption of the Regulation has come in different forms. Firstly, at the time of the adoption of the Regulation, Hungary and Poland opposed the text agreed by the Parliament and the Council and while they could not veto its adoption (due to the qualified majority vote in the Council), they had leveraged their opposition by threatening to block the financial and economic recovery instruments (requiring a unanimous approval from the Member States) that were being adopted at the time – notably, the EU’s long-term budget for the period 2021-2027 and the *NextGenerationEU* plan<sup>50</sup>. The European Council meeting of 11 December 2020 ended the stalemate, with the former offering assurances to the Member States that the Regulation will be applied in full respect of the art. 4, para. 2 TEU

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<sup>44</sup> See [https://commission.europa.eu/strategy-and-policy/eu-budget/protection-eu-budget/rule-law-conditionality-regulation\\_en#:~:text=Under%20the%20conditionality%20regulation%2C%20the,on%20the%20proposals%20of%20measures.](https://commission.europa.eu/strategy-and-policy/eu-budget/protection-eu-budget/rule-law-conditionality-regulation_en#:~:text=Under%20the%20conditionality%20regulation%2C%20the,on%20the%20proposals%20of%20measures.)

<sup>45</sup> Regulation (EU, Euratom) 2020/2092, art. 1.

<sup>46</sup> Explanatory Memorandum to the Proposal for a Regulation of the European Parliament and of the Council, of 2 May 2018, *on the protection of the Union’s budget in case of generalised deficiencies as regards the rule of law in the Member States*, COM(2018) 324 final, 2018/0136 (COD), p. 1.

<sup>47</sup> Explanatory Memorandum, p. 1.

<sup>48</sup> Rule of Law Conditionality Regulation, art. 4, para. 1. Behaviours or practices that may be indicative of breaches of the principles of the rule of law have been listed in art. 3 of the Regulation: “*For the purposes of this Regulation, the following may be indicative of breaches of the principles of the rule of law: (a) endangering the independence of the judiciary; (b) failing to prevent, correct or sanction arbitrary or unlawful decisions by public authorities, including by law enforcement authorities, withholding financial and human resources affecting their proper functioning or failing to ensure the absence of conflicts of interest; (c) limiting the availability and effectiveness of legal remedies, including through restrictive procedural rules and lack of implementation of judgments, or limiting the effective investigation, prosecution or sanctioning of breaches of law*”.

<sup>49</sup> Rule of Law Conditionality Regulation, art. 6.

<sup>50</sup> CJEU, Opinion of Advocate General Campos Sánchez-Bordona of 2 December 2021, case C-156/21 *Hungary v Parliament and Council*, para. 88.



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“national identity” clause<sup>51</sup>. Secondly, on 11 March 2021, Hungary and Poland (each of them separately), launched proceedings before the CJEU disputing the validity of the Regulation on multiple grounds, challenging the validity of the rule of law conditionality mechanism it establishes. On 16 February 2022, the CJEU gave its rulings in both cases, which will be analysed *infra* in Section 4, specifically, in reference to the “national identity” arguments raised by Hungary and Poland.

Apart from the general conditionality mechanism which applies to breaches of the principles of the rule of law that affect or seriously risk affecting the sound financial management of the Union budget or the protection of the Union’s financial interests in a sufficiently direct way, the EU has at its disposal a range of other rule of law conditionality instruments, branded as “response” tools. Some of these include: i) the “rule of law framework”, an early-warning instrument adopted by the Commission in March 2014 which foresees a structured dialogue with a Member State to address systemic threats to the rule of law<sup>52</sup>; ii) the “horizontal enabling condition” on the EU Charter of Fundamental Rights, a tool ensuring the protection of EU funds in the context of the cohesion policy, requiring all Member States to put in place effective mechanisms that guarantee the programmes supported by the Common Provisions Regulation and their implementation comply with the Charter<sup>53</sup>. Further tools are the iii) infringement actions launched by the Commission (or the Member States) before the CJEU, to ensure that EU law is correctly applied and respected at the national level<sup>54</sup>, enhanced by the options to carry out expedited infringement proceedings, request interim measures, or bring actions regarding the non-implementation of CJEU’s judgments<sup>55</sup>. The so-called “last resort” mechanism is iv) art. 7 TEU which is a Treaty instrument envisaged to address serious breaches or risks of serious breaches to the rule of law as well as the rest of the art. 2 values, which, if applied to its full extent, could lead to the adoption of sanctions such as suspension of a Member State’s voting rights in the Council of the EU<sup>56</sup>.

In addition to these tools, the EU has also put into effect and perfected over the course of the years, so-called “preventive” tools to address the Member States’ rule of law challenges. Some of these include: i) the “annual rule of law cycle” which centers on an annual rule of law report prepared by the Commission, with the goal of promoting the rule of law through dialogue and exchange of information, preventing rule of law problems from emerging or deepening<sup>57</sup>; ii) the “EU justice scoreboard” which is an annual report prepared by the Commission that provides verifiable and comparable data and monitors the independence, quality and efficiency of the Member States’ justice systems<sup>58</sup>, as well as iii) the “European semester” which is a yearly assessment process, more general in nature, that provides country-specific recommendations on macroeconomic and structural issues, including on justice systems and the fight against corruption, aimed at improving the Union’s economic growth<sup>59</sup>.

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<sup>51</sup> European Council Conclusions of 11 December 2020, EUCO 22/20, para. 2; See also Opinion of AG Campos Sánchez-Bordona, cit., para. 91.

<sup>52</sup> European Commission, *The EU’s Rule of Law Toolbox Factsheet*, 2023, [https://commission.europa.eu/system/files/2023-07/112\\_1\\_52675\\_rol\\_toolbox\\_factsheet\\_en.pdf](https://commission.europa.eu/system/files/2023-07/112_1_52675_rol_toolbox_factsheet_en.pdf).

<sup>53</sup> *Ibidem*.

<sup>54</sup> *Ibidem*.

<sup>55</sup> Resolution of the European Parliament, *on the situation in Hungary and frozen EU funds*, of 18 January 2024, P9\_TA(2024)0053, (2024/2512(RSP)), para. 10.

<sup>56</sup> See [https://commission.europa.eu/system/files/2023-07/112\\_1\\_52675\\_rol\\_toolbox\\_factsheet\\_en.pdf](https://commission.europa.eu/system/files/2023-07/112_1_52675_rol_toolbox_factsheet_en.pdf)

<sup>57</sup> See [https://commission.europa.eu/system/files/2023-07/112\\_1\\_52675\\_rol\\_toolbox\\_factsheet\\_en.pdf](https://commission.europa.eu/system/files/2023-07/112_1_52675_rol_toolbox_factsheet_en.pdf)

<sup>58</sup> *Ibidem*.

<sup>59</sup> *Ibidem*.



### 3.1. The EU's Rule of Law Conditionality Mechanism as Applied with Respect to Hungary

As indicated *supra*, in the past years Hungary has been facing important challenges on the domestic rule of law front. This is the reason why in order to curb these deficiencies, the EU has activated the Regulation's rule of law conditionality mechanism against Hungary. The amount of around EUR 21 billion in EU budget money currently remains blocked for Hungary<sup>60</sup> - part of this sum comes from the Cohesion Policy funds and part is allocated from the Recovery and Resilience Fund<sup>61</sup>. The freezing of the funds allocated to Hungary was done based on evaluations carried out by the Commission.

The Commission made use of the Regulation's conditionality mechanism for the first time against Hungary on 18 September 2022, by adopting a *Proposal on measures for the protection of the Union budget against breaches of the principles of the rule of law in Hungary*<sup>62</sup>. Based on the Regulation, the Commission proposed budget protection measures to the Council, such that would ensure the protection of the EU budget and the financial interests of the EU against breaches of the principles of the rule of law in Hungary<sup>63</sup>. Acting on the Commission's Proposal, on 15 December 2022, the Council adopted *Implementing Decision (EU) 2022/2506 on measures for the protection of the Union budget against breaches of the principles of the rule of law in Hungary*<sup>64</sup>, based on the evaluation provided by the Commission, assessing the relevant facts and circumstances which had led to the activation of the conditionality mechanism<sup>65</sup>. In their deliberations, the representatives of the Member States in the Council had acknowledged the efforts undertaken by the Hungarian authorities, but decided that these remedial measures failed to satisfactorily address the identified breaches of the rule of law and the risks they pose to the Union budget<sup>66</sup>. Under the Council Implementing Decision, the Commission is tasked with monitoring the adoption of remedial measures by Hungary in

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<sup>60</sup> European Commission Press Release, *Commission considers that Hungary's judicial reform addressed deficiencies in judicial independence, but maintains measures on budget conditionality*, 13 December 2023 [https://ec.europa.eu/commission/presscorner/detail/en/ip\\_23\\_6465](https://ec.europa.eu/commission/presscorner/detail/en/ip_23_6465).

<sup>61</sup> European Parliament Press Release, *European Parliament debate: Release of frozen EU funds to Hungary: MEPs to debate next steps with Commission*, 23 January 2024, <https://www.europarl.europa.eu/news/en/press-room/20240122IPR17026/release-of-frozen-eu-funds-to-hungary-meps-to-debate-next-steps-with-commission>; Resolution of the European Parliament of 18 January 2024, *cit.*, para. H.

<sup>62</sup> European Commission Press Release, *EU budget: Commission proposes measures to the Council under the Conditionality Regulation*, 18 September 2022, [https://ec.europa.eu/commission/presscorner/detail/en/ip\\_22\\_5623](https://ec.europa.eu/commission/presscorner/detail/en/ip_22_5623).

<sup>63</sup> *Ibidem*.

<sup>64</sup> Council Implementing Decision (EU) 2022/2506, *on measures for the protection of the Union budget against breaches of the principles of the rule of law in Hungary*, of 15 December 2022, in OJ L 325/94, of 20 December 2022.

<sup>65</sup> On the potential problems arising from the legal implications of this Council Implementing Decision for certain entities falling within its scope of application, see the Action brought before the EU General Court on 2 March 2023, Case T-115/23 *Debreceni Egyetem v Council*. The applicant in the case is seeking annulment of parts of the Council Implementing Decision, alleging that they represent an infringement of the principles of the rule of law, legal certainty, equality and equal treatment and are therefore violation of art. 2 TEU, [https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv%3AOJ.C\\_.2023.173.01.0031.02.ENG&toc=OJ%3AC%3A2023%3A173%3ATOC#ntr1-C\\_2023173EN.01003102-E0001](https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv%3AOJ.C_.2023.173.01.0031.02.ENG&toc=OJ%3AC%3A2023%3A173%3ATOC#ntr1-C_2023173EN.01003102-E0001).

<sup>66</sup> See <https://www.consilium.europa.eu/en/press/press-releases/2022/12/12/rule-of-law-conditionality-mechanism/>.

the course of the procedure set out therein<sup>67</sup>. Likewise, on the same date, based on a proposal from the Commission, the Council adopted an *Implementing Decision on the approval of the assessment of the recovery and resilience plan for Hungary*, which set out ‘super milestones’ for Hungary to implement before the submission of the first payment request from the EU’s Recovery and Resilience Fund<sup>68</sup>. Overall, under the Recovery and Resilience Plan, Hungary committed to 27 ‘super milestones’ that include the measures requested by the Commission under the ‘horizontal enabling condition’ on the EU Charter of Fundamental Rights as well as 21 ‘super milestones’ which correspond to the remedial measures pledged by Hungary under the rule of law conditionality mechanism<sup>69</sup>.

A year later, on 13 December 2023, the Commission adopted two decisions reviewing the rule of law situation in Hungary. The Commission’s *first decision*<sup>70</sup> relates to the horizontal enabling condition on the EU Charter and concerns the judicial reform in Hungary. Upon a thorough assessment and several exchanges with the Hungarian government, the Commission found that Hungary has adopted legislation that contributes to strengthening the independence of the national judiciary thereby fulfilling the horizontal enabling condition with respect to judicial independence<sup>71</sup>. This decision practically meant that the Hungarian authorities could start claiming reimbursements of up to around EUR 10,2 billion from the roughly EUR 22 billion allocated in Cohesion funds for the country<sup>72</sup>. The Parliament voiced its strong disapproval regarding this course of action taken by the Commission by stating that Hungary has not fulfilled the pledged reforms for judicial independence and indicating its intention to pursue legal action to overturn the Commission’s decision<sup>73</sup>.

The Commission’s *second decision* concerns the Regulation’s rule of law conditionality mechanism, where, upon reviewing Hungary’s situation, the Commission was not satisfied that Hungary’s breaches of the principles of the rule of law that led to the adoption of the Council implementing decisions in December 2022, had been adequately addressed<sup>74</sup>. The Commission confirmed that the risk to the Union budget had remained unchanged since December 2022, finding no grounds for the Council’s measures against Hungary to either be adapted or lifted<sup>75</sup>. As a result of this, funds from three Cohesion Policy programmes, with a budget of EUR 6.3 billion, still remain suspended for Hungary<sup>76</sup>.

Regarding the Commission’s *first decision* of 13 December 2023 which allowed for the release of the blocked funds to the amount of EUR 10,2 billion to Hungary, in a

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<sup>67</sup> *Ibidem*. The measures in question concern the implementation of the principles of the rule of law in Hungary in the areas of public procurement, the fight against corruption, public interest trusts and prosecutorial action.

<sup>68</sup> Council Implementing Decision (EU), *on the approval of the assessment of the recovery and resilience plan for Hungary*, ST 15447/22 INIT, ST 15447/22 ADD 1.

<sup>69</sup> These “super milestones” remain unchanged in Hungary’s revised plan (approved by the Council on 8 December 2023), and equally apply to the *REPowerEU* chapter (see European Commission Press Release of 13 December 2023, cit.

<sup>70</sup> Commission Decision C(2023) 9014.

<sup>71</sup> *Ibidem*.

<sup>72</sup> European Parliament Press Release of 23 January 2024, cit., para. K. In spite of the funds being released, the Commission will continue to closely monitor the application of the measures adopted by Hungary and, should it, at any point in time, find that the country has again failed to meet the horizontal enabling condition, it may decide to block further funding (European Commission Press Release of 13 December 2023, cit.).

<sup>73</sup> European Parliament Press Release of 23 January 2024, cit.

<sup>74</sup> European Parliament Resolution of 18 January 2024, cit., in part H.

<sup>75</sup> *Ibidem*.

<sup>76</sup> European Commission Press Release of 13 December 2023, cit.

Resolution passed on 18 January 2024<sup>77</sup>, the Parliament described this decision as politically contradicting the decision to prolong the measures adopted under the Rule of Law Conditionality Regulation, emphasising that the Commission is charged with independently and objectively assessing Hungary's compliance, without compromising on democracy, the rule of law and fundamental rights<sup>78</sup>. Contrary to the Commission's assessment, the Parliament considers that even after the recent reforms, Hungary continues to fall behind in meeting the standard of judicial independence set out in the EU Charter, which is a finding corroborated by experts in Hungary and internationally<sup>79</sup>. The Parliament maintains that the measures required for the release of EU funding must be treated as a single (integral) package, insisting that no payments should be released to Hungary if progress is made in one or more areas while at the same time deficiencies persist in another<sup>80</sup>. The Parliament followed up on the concerns voiced by instructing its Committee on Legal Affairs to take the necessary steps as soon as possible in relation to the Commission's decision, as well as requesting an analysis from its Legal Service, for the purpose of reviewing the legality of the decision before the CJEU, in accordance with the art. 263 TFEU procedure for the review of legality of Union acts<sup>81</sup>. In March 2024, the Parliament's Committee on Legal Affairs voted in favor of bringing an action against the Commission before the CJEU for breach of the obligation to ensure against payments from the EU budget being misused<sup>82</sup>. In relation to these developments, the Parliament has equally questioned the competence of the Hungarian government to credibly fulfil the task of holding the Council presidency for the period July-December 2024, on account of the country's non-compliance with the EU standards and requirements relative to the EU values and the principle of sincere cooperation<sup>83</sup>.

#### 4. The Particularity of “National Identity” Concerns versus the Commonality of the EU's Shared Values

##### 4.1. National Identity as a “Loaded” Term

National identity is a versatile and multi-faceted concept, difficult to pin down on account of its constantly evolving and increasingly fluid nature. It encompasses a number of different aspects, also known as elements of nationhood<sup>84</sup>. The most prominent of these include: i) historically shared territory of a given population, ii) shared nature of myths

<sup>77</sup> European Parliament Resolution of 18 January 2024, cit.

<sup>78</sup> Id., para. 5.

<sup>79</sup> *Ibidem*. The Parliament considers the measures adopted by Hungary to be insufficient in deterring undue political interference as they are liable to be circumvented or inadequately applied.

<sup>80</sup> European Parliament Resolution of 18 January 2024, cit., para. 9. The Parliament has declared its commitment to continually ensure that EU funds reach the Hungarian population, including through direct funding for local and regional authorities and civil society, once the conditions have been fulfilled, stressing that the Hungarian authorities are the sole culprit for the current situation.

<sup>81</sup> European Parliament Resolution of 18 January 2024, cit., para. 11.

<sup>82</sup> *Brussels vs. Brussels: EU Parliament to Sue Commission over Hungary Cash*, in *Politico*, 12 March 2024 <https://www.politico.eu/article/parliament-sues-commission-over-unfreezing-of-hungary-funds/#:~:text=The%20Parliament's%20legal%20affairs%20committee,taxpayer%20money%20from%20being%20misused.>

<sup>83</sup> European Parliament Resolution of 18 January 2024, cit., para. 8. For a further discussion on the use of the principle of sincere cooperation as a tool to forestall the possibility for Member States to abuse or misuse the art. 4, para. 2 TEU “national identity” clause, see Section 6 *infra*.

<sup>84</sup> A.D. SMITH, *National Identity and the Idea of European Unity*, in *International Affairs*, Vol. 68, Issue. 1, 1002, p. 60.

and origin and historical memories of the community; iii) common bond of a standardized public culture; iv) common economy and territorial mobility for all members of a population, and v) the existence of a unified system of common legal rights and duties for all members, established under common laws and by common institutions<sup>85</sup>.

The introduction of the concept of “national identity” in the Union Treaties acts as a double-edged sword. On the one hand, it is meant to be an expression of the Union’s deference to the Member States’ national identity concerns, while on the other hand, it has gradually become, the source of lingering controversy regarding its interpretation and practical application. Pursuant to the art. 4, para. 2 TEU “national identity” clause, originally included in the Maastricht Treaty (1992), the Union undertakes to respect the equality of the Member States before the Union Treaties as well as their national identities, inherent in their fundamental political and constitutional structures. Next, the Union is to respect the Member States’ essential State functions, including ensuring the territorial integrity of the State, maintaining law and order, and safeguarding national security. The initial, Maastricht Treaty version of the “national identity” clause is less elaborate than the existing one and merely provides that the Union “shall respect the national identities of its Member States, whose systems of government are founded on the principles of democracy<sup>86</sup>, whereas the subsequent, Amsterdam Treaty version simply states that the Union “shall respect the national identities of its Member States”<sup>87</sup>.

The EU’s obligation to respect the Member States’ national identities, as these have been independently defined by them, epitomizes the “very essence of the European project ... which consists of following the path of integration whilst maintaining [the Member States’] political existence”<sup>88</sup>. It is a necessary obligation that the Union has assumed towards its Member States for the purpose of moving the integration process forward<sup>89</sup>. The insertion of the “national identity” clause in the Treaties serves to limit the effect of EU law in areas which are regarded as essential for the Member States<sup>90</sup> and acts as a counterpoint to European integration as well as a vital safeguard which secures the evolution of the integration process<sup>91</sup>. The “national identity” guarantee provides a counterbalance to the goals of “an ever-closer union”, integration, harmonisation, unification and convergence<sup>92</sup>, by requiring that EU action is consistent with the Member States’ national identities and respects the limitations emanating from them<sup>93</sup>. Hence, the “national identity” clause sets boundaries on the EU’s potential to act in a way that may jeopardise the Member States’ national identities and circumscribes the “constitutional limits of EU integration” as outer limits of the EU’s conferred competences<sup>94</sup>.

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<sup>85</sup> *Id.*, p. 64. Smith makes a very poignant observation which ties back to present-day occurrences within the Union, namely that “*given the multiplicity of language groups and ethnic heritages in Europe, it is reasonable to expect the persistence of strong ethnic sentiments in many parts of the continent, as well as the continuity of periodic revival of national identities*”.

<sup>86</sup> Art. F, para. 1 of the Treaty of Maastricht.

<sup>87</sup> Art. F, para. 3 of the Treaty of Amsterdam.

<sup>88</sup> CJEU, Opinion of Advocate General Poiares Maduro of 8 October 2008, case C–213/07, *Michaniki AE*, para. 31.

<sup>89</sup> *Ibidem*.

<sup>90</sup> CJEU, Opinion of Advocate General M. Campos Sánchez-Bordona of 2 December 2021, Case C-157/21, *Poland v Parliament and Council*, para. 19.

<sup>91</sup> M. CLAES, *National Identity: Trump Card or Up for Negotiation?*, in A. SAIZ ARNAIZ, C. ALCOBERRO LLIVINA (eds.), *National Constitutional Identity and European Integration*, 2013, p. 109, 111.

<sup>92</sup> *Id.*, p. 109.

<sup>93</sup> See also T. KONSTADINIDES, *Dealing with Parallel Universes: Antinomies of Sovereignty and the Protection of National Identity in European Judicial Discourse*, in *Yearbook of European Law*, Vol. 34, 2015, p. 130; M. VARJU, *op. cit.*, p. 75-76.

<sup>94</sup> D. FROMAGE, B. DE WITTE, *op. cit.*, p. 415-416.

To exhaustively define the term “national identity” and the elements it comprises is an all but impossible task given that the term can have different meaning to different Member States<sup>95</sup>. Despite clarifications provided by the relevant EU institutions (including the CJEU) as to the intended meaning of the term “national identity” as it appears in art. 4, para. 2 TEU, the term remains – to a large extent – vague and ambiguous<sup>96</sup>. Nevertheless, ultimately, the discretion to decide on what the term “national identity” encompasses and how it is to be interpreted rests with the Member States given that the only right way to go about protecting the Member States’ national identities is through engagement with the competent national actors<sup>97</sup>. Still, it has been suggested that the “national identity” clause protects those elements of national identity belonging to the so-called “national core”<sup>98</sup>, demanding, in turn, that any interpretation and/or application of art. 4, para. 2 TEU necessarily involve a “filtering” of the Member States’ national identity claims<sup>99</sup>. More precisely, the obligation of respect under the “national identity” clause extends to those features that are specific to a given national community and make it what it is: history, language, values and traditions – features found in the fundamental domestic constitutional structures<sup>100</sup>. Beyond this frame of thinking, other authors support a more extensive interpretation of art. 4, para. 2 TEU and see the reference to “political and constitutional structures” as covering, in addition to institutional elements, sociocultural phenomena, fundamental rights and broader perspectives and understandings of the rule of law<sup>101</sup>.

That being said, it is clear that Member States’ expression and preservation of their national identities constitutes a legitimate interest that can justify derogating from the obligations set out by Union law<sup>102</sup> – in fact, the CJEU has explicitly recognised the preservation of national identity as a “legitimate aim respected by the [Union] legal order”<sup>103</sup>. Regardless, doubts remain over the exact normative nature of art. 4, para. 2 TEU and whether the “national identity” clause can be viewed as a legal tool as well as a political one<sup>104</sup>.

#### 4.2. *The interplay Between EU Values and National Identity*

Moving the conversation about national identity forward, it would be pertinent to now explore the interaction between two distinct rationales: national identity preservation and protection of the Union values. These two rationales are important to keep in mind as they are a powerful reminder that the common obligations undertaken by the Member States in the competence areas allocated to the EU, as well as their conduct when acting under

<sup>95</sup> L. BESSELINK, *National and Constitutional Identity Before and After Lisbon*, in *Utrecht Law Review*, Vol. 6, Issue 3, 2016, p. 42.

<sup>96</sup> E. CLOOTS, *National Identity, Constitutional Identity, and Sovereignty in the EU*, cit., p. 85; A. VON BOGDANDY, S. SCHILL, *op. cit.*, p. 1421.

<sup>97</sup> M. CLAES, *op. cit.*, p. 110, 123.

<sup>98</sup> For a definition of the “national core”, see M. CLAES, *op. cit.*, p. 110. See also. M. VARJU, *op. cit.*, p. 75.

<sup>99</sup> *Id.*, p. 75-76.

<sup>100</sup> E. CLOOTS, *National Identity, Constitutional Identity, and Sovereignty in the EU*, cit., p. 90-91.

<sup>101</sup> L. BESSELINK, *The Persistence of a Contested Concept: Reflections on Ten Years Constitutional Identity in EU Law*, in *European Public Law*, Vol. 27, Issue 3, 2021, pp. 597-612; D. FROMAGE, B. DE WITTE, *op. cit.*, p. 422.

<sup>102</sup> CJEU, Opinion of Advocate General Poirares Maduro, cit., para. 33.

<sup>103</sup> See CJEU, Judgment of 2 July 1996, case C-473/93, *Commission v Luxembourg*, para. 35.

<sup>104</sup> See L. ZUCCA, *A Secular Europe: Law and Religion in the European Constitutional Landscape*, Oxford, 2012, p. 73.



those obligations, are subject to limitations<sup>105</sup>. As a consequence, it can be claimed that the Union values and the Member States’ national identity considerations function as *benchmarks* for national authorities when they exercise the discretion provided to them under EU law or when implementing the obligations arising from the latter<sup>106</sup>.

The EU Charter of Fundamental Rights contains a reference that may provide a suitable lens through which the relationship between national identity arguments and values can be studied. Recital 3 of the Preamble to the EU Charter refers to the Union’s endeavours to preserve and develop its foundational values while “respecting the diversity of the cultures and traditions of the peoples of Europe as well as the *national identities* of the Member States and the organization of their public authorities at national, regional and local levels”<sup>107</sup>. This formulation couples the duty to respect the Union’s common values with the duty to respect the Member States’ national identities thereby essentially obliging the Union to protect its values in a manner that does not threaten or interfere with the Member States’ national identity concerns<sup>108</sup>. At the same time, however, it also opens up the possibility for national governments to evade their obligations relative to the safeguarding of the Union’s values by having recourse to the “national identity” justifications<sup>109</sup>.

In a certain way, the Member States’ national identities and the Union values can be viewed as “higher-order” issues that are different from the typical legal obligations incumbent on the Member States as part of the Union’s regular course of operation<sup>110</sup>. EU’s duty to respect the national identities in turn empowers the Member States to impose limitations on the ordinary functioning of the Union legal and institutional order that derive from a rationale presumed to be “higher order” than “mere interests”<sup>111</sup>. Indeed, if one could conceive of such a hierarchy of importance, certain issues would indeed appear to rank higher than others. This, however, generates another conundrum: if a Member State’s “national identity” interest clashes with a Union value, resulting in a breach of the latter, which one of the two should be presumed to take precedence? What would in this instance be the limits of the “national identity” justification? While the identity clause does perform the role of a barrier warding off actual or potential Union intrusion on Member States’ competences, respect for the diversity of the national political, legal and cultural traditions should not come at the expense of the uniform protection of democracy and rule of law throughout the Union<sup>112</sup>. To overcome such a clash would therefore necessitate a balancing approach by which the Union actively protects its values while *simultaneously* maintaining a steadfast commitment to diversity<sup>113</sup>. The foregoing is borne out by the fact that the art. 2 TEU values themselves find their origin in the common

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<sup>105</sup> M. VARJU, *op. cit.*, p. 66. On the emergence of a legal protection of national identities, see F.X. MILLET, *op. cit.*

<sup>106</sup> M. VARJU, *op. cit.*, p. 66.

<sup>107</sup> Preamble to the CFREU, Recital 3 (emphasis added).

<sup>108</sup> I. CENEVSKA, *A Member State’s “National Identity” Plea as a justification for Circumventing EU Law Obligations*, in *Justinianus Primus Law Review*, Vol. 13, Issue 1, 2022, p. 5.

<sup>109</sup> *Ibidem*.

<sup>110</sup> M. VARJU, *op. cit.*, p. 67, 86. For a discussion on the “value ranking” of EU rules as well as with regard to competing national constitutional rules, and whether in the context of the application of art. 4, para. 2 TEU, certain legal rules could be deemed to have a “lower” value than others, see L. BESSELINK, *National and Constitutional Identity Before and After Lisbon*, *cit.*, p. 49.

<sup>111</sup> See M. VARJU, *op. cit.*, p. 75.

<sup>112</sup> Resolution of the European Parliament, *on the establishment of an EU mechanism on democracy, the rule of law and fundamental rights*, of 25 October 2016, 2015/2254(INL), recital L.

<sup>113</sup> Resolution of the European Parliament, *on the situation of fundamental rights: standards and practices in Hungary (pursuant to the European Parliament resolution of 16 February 2012)*, of 3 July 2013, 2012/2130(INI), recital K.

constitutional traditions of the Member States, making the Union a values-based community *within* which Member States can preserve and develop their national identity<sup>114</sup>.

It has been argued that the relationship between the EU's fundamental values and the "national identity" clause of art. 4, para. 2 TEU is not a hierarchical one since the principle of protection of the national constitutional structures should also be considered as a fundamental principle of the EU legal order<sup>115</sup>. As a consequence to this, the obligations arising from art. 2 TEU and art. 4, para. 2 TEU should be presumed to have the same legal status and importance and must be interpreted harmoniously<sup>116</sup>. The foregoing serves to underscore that art. 4, para. 2 TEU should not be interpreted in isolation from the rest of the Treaty provisions it has a bearing on<sup>117</sup> – markedly, the principle of sincere cooperation, the principle of equality of the Member States (including the equality of their constitutional identities as a corollary) and other principles emanating from the values articulated in art. 2 TEU<sup>118</sup>.

## 5. Hungary and Poland's "National Identity" Arguments before the EU Court of Justice – Balancing Between the Strength of the "Particular" and the Power of the "Shared"

This Section discusses three CJEU cases, decided in 2022 and 2023. In the first two cases, Hungary and Poland, each of them separately, challenged the validity of the Rule of Law Conditionality Regulation, while the third case is an infringement case brought by the Commission against Poland, concerning the breach of the principle of independence of the judicial function. Each of these cases provides important insight into the manner in which the governments of Hungary and Poland formulated their "national identity" pleas for the purpose of justifying their failure to comply with the requirements emanating from the rule of law as a fundamental value of the EU order.

### 5.1. C-156/21 Hungary v Parliament and Council and C-157/21 Poland v Parliament and Council

In the first two cases that will be analysed – *C-156/21 Hungary v Parliament and Council* and *C-157/21 Poland v Parliament and Council*, Hungary and Poland offered similar arguments that turned, *inter alia*, on the possibility for these Member States to rely on the "national identity" justification flowing from art. 4, para. 2 TEU in order to be able to forge their own independent understanding and interpretation of the rule of law as a fundamental value. Decided by a full court and on the same day (16 February 2022), these two high-profile cases illustrate one possible scenario on how a judicial resolution between the competing narratives of safeguarding the art. 2 TEU values and respecting the Member States' national identities can play out. Although all of the pleas raised by Hungary and Poland were rejected by the CJEU, weighing in on how the arguments

<sup>114</sup> *Ibidem* (emphasis added).

<sup>115</sup> See P. FARAGUNA, *On the Identity Clause and Its Abuses: 'Back to the Treaty'*, in *European Public Law*, Vol. 27, Issue 3, 2021, pp. 427-446.

<sup>116</sup> *Ibidem*.

<sup>117</sup> G. MARTINICO, *Taming National Identity: A Systematic Understanding of Article 4(2) TEU*, in *European Public Law*, Vol. 27, Issue 3, 2021, pp. 447-464.

<sup>118</sup> See D. FROMAGE, B. DE WITTE, *op. cit.*, p. 416.

relating to national identity were addressed and ultimately dismissed by the Court provides a much-needed insight.

In C-156/21 *Hungary v Parliament and Council*, as an applicant Hungary was supported by Poland, whereas the defendants, the Parliament and the Council, were supported by a number of Member States (Belgium, Denmark, Germany, Spain, France, Luxembourg, the Netherlands, Finland, Sweden), with the Commission also acting as intervener. In its application, Hungary maintained that the Court should (fully or in part) annul the Rule of Law Conditionality Regulation<sup>119</sup> and insisted that the rule of law conditionality mechanism is contrary to the fundamental guarantee of art. 4, para. 2 TEU that the Union will respect the Member States’ national identities, arguing that the conditionality procedure of the Regulation authorizes reviewing a Member States’ legislation and practice even where it falls outside the scope of EU law<sup>120</sup>. It was alleged that the Regulation suffers from “conceptual shortcomings” since it fails to satisfy the condition of uniform application of the law due to the impossibility to precisely define the concept of the “rule of law”<sup>121</sup>.

With regard to the obligation to protect the Member States’ national identities, Hungary argued in favour of the possibility for the rule of law and the principles of the rule of law to be assessed *differently* in each of the Member States<sup>122</sup>. In response to this claim, the CJEU explained that the EU endorses a *specific* conception of the rule of law which originates from a range of eminent EU and Council of Europe instruments<sup>123</sup>. Hungary, supported by Poland, appealed to the “abstract” nature of the concept of the rule of law which makes the former unable to be precisely defined and uniformly interpreted<sup>124</sup>. On account of the different legal systems and legal traditions of the Member States, Hungary’s contention was that the impossibility to precisely define and uniformly interpret the rule of law allows for different interpretations of the rule of law in different Member States<sup>125</sup>. The Court, in turn, emphasised that the definition of the rule of law contained in art. 2(a) of the Rule of Law Conditionality Regulation was *not intended to be exhaustive*, but, rather, such that, for the purposes of the Regulation, outlines “a number of the principles” that the rule of law covers and which, in light of the Regulation’s objective, are considered as most relevant by the EU legislature<sup>126</sup>. Especially important for the forging of an EU-specific conception of the rule of law, is the CJEU’s assertion that the Union’s duty to respect the different national identities of its Member States does not detract from the obligation of the Member States to adhere to a shared and uniform concept of the rule of law as a value common to their constitutional traditions, which they have undertaken to respect at all times and which represents a “specific expression” of the requirements that result from their Union membership status<sup>127</sup>.

In C-157/21 *Poland v Parliament and Council*, Poland was supported by Hungary, while the Council and the Parliament were supported by Belgium, Denmark, Germany,

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<sup>119</sup> Para. 1.

<sup>120</sup> Para. 202.

<sup>121</sup> Para. 211.

<sup>122</sup> Para. 211 (emphasis added).

<sup>123</sup> Among which, the Venice Commission’s Study No 711/2013 of 18 March 2016 which introduced a ‘Rule of law checklist’ (para. 201 of judgment).

<sup>124</sup> Para. 222.

<sup>125</sup> *Ibidem*.

<sup>126</sup> Para. 227. The same argument and CJEU’s almost identical reply appear in the Polish judgment, CJUE, C-157/21, cit., para. 323.

<sup>127</sup> Paras. 231-232. For a similar pronouncement in the Polish judgment, see CJUE, C-157/21, cit., para. 266.

France, Ireland, Spain, France, Luxembourg, the Netherlands, Finland and Sweden, with the European Commission appearing as an intervener. Poland sought the annulment of the Rule of Law Conditionality Regulation<sup>128</sup>, claiming that the application of the Regulation would qualify as an infringement of the first sentence of art. 4, para. 2 TEU, according to which the Union is required to respect the equality of the Member States before the Treaties and their national identities<sup>129</sup>. The arguments advanced by the Polish government in this case mirror, in large measure, those expressed by Hungary in the case referred to previously. Dismissing Poland's contention which advocated for a "differentiated" interpretation of the rule of law, the CJEU clarified that even though under the "national identity" clause the Member States are entitled to *some degree of discretion in implementing* the principles of the rule of law, the former should not be taken to mean that the obligation to observe these principles (as an obligation as to the result to be achieved) may vary from one Member State to another<sup>130</sup>. Relatedly, the obligation of the Member States to uphold the principles of the rule of law, within the meaning of art. 2 TEU, emanates directly from their membership in the Union and they are not allowed to disregard it<sup>131</sup>.

## 5.2. C-204/21 Commission v Poland (*Independence and Private Life of Judges*)

Another case which proves relevant to the "national identity" debate and gives insight as to the boundaries the Member States should not be allowed to cross when advancing "national identity" type of justifications is C-204/21 *Commission v Poland*, decided on 5 June 2023<sup>132</sup>. In its judgment, the CJEU determined that the regime put into place by the Polish law, adopted on 20 December 2019, amending the national rules relating to the organisation of the ordinary courts, the administrative courts and the Supreme Court, violates EU law<sup>133</sup>. The Commission claimed that the law in question effectively prohibits any national court from reviewing compliance with the EU rules relating to the requirement of "an independent and impartial tribunal previously established by law", and, furthermore, qualifies any such review as a disciplinary offence<sup>134</sup>. Prior to the delivery of the judgment, for the purposes of the infringement proceedings, the Vice-President of the CJEU issued an Order imposing on Poland a daily penalty of EUR 1,000,000, the reason for imposing the penalty being to ensure Poland's compliance with the interim measures outlined in a previous Order issued on July 14, 2021 which

<sup>128</sup> C-157/21 *Poland v Parliament and Council*, para. 1.

<sup>129</sup> Para. 273.

<sup>130</sup> Para. 265.

<sup>131</sup> Para. 282.

<sup>132</sup> CJEU, Judgment of 5 June 2023, case C-204/21, *Commission v Poland (Independence and private life of judges)*.

<sup>133</sup> CJEU, *Judgment of the Court in Case C-204/21 | Commission v Poland (Independence and private life of judges): Rule of law: the Polish justice reform of December 2019 infringes EU law*, 5 June 2023, Press Release No. 89/23. Some of these modifications to the Polish judicial system included providing the Polish Supreme Court's Disciplinary Chamber the jurisdiction to decide in cases that directly affect the status of judges and the performance of their duties, thus being liable to compromise their independence and impartiality. The Commission had repeatedly raised doubts over the independence and impartiality of this Chamber. Furthermore, a different chamber of the Supreme Court, the Extraordinary Review and Public Affairs Chamber, was charged with overseeing whether the courts review compliance with the EU rules relating to the requirement of "an independent and impartial tribunal previously established by law".

<sup>134</sup> *Ibidem*.

instructed the Polish government to suspend the application of the disputed provisions of the Polish law<sup>135</sup>.

In the instant case, Poland sought to challenge both the existence of the infringements alleged by the Commission, among which those concerning violations of art. 19, para. 1 TEU (read in conjunction with art. 47 of the Charter of Fundamental Rights), the principle of primacy of EU law, and the jurisdiction of the CJEU to rule in such proceedings<sup>136</sup>. In its rejoinder, Poland centered the rationale of its argumentation by referring to the judgment of the Polish Constitutional Tribunal (CT) of 14 July 2021 in Case P0 7/20, where the CT declared the CJEU’s interpretation of specific provisions of art. 4, paras. 1, 2 and 3 as well as art. 5, para. 1 TEU, primarily, concerning the principle of conferral of powers and the EU’s obligation to respect the national identities of the Member States, as being incompatible with certain provisions of the Polish Constitution<sup>137</sup>. Poland contended that to uphold the infringement claims made by the Commission would amount to the CJEU exceeding its judicial powers and would *undermine*, first, the exclusive competence of Poland to organise its national justice system (in violation of the principle of conferral of powers) and, second, the national identity inherent in the fundamental political and constitutional structures of that Member State as it stems from art. 4, para. 2 TEU<sup>138</sup>.

The CJEU rejected Poland’s “national identity” claim, finding there to be no ground in maintaining that the EU requirements arising from the duty to respect the values and principles such as the rule of law, effective judicial protection and judicial independence – *as conditions for both accession to and participation in the EU* – are as such capable of affecting the national identity of a Member State within the meaning of art. 4, para. 2 TEU<sup>139</sup>. The CJEU stressed that art. 4, para. 2 TEU could not serve to exempt Member States from their obligation to comply with the requirements arising from art. 2 and the second subparagraph of art. 19, para. 1 TEU so that the “national identity” clause could only be interpreted by taking into account the latter provisions which are of the same rank.<sup>140</sup> Hence, *even though* art. 4, para. 2 TEU requires of the Union to respect the national identities of the Member States, inherent in their fundamental structures, political and constitutional, such that those States are entitled to *a certain degree of discretion* in implementing the principles of the rule of law, this nevertheless *does not allow* for that obligation as to the result to be achieved to vary from one Member State to another.<sup>141</sup> Importantly, the Court emphasised that, while they indeed have separate national

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<sup>135</sup> See CJEU, Order of the Vice-President of the Court of Justice of the European Union of 27 October 2021, case C-204/21 R, *Commission v Poland (Independence and private life of judges)*; CJEU, Order of the Vice-President of the Court of 14 July 2021 in Case C-204/21 R, *Commission v Poland (Independence and private life of judges)*; In a subsequent order, the Vice-President of the Court reduced the daily penalty to EUR 500,000 (see CJEU, Order of the Vice-President of the Court of 21 April 2023, case C-204/21 R-RAP, *Commission v Poland (Independence and private life of judges)*). With the delivery of the 5 June 2023 judgment, the effects of the foregoing orders come to an end, marking the conclusion of the infringement proceedings. Poland is nevertheless still obligated to pay the daily penalty amounts due for the past period (Press Release No. 89/23 of 5 June 2023, cit.).

<sup>136</sup> Para. 61.

<sup>137</sup> Para. 60. According to the Polish CT, by adopting in that Order *interim* measures concerning the organisation and jurisdiction of the Polish courts, including the procedure before them, and in such a way that imposes obligations on Poland, the CJEU has ruled *ultra vires*. Therefore, these interim measures were not considered by the Polish CT as being covered by the principles of primacy and direct applicability of EU law.

<sup>138</sup> Para. 61 (emphasis added).

<sup>139</sup> Para. 72 (emphasis added).

<sup>140</sup> *Ibidem*.

<sup>141</sup> Para. 73 (emphasis added).



identities, Member States are still required to follow a concept of the rule of law “which they share, as a value common to their own constitutional traditions, and which they have undertaken to respect at all times”<sup>142</sup>.

In his Opinion in this case, delivered on 15 December 2022, Advocate General (AG) Collins pointed out that in instances of conflict between national and EU law, the Polish courts must disapply the case law of the Polish Constitutional Court that undermines the primacy of EU law<sup>143</sup>. Next, AG Collins affirmed that art. 4, para. 2 TEU does not give a free hand to the national constitutional courts to verify whether specific provisions of EU law impinge upon a Member State’s national identity since deference to national constitutional rules fashioned in this way would undermine the EU’s obligation to respect the equality of its Member States and ensure the uniform and effective application of EU law<sup>144</sup>.

## 6. A Possible Resolution to the Clash Between EU Values and a Member State’s National Identity – Enter the Principle of Sincere Cooperation

When assessing the scope and limits to employing the “national identity” justification, it is important to factor in the Treaty provision that follows immediately after the art. 4, para. 2 TEU “national identity” clause, establishing a principle that could potentially act as a barrier against attempts to misuse said clause. Namely, Art. 4, para. 3 TEU enshrines the principle of sincere cooperation which requires the Union and the Member States to, in full mutual respect, assist each other in the execution of the tasks arising from the Union Treaties<sup>145</sup>. Further, under the same provision, Member States are obligated to ensure fulfilment of the obligations stemming from the Union Treaties or the acts of the EU institutions, as well as facilitate the achievement of the Union’s tasks and refrain from any measure that could jeopardize the attainment of the Union’s objectives.

The European Parliament has labelled the duty of respect for “national identities” (art. 4, para. 2 TEU) and for the “different legal systems and traditions of the Member States” (art. 67, para. 1 TFEU) as being *intrinsically linked* with the principles of sincere cooperation (art. 4, para. 3 TEU), mutual recognition (arts. 81 and 82 TFEU) and mutual trust<sup>146</sup>. It could consequently be surmised that the second and third paragraph of art. 4 TEU correspond to each other in a way that requires the former provision to be exercised in conformity with the letter and spirit of the latter<sup>147</sup>. In other words, while the Union is responsible for respecting the national identities of the Member States, the latter are, in

<sup>142</sup> *Ibidem*; see also CJEU, C-156/21, cit., paras. 233-234.

<sup>143</sup> CJEU, Opinion of Advocate General Collins of 15 December 2022, case C-204/21, *Commission v Poland*.

<sup>144</sup> *Id.*, para. 45.

<sup>145</sup> For a more extensive elaboration on the concept of sincere cooperation and its application in the EU’s politico-legal framework, see J. LARIK, *Pars pro toto: The Member States’ Obligations of Sincere Cooperation, Solidarity and Unity*, in M. CREMONA (ed.), *Structural Principles in EU External Relations Law*, 2018, pp. 175-199; B. GUASTAFERRO, *Sincere Cooperation and Respect for National Identities*, in R. SCHÜTZE, T. TRIDIMAS (eds.), *Oxford Principles of European Union Law: The European Union Legal Order*, Oxford, 2018, pp. 350-382; F. CASOLARI, *EU Loyalty and the Protection of Member States’ National Interests*, in M. VARJU (ed.), *Between Compliance and Particularism: Member State Interests and European Union Law*, 2019.

<sup>146</sup> Resolution of the European Parliament of 3 July 2013, cit., recital L [emphasis added].

<sup>147</sup> See, I. CENEVSKA, *op. cit.*, p. 4. The duty of respect for “national identity” should be exercised in a manner consistent with the principle of sincere cooperation, *inter alia*, in the context of a “national identity” review performed by the Member States’ courts (see CJEU, Opinion of Advocate General Cruz Villalón of 14 January 2015, case C-62/14 *Gauweiler et al. v Deutscher Bundestag*, para. 62).

turn, responsible for facilitating the achievement of the Union’s tasks, making sure that the obligations arising from the Union Treaties and the acts of the EU institutions are fulfilled and refraining from any actions or measures that may compromise the attainment of the Union’s objectives. The obligation of sincere cooperation therefore operates both ways – from the Member States towards the Union and *vice versa*.

The principle of sincere cooperation, as set forth in art. 4, para. 3 TEU, can arguably be seen as a device well suited for delineating the boundaries of the discretion of Member States to advance “national identity” arguments for the purpose of derogating from their obligations under EU law. There is, clearly, a limit as to which elements of national identity (broadly construed) should be deemed protected under art. 4, para. 2 TEU. In other words, Member States should not be granted unfettered discretion to define the concept of national identity in absolute terms: framing and interpreting “national identity” derogations fully independently risks leaving the EU legal order in a qualitatively subordinate position to the national one<sup>148</sup>. Yet, as far as national constitutional issues are concerned, Member States enjoy complete autonomy to decide which such issue they consider to be part of their national identity – irrespective of whether other Member States would consider the same issue as falling into the “national identity” category<sup>149</sup>.

On the matter of how EU values factor into the “national identity” narrative, in the Parliament’s view, respect for the EU’s common values should go hand in hand with the Union’s commitment to diversity, stemming from the fact that the art. 2 TEU values find their origin in the common constitutional traditions of the Member States, which in turn provide the “basic framework within which Member States can preserve and develop their national identity”<sup>150</sup>. As a consequence of this, the art. 2 TEU values cannot be “played off” against the art. 4, para. 2 TEU obligation to respect the Member States’ national identities<sup>151</sup>. By the same token, a Member State’s violation of the Union’s common principles and values cannot be justified or defended by invoking respect for its national identity or traditions where the violation in question results in a *deterioration* of the core principles of European integration<sup>152</sup>. According to the Parliament, invoking art. 4, para. 2 TEU can only be acceptable *provided that* a Member State respects the art. 2 TEU values<sup>153</sup>.

In instances where the art. 2 TEU values appear to be in competition (or opposition) with the art. 4, para. 2 TEU obligation, it is crucial to emphasise that the application of the “national identity” clause necessarily operates *in conjunction* with the vertical division of powers (between the EU and the Member States) and the principle of sincere cooperation set out in art. 4, para. 3 TEU<sup>154</sup>. Framed in this way, the principle of sincere cooperation serves as a pertinent device that helps chart out the outer limits of the art. 4, para. 2 TEU “national identity” justification. Likewise, in support of the former line of argument, AG Collins in his Opinion in *C-204/21 Commission v Poland* (discussed in Section 5.1.) recalled that it is an expression of the principle of sincere cooperation of art. 4, para. 3 TEU to require the disapplication of any provision of national law that may

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<sup>148</sup> *Id.*, paras. 59-60.

<sup>149</sup> A. VON BOGDANDY, S. SCHILL, *op. cit.*, p. 1430. For further reference, see CJEU, Judgment of 14 October 2004, case C-36/02, *Omega*, para. 37 ff.; CJEU, Judgment of 14 February 2008, case C-244/06, *Dynamic Medien*, para. 44 ff.

<sup>150</sup> Resolution of the European Parliament of 3 July 2013, *cit.*, recital K (emphasis added).

<sup>151</sup> *Ibidem*.

<sup>152</sup> *Id.*, recital M (emphasis added).

<sup>153</sup> *Ibidem*.

<sup>154</sup> See Opinion of Advocate General Campos Sánchez-Bordona, case C-157/21, *cit.*, para. 19. This case was discussed *supra* in Section 5.

be contrary to EU law, irrespective of when that provision was adopted<sup>155</sup>. Accordingly, this rules out the possibility for automatic deference to national constitutional rules in the event of collision between these and EU rules. And, yet, for example, there has been more than one occasion in which the Polish CT declared the CJEU's interpretation of specific provisions of EU law as being incompatible with the Polish Constitution<sup>156</sup>.

## 7. Conclusion

By joining the EU, the Member States are joining a legal system whose supranational adopted rules they agree to be bound by from then onwards. In fact, the very functioning of the EU system is based on the fundamental premiss that each Member State shares with all the other Member States, and recognises that they share with it, a set of common values – the values enounced in art. 2 TEU<sup>157</sup>. The former presupposes the existence of mutual trust<sup>158</sup> and confidence between the Member States that their national laws and practices will comply with the Union's common values and that the Union legal rules implementing them will be observed<sup>159</sup>. This paper set out to investigate how a potential clash between the Member States' interest in safeguarding their national identities and their duty to observe the Union values can be resolved, by delving into the inner workings of the EU's (internal) values-based conditionality and the place that “national identity” considerations have in this values-based conditionality exercise. The above examination of the multi-faceted interplay between the EU's values-based conditionality (as it has been applied to the Member States) and the latter's “national identity” concerns has yielded a possible solution through which any potential or actual clash could be averted or, at the very least, mitigated.

The analysis has shown that the principle of sincere cooperation, as articulated in art. 4, para. 3 TEU, is a useful, albeit underused, tool that can help delineate the boundaries of the discretion of Member States in advancing “national identity” arguments for the purpose of derogating from their EU law obligations. The requirements emanating from the art. 4, para. 2 TEU “national identity” clause and those dictated by the principle of sincere cooperation should not necessarily be seen as being in competition with each other – rather, the duty of respect for the Member States' “national identities” should be understood as being intrinsically linked with the principles of sincere cooperation and mutual trust between the EU and the Member States<sup>160</sup>. Consequently, a Member States' reliance on the “national identity” justification of art. 4, para. 2 TEU can only be acceptable on the condition that the former is exercised in compliance with the Union's fundamental values set forth in art. 2 TEU.

Although a hierarchical relationship between the Member States' obligation to uphold the Union's values and the Union's duty to respect the Member States' national identities cannot be conclusively established, the Member States should not be presumed to enjoy

<sup>155</sup> Opinion of Advocate General Collins, case C-204/21, cit., para. 46.

<sup>156</sup> E.g., see the following judgments of the Polish Constitutional Tribunal, Judgment of 14 July 2021, case P 7/20; Polish Constitutional Tribunal, Judgment of 7 October 2021, case no. K 3/21.

<sup>157</sup> Preamble to the Rule of Law Conditionality Regulation, recital 5; CJEU, C-619/18, para. 42; CJEU, C-621/18, *Wightman*, para. 63.

<sup>158</sup> As argued by Varju, through the implementation of art. 2 TEU, the prominence of the principle of mutual trust has been reinforced, thereby having assumed an “integrative function” (M. VARJU, *Member State Interests and European Union Law*, cit., p. 70-71).

<sup>159</sup> CJEU, Opinion 2/13 of 18 December 2014, para. 168; Preamble to the Rule of Law Conditionality Regulation, recital 5.

<sup>160</sup> European Parliament Resolution of 3 July 2013, cit., recital L.

an *unlimited* discretion in advancing any and all type of “national identity” arguments, particularly if these are being used as a pretext for violating the Union’s fundamental values. Any inference alternative to this one would clearly be disruptive and run counter to the preservation of the uniformity, autonomy and coherence of the EU legal order. It is for this reason that finding ways to unlock the full potential of the principle of sincere cooperation would be instrumental in counteracting any abuse or misuse of the art. 4, para. 2 TEU “national identity” clause, especially when such behaviour risks eroding the EU’s values.

In spite of the unique set of value conditionality tools the EU currently has in place, which the paper elaborated on, it could nevertheless be posited that the Union’s credibility as protector and promoter of its fundamental values as well as its trademark image as a “community of values”, could stand to be improved, particularly as it concerns the way these values are enforced *vis-à-vis* the Member States. As evidenced by the analysis in this paper, ongoing developments on the rule of law front point to a patent discrepancy between the manner in which the EU applies its values in its external relations as opposed to how these values are enforced internally – specifically, in response to the domestic rule of law challenges facing some of its Member States. Hence, it could be proposed that in order to overcome the noted discrepancy, the prominence of the principle of sincere cooperation of art. 4, para. 3 TEU should be enhanced by formulating concrete policy and/or legal guidelines for Member States to follow and for the EU institutions to implement.

### ABSTRACT

This paper investigates the phenomenon of values-based conditionality that the European Union employs internally (towards its Member States), focusing specifically on the degree to which the Member States’ concerns surrounding the protection of their “national identity” figures into how the Union implements its values-based conditionality. It aims to examine how the EU manages to balance the duty to respect the Member States’ national identities (as it flows from art. 4, para. 2 TEU) with the task of safeguarding its fundamental values (articulated in art.2 TEU) against Member State violations thereof.

Section 2 of the paper expands on the relationship between the EU, on the one side, and Hungary and Poland, on the other, in respect of these Member States’ past and present systematic breaches of the rule of law as a fundamental Union value. Section 3 discusses the EU’s unique brand of values-based conditionality, applied in the internal and external context, followed in Section 4 by an exploration of the contentious interplay between the EU’s value-based conditionality approach (with the EU’s Rule of Law Conditionality Regulation as its most prominent manifestation), on the one hand, and its duty to respect the Member States’ national identities, on the other. Section 5 weighs in on three high-profile cases involving Hungary and Poland, decided by the CJEU in 2022 and 2023, in which each of the two governments raised a “national identity” plea in order to justify failing to comply with the requirements emanating from the rule of law as a fundamental EU value. These cases provide a fitting basis for studying the manner in which the EU’s value conditionality approach interacts with the different “national identity” claims put forward by the Member States. Section 6 gages the potential of the principle of sincere cooperation of art. 4, para. 3 TEU as a facilitating device in resolving the instances of conflict between the Union’s values and the Member States’ “national identity” claims. The concluding Section of the paper critically reflects on the place that “national identity” considerations have in the EU’s approach of value conditionality, by considering the option of applying the principle of sincere cooperation in such a way as to pre-empt the

possibility for Member States to abuse or misuse the “national identity” clause of art. 4, para. 2 TEU.

**KEYWORDS**

*European Union, Fundamental Values, Member States, National Identity, Sincere Cooperation.*

**CONSIDERAZIONI SULLA “IDENTITÀ NAZIONALE” ED IL LORO RUOLO  
NELLA CONDIZIONALITÀ FONDATA SUI VALORI DELL’UE: ANALISI DI  
UN’INTERAZIONE COMPLESSA**

**ABSTRACT**

*Il presente lavoro indaga il fenomeno della condizionalità basata sui valori che l’Unione europea impiega al suo interno (nei confronti dei suoi Stati membri), concentrandosi in particolare su quanto le preoccupazioni degli Stati membri in merito alla protezione della propria “identità nazionale” si riflettono nel modo in cui l’Unione attui detta condizionalità. L’obiettivo è esaminare in che maniera l’UE riesca a bilanciare l’obbligo di rispetto dell’identità nazionale degli Stati membri (come risultante dall’art. 4, par. 2 TUE) con il compito di salvaguardare appunto i suoi valori fondamentali (sanciti dall’art. 2 TUE) contro le violazioni degli Stati membri. La Sezione 2 del paper approfondisce le relazioni tra l’UE, da un lato, e l’Ungheria e la Polonia, dall’altro, in relazione alle violazioni sistematiche passate e presenti dello Stato di diritto da parte di questi Stati membri come valore fondamentale dell’Unione. La Sezione 3 esamina l’unicità della condizionalità UE fondata sui valori, applicata sia al contesto interno che esterno, seguita nella Sezione 4 da un’analisi della controversa interazione tra l’approccio dell’UE basato sulla condizionalità dei valori (con il Regolamento sulla condizionalità dello Stato di diritto dell’UE come manifestazione più evidente), da un lato, e il suo dovere di rispettare le identità nazionali degli Stati membri, dall’altro. La Sezione 5 si sofferma su tre casi di alto profilo che hanno coinvolto Ungheria e Polonia, decisi dalla CGUE a cavallo tra il 2022 ed il 2023, in cui ciascuno dei due governi ha sollevato un’eccezione di “identità nazionale” per giustificare il mancato rispetto degli obblighi derivanti dallo Stato di diritto quale valore fondamentale dell’UE. Questi casi giurisprudenziali forniscono una base adeguata per analizzare il modo in cui l’approccio della condizionalità UE interagisce con le diverse rivendicazioni di “identità nazionale” avanzate dagli Stati membri. La Sezione 6 esamina il potenziale del principio di leale cooperazione di cui all’art. 4, par. 3 TUE come strumento di facilitazione nella risoluzione dei casi di conflitto tra i valori dell’Unione e le rivendicazioni di “identità nazionale” degli Stati membri. La Sezione conclusiva riflette criticamente sul ruolo che la considerazione della “identità nazionale” ha nell’approccio dell’UE alla condizionalità dei valori, considerando la possibilità di applicare il principio di leale cooperazione in modo tale da prevenire che gli Stati membri abusino della clausola di “identità nazionale” di cui all’art. 4. par. 2 TUE.*

**KEYWORDS**

*Identità nazionale, Leale cooperazione, Stati Membri, Unione europea, Valori fondamentali.*