11

SINCERE COOPERATION AND RESPECT FOR NATIONAL IDENTITIES

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I. Introduction: Article 4 of the Treaty on the European Union

Article 4 of the Treaty on the European Union[1] is a core provision to understand the 'federal' nature of the European Union. It is composed of three paragraphs, any of which tries to strike a balance between the constitutive units of the composite legal order, namely the EU, on the one hand, and the Member States, on the other. The first paragraph enshrines the so-called

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[1] The text of TEU art 4 reads as follows: '1. In accordance with Article 5, competences not conferred upon the Union in the Treaties remain with the Member States; 2. The Union shall respect the equality of Member States before the Treaties as well as their national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government. It shall respect their essential State functions, including ensuring the territorial integrity of the State, maintaining law and order and safeguarding national security. In particular, national security remains the sole responsibility of each Member State; 3. Pursuant to the principle of sincere cooperation, the Union and the Member States shall, in full mutual respect, assist each other in carrying out tasks which flow from the Treaties. The Member States shall take any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the Union. The Member States shall facilitate the achievement of the Union's tasks and refrain from any measure which could jeopardise the attainment of the Union's objectives'.

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'principle of presumed Member States competences', according to which competences not conferred upon the EU remain to the Member States. The second paragraph requires the EU to respect Member States' national identities, inherent in their fundamental political and constitutional structures. The third paragraph enshrines the principle of sincere cooperation. In this respect, all the paragraphs express a sort of 'federal concern'. Article 4(1) TEU is devoted to the vertical division of competences and strengthens the respect of the principle of conferral, Article 4(2) TEU is devoted to the identities of the Member States of the EU thus protecting diversities in the composite legal order, and Article 4(3) TEU is devoted to loyalty, which, like in many federal or compound legal orders, should inform the cooperation among levels of government.

After briefly exploring the principle of presumed Member State competence according to Article 4(1) TEU (section II), this chapter will focus particularly on the other principles enshrined in Article 4 of the Treaty on the European Union, namely the principle of sincere cooperation (section III) and the principle of respect for Member States' national identities (section IV).

The first one is a pivotal one in the European legal order,[2] in that it is strongly connected with one of the main features of this order: the decentralized enforcement of EU law. Loyalty appears crucial for the federal balance of the EU in so far as the European legal order ultimately rests on voluntary obedience of its Member States, and therefore on their loyalty.[3] If, on the one hand, it is mostly up to the Member States to give concrete application to EU law,[4] on the other hand, the principle of sincere cooperation requires Member States to take all actions necessary to implement EU law and fulfil the obligations arising from the treaties. In this respect, sincere (or loyal) cooperation might be defined as a 'general constitutional principle governing the decentralized enforcement of European law'.[5] It is enshrined in the European treaties since the very beginning of the European process,[6] although expressly qualified as a 'principle' only by the Treaty of Lisbon.

By way of contrast, the principle of respect for Member States' national identities enters the picture only with the Maastricht Treaty,[7] together with the principle of subsidiarity. The integrationist nature of the Maastricht Treaty, which provides the EU with new competences in sensitive areas such as the common foreign and security policy and justice and home affairs, is to a certain extent compensated by two new *words*,[8] namely 'national identity' and 'subsidiarity', devoted to the constitutional accommodation of national values and interests within the European legal order.[9] Nevertheless, it is only with the Lisbon Treaty that respect for national

[2] J. T. Lang, 'Community Constitutional Law: Article 5 EEC Treaty' (1990) *Common Market Law Review* 645 ff.

[3] A. von Bogdandy, 'Constitutional Principles' in A. von Bogdandy and J. Bast (eds), *Principles of European Constitutional Law* (2nd rev edn, Hart Publishing 2010) 3–52.

[4] According to TFEU art 291(1), indeed, 'Member States shall adopt all measures of national law necessary to implement legally binding Union acts', the possibility for the Union to adopt an executive act notwithstanding.

[5] R. Schütze, *European Constitutional Law* (Cambridge University Press 2012) 251.

[6] See EEC Treaty art 5 and EC Treaty art 10.

[7] According to Article F(1) of the Maastricht Treaty: 'The EU shall respect the national identities of the Member States, whose forms of government are founded on the principle of democracy'.

[8] Subsidiarity was qualified as the 'word that saved Maastricht' by D. Z. Cass, 'The Word that Saves Maastricht? The Principle of Subsidiarity and the Division of Powers within the European Community' (1992) *29 Common Market Law Review* 1107.

[9] I have explored the strong connection between the two principles in B. Guastaferro, 'Coupling National Identity with Subsidiarity Concerns in National Parliaments' Reasoned Opinions' (2014) 21(2) *The Maastricht Journal of European and Comparative Law* 320.

identities becomes an officially reviewable principle before the Court[10] (although the Court referred to it in its previous case law) and that the scope of the identity clause is clarified. Article 4(2) TEU requires the EU to respect Member States' national identities, 'inherent in their fundamental, structures, political and constitutional, inclusive of regional and local self-government'.

The possible tension, or even merely connection, between these two principles has been undervalued in academic literature.[11] This is probably due to the following reasons.

On the one hand, scholars studying the duty of loyal cooperation, while recognizing its integrationist force, have underestimated the *general* foundational and 'federal' nature of the principle,[12] paying more attention to the *specific* obligations upon Member States arising from the principle itself, such as the duty to give full effect to EU law, the duty to provide information to the Commission, and the duty not to interfere with Community actions, especially in the field of external relationships etc.[13] Moreover, for a long time it has been argued that loyal cooperation was not likely to be invoked separately as an autonomous legal principle, but instead constituted a *lex generalis* expressing principles that are specified further elsewhere in the Treaty.[14]

On the other hand, scholars studying the identity clause, building on the novel Lisbon formulation which sees national identities as being 'inherent in the fundamental … constitutional structure' of the Member States, have proffered a misleading identification of the concept of *national identities* provided by the EU Treaty with the concept of *national constitutional identities* provided by national constitutional courts opposing specific limits to primacy. Looking at the duty upon the EU to respect Member States' national identities as a sort of acknowledgement, at the EU level, of the 'controlimiti' doctrine advocated by constitutional courts at the national level, scholarly literature merely explored the possible tension between respect for national identity, on the one hand, and the supremacy doctrine.

[10] It has been pointed out that since TEU art 46 of the Nice version of the Treaty outlined the relevant provisions within the TEU over which the CJEU had jurisdiction, the exclusion of the provision on national identity by this positive list, made it not reviewable by the CJEU. The Treaty of Lisbon removal of TEU ex art 46 enables TEU art 4(2) to be reviewed by the CJEU. See M. Dobbs, 'Sovereignty, Article 4(2) TEU and the Respect of National Identities: Swinging the Balance of Power in Favour of the Member States?' (2014) 33 *Yearbook of European Law* 1, 3.

[11] For a few exceptions see P. Van Elsuwege and H. Merket, 'The Role of the Court of Justice in Ensuring the Unity of the EU's External Representation' in S. Blockmans and R. A. Wessel (eds), *Principles and Practices of EU External Representation* (CLEER Working Papers 2012/5) 37–57, simply pointing out that the principles that TEU art 4 brings together, 38–39. To explore the possible significance of the Lisbon novelties see F. Casolari, 'EU Loyalty after Lisbon: An Expectation Gap to Be Filled?' in F. Casolari and S. Rossi (eds), *The EU after Lisbon* (Springer 2014) 112–18.

[12] But see O. Due, 'Article 5 du traité. Une disposition de caractère fédéral?' in F. Emmert and Academy of European Law (eds), *European Community Law* (Kluwer Academic Publishers, Martinus Nijhoff Publishers, Academy of European Law, European University Institute 1992, Collected Courses of the Academy of European Law 1991) II/1, 15–35.

[13] An exhaustive list of the duties upon the State stemming by the principle of sincere cooperation is in J. Temple Lang, 'The Development by the Court of Justice of the Duties of Cooperation of National Authorities and Community Institutions under Article 10 TEC' (2007) 31(5) *Fordham International Law Journal* 1483.

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

In this line of reasoning, Article 4(2) TEU might foster a 'relative', rather than an 'absolute', reading of the supremacy of EU law, which should not be allowed to encroach upon national constitutional identities.[15] Another reason advocated for reading these principles in a 'contrapunctual' connection inter se was that the draft Constitutional Treaty enshrined respect for national identities in Article I-5 and codified the principle of supremacy in the immediately following provision, Article I-6.[16]

On closer inspection, Article I-5 of the draft Constitutional Treaty was explicitly dedicated to the 'relationship' between the Union and the Member States, and the principles governing the relationship between the two constitutive parts of the 'composite' legal order contemplated by the article were the principle of sincere cooperation, on the one hand, and the principle of respect for national identities, on the other. For this reason, after exploring at the descriptive level the functions performed by the two principles in the European legal order through the lens of the Court of Justice of the European Union (CJEU) case law, I try to show why it is important to study the tension between those two principles, which the Lisbon Treaty also seeks to combine with Article 4 TEU, revising the legal context of the pre-Lisbon Treaty version.

It is submitted that the duty of loyal cooperation, mainly addressed to the Member States, represents the *unitary* twist, while the duty of respect for national identity, mainly addressed to the Union, represents the *pluralist* twist of the European integration process (section V). Some concluding remarks will be unravelled on the possible new balance provided by the Lisbon Treaty, which could proffer a less integrationist-based concept of the principle of sincere cooperation (section VI).

II. The Principle of Presumed Member State Competence

According to Article 4(1) TEU, '[I]n accordance with Article 5, competences not conferred upon the Union in the Treaties remain with the Member States'. It is peculiar that the Treaty spells out this 'principle' of presumed Member State competence even before envisaging the principle of conferral, according to which the EU 'shall act only within the limits of the competences conferred upon it by the Member States in the Treaties', according to Article 5(2) TEU.

At first glance, the introduction of this generic statement on residual competence to be reserved for the Member States seems to state the obvious, because—in so far as the EU,

[15] See, among others, A. von Bogdandy and S. Schill, 'Overcoming Absolute Primacy: Respect for National Identity under the Lisbon Treaty' (2011) 48 *Common Market Law Review* 1417; M. Kumm, 'The Jurisprudence of Constitutional Conflict: Constitutional Supremacy in Europe before and after the Constitutional Treaty' (2005) 11 *European Law Journal* 262; L. Besselink, 'National and Constitutional Identity before and after Lisbon' (2010) 6 *Utrecht Law Review* 44. I contested this 'conventional' reading of the clause in B. Guastaferro, 'Beyond the Exceptionalism of Constitutional Conflicts: the Ordinary Functions of the Identity Clause' (2012) 31(1) *Yearbook of European Law* 263. For a more nuanced reading of TEU art 4(2) (namely not necessarily linked to the 'primacy saga') see also T. Konstadinides, 'Constitutional Identity as a Shield and as a Sword: The European Legal Order within the Framework of National Constitutional Settlement' (2011) 13 *Cambridge Yearbook of European Legal Studies* 195; G. van der Schyff, 'The Constitutional Relationship between the European Union and its Member States: the Role of National Identity in Article 4(2) TEU' (2012) 37 *European Law Review* 563; M. Claes, 'National Identity: Trump Card or Up for Negotiation?' in A. Saiz Arnaiz and C. Alcoberro Llivina (eds), *National Constitutional Identity and European Integration* (Intersentia 2013).

[16] On this balance see M. Cartabia, 'Unità nella diversità: il rapporto tra la Costituzione europea e le Costituzioni nazionali' (2005) 3 *Il diritto dell'Unione europea* 1.

like all international organizations, is based on the principle of allocated powers—it goes without saying that the EU has no competence other than those conferred upon it by the Treaty. On closer inspection, in the Final Report of Working Group V on 'complementary competences'—responsible for the drafting of the article—we can find a specific recommendation explicitly to state in a future Treaty that all powers not conferred on the Union by the Treaty remains with the Member States, because 'such an amendment would in itself establish an assumption in favour of national competence'.[17]

During the European Convention debate, these kinds of concerns were advocated by the European Parliament, and by Mr Hannes Farnleitner, according to whom—beyond the principle of allocated powers—it was necessary to stress the 'general presumption that in case of doubt the competence shall lie with the Member States'. The chair of the working group himself, namely Mr Henning Christophersen, identified the statement now envisaged by Article 4(1) TEU as one of the four possible solutions to the competence creep problem. As a matter of fact, the Treaty of Lisbon accommodates this concern repeating redundantly the same principle in many articles. The same statement envisaged by Article 4(1) TEU is present in Article 5(2) TEU and in Declaration No 18 on the delimitation of competencies. In this respect, the statement contributes to strengthen the principle of conferral envisaged by Article 5 TEU, according to which the Union can act only within the powers conferred on it by the Member States.[18]

III. The Principle of Sincere Cooperation

The principle of sincere cooperation is a pivotal one in EU law, and it is present from the very beginning, although Article 5 TEEC did not explicitly mention the principle. Building, as we saw in the introduction, on the decentralized enforcement of EU law, the principle has been often used in the case law of the Court of Justice in connection with the implementation of EU law, either requiring Member States to put into effect some provisions of the Treaty (by eliminating for instance custom duties) or preventing Member States from using provisions and practices existing within its internal legal system to justify a failure to comply with obligations laid down by Community law.[19] Moreover, it is telling that in one of the first rulings mentioning the principle, the Court emphasized the role of Member States as the intermediaries in the application of EU law. The Court stated that, in so far as the detailed rules of application indispensable to the functioning of the import and export system laid down in a Regulation had not yet be determined by the Community, 'the Member States were entitled and, by virtue of the general provisions of Article 5 of the Treaty, *obliged* to do everything in their power to ensure the effectiveness of all the provisions of the regulation' (emphasis added).[20]

[17] Final Report of Working Group V on Complementary Competences, CONV/375/1/02, Brussels (4 November 2002) 10.

[18] For a comment to TEU art 4 see De Pasquale 'Article 4, para 1', Cartabia 'Article 4, para 2', and Iannone 'Article 4, para 3' in A. Tizzano (ed), *Trattati dell'Unione europea: Le fonti del diritto italiano* (Giuffrè Editore 2014) 20–44.

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

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

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

A. The 'Positive' Obligation upon Member States to Take Any Appropriate Measure to Ensure Fulfilment of the Obligations Arising Out of EU Law

By inviting Member States to take any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the Treaties, the second paragraph of Article 4(3) TEU requires Member States to ensure the effectiveness of EU law. In this respect, national institutions are required, first, to secure legal certainty for EU law by publishing both national implementing measures and the EU measure which gave rise to it,[21] so that citizens can identify the source of their rights,[22] and, secondly, to sanction violations of EU law.[23]

Although the provision is formally addressed to the Member States, the obligation to cooperate faithfully with European institutions is attached to the legislator, as well as to the administrative and judicial authorities.

As far as national administrative authorities are concerned, the principle of sincere cooperation implies a general duty of care in the execution of the acts of the Union.[24] For instance, national authorities are called upon to control the proper use of EU resources in the field of structural funds. They should carry out all the administrative controls necessary to ensure the effectiveness and regularity of the financial transactions of the fund, even in the absence of an express provision in the legislation of the Union.[25] National administrations must also adopt measures to remedy the possible irregularities. For instance, in the case of erroneous disbursement of funds, they must take immediate action to recover funds improperly granted by national authorities.[26] An obligation of loyal and faithful cooperation may also necessitate the participation in advisory bodies, or supplying necessary information. For instance, the CJEU ruled that Belgium failed to provide the Commission with sufficient information on the prices of crude petroleum and mineral oil products. Mentioning former Article 5 EEC,

[21] Case C-146/11 *AS Primix* ECLI:EU:C:2012:450, judgment of 12 July 2012, quoted in D. Chalmers, G. Davies, and G. Monti, *European Union Law* (3rd edn, Cambridge University Press 2014) 214.

[22] Case C-313/99 *Mulgan and Others* [2002] ERC I-5719, quoted in Chalmers, Davies, and Monti, *European Union Law* (n 21) 214.

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

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

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

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

the CJEU deemed that Belgium failed to fulfil its duty of loyal cooperation and assistance because it only complied with a Directive after the threat of sanctions.[27] More recently, the Court has stated that Member States are under a duty to notify the Commission if they have any problems in enforcing EU law, and cannot use Commission reservations or objections as a basis for derogating from EU law.[28]

National administrations play an important role in enforcing the principle of sincere cooperation also because Article 4(3) TEU requires Member States to prevent actions by private individuals impairing the exercise of rights provided for in the Treaty. The CJEU, for instance, following French farmers' attempts to impede the import of Community fruit and vegetables by attacking trucks carrying such goods, ruled that France's lack of effort to enforce Treaty-based rights in the field of free movement of goods amounted to a violation of the TEC.[29] Furthermore, 'the Court has used Article 10 to define the role of national legislation in implementing rights directly based on Community law. Thus, the Court held that national authorities could not adopt measures diminishing the effect of directly applicable Community law, or concealing its Community nature'.[30]

As far as judicial authorities are concerned, one of the most important obligations stemming from the duty of loyal cooperation is to ensure the judicial protection of individuals in the case of subjective rights deriving from EU law. This is why sincere cooperation lies at the basis of the case law which established the principle of state liability of the Member States for damages caused by failure to fulfil obligations incumbent on it by EU law. Notoriously, in the famous *Francovich* case,[31] the CJEU derived from the principle of sincere cooperation the obligation to pay damages to the individuals whose Community-granted rights were violated. The obligation upon national courts to eliminate the unlawful consequences of a breach of Community law would then be considered as one of those 'appropriate measure' that Member States are required to take to 'ensure fulfilment of the obligations arising out of the Treaties' according to Article 10 TEC.[32] It is a task of the national courts to ensure that 'irrespective of how breaches of national law are handled, penalties for breach of EU law are effective, proportionate and dissuasive'.[33]

Besides ensuring that Member States repair damages incurred as a result of a breach of Community obligations, judicial authorities are in charge of other duties stemming from the principle of sincere cooperation, such as the duty to interpret national law consistently with

[27] Case 374/89 *Commission v Kingdom of Belgium* (n 19).

[28] See Chalmers, Davies, and Monti, *European Union Law* (n 21) 214, with reference to Case C-105/02 *Commission v Germany* [2006] ECR I-09659.

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

[30] P. E. Herzog, 'Article 4 TEU on the Relationship between the European Union and its Member States' in P. E. Herzog, C. Campbell, and G. Zagel (eds), *Smith and Herzog on the Law of the European Union* (Matthew Bender 2012) .

[31] Joined Cases 6/90 and 9/90 *Andrea Francovich and Danila Bonifaci and Others v Italian Republic* ECLI:EU:C:1991:428, [1991] ECR I-5357.

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

[33] See Chalmers, Davies, and G. Monti, *European Union Law* (n 21) 215. Although expressed in previous case law (C-68/88 *Commission v Greece* [1989] ECR 2965; Case C-326/88 *Hansen* [1990] ECR I-2911; Case C-167/01 *Inspire Art* [2003] ECR I-10155), the author notes how Advocate General Kokott has recently specified these qualification by stating that penalties are *effective* where they are framed in such a way that they do not make it practically impossible or excessively difficult to impose to attain the objectives pursued by Community law; are *dissuasive* where they prevent an individual from infringing the objectives of Community law, and are *proportionate* where they are appropriate for attaining the same objectives (see the Opinion in the Joined Cases C-387/02, C-391/02, and C-403/02 *Berlusconi and Others* [2005] ECR I-3565.

EU law. As is clear from the *Von Colson* case, this request was based also on the duty of sincere cooperation. In the wording of the Court,

> the Member States' obligation arising from a directive to achieve the result envisaged by the directive and their duty under Article 5 of the Treaty to take all appropriate measures, whether general or particular, to ensure the fulfilment of that obligation, is binding on all the authorities of Member States including, for matters within their jurisdiction, the courts. It follows that, in applying the national law and in particular the provisions of a national law specifically introduced in order to implement Directive No 76/207, national courts are required to interpret their national law in the light of the wording and the purpose of the directive in order to achieve the result referred to in the third paragraph of Article 189.[34]

It was pointed out that 'ex Article 10 EC is the exclusive legal basis for the obligation of Member States to construe national law in the light of the EU Treaty'.[35]

On the basis of the principle of sincere cooperation (and on the deriving duty of consistent interpretation), judicial authorities are also prohibited from interpreting national law in a way which could seriously jeopardize the achievement of an outcome pursued by a directive, even before the expiry of the deadline for its transposition.[36] The Court stated that: 'although the Member States are not obliged to adopt those measures before the end of the period prescribed for transposition, it follows from the second paragraph of Article 5 in conjunction with the third paragraph of Article 189 of the Treaty … that during that period they must refrain from taking any measures liable seriously to compromise the result prescribed'.[37] This prohibition has been derived from the duty upon the Member States to refrain from any measure which could jeopardize the attainment of the Union's objectives (now present in the third sentence of Article 4(3) TEU), which represents the 'negative' side of the principle of loyal cooperation, imposing upon Member States a duty to abstain rather than a duty to act, to which I now turn.

B. The 'Negative' Obligation upon Member States to Refrain from Any Measure Jeopardizing the Attainment of the Union's Objectives

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

[34] Case 14/83 *Sabine von Colson and Elisabeth Kamann v Land Nordrhein-Westfalen* [1984] ECR 1891, para 26. Similar principles are envisaged in following case law. See Case 31/87 *Gebroeders Beentjes BV* [1988] ECR I-4635; Case 190/87 *Moormann* [1988] I-4689; Case 91/92 *Faccini Dori* [1994] ECR I-3325; Case 62/00 *Marks & Spencer* [2002] ECR I-6325; Case C-2/97 *Società Italiana Petroli Spa (IP) v Borsana Srl* [2001] 1 CMLR 27, para 26.

[35] M. Klamert, *The Principle of Loyalty in EU Law* (Oxford University Press 2014) 75. The author mentions in particular the *van Munster* case with regard to ex Article 48 EC. 'A difference in legislation' between retirement schemes for migrant workers and that for non-migrant workers had caused migrant workers to lose a social security advantage. The Court ordered the referring national court to strive to interpret its national law in a way so as to avoid such outcome.

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

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

The negative obligation contemplated by the third paragraph of Article 4(3) TEU comes to the fore especially when the cooperation between European institutions and Member States is required, namely in the procedures in which state intervention is necessary for the European institutions to perform their duties. This is for example the case for the supervisory activity on the behaviour of the Member States exercised by the Commission under Article 17(1) TEU. Member States must provide the Commission with all the tools necessary to ascertain possible violation of EU law.

In this respect, the CJEU envisages a violation of the duty of loyal cooperation when a Member State does not reply to the questions of the Commission exercising its supervisory function without giving reasons for this behaviour,[38] and when a Member State prevents the Commission from scrutinizing national administrative practice in order to verify its consistency with EU law within the framework of infringement procedures.[39] Also when the Commission is in charge of the control procedure of state aid, national authorities must provide all the necessary information to assess national measures and to determine the amount to be recovered.[40] Along similar lines, the Court ruled that Ireland, Italy, and Greece failed to fulfil their obligations under the relevant EC regulations, by omitting to submit certain information related to the fish market within the stipulated time period.[41]

The duty to cooperate according to former Article 10 EC has been mentioned by the CJEU also in interpreting competition rules. For instance, the CJEU ruled that Member States, by virtue of the principle, shall not introduce measures which may render ineffective the competition rules provided by the Treaty, even if those rules—such as Articles 101 and 102 TFEU, prohibiting anti-competitive agreements and abuse of dominant position—are addressed to enterprises rather than to Member States.[42] A duty of cooperation between the European Commission and national authorities in promoting respect of competition rules by enterprises is envisaged also in the Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in the Treaty. Chapter IV of the Regulation, entitled 'cooperation' requires exchange of information and exchange of documents.

The abstention duties envisaged by the third sentence of Article 4(3) TEU was applied also within the context of external relations. In the famous *ERTA* case,[43] the CJEU stated that the EU has treaty-making competence not only when the TEC specifically granted such powers to the Community, but also in all other areas in which the Community had developed its own internal policies, according to the so-called principle of parallelism between internal and external competencies of the Community. As it has been argued, 'this position ran counter to the frequently stated opinion that the Community possessed only the powers specifically conferred upon it, and the CJEU solved the contradiction in part by reference to Article 10.

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

[39] Case 192/84 *Commission v Greece* [1985] ECR 3967, para 19; Case 10/00 *Commission v Italy* [2002] ECR I-2537, paras 87–91; Case 478/01 *Commission v Luxembourg* [2003] ECR I-2351, para 24, sometimes even refusing to transmit the required documents to the Commission (Case 35/88 *Commission v Greece* [1990] ECR I-3125, paras 39–41.

[40] Case 400/99 *Italy v Commission* [2001] ECR I-7303, paras 29–30; and Case 411/06 *Commission v France* [2007] ECR I-8887, paras 47–52.

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

[42] See, among others, Case 267/88 *Eycke v Aspa* [1988] ECR 4769; Case C-185/91 *Reiff* [1993] ECR I-5801.

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

Article 10 prohibited the Member States from impairing Community achievements through the conclusion of agreements with third countries, thus implicitly leading to the transfer of the treaty-making power to the Community in appropriate instances'.[44]

Again in the field of external relations, the obligation upon Member States to refrain from jeopardizing the achievement of Union goals was used to prevent Member States from maintaining older treaties in effect once they are affected by Community rules. For instance, where certain Member States concluded (or maintained in effect) 'open skies' agreements with the United States, which were no longer consistent with Community rules on fares and routes on intra-Community flights, they violated their obligations under Community law.[45] More recently, the Court stated that the exercise by the Member States of a retained external competence, without consulting with the Commission, while negotiations at Community level had been initiated, constitutes a failure to comply with Article 10 EC (now Article 4(3) TEU).[46] In this reading, the mere independent exercise of competence by a Member State, which may jeopardize the ongoing exercise of Union action, constitutes an infringement of Article 4(3) TEU.

C. Loyalty in Comparative Perspective

(1) Sincere Cooperation in EU Law and Good Faith in International Law

The previous sections have outlined how the principle of loyal cooperation has evolved in the EC and EU legal order, especially through the interpretation of the Court of Justice. The present section will briefly explore how the principle itself borrows some of its distinctive features both from the principle of good faith, characterizing international public law, and from the principle of federal fidelity, characterizing many compound domestic legal orders (independently from their being classic federal states or unitary regional states).

The principle of good faith is a general principle of public international law which flows directly from the rule *pacta sunt servanda*.[47] Indeed, after providing that every treaty in force is binding upon the parties, Article 26 of the Vienna Convention on the Laws of Treaties requires those parties to perform the treaty 'in good faith'. This principle is rooted in a natural law conception of customary international law, where natural law is conceived as 'a constraint upon a nation to act in a manner that takes into account the reasonable expectations and needs of other nations in the international community. Under this view, a treaty should be implemented in a way that fulfils the purposes of the joint undertaking, including the exchange of reciprocal obligations. Natural law would exclude the exploitation of an advantage deriving from a literal but mutually unintended reading of a treaty or other international agreement'.[48] In this respect, a concretization of the principle of good faith in international law is the prohibition on the abuse of right, which occurs when a Member State exercises its right in such a way as to encroach on the rights of another Member State in an arbitrary

[44] P. E. Herzog, 'Article 4 TEU on the Relationship between the European Union and its Member States' (n 30).

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

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

[47] M. Virally, 'Good Faith in Public International Law' (1983) 77 *American Journal of International Law* 130; G. White, 'The Principle of Good Faith' in V. Lowe and C. Warbrick (eds), *The United Nations and the Principles of International Law: Essays in Memory of Micheal Akehurst* (Routledge 1994) 230, 236; J. F. O'Connor, *Good Faith in International Law* (Dortmann 1991).

[48] A. D'Amato, 'Good Faith' in R. Bernhardt (ed), *Encyclopaedia of Public International Law*, vol II (North-Holland 1992) 599

manner, which does not take in due consideration the legitimate expectations of the other Member State.[49]

The principle of good faith, despite being a rule of customary international law, informs many international treaties. Suffice here to recall that the Charter of the United Nations explicitly states at Article 2(2) that 'All Members, in order to ensure to all of them the rights and benefits resulting from membership, shall fulfil in good faith the obligations assumed by them in accordance with the present Charter'. Also, the CJEU affirmed that good faith is part of the EU legal order,[50] expressly linking this general principle of good faith with the specific principle of legitimate expectations, which is well established in the EU legal order. Besides this, it is clear that the principle of sincere cooperation in the EU legal order borrows from the principle of good faith. It is worth exploring some similarities between the obligations arising from the principle of good faith in international law and the obligations arising from the duty of loyal cooperation in the EU.

The Vienna Convention on the Laws of the Treaties requires the treaties not only to be performed in good faith (according to the abovementioned Article 26) but also to be formed and interpreted in good faith (according to Articles 18 and 31 of the Vienna Convention, respectively).[51] As to the treaty formation process, Article 18 is considered to be an expression of the principle of good faith (which is not explicitly mentioned in the text) when it obliges a contracting party who has signed the treaty, even prior to ratification 'to refrain from acts which would defeat the object and purpose' of the treaty. The obligation to observe the terms of the treaty after signing (but before ratifying) the same treaty is based on good faith in that it protects the legitimate expectation of the participants in the treaty-making process. Nevertheless, it has been noted that 'there does not exist enough state practice to point to a rule that signature of a treaty leads to a good faith *obligation to ratify,* but only an obligation not to defeat the purpose or material normative content of the treaty in question'.[52] In this respect, this obligation not to nullify the object of the treaty between the signature and its entry into force presents striking similarities with the duty of abstention which is imposed on Member States with regard to directives, even before the expiry of the transposition period.[53]

Shifting to the interpretation of the treaties, Article 31(1) of the Vienna Convention states that 'A Treaty shall be interpreted in good faith in accordance to the ordinary meaning to be given to the terms of the treaty in their context and in the light if its object and purpose'. As it has been noted, 'these references to context and purpose demonstrate that the substance of the principle of good faith is the negation of unintended and literal interpretations of words that might result in one of the parties gaining an unfair or unjust advantage over another party'.[54] Nevertheless, besides this bilateral aspect, good faith has become a sort of 'test of reasonableness for the interpretation of international instruments. This has been confirmed by the International Law Commission, stating that if a treaty is open to two interpretations of which one does and the other does not enable the treaty to have appropriate effects, "good faith and the objects and purpose of the treaty demand that the former interpretation should be adopted". This maxim of *magis valeat quam pereat* … means that instruments and

[49] S. Reinhold, 'Good Faith in International Law' Bonn Research Papers on Public International Law, No 2/2013(23 May 2013) 8–9 www.ssrn.com.

[50] The Court held that the principle of good faith is a rule of customary international law binding on the Union in Case T-115/94 *Opel Austria GmbH v Council* [1997] ECR II-39, para 24.

[51] A comment to each of the articles is present in O. Corten and P. Klein (eds), *Vienna Convention on the Law of Treaties: A Commentary* (Oxford University Press 2012).

[52] See Reinhold, 'Good Faith in International Law' (n 49) 13, 18.

[53] See Case C-129/96 *Inter-Environnement Wallonie* [1997] ECR 7411.

[54] A. D'Amato, 'Good Faith' (n 48).

provisions must be interpreted as if they had been intended "to achieve some end", which prohibits an interpretation that would make a provision ineffective'.[55] Also in this case there are striking similarities between the way in which good faith has been coupled with the object and purpose of the treaty and the way in which the duty of loyal cooperation has been coupled with the *effet utile* doctrine, trying to maximize the effectiveness of EU Treaty provisions.

Last but not least, a concrete operationalization of the principle of good faith is the principle of estoppel,[56] according to which 'a party is not permitted to take up a legal position that is in contradiction with its own previous representations or conduct, when another party has been led to assume obligations towards … the former party in reliance upon such representations of conduct … The legitimate reliance of one State (State A) on the conduct of another (State B) precludes this State from acting contrary to its representations. If State B then acts contrary to this representation, it is acting without good faith and therefore in contravention of international law'.[57] Also this principle resembles the duty of loyal cooperation which, in the words of Constantinesco, in its very essence can be conceived as the legal manifestation of the principle of 'non-contradiction'[58] and which, as we have seen, has for example precluded Member States from acting in the fields of external relations in a way which would have contradict their commitments as Members of the European Union. The not contradictory behaviour of the members of the organization towards the organization itself and towards its objective is required also by the Charter of the United Nations, which, in two articles equally inspired by the principle of good faith, similarly states that Member States 'shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or *in any other manner inconsistent with the purposes of the United Nations*' (Article 2(4)) and that 'All Members shall give the United Nations every assistance in any action it takes in accordance with the present Charter, and shall refrain from giving assistance to any state against which the United Nations is taking preventive or enforcement action' (Article 2(5)).[59]

Despite the many similarities between good faith in international law and loyal cooperation in EU law, the two principles are not equivalent. Sincere cooperation goes much further than the general principle which requires Member States to implement treaties they are party to in good faith. First of all, the principle of sincere cooperation holds its specificity in the European legal order, entailing also a more general cooperative attitude between Member States and the EU in order to facilitate the achievement of Union's objectives.[60] Indeed, both Article 2(5) of the UN Charter and Article 4(3) TEU, attach to the Member States similar positive duties of assistance and similar negative duties of abstention. Nevertheless, only the EU Treaty requires Member States to 'facilitate the achievement of the Union's tasks'. In this respect, the principle of sincere cooperation 'expresses the intent of the Member States not only to be bound by the various specific Treaty rules, but also to attempt to achieve the more general purposes stated in the Preamble and in Articles 2 and 3. Article 10 TEC [now Article

[55] M. Klamert, *The Principle of Loyalty in EU Law* (n 35) 44.

[56] On the many applications of the principle see M. Kotzur, 'Good Faith (Bona Fides)', Max Planck Encyclopedia of Public International Law http://www.mpepil.com.

[57] See Reinhold, 'Good Faith in International Law' (n 49) 13; I. C. MacGibbon, 'Estoppel in International Law' (1958) 7 *International and Comparative Law Quarterly* 468, 471.

[58] V. Constantinesco, 'L'Article 5 CEE. De la bonne foi à la loyauté communautaire' in F. Capotorti and P. Pescatore (eds), *Du droit international au droit de l'intégration: Liber amicorum Pierre Pescatore* (Nomos 1987) 108–109.

[59] See the comments on both articles in B. Simma, *The Charter of the United Nations: A Commentary* (Oxford University Press 1994).

[60] See Constantinesco, 'L'Article 5 CEE' (n 58).

4(3) TEU], therefore, affords an additional justification for utilizing the general statements of purpose in the Preamble and in Articles 2 and 3 as guides in the interpretation of the rest of the Treaty'.[61]

Secondly, while good faith can have a pivotal role in the determination of obligations, it can generally not be the source of such obligations.[62] 'Instead of answering what the obligations placed on a State are, or why they create legal effects for the State, the principle of good faith … can guide a States' behaviour as to how the inherent rights and obligations are exercised'.[63] Also, in relation to the interpretation of the Treaty, it has been argued that: 'the obligation to interpret a treaty according to good faith finds its limitations in the creation of new obligations which are no longer covered either by the wording of the treaty or the intent of the signatories. The approach indicated by judicial practice aims to clear up ambiguous wording, yet not to act as a gap-filling function in order to create new obligations. By advancing or creating an interpretation that adds (or creates) obligations for another party, not intended or covered by the wording of the treaty, this party may be acting in bad faith'.[64] Against this backdrop, the case law of the Court of Justice of the EU analysed in the previous paragraphs—often attaching to the duty of loyal cooperation a strong gap-filling function—stands in sharp contrast with those guidelines and contributes to distinguishing the principle of good faith from the principle of sincere cooperation. As we have seen, indeed, the latter has imposed wide-reaching obligations applying to both the judicial and the administrative authorities of the Member States, and could not be considered to have the merely 'interstitial nature' of good faith, namely the nature of a principle 'lending contours without imposing specific obligations'.[65]

(2) Sincere Cooperation in EU Law and Federal Fidelity in Constitutional Law

In addition to presenting some similarities to the principle of good faith in international law, the principle of sincere cooperation in the EU legal order resembles the principle of federal fidelity embedded in some federal states and the principle of loyal cooperation embedded in some unitary regional states. At first glance, it might be argued that it is the compound nature of the legal order itself—no matter if the latter is a federal, regional, or supranational one—to require some forms of cooperation between the several levels of government involved in the decision-making process. On closer inspection, it is also a matter of constitutional culture, in that not all the systems organized along a vertical division of power experience cooperative relations informed by loyalty. It has been argued, for example, that in the United States the dominant culture promotes an 'entitlement approach' to the division of power, where the powers granted from the federal constitution to each unit of government 'may be used without regard to whether the exercise of these powers serves the system of democratic governance as a whole', thus protecting 'the institutional actors' self-interested political calculus'.[66] By way of contrast, the 'fidelity approach' to the division of power—which characterizes some federal states as Germany— sees all units of government to owe some allegiance to the public as a whole. In this model 'public power' is conceived of as 'public trust', and 'a duty of loyalty

[61] Herzog, 'Article 4 TEU on Relationship Between the European Union and its Member States' (n 30).
[62] See Reinhold, 'Good Faith in International Law' (n 49) 2.
[63] Ibid 17.
[64] Ibid 20.
[65] Ibid.
[66] D. Halberstam, 'Of Power and Responsibility: The Political Morality of Federal Systems' (2004) 90 *Virginia Law Review* 731 (the version quoted here corresponds to the paper downloaded from www.ssrn.com 1). The analysis of the case law of the Supreme Court brings the author to conclude 'the Court refuses to appeal systematically to any generalised principle of making the federal system work as a productive whole. Instead, the Court frequently seems preoccupied with protecting state autonomy as an end in itself' (at 57).

to the other actors and institutions within the federal system tempers institutional actor's political self-interest'.[67]

From a comparative perspective, the principle of sincere cooperation as developed in the EU has been deemed to be closer to the latter model of federal fidelity than to the entitlement model.[68] First of all, since the very beginning of the European integration process, the constitutive treaties themselves, starting with the ECSC Treaty, have somehow spelt out the duty of loyal cooperation, envisaging specific provision which are the equivalent of Article 4(3) TEU. Secondly, the very same structure of the EU legal order is far from the 'dual federalism' model characterizing the US separation of power between federal and state powers, espousing a 'cooperative federalism' model where the units of the federation are deeply interconnected and are thus called to cooperate.[69] Thirdly, until the Treaty of Lisbon, the EU was not characterized by a clear-cut allocation of power between the Union and its Member States resembling the competence catalogue characterizing federal states espousing the entitlement approach.

In other words, in contrast to federal systems such as those in the US, Australia, and Canada, the European Union did not develop 'strong rules of competence delimitations that reduce the potential overlap between federal and state power'.[70] By way of contrast, the EU presented the strong interdependence and interconnection among levels of government which is a condition for the spreading of loyal cooperation. Indeed, the concept has its origin in the German notion of *Bundestrue,* or 'federal fidelity', embedded in the conservative political ideology developed to protect the unity of the newly created German Reich of 1871, which brought together the Prussia-dominated North German Federation and four southern German states. The intergovernmental nature of this Imperial Constitution required the contracting parties to uphold the treaties with uncompromising fidelity and to ensure mutual respect.[71] Although the Weimar Republic of 1919 seemed to pose a challenge to the significance of *Bunderstrue*, in that it stemmed from the German people rather than from a sort of contractual intergovernamentalism among several princes coming together to recognize the Prussian emperor as their king, the concept of *Bundestrue* survived and gained a new momentum thanks to the work of Rudolf Smend,[72] who connected it with the new constitutional enterprise.[73] In the words of Smend, the Constitution commits the Reich and the *Länder* not only to formal correctness vis-à-vis one another in the fulfilment of their legal duties, but to the 'continual search and creation of a good relationship that is conducive to a union'.[74] Eventually, although not explicitly mentioned in the *Grundgesetz*, the principle of federal fidelity also informs Germany's modern federal architecture and its cooperative structures of governance, which strongly intertwines the Federal State and the *Länder*. The case law of the German Constitutional Court—which deems *Bundestrue* to be inherent in

[67] Ibid 3.

[68] For some comparative insights see F. Laursen (ed), *EU and Federalism: Polities and Policies Compared* (Ashgate Publishing 2010); E. Cloots, G. De Baere, and S. Sottiaux (eds), *Federalism in the European Union* (Hart Publishing 2012); F. Scharpf, 'The Joint Decision Trap: Lessons from German Federalism and European Integration' (1998) 66(3) *Public Administration* 239.

[69] Robert Schütze, *From Dual to Cooperative Federalism* (Oxford University Press 2009); A. von Bogdandy and J. Bast, 'The Federal Order of Competences' in A. von Bogdandy and J. Bast (eds), *Principles of European Constitutional Law* (Hart Publishing, Beck, Nomos 2009) 285.

[70] See Klamert, *The Principle of Loyalty in EU Law* (n 35) 58.

[71] See Halberstam, 'Of Power and Responsibility' (n 66) 8–9.

[72] R. Smend, *Verfassung und Verfassungsrecht* (Duncker & Humblot 1928).

[73] Halberstam, 'Of Power and Responsibility' (n 66) 11–12.

[74] See Smend, *Verfassung und Verfassungsrecht* (n 72), as translated by Halberstam, 'Of Power and Responsibility' (n 66) 13.

the idea of federalism itself—recalls the very same concept of the constitutional duty upon the components of the Federation to maintain fidelity to one another as well as to the larger whole. 'In the court's view, fidelity required all parties to come together and attempt in good faith to reach agreement about the project'.[75]

Many of the analysed duties of coordination, assistance, and abstention stemming from the principle of sincere cooperation in EU law are inspired by the same commitments to mutual respect among parties and a shared understanding about the common project.[76] Nevertheless, the duty of loyal cooperation as developed in the EU legal order presents some dissimilarities from the principle of federal fidelity as developed in Germany.

First of all, in the Community legal order the idea of mutuality seemed to be softer, in the sense that the duty of loyal cooperation has been primarily addressed to the Member States rather than to the Union. As we have already seen, what makes loyal cooperation a pivotal principle in the EU is the decentralized enforcement of EU law, namely the fact that the Community relies much more than most federations on having its actions carried out by Member States and, therefore, requires Member States' strong loyalty and commitment to the Union project. Secondly, the German Constitutional Court has 'generally sought an approach to federalism that emphasizes harmony over democratic dissonance … even in enforcing the decentralization inherent in Germany's vertical division of federal legislation and *Land* administration, the court's decisions have generally fostered a kind of harmonized decentralization without ensuring democratic diversity at the local level'.[77] By way of contrast, even the more intrusive obligations arising upon the Member States from the duty of loyal cooperation in the Union have been deemed to indicate 'a genuine concern about effectiveness of the law, not harmony in politics',[78] in the sense that they do not push towards a unitary alignment of interests at the substantive policy-making stage, but they are more concerned with the effectiveness at the implementation level.[79]

On the middle ground between the *Bundestrue*'s quest for harmony in federal systems and sincere cooperation's quest for effectiveness in the EU legal order, there is the principle of loyal cooperation as developed in unitary states articulated in territorial autonomies, such as Italy or Spain.[80] Needless to say, this principle embraces the basic duties of mutual consideration and respect between levels of government. Nevertheless, these duties—while being occasionally related to the principle of effectiveness[81]—do not necessarily push towards harmony and unity of the system, but often result in a legal restriction on the exercise of legislative competences on both the central and the regional sides. As far as Italy is concerned, for example, the foundational case law of the Constitutional Court has deemed the principle of loyal cooperation as a logical deduction of the Italian model of cooperative regionalism.[82]

[75] See Halberstam, 'Of Power and Responsibility' (n 66) 24.

[76] Some authors have detected some similarities between the case law of both the German Constitutional Court and the CJEU, regarding for example the pre-emptive effect of EU initiatives upon Member States' action in comparison with the abstention duties of the German *Länder* stemming from a legislative initiative of the federal state. See Klamert, *The Principle of Loyalty in EU Law* (n 35) 60.

[77] See Halberstam, 'Of Power and Responsibility' (n 66) 25.

[78] Ibid 41.

[79] Ibid 42.

[80] For a comparative analysis see R. Bifulco, *La cooperazione nello Stato unitario composto. Le relazioni intergovernative di Belgio, Italia, Repubblica Federale di Germania e Spagna nell'Unione europea* (Cedam 1995) and A. D'Atena (ed), *I cantieri del federalismo in Europa* (Giuffrè 2008).

[81] In some cases, the Italian Constitutional Court has linked the duty to cooperate to the necessity 'to ensure the efficiency and impartiality of administration', as provided by art 97 of the Italian Constitution.

[82] This model contemplates that the central State and territorial autonomies concur in the exercise of legislative, administrative, and regulatory powers. Seminal works on how this model developed, as well as on the role of the Constitutional Court in managing the interactions between the State and the Regions in

Where there are overlapping functions at both the legislative and the administrative level, loyal cooperation requires competences of the regions and competences of the state to coordinate with each other, so as to realize a fair balance of the respective purposes.[83] The modalities through which to achieve this balance have been slowly proceduralized and they range from mutual duties of information[84] to the creation of institutionalized agreements (*intese*) between the state and the regions.[85] These instruments fostering coordination need to be put into practice not only when the state and the regions share the same functions, but also when there is a clear-cut separation of competences between the state and the regions, which nevertheless triggers some functional interferences between the two levels of governments. In other words, the principle serves the purpose of limiting the exercise of competences and prerogatives when they possibly encroach upon the competences and prerogatives of the other levels of government.[86]

The Italian case is very interesting from the comparative perspective in that it shows that the duty of loyal cooperation is not necessarily interpreted as a constitutional safeguard of unitarianism, but also as a catalyst of pluralism in that it has allowed lower levels of government to have a say in the decision-making process.[87] Even before its codification within the Constitution in 2001, the duty of loyal cooperation has been used by the Constitutional Court as an unwritten principle with a constitutional relevance,[88] often embedded in Article 5 of the Constitution. Notoriously, this article protects 'the unity and indivisibility of the Republic', and this is why the same Court, in one of the pivotal judgments on loyal cooperation, stated that state and regions do not have to obey a jealous, spiteful, and formalistic defence of respective positions and prerogatives, but should be guided by the model of cooperation and integration in the sign of the great interest of the unity of the country.[89] On the other hand, the same Article 5 states that the Republic 'recognises and promotes local autonomies, and implements the fullest measure of administrative decentralization … The Republic adapts the principles and methods of its legislation to the requirements of autonomy and decentralisation'. For this reason, in the name of Article 5 of the Italian Constitution, the duty of loyal cooperation has been used also to favour local autonomies and impose their involvement in the decision-making process any time that, for example, the

Italy are G. Amato, *Il sindacato di costituzionalità sulle competenze legislative dello Stato e della regione. Alla luce dell'esperienza statunitense* (Giuffrè 1963) and A. Barbera, *Regioni e interesse nazionale* (Giuffrè 1973).

[83] See eg Italian Constitutional Court Judgment No 175/1976. It is not possible here to take into account the huge case law of the Italian Constitutional Court in solving the conflicts between central state and territorial autonomies (where the principle of loyal cooperation looms large). For a general overview see E. Malfatti, S. Panizza, and R. Romboli, *Giustizia Costituzionale* (Giappichelli 2016) and V. Barsotti, P. Carozza, M. Cartabia, and A. Simoncini, *Italian Constitutional Justice in Global Context* (Oxford University Press 2015).

[84] Italian Constitutional Court Judgments Nos 201/1987; 618/1988; Ord 495/1988; 730/1988; 924/1988.

[85] Among others see Italian Constitutional Court Judgments Nos 286/1985; 64/1987; 70/1987; 302/1988; 1141/1988; 256/1989; 452/1989; 70/1995; 242/1997; and 98/2000.

[86] R. Bifulco, 'Leale collaborazione' in S. Cassese (a cura di), *Dizionario di diritto pubblico,* vol 4 (Giuffrè 2006) 3356 ff. The literature on the duty of loyalty in the Italian legal order is very extensive. See, among others, A. Anzon, *I poteri delle Regioni dopo la riforma costituzionale* (Giappichelli 2002); S. Bartole, 'Spunti in tema di collaborazione tra Stato e Regioni' *Giurisprudenza Costituzionale* (1970); R. Bin, 'Il principio di leale cooperazione nei rapporti tra poteri' (2001) *Rivista di diritto costituzionale* 163 ff; P. Carrozza, 'Principio di leale collaborazione e Sistema delle garanzie procedurali (la via italiana al regionalismo cooperativo)' (1989) *Le Regioni* 473 ff.

[87] See the suggestions on a more pluralist interpretation of the duty of loyal cooperation advanced in the concluding section.

[88] Italian Constitutional Court Judgment Nos 242/1997; 35/1972.

[89] Italian Constitutional Court Judgment No 219/84.

Member State took upon itself some competences devolved to regions in the name of efficiency or protection of national interest, thus using the principle of subsidiarity to favour the allocation of powers at the higher rather than at the lower level of government. More specifically, in the important Judgment No 303/2003, the Court ruled that the principles of subsidiarity and adequacy allow the intake of regional functions by the state (thus derogating from the constitutional allocation of powers) provided that this change is assisted by two essential and unavoidable conditions: (a) the existence of a public interest; (b) the achievement of an agreement with the region concerned.[90]

Especially after the constitutional reform of 2001, which has bolstered the role of the regions and their legislative function, the duty of loyal cooperation served the purpose of protecting territorial autonomies, thus being in line with the constitutional reform which wanted to rebuff the hierarchical relationship between central state and regions and to be informed by the principle of equality between all the levels of government composing the Republic. In this respect, the Italian experience proved the mutability and adaptability of the principle which fostered plurality rather than unity in the wake of a constitutional change refusing the long-standing supremacy of the central state upon the regions. As we will see in the concluding remarks, the novelty introduced by the Treaty of Lisbon, which for the very first time refers to the 'mutuality' of the principle of sincere cooperation—imposing upon the Union a duty of loyalty towards its Member States—might solicit an evolving understanding of the principle of sincere cooperation, comparable to the one existing in unitary regional states.

IV. The Principle of Respect for Member States' National Identities

A. History of the Identity Clause

The current formulation of the identity clause stems from the works of the European Convention drafting the Treaty establishing a Constitution for Europe. If compared with the ex Article 6 TEU (Nice Version) which already required the EU to respect national identities of its Member States, Article 4(2) TEU (Lisbon version) tries to clarify the scope of the concept of national identities, which are deemed to be 'inherent' in Member States' 'fundamental structures, political and constitutional, inclusive of regional and local self-government'. In its novel formulation, Article 4(2) TEU also requires the EU to respect Member States' 'essential State functions, including ensuring the territorial integrity of the State, maintaining law and order and safeguarding national security'.

Indeed, this novel formulation of the identity clause was first proposed by the Chair of working group V on 'complementary competence', Mr Henning Christophersen—so to be consistently referred to as the 'Christophersen clause' in all the working documents of the European Convention. Building on an analysis of the *travaux préparatoires* of this clause it has been already submitted that 'by expanding the concept of "national identities" so as to include Member States' "fundamental structures" and by introducing a duty to respect "essential State functions" the drafters sought to carve out core areas of national sovereignty, as no list of Member States' exclusive powers was eventually included in the Treaties'.[91]

The history of the clause shows that the clause was meant to solve a problem that had and still has a great relevance in the everyday life of EU law: to avoid the encroachment of Union

[90] A strong defence of the necessary agreement with the regions is contained in the very recent Judgment No 251/2016 of the Italian Constitutional Court.

[91] Guastaferro, 'Beyond the Exceptionalism of Constitutional Conflicts' (n 15).

action upon Member States' prerogatives in the so-called 'complementary competences' areas (eg education, culture, and sport).[92] Notoriously, complementary competences basically include the policy areas—such as culture, education, employment, customs cooperation, vocational training (where the EU's role should be limited to supporting, supplementing, or coordinating functions) where Member States are left substantive scope of action. The limited nature of Community power is usually expressed in legal bases which explicitly rule out harmonization measures. This is for example the case of employment, culture, and education where the EU can encourage cooperation between Member States; it can—if necessary—support and supplement their action, but at the same time, it cannot harmonize the laws and regulations of the Member States.[93]

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

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

B. The Use of Article 4(2) TEU in the Case Law of the Court of Justice of the European Union

(1) Review of National Measures

One of the areas in which the use of the identity clause figures prominently in the case law is the review of national measures constituting a restriction to internal market fundamental freedoms. Internal market law provides some exceptions to the four freedoms relating to the movement of goods, persons, services, and capital, which can be either treaty-based justifications or case law exceptions, the so-called 'mandatory requirements'. Even before the entry into force of the Treaty of Lisbon, the CJEU drew certain conclusions from the obligation imposed on the EU by Article 6(3) TEU to respect the national identities of the Member States, including their constitutions. In the course of proceedings before the CJEU, respect for national identities has been invoked both as an autonomous ground of derogation and as a rule of interpretation of existing justifications, such as public policy.

As to the first aspect, the identity clause can be invoked by Member States as a 'legitimate and independent ground of derogation',[94] ie as a justification for a national measure that is

[92] Complementary competences are now envisaged by TFEU art 6.

[93] See, respectively, TEC art 139, TEC art 151(5), and TEC art 149.

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

found to be prima facie inconsistent with the fundamental freedoms. For instance, the Grand Duchy of Luxembourg sought to rely upon the protection of national identity to justify the exclusion of nationals of other Member States from access to posts in the field of public education.[95] In a similar action for failure to fulfil obligations, the Grand Duchy of Luxemburg asserted that, since the use of the Luxembourgish language is necessary in the performance of notarial activities, 'the nationality condition at issue is intended to ensure respect for the history, culture, tradition and national identity of Luxembourg within the meaning of Article 6.3 EU'.[96] The conclusion of the Court was the following:

> As to the need relied on by the Grand Duchy of Luxembourg to ensure the use of the Luxemburgish language in the performance of the activities of notaries, it is clear that … While the preservation of the national identities of the Member States is a legitimate aim respected by the legal order of the European Union, as is indeed acknowledged by Article 4(2) TEU, the interest pleaded by the Grand Duchy can, however, be effectively safeguarded otherwise than by a general exclusion of nationals of the other Member States (see, to that effect, Case C- 473/93 *Commission v Luxembourg* [1996] ECR I-3207, paragraph 35).[97]

In sum, in both cases the Court recognized that the preservation of national identity 'is a legitimate aim respected by the Community legal order', but ruled that the restrictive national measures at issue were disproportionate, since the interest pleaded could be effectively safeguarded by other means.[98]

In other rulings, respect for national identities was regarded as 'a legitimate objective' by itself, although enshrining other values protected by the Treaty, such as cultural and linguistic diversity as enshrined in former Article 149 EC (now Article 165 TFEU) referring to the EU duty to respect the cultural and linguistic diversity of the Member States. In his Opinion in the *Spain v Eurojust* case, Advocate General Maduro emphasized that 'respect for linguistic diversity is one of the essential aspects of the protection granted to the national identities of the Member States, as is apparent from Article 6(3) EU and Article 149 EC'.[99]

Also in a very recent case the Court has linked respect for national identities to the protection of national languages. In a reference for preliminary ruling from a Lithuanian Court,[100] Article 4(2) TEU is intertwined with the Treaty provisions enshrining the promotion of cultural and linguistic diversity, and respect for national identities is expressly supposed to include protection of a Member State's national official language.[101] The CJEU faced the problem of the possible encroachment on the freedom to move and reside of national rules requiring that the surnames and forenames of natural persons must be entered on certificates

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

[96] Case C-51/08 *Commission v Luxembourg* ECLI:EU:C:2011:336 (24 May 2011) para 72.

[97] Ibid para 124.

[98] This is particularly true in Case C-473/93 *Commission v Luxembourg* [1996] ECR I-03207, para 35, where the Court mentions the AG Opinion, which emphasized that nationals of other Member States must, like Luxembourg nationals, still fulfil all the conditions required for recruitment, in particular those relating to training, experience, and language knowledge. In this respect, if the aim of the restrictive measure was to protect national identity, the demanding conditions required for recruitment where a less restrictive mean than the exclusions of non-nationals.

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

[100] Case 391/09 *MalgozataRunevic-Vardyn, LukaszPawel Wardyn v Vilniausmiestosavivaldybe_sadministracija and Others* ECLI:EU:C:2011:291 (12 May 2011).

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

of civil status in a form which complies with the rules governing the spelling of the official national language. In the words of the Court: 'According to several of the governments which have submitted observations to the Court, it is legitimate for a Member State to ensure that the official national language is protected in order to safeguard national unity and preserve social cohesion. The Lithuanian government stresses, in particular, that the Lithuanian language constitutes a constitutional asset which preserves the nation's identity, contributes to the integration of citizens, and ensures the expression of national sovereignty, the indivisibility of the State, and the proper functioning of the services of the State and the local authorities'.[102] Also in this case the Court deems respect for national identities to be a legitimate aim capable of justifying restrictions on the rights of freedom of movement and residence provided for in Article 21 TFEU.[103]

The same line of reasoning has been followed also in a more recent case by Advocate General Jaaskinen, who, by way of contrast, deems the Flemish Decree on Use of Languages to constitute an unjustified impairment of the freedom of movement for workers provided for in Article 45 TFEU in that it uses means which are not appropriate for the attainment of the legitimate objectives relied upon. Indeed, under the Decree of the Flemish Community of the Kingdom of Belgium on the use of languages in relations between employers and employees, where an employer's established place of business is in the Dutch-language region, use of that language is required in respect of all employment relations in the broader sense. On the one hand, the Advocate General states that 'the rules of EU law concerning respect for the national identity of the Member States, which, in the case of the Kingdom of Belgium, indisputably includes its division under the constitution into linguistic communities, tend to support the idea that, as the Court has already ruled, a policy of protecting a language is a justification for a Member State having recourse to measures restricting freedom of movement'.[104] On the other hand, the AG takes the view that the 'obligatory use of a Member State's language by nationals or undertakings of other Member States exercising their fundamental freedoms, as laid down by the legislation at issue, does not really meet that objective. It cannot be argued that the mere drafting of employment contracts of a cross-border nature in a language other than Dutch by some undertakings based in Flanders is likely to threaten the established use of Dutch'.[105] If the AG finds the national measure inadequate to achieve the purposed objective, the Court found the national legislation at issue disproportionate. After stating that 'in accordance with Article 4(2) TEU, the Union must also respect the national identity of its Member States, which includes protection of the official language or languages of those States'[106] and that 'the objective of promoting and encouraging the use of Dutch, which is one of the official languages of the Kingdom of Belgium, constitutes a legitimate interest which, in principle, justifies a restriction on the obligations imposed by Article 45 TFEU',[107] the Court concluded that a solution less restrictive upon the free movement of workers could have been found. In the words of the Court, 'legislation of a Member State which would not only require the use of the official language of that Member State for cross-border employment contracts, but which also, in addition, would permit the drafting of an authentic version of such contracts in a language known to all the parties concerned,

[102] Ibid para 84.
[103] Ibid para 87.
[104] Opinion of Advocate General Jaaskinen, delivered on 12 July 2012 in Case 202/11 *Anton Las v PSA Antwerp NV* ECLI:EU:C:2012:456, para 60.
[105] Ibid para 61.
[106] Case 202/11 *Anton Las v PSA Antwerp NV* ECLI:EU:C:2013:239, CJEU (Grand Chamber) judgment of 16 April 2013, para 26.
[107] Ibid para 27.

would be less prejudicial to freedom of movement for workers than the legislation in issue in the main proceedings while being appropriate for securing the objectives pursued by that legislation'.[108]

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

Without expressly mentioning protection of national identities, already in the *Omega* case the CJEU interpreted public policy derogation in the light of fundamental values enshrined in the constitution of a Member State. In the *Omega* case, a national measure prohibiting the commercial exploitation of games simulating acts of homicide was not regarded as an unjustified restriction on the freedom to provide services. In the words of the Court: 'The competent authorities took the view that the activity concerned by the prohibition order was a threat to public policy by reason of the fact that, in accordance with the conception prevailing in public opinion, the commercial exploitation of games involving the simulated killing of human beings infringed a fundamental value enshrined in the national constitution, namely human dignity'.[109]

The first rulings mentioning Article 4(2) TEU following the entry into force of the Treaty of Lisbon can be framed within the outlined cases, owing to some similarities. In the well-known *Sayn-Wittgenstein* case,[110] the identity clause enters the picture in the context of a preliminary ruling procedure referred by Austria, concerning the review of a national measure representing a potential obstacle to freedom to move and reside according to Article 21 TFEU. The CJEU states that the national measure which refuses to recognize the surname of an (adult) adoptee, determined in another Member State, in so far as it contains a title of nobility which is not permissible under Austrian constitutional law, is a restriction to the freedom to move and reside in that Member State. Indeed, the discrepancy in names could dispel doubts as to the citizen's identity in a way that can hinder the exercise of the right that flows from Article 21 TFEU.[111] Nevertheless, the Austrian government invokes public policy as a ground for justification. According to the Austrian government: 'the provisions at issue in the main proceedings are intended to protect the constitutional identity of the Republic

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

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

[110] For a case note see L. F. M. Besselink, 'Respecting Constitutional Identity in the European Union: Case C -208/09, 22 December 2010, Ilonka Sayn—*Wittgenstein v Landeshauptmann Von Wien*' (2012) 49 *Common Market Law Review* 671. See also more generally on TEU art 4(2), A. von Bogdandy and S. Schill, 'Overcoming Absolute Primacy: Respect for National Identity under the Lisbon Treaty' (2011) 48 *Common Market Law Review* 147; van der Schyff, 'The Constitutional Relationship between the European Union and its Member States' (n 15) 563; Claes, 'National Identity: Trump Card or Up for Negotiation?' (n 15); F.-X. Millet, *L'Union européenne et l'identité constitutionnelle des États membres* (LGDJ 2013); M. Rosenfeld, 'Constitutional Identity' in M. Rosenfeld and A. Sajo (eds), *The Oxford Handbook of Comparative Constitutional Law* (Oxford University Press 2012) 756.

[111] Case 208/09 *Ilonka Sayn-Wittgenstein v Landeshauptmann von Wien* [2010] ECR I-13693, para 70.

of Austria. The Law on the abolition of the nobility … constitutes a fundamental decision in favor of the formal equality of treatment of all citizens before the law'.[112] Moreover, 'any restrictions on the rights of free movement which would result for Austrian citizens from the application of the provisions at issue in the main proceedings are therefore justified in the light of the history and fundamental values of the Republic of Austria'.[113] In assessing the proportionality of the national measure concerned, the Court, quoting the principle enshrined in *Omega* according to which the level of protection accorded to a legitimate interest may not be uniform in all Member States, and mentioning *ad audiuvandum* respect for national identities as provided for by Article 4(2) TEU, concludes that 'it does not appear disproportionate for a Member State to seek to attain the objective of protecting the principle of equal treatment by prohibiting any acquisition, possession or use, by its nationals, of titles of nobility or noble elements which may create the impression that the bearer of the name is holder of such a rank'.[114]

To conclude, it is interesting to outline some very recent cases in which respect for national identities is not linked to the protection of the official national language or of pivotal constitutional values such as the principle of equality and human dignity, but to the vertical division of power between the Member States and their territorial autonomies. In a request for a preliminary ruling coming from a German Court—asking whether the existence of a more liberal regime in one *Land* called into question the proportionality and consistency of the restrictive legislation on games of chance common to the majority of German federal entities—the CJEU seemed to be very respectful of the internal organization of powers of the Member State concerned, by virtue of Article 4(2) TEU. In the words of the Court: 'the division of competences between the *Länder* cannot be called into question, since it benefits from the protection conferred by Article 4(2) TEU according to which the Union must respect national identities, inherent in their fundamental structures, political and constitutional, including regional and local self-government'.[115]

Nevertheless, it is also interesting to point out that when respect for local self-government as provided by Article 4(2) TEU has been used as a pretext to escape obligations arising from EU law the CJEU refused to take into consideration national claims. In a recent infringement procedure against Spain, the contested national measure allowed the autonomous communities to establish a number of tax deductions, which applied only in cases of attachment to the territories of those communities. Despite the defence of the Spanish government arguing that by virtue of Article 4(2) TEU protecting national identity—including regional and local autonomy—the Court had no jurisdiction to rule on the exercise of fiscal powers in the Spanish constitutional law,[116] the Court condemned Spain in that the national measure at stake violated the freedom of the movement of capital. The arguments based on the identity clause were rejected stating that the infringement procedure was not intended to challenge the distribution of powers between the Member State and the autonomous communities or, more specifically, the jurisdiction assigned to the autonomous communities in tax matters. What was in breach of EU law was the possibility for autonomous communities to apply tax deduction only to taxpayers residing in the territory of these communities or holding some properties on those territories, thus discriminating against non-residents.[117]

[112] Ibid para 74.
[113] Ibid para 75.
[114] Ibid para 93.
[115] Case C-156/13 *Digibet Ltd and Gert Albers v Westdeutsche Lotterie GmbH & Co. OHG* ECLI:EU:C:2014:1756, para 34.
[116] Case C-127/12 *European Commission v Kingdom of Spain* ECLI:EU:C:2014:2130, Judgment of 3 September 2014, para 42.
[117] Ibid paras 61–63.

(2) Review of EU Measures

Respect for national identities could also become to a certain extent a constraint on EU legislators. Some institutions have referred to the clause in some of their non-binding acts, either to emphasize the importance of regional and local self-government[118] or to express a sort of self-commitment in taking into account respect for national identities while implementing their policies.[119] Besides entering the discourse of EU institutions, Article 4(2) TEU has been used as a ground for judicial review of EU acts, although in few cases.

The first case after the entry into force of the Lisbon Treaty is the *Affatato* case.[120] The Trial Court of Rossano (Italy) referred a question for a preliminary ruling concerning the interpretation of clause no 5 of the framework agreement on fixed-term work, which is annexed to Directive 1999/70. Clause 5 provides for a set of measures aimed at preventing abuse arising from the use of successive fixed-term employment contracts. Moreover, it allows Member States, where appropriate, to determine under what conditions fixed-term employment contracts shall be deemed to be contracts or relationships of indefinite duration. The referral is aimed at assessing the compatibility with this clause of Article 36 of Legislative Decree no 165/2001, which, even where there is abuse arising from the use of successive fixed-term employment contracts or relationships by a public-sector employer, precludes their being converted into contracts of indeterminate duration. The judge also asks if—should clause 5 preclude this national legislation—the clause itself infringes upon the fundamental political structure of the Member State, as well as their essential functions, thus violating Article 4.2 TEU.[121] The second part of the question stems from the fact that the national legislation forbidding the conversion of fixed-term contracts into contracts of indeterminate duration is based on a provision of the Italian Constitution according to which permanent posts in the public service must be filled on the basis of a public competition.[122] The interesting aspect of the order for reference submitted by the Italian court is that, in seeking guidance as to the interpretation of EU law, the Trial Court of Rossano also enquiries about the legality of an EU measure which could eventually infringe upon Article 4(2) TEU, thus impliedly asking the CJEU to use the identity clause as a ground of review of the legality of an EU act.

The position of the Court is that the framework agreement neither lays down a general obligation on the Member States to provide for the conversion of fixed-term employment contracts into contracts of indefinite duration nor prescribes the precise conditions under which fixed-term employment contracts may be used. In other words, the agreement gives Member States a significant margin of discretion in the matter.[123] It follows that clause 5

[118] Opinion of the Committee of the Regions on the 'Strategy for the effective implementation of the Charter of Fundamental Rights by the European Union' [2012] OJ C 9 (11 January 2012) 61–64 (para 6). According to TEU art 4(2), regional and local self-government are expressly enshrined in the concept of national identity (and they are also emphasized in the novel formulation of the subsidiarity principle).

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

[120] Case 3/10 *Franco Affatato v Azienda Sanitaria Provinciale di Cosenza* ECLI:EU:C:2010:574 Order of the Court (Sixth Chamber) of 1 October 2010.

[121] Ibid para 36.

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

[123] Ibid para 38.

of the framework agreement must be interpreted as not in principle precluding national legislation which, where there is abuse arising from the use of successive fixed-term employment contracts or relationships by a public-sector employer, precludes their being converted into contracts of indeterminate duration, and that—accordingly—clause 5 does not infringe upon the fundamental structures of the Member State—political and constitutional—and upon the essential function of the Member State in accordance with Article 4(2) TEU.[124]

There are also two other cases in which the possibility that Article 4(2) TEU might be used as a ground of review of the legality of EU acts emerges. As a matter of fact, this possibility is envisaged by national courts' reference orders and/or by the Opinion of Advocate Generals, but the issue has not been addressed by the CJEU so far. The first case to be mentioned is the *Melloni* one. The main issue at stake was the interpretation of Article 53 of the Charter of Fundamental Rights in the light of a case where the Spanish Constitution and EU secondary law provided for different levels of protection to the right of defence. On the one hand, the Advocate General states that 'the Charter is not designed to replace their national constitution with regard to the level of protection which this guarantees within the scope of national law'. On the other hand, the Advocate General points out that 'the Charter cannot undermine the primacy of European Union law since the assessment of the level of protection for fundamental rights to be achieved is carried out within the framework of the implementation of European Union law'.[125] The interesting aspect is that, despite the issue not being raised in the referral order, the Advocate General stresses that the European Union is required, according to Article 4(2) TEU, to respect the national identity of the Member States, inherent in their fundamental structures, political and constitutional, which is also pointed out in the preamble to the Charter. In this connection, the Advocate General explicitly states that 'A Member State which considers that a provision of secondary law adversely affects its national identity may therefore challenge it on the basis of Article 4(2) TEU'.[126] Nevertheless, while acknowledging that Article 4(2) TEU may constitute a ground for the judicial review of EU acts, AG Bot concludes that, in the specific situation, the determination of the scope of the rights of the defence in the case of judgments rendered *in absentia* does not affect the national identity of the Kingdom of Spain. The CJEU, by its token, does not even mention national identity in its *Melloni* judgment.[127]

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

[124] Ibid paras 40 and 41.

[125] Opinion of Advocate General Yves Bot of 2 October 2012 in Case 399/11 *Melloni* ECLI:EU:C:2012:600, para 135.

[126] Ibid para 139.

[127] Case 399/11 *Melloni* ECLI:EU:C:2013:107, judgment of 26 February 2013 (Grand Chamber).

Italian Constitution makes provision for a state examination to become lawyer and since the examination forms part of the fundamental principles safeguarding consumers of legal services and the proper administration of justice. Following the suggestion of the AG,[128] the CJEU has dismissed the invalidity of the Directive in light of Article 4(2) TEU.[129]

V. The Unitary and Pluralist Twists of the European Integration Process

A. The Unitary Twist of the Principle of Sincere Cooperation

Loyalty expresses 'the gravitational force of European Union law', having 'the effect of furthering the integration of the Member States as constituent elements of the European Union, of providing the basis for all sorts of duties of cooperation, and of interlocking the legal regimes of the Member States with the Union'.[130] While ensuring the cohesion of the European legal order, the principle of sincere cooperation might not be 'neutral'. Its integrationist force might favour the Union at the expense of the Member States, so that the literature has referred to the principle as a sort of 'reverse subsidiarity'.[131]

Indeed, the paragraphs outlining the use of the principle of sincere cooperation by the CJEU show that the principle bears the potential of intruding into Member States' autonomy. Just to give an example, in the name of the duty of loyal cooperation the principle of effectiveness has progressively and significantly limited the national procedural autonomy of the Member States.[132] The case law on the principle of effectiveness shows that the CJEU shifted from a 'negative duty' imposed upon the Member States—entailing the guarantee of the non-impossibility of enforcing Community rights within the domestic legal orders—to a 'positive duty' upon Member States to provide adequate and appropriate judicial remedies.[133] The recent *Taricco* judgment clearly shows how the duty of loyal cooperation has been pushed so far to intrude also upon national procedural autonomy in the field of criminal law, which is a quite sensitive area for domestic legal order.[134] This shift from a minimalist approach to a more

[128] See the Opinion of Advocate General Nils Wahl of 10 April 2014 in Joined Cases 58/13 and 59/13 *Angelo Alberto Torresi and Pierfrancesco Torresi v Consiglio dell'ordine degli Avvocati di Macerata* ECLI:EU:C:2014:265.

[129] See the judgment of 17 July 2014 in Joined Cases 58/13 and 59/13 *Angelo Alberto Torresi and Pierfrancesco Torresi v Consiglio dell'ordine degli Avvocati di Macerata* ECLI:EU:C:2014:2088, paras 53–59.

[130] See Klamert, *The Principle of Loyalty in EU Law* (n 35) 20.

[131] The word has been used by Schütze in *European Constitutional Law* (n 6) 218 to indicate the restriction on the exercise of shared powers arising from loyal cooperation in the field of EU external relations, and more generally by Konstadinides, 'Constitutional Identity as a Shield and as a Sword' (n 16) 207–208, who highlighted that the positive duty upon Member States to avoid conflict, arising from sincere cooperation, might reduce a 'subsidiarian' Europe.

[132] Indeed, some commentators ironically referred to the 'not-so-autonomous national procedural autonomy' to highlight that, 'in contrast to the *legislative* unification or harmonization of national procedural rules, the *judicial* reach—that is, unification by the case law of the Court—is limitless'. See M. Bobek, 'The Effects of EU law in the national legal systems' in C. Barnard and S. Peers (eds), *European Union Law* (OUP 2014) 166.

[133] See the decreasing level of judicial self-restraint of the CJEU from *Rewe* case, to the *Von Colson* case, up to *Factortame*, as outlined in Schütze, *European Constitutional Law* (n 5) 389–93.

[134] In Case C-105/14 *Ivo Taricco and Others,* delivered on 8 September 2015, the EU Court of Justice imposed a duty upon the Member State to effectively penalize fraud against the EU budget infringing upon national criminal procedure, so as to provoke a reaction of the Italian Constitutional Court. The latter, in the order no 24 of 2017, has made a preliminary reference to the EU Court of Justice to ask for an interpretation of art 325 TFEU and of the ECJ *Taricco* judgment, which could avoid the conflict with the principle of legality in criminal matters enshrined in art 25 of the Italian Constitution.

interventionist approach finds its apex with the creation of a new European remedy before national courts thanks to the principle of a Member State's liability for breach of Community law, which, since its first formulation in *Francovich*, finds in the duty of loyal cooperation one of its legal foundations.[135]

Besides national procedural autonomy, also the principle of conferral, notoriously protecting Member States' competences, could be qualified as a possible 'victim' of the integrationist force of the duty of loyal cooperation. The latter, especially in the field of external relations, has acted as a 'constitutional safeguard of unitarianism',[136] limiting Member States' action in the name of the necessary unity of external representation.[137] If, differently from pre-emption, the Union interest, as an expression of the duty of cooperation, has been conceived as a 'restraint' but not a 'denial' of Member States competence,[138] the CJEU has based on the sole duty of loyalty an obligation upon the Member State to facilitate the exercise of Union competences, intruding once more on Member States' autonomy to negotiate and conclude international agreements, during the exercise of their remaining external competence.[139] A sort of 'competence creep through the duty of loyalty' has been conceptualized with regard to the possibility that 'Article 4 (3) TEU is slowly turning into an instrument for the Union institutions to achieve a loss of national competence, disguised as restrictions on the Member States' freedom to exercise their powers'.[140]

Last, but not least, the principle of sincere cooperation has significantly limited the powers of national judicial authorities, and their discretionary interpretative function, by prescribing a duty of consistent interpretation of national law with EU law, as long as they can, namely only insofar as this would not result into a *contra legem* interpretation of domestic law. More generally, 'a vital part of the Court's constitutionalization of the EC Treaty has depended upon the elaboration, based on Article 5 EEC and the principle of cooperation of Member States, of increasingly far-reaching obligations on national judges in the context of their Community law mandate'.[141]

More generally, the integrationist function of loyalty is clear in its connections with primacy. In a seminal article, AG Mancini wrote that, if the Rome Treaty failed 'to state squarely whether Community law is pre-eminent vis-à-vis prior and subsequent Member State law', it included 'some hortatory provisions to the same effect (Article 5)'.[142] Similarly, more recently, it has been argued that 'despite the absence of an explicit supremacy or conflict clause in the Treaties, loyalty is the rule that was invoked by the Court to

[135] See, among others, M. Dougan, 'The *Francovich* Right to Reparation: Reshaping the Contours of Community Remedial Competence' (2000) *European Public Law* 103; S. Drake, 'Scope of Courage and the Principle of "Individual Liability" for Damages' (2006) 31 *European Law Review* 841.

[136] See Schütze, *European Constitutional Law* (n 5) 213.

[137] See in particular Opinion 1/94 *WTO Agreement* [1994] ECR I-52/77.

[138] M. Cremona, 'Defending the Community Interest: the Duties of Cooperation and Compliance' in M. Cremona and B. de Witte (eds), *EU Foreign Relations Law* (Hart Publishing 2008).

[139] See Neframi, 'The Duty of Loyalty' (n 14) 349.

[140] See K. Reuter, 'Competence Creep via the Duty of Loyalty? Article 4(3) TEU and its Changing Role in EU External Relations' (EUI PhD Thesis, Department of Law, 2013) http://cadmus.eui.eu/handle/1814/28050 where the author emphasizes this risk but argues that 'instead of pursuing political harmony between the Member States and the Union by way of creeping competence, Article 4(3) TEU emphasises cooperation, compliance and complementarity in areas where the rigid division of competence would otherwise render the system of external relations ineffective'.

[141] D. Curtin, 'The Decentralised Enforcement of Community Law Rights: Judicial Snakes and Ladders' in D. Curtin and D. O'Keeffe (eds), *Constitutional Adjudication in European Community and National Law* (Butterworths 1992) 33–49, 41; Klamert, *The Principle of Loyalty in EU Law* (n 35) 70.

[142] G. F. Mancini, 'The Making of a Constitution for Europe' (1989) 26 *Common Market Law Review* 595, 599.

settle issues of the relationship between the Community (Union) legal order and these regimes of the Member States'.[143] This sort of 'conflict-avoidance' function of loyalty emerges in *Costa,* where 'the abstention obligation *qua loyalty* displaced the public international law principle of *lex posterior derogate* priori',[144] in the sense that Member States were prohibited from deferring to subsequent domestic laws inconsistent with EU law, in that they could jeopardize the attainment of the objectives of the Treaty set out in Article 5 (2) EEC Treaty, allowing 'the executive force of Community law to vary from one state to another'.[145] The same function is even more clear in *ERTA*, which established an obligation of abstention incumbent on the Member States aimed at the avoidance of conflict between Union objectives or, more precisely, Community rules promulgated for the attainment of those objectives, and international obligations entered into by the Member States.[146]

Against this backdrop, it can be asserted that the principle of sincere cooperation provided the European legal order with a strong unitary twist. At risk of simplifying, I would conclude that loyalty push towards *uniformity* lies in the decentralized application of EU law, and in the CJEU necessity to avoid discrepancies between Member States' national authorities in implementing EU law.[147] On the other hand, loyalty push towards *integration* lies in the strong connection envisaged by the Treaties between sincere cooperation and the objectives of the Treaty, which often required Member States to act as facilitators of the Union's tasks. Notoriously, whenever the CJEU has the chance to engage in teleological interpretation of the Treaty, it uses all its margin of manoeuvre to act as an engine of integration at the expense of the Member States.[148] As the *effet utile* served the purpose of circumventing the typical international law rule requiring Treaties to be interpreted in the way which least encroaches upon state sovereignty,[149] the principle of sincere cooperation not only prevented a restrictive interpretation of some obligations imposed on the Member States, but sometimes formed the legal basis for new Member State's obligation that cannot be derived from other Treaty provisions, but are necessary to attain a Treaty's goals.[150]

B. The Pluralist Twist of the Duty to Respect Member States' National Identity

The pluralist twist of the duty upon the EU to respect Member States' national identities is, first of all, in its genetic code. As recalled in the introduction, the concept of national identity was introduced in the Maastricht Treaty, together with the concept of subsidiarity, to express the same kind of concern: how to accommodate national interests and values within the framework of the strong political and integrationist choice of the 1990s.[151] The same concern is also at the basis of the novel formulation of the identity clause provided by the Lisbon Treaty. In clarifying that national identities are inherent in Member States' political

[143] See Klamert, *The Principle of Loyalty in EU Law* (n 35) 69–70.
[144] Ibid 72.
[145] Ibid, reporting the words of the Court in Case 6/64 *Costa* [1964] ECR 585.
[146] Ibid 73.
[147] It has been argued that 'loyalty has "Europeanized" the Member State administrations. One might assume that, had the Union a general procedural law such as the German Verwaltungsverfahrensgesetz or the Austrian Allgemeines Verwaltungsverfahrensgesetz, loyalty in the EU would be less interventionist'. See Klamert, *The Principle of Loyalty in EU Law* (n 35) 60.
[148] See parallel with the use of the 'functional clauses' such as TFEU art 114 and TFEU art 352.
[149] J. H. H. Weiler, 'The Transformation of Europe' (1991) *Yale Law Journal* 2403, 2416. For an analogous criticism to the *effet utile* doctrine, see F. Snyder, 'The Effectiveness of European Community Law: Institutions, Processes, and Tools' (1993) *Modern Law Review* 19.
[150] Herzog, 'Article 4 TEU on Relationship Between the European Union and Its Member States' (n 30).
[151] See the introduction by the editors in *National Constitutional Identity and European Integration* (n 15).

and constitutional structures, the drafters wanted to protect national sovereign prerogative against a possible expansion of Union competences.

Besides its historical origins and besides the intent of the drafters, the pluralist twist of the identity clause is visible also in the political and legislative realms, where respect for national identities is used 'as a reason for establishing minimum standards rather than detailed, uniform rules, for preferring gradual over abrupt convergence, for minimal interference with existing domestic measures in the field, and for allowing for national implementation of European legislative acts'.[152] Moreover, always at the political level, national identity started to be used in national parliaments' reasoned opinion in the context of the early-warning system, possibly paving the way for a reframing of the subsidiarity inquiry from a 'comparative-efficiency' test to a test which is more focused the possible encroachment of EU action on Member States' regulatory autonomy.[153] Subsidiarity and national identity as 'accommodating provisions able to counter-balance the "integrationist provisions" of the Treaty demand that the European institutions act with moderation and prudence in the exercise of the powers conferred on them by the Treaties'.[154] In this sense, respect for national identities might join subsidiarity as a 'constitutional safeguard of federalism'[155] and follows the same direction of those principles behaving as 'principles of differentiation' in the European legal order.[156]

Last, but not least, in the light of the analysed case law, the pluralist force of the identity clause lies in its potential legal implications. In the context of the review of national measures, I have already noted that Article 4(2) TEU could afford a broader 'margin of appreciation' in justifying national measures which constitute an obstacle to the internal market fundamental freedoms. In this respect, when the identity clause is invoked to strengthen already existing internal market grounds of derogation from fundamental freedoms, the Court could relax its traditionally restrictive interpretation of justifications, possibly dropping the strict scrutiny which characterizes its proportionality review of national measures (in *Syan-Wittgenstein*, for example, the Court deems the restriction to the fundamental freedom as proportionate without requiring a less-restrictive-alternative test). The Court could also allow for more differentiation in the interpretation of expressed derogation in light of its *Omega* jurisprudence. If in *Omega* the Court implied that the standard of protection of the fundamental right or of the legitimate interest concerned can vary from one Member State to another, in a subsequent case the Court confirmed this view by asserting that such a variation could rest upon different 'moral and cultural views'.[157] The same Court, when national identity issues are at

[152] E. Cloots, *National Identity in EU Law* (Oxford University Press 2015) 176.

[153] For the empirical evidence supporting this argument see Guastaferro, 'Coupling National Identity with Subsidiarity Concerns in National Parliaments' Reasoned Opinions' (n 9). On subsidiarity as 'comparative efficiency test' see P. Craig and G. de Búrca, *EU Law: Text, Cases and Materials* (Oxford University Press 2011) 94; and P. Craig, 'Subsidiarity: A Political and Legal Analysis' (2012) 50 *Journal of Common Market Studies* 72.

[154] See Cloots, *National Identity in EU Law* (n 152) 85.

[155] See Schütze, *From Dual to Cooperative Federalism* (n 69) 284.

[156] G. de Búrca, 'Legal Principles as an Instrument of Differentiation? The Principles of Proportionality and Subsidiarity' in B. de Witte, D. Hanf, and H. Vos (eds), *The Many Faces of Differentiation in EU Law* (Intersentia 2001) 134. More recently, other authors have also invited the CJEU to foster the decentralizing values of the European legal order, such as subsidiarity and respect for national identities. See in particular D. Wyatt, 'Does the European Court of Justice Need a New Judicial Approach for the 21st Century?' Lecture presented at the British Institute of International and Comparative Law (2 November 2015).

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

stake, could endorse a more deferential approach towards the 'right of assessment' of national courts referring a preliminary ruling, issuing for example a 'deference' rather than an 'outcome' judgment.[158] Turning to the less frequent review of EU measures, the considered cases suggest that the identity clause can potentially be relied upon to strike down EU measures having excessive pre-emptive effects on Member States' scope of action. Should this indication be confirmed by subsequent case law, respect for national identity may entail a duty upon the EU legislature to have due regard to the intensity and form of EU action, which should allow for more discretion in the application of EU law.[159]

I have already suggested that Article 4(2) TEU should not be interpreted as a European-Treaty based authorization to invoke national constitutional identities against the supremacy of EU law. It should be interpreted as a horizontal clause designed to bolster an interpretation of existing EU law doctrines, provisions, and principles which is more favourable to the safeguarding of Member States' discretion, regulatory autonomy, constitutional, and cultural diversity.[160] Rather than being a silent clause bound to have a say in cases of *exceptional* conflicts between EU law and domestic constitutional law—which would be possibly dismissed by the CJEU's absolute reading of supremacy as a dangerous attempt to rely on national constitutional law to derogate from EU law—Article 4(2) TEU could have an impact in the *ordinary* functioning of EU law. It could affect, indeed, the legal reasoning of the ECJ, the balancing exercise carried out by the EU legislator, as well as the way in which Member States comply with—or derogate from—EU law.

Indeed, more than a *conflict-resolution* function, the identity clause could play a *conflict-prevention* function, if used, as suggested, to couple existing concepts of EU law or, simply, to interpret EU law provisions.[161] If, in light of respect for national identities, the EU legislator chose the less pre-emptive act upon Member States' scope of action, or, the CJEU mitigates its restrictive interpretation of derogations such as public policy etc. the clause could 'help releasing national provisions from their allegations of inconsistency with EU law and then *prevent issues of primacy from coming into the fore altogether*'.[162] In this reading, 'the identity

[158] On the difference between 'outcome', 'guidance', and 'deference' cases see T. Tridimas, 'Constitutional Review of Member State Action: The Virtues and Vices of an Incomplete Jurisdiction' (2011) 9(3–4) *International Journal of Constitutional Law* 737, 737. In answering preliminary questions referred by national courts, the CJEU enjoys a broad discretion in determining the level of detail of its answers. According to Tridimas' classification, the Court indeed 'may give an answer so specific that it leaves the referring court no margin for manoeuvre and provides it with a ready-made solution to the dispute (outcome cases); it may, alternatively, provide the referring court with guidelines as to how to resolve the dispute (guidance cases); finally, it may answer the question in such general terms that, in effect, it defers to the national judiciary (deference cases)'.

[159] In the *Affatato* order the CJEU ruled out that a framework agreement did not infringe TEU art 4(2) because it left a certain 'margin of discretion' to the Member States in achieving the objective of the agreement. In this sense I have submitted that there are some hints in the *Affatato* order which trigger a normative suggestion to use TEU art 4(2) as a way to bolster one of the original meanings of the principle of proportionality according to which EU measures should provide Member States with alternative ways to achieve the objective of the measure (Guastaferro, 'Beyond the *Exceptionalism* of Constitutional Conflicts' (n 16) 313).

[160] Guastaferro, 'Beyond the *Exceptionalism* of Constitutional Conflicts' (n 15) 316.

[161] I showed how the intuition to study the *ordinary* and the *conflict-prevention* reading of the identity clause stemmed from the history of the clause, briefly outlined in paragraph IV.A of this chapter. In my view, 'the history of the clause triggers two reflections. The first is that the clause was meant to solve a problem that had and still has a great relevance in the everyday life of EU law, where Member States' prerogatives currently belonging to the category of "complementary competences" (e.g. education, culture, and sport) have often been encroached upon both by internal market *positive* and *negative* integration provisions. The second is that the clause was intended to have a legal impact at a stage—that of the delimitation of competences between the Union and its Member States—that is both logically and legally *antecedent* to that of the application of the principle of primacy of EU law over national law' (B. Guastaferro, 'Beyond the *Exceptionalism*' (n 15) 265).

[162] See Guastaferro, 'Beyond the *Exceptionalism* of Constitutional Conflicts' (n 15) 315.

clause should enter the picture at a stage which is preliminary to that of the normative conflict to be solved through the supremacy doctrine'[163] and it should inform EU law interpretation, as well as both Union and Member States' action.[164]

Along similar lines, a recent study shares this idea that the CJEU itself should be bound by respect for national identities,[165] studies the techniques available to the CJEU in order to interpret EU law in a way which is sensitive to national identity,[166] and calls for a 'nation-sensitive European law-making and interpretation'[167] triggered by Article 4(2) TEU. Against this backdrop, I will now turn to examine if, and to what extent, it would be possible to have a more national-identity-sensitive reading, or, a less integrationist-biased concept of the principle of sincere cooperation in light of the novelties proposed by the Lisbon Treaty.

VI. Towards a Less Integrationist-biased Concept of Sincere Cooperation? The New Balance Provided by the Treaty of Lisbon

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

The first novelty is that the first paragraph of Article 4 TEU enshrines the so-called 'principle of presumed Member States competences', according to which competences not conferred upon the EU remain to the Member States. Besides being specular to the principle of conferral, according to which the EU 'shall act only within the limits of the competences conferred upon it by the MS in the Treaties',[168] this principle presents striking similarities with the clauses existing in some federal orders, such as the 10th amendment to the US Constitution. The second novelty is that paragraph 3 of Article 4, before spelling out the positive and negative duties arising upon the Member States from the duty of loyalty (with the same wording of the pre-Lisbon version of the treaties), adds a completely new sentence: 'pursuant to the

[163] Ibid.

[164] Specific examples on how TEU art 4(2) could be used by the Member States, especially in the political realm, thus preventing the judicial conflict on primacy from coming to the fore, have been developed in Guastaferro, 'Coupling National Identity with Subsidiarity Concerns in National Parliaments' Reasoned Opinions' (n 9), where it is shown how respect for national identities is used by national parliaments to protect national interests, national competences, and Member States' regulatory autonomy.

[165] See Cloots, *National Identity in EU Law* (n 152) 63–81.

[166] Ibid 180. See in particular Part II dedicated to the methods of adjudication.

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

[168] See TEU art 5(2).

principle of sincere cooperation, the Union and the Member States shall, *in full mutual respect, assist each other* in carrying out tasks which flow from the Treaties'.

While the duty of loyal cooperation has commonly been addressed to the Member States, the novel formulation requires also the Union to assist Member States in achieving the Treaty's goal. Besides the reference to *mutuality*, which stresses that the principle of sincere cooperation binds not only to the Member States, but also to the EU institutions,[169] the novel reference to the word *respect* is equally important. Indeed, being already mentioned in Article 4(2) TEU on national identities, it assumes a crucial relevance in informing the relationship between the Union and the Member States. It was pointed out, indeed, that in the context of Article 4(3) TEU on sincere cooperation, respect goes beyond mutual and reciprocal assistance, to entail that the Union and the Member States must not transgress upon the prerogatives of the other.[170]

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

As far as the new legal context provided by Article 4 TEU is concerned, it is interesting to note that sincere cooperation,[171] a principle which has fostered *unitarianism*, is coupled with both the principle of presumed Member States' competences[172] and the principle of respect for national identities,[173] namely two principles which have fostered *pluralism* and that, at least in the drafters' intention, were supposed to defend Member States' sovereign prerogatives.[174] More specifically, whereas sincere cooperation has solicited the competence creep, the principle of presumed Member States' competences is a *redundant* emphasis of the principle of conferral, and of the idea that Member States are the masters of the Treaties. Along similar lines, whereas sincere cooperation has strongly prevented a restrictive interpretation of some obligations imposed on the Member States,[175] respect for national identities allowed more discretion in derogating from EU law. In my reading, the contradiction is so puzzling that the new legal context cannot be meaningless. I would therefore contest the assertion that 'loyalty is not counterbalanced by Article 4(2) TEU on the protection of national identities. Even though this is now placed in close context to loyalty, there is no indication that this could influence its future scope or effect'.[176] I think that there are at least some indications that the scope of loyalty might change.

[169] That the duty of loyalty was also addressed to Union institutions was nevertheless already stated by the CJEU. See eg Case 325/85 *Ireland v Commission* [1987] ECR 5041, where the obligation to cooperate loyally is extended to the Commission, which is expected to play an active role and Case 2/88 *Zwartveld* [1990] ECR 3365, where the obligation of loyal cooperation is extended to the Community institutions. In literature see K. Mortelmans, 'The Principle of Loyalty to the Community (Article 5 EC) and the Obligations of the Community Institutions' (1998) 5 *Maastricht Journal of European and Comparative Law* 67.

[170] See Chalmers, Davies, and Monti (n 21) 213.

[171] TEU art 4(3) .

[172] Ibid art 4(1).

[173] Ibid art 4(2).

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

[175] See Herzog, 'Article 4 TEU on the Relationship between the European Union and its Member States' (n 30).

[176] See Klamert, *The Principle of Loyalty in EU Law* (n 35) 84.

First of all, the new wording of the Lisbon Treaty on Article 4(3) TEU might be considered perfectly consistent with the new legal context, in the sense that the explicit recognition of the *mutuality* of sincere cooperation, on the one hand, and its coupling with two principles accommodating Member States interests and values, on the other, seem to push towards the same direction: a less integrationist-biased concept of loyalty. Cooperation is not a one-way obligation. It must also inform Union action. Even if the Court of Justice already stated the bi-directional nature of sincere cooperation, where the Court imposed a duty of loyalty upon the EU institution, 'these were often a reflection and logical extension of distinct duties of cooperation on the part of the Member States'.[177] For example, in infringement proceedings, the duty of information upon the Member States, is 'offset by the requirement that the Commission's request for information on a specific charge must satisfy conditions of clarity and precision'.[178] Moreover, even when the Court faced the Commission's alleged breach of Article 4(3) TEU, it dismissed the question and 'did not seize this opportunity to give further guidance on EU loyalty duties',[179] with the consequence that—when imposed on Member States—the duty of loyalty entailed specific obligations, whereas—when imposed on Union institutions—it failed to provide a clear picture on the concrete positive or negative measures the Union institutions should carry out. Should the (novel) explicit referral to the mutuality of sincere cooperation be interpreted in the light of the (novel and close) duty upon the EU to respect national identities, a more pluralistic concept of loyalty may arise in the legal order. It is not unrealistic that Member States engaged in acting to give effectiveness to EU law and to facilitate Union goals, may require an analogous form of attention from the EU.[180] It is up to the Court of Justice to clarify what it means by stating that 'the Union and the Member States shall in full mutual respect, assist each-other in carrying out the task which flows from the Treaty' and if, and to what extent, specific duties of respect of the Member States arise from this novel formulation entrenched in a novel legal context. Few open questions could already be asked in this respect: what are the fields in which the bi-directional nature of the duty of sincere cooperation can emerge? Could mutuality be proceduralized? Shall loyal cooperation—when imposed upon Union institutions—entail a 'duty to act' or a 'duty to abstain'? What are the more suitable ways to challenge EU institutions' violations of Article 4(3) TEU before the Court?

Another element which could endorse the possibility of a more 'pluralist' reading of sincere cooperation, lies in the fact that most of the *gravitational* nature of the duty of loyalty, according to me, builds upon its connection with the objectives of the Treaty and upon the misleading identification between the Union's *objective* and the Union's *interests*. At a general level, indeed, it might be argued that the text of the Treaty—requiring Member States to take any appropriate measure to ensure fulfilment of the obligations arising out of the Treaties—is to a certain extent 'neutral', in the sense that it imposes upon Member States a general duty of

[177] Ibid 27.

[178] Ibid.

[179] See Casolari, 'EU Loyalty After Lisbon: An Expectation Gap to Be Filled?' (n 11) 110; the case is CJEU, Case C-45/07 *Commission of the European Communities v Hellenic Republic* [2009] ECR I-00701.

[180] Despite endorsing this position, I agree with scholars contesting that a Member State who feels that its national identity has been violated could stop fulfilling the obligation arising from the duty of loyal cooperation (see Klamert, *The Principle of Loyalty in EU Law* (n 35)). By way of contrast, I disagree with scholars arguing that the duty of loyal cooperation, in asking the Member States to refrain from jeopardizing the implementation of EU law, prevents the possible use of TEU art 4(2) to challenge an EU measure (see Dobbs, 'Sovereignty, Article 4(2) TEU and the Respect of National Identities' (n 10) 20), also because the case law of the Court of Justice and the Opinions of AG show that respect for national identity might have an impact in scrutinizing EU measures and in derogating from EU law.

compliance with EU law.[181] Nevertheless, sincere cooperation also asked the Member States to facilitate the achievement of the Union's tasks and refrain from any measure which could jeopardize the attainment of the Union's objectives. What accounted for the unitary twist of the principle of sincere cooperation is the interpretation of the obligations imposed upon the Member States in the light of a strong *integrationist-biased* reading of the objectives of the Treaty. It is telling that, on the one hand, the duty of loyalty has played a significant role in the foundational case law asserting supremacy, direct effect, the ERTA principle etc., and, on the other, the referral that the Treaty makes to 'Union's objectives' has been too often, both by the CJEU and by the scholarly literature, identified with the 'Union's interests'.[182] In my reading, while the Treaty objectives preserve a balance between the constitutive parts of the composite legal order, the Union's interests are more likely to infringe upon Member States' interests. Moreover, the objectives of a legal order are subject to dynamic developments, and the current objectives of the Treaty might not necessarily want to push the integration so far as it was both feasible and desirable at the very beginning of the integration process. Just to give an example, Article 3 TEU, dedicated to the objectives of the Treaty, for the very first time requires the Union to 'respect its rich cultural and linguistic diversity', and to 'ensure that Europe's cultural heritage is safeguarded and enhanced'. If the duty of loyal cooperation requires the Union and the Member States to assist each other in the achievement of Union objectives, this absolutely new referral to pluralism in the Treaty objectives might be another reason to interpret loyal cooperation in a less integrationist manner more respectful of Member States' national identities.

Last but not least, some comparative insights might be drawn from those systems of cooperative regionalism where loyal cooperation served the purpose of enhancing pluralism and allowing lower level of governments to have a say in the decision-making process rather than acting as a constitutional safeguard of unitarianism (this is for example the case such as the Italian one, where the principle was first created by the Constitutional Court, then codified by the Constitution, and has been 'proceduralized' to involve regions in the decision-making process).[183]

To conclude, Article 4 TEU lies at the heart of the composite nature of the European Union and it is crucial to understand the complex balance between the Union and the Member States as its constitutive parts. This chapter suggested a reading of Article 4 TEU in its entirety. Such reading might foster a more pluralist interpretation of the duty of loyal cooperation, which, in the words of Advocate General Sharpston, represented 'the "glue" to keep the federal construction together'.[184]

[181] Such a duty of compliance is now clearly stated in the Lisbon Treaty. According to art 291(1): 'Member States shall adopt all measures of national law necessary to implement legally binding Union acts'. Along similar lines, the provisions of the TEU devoted to the Court of Justice of the EU state that: 'Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law' (TEU art 19(1)). In this respect, the gap-filling function of the duty of loyal cooperation might be reduced since this duty of compliance has been strongly codified.

[182] See eg Neframi, 'The Duty of Loyalty' (n 14), who argues that the nature of the specific obligations arising from loyalty depend on the particular facet of the Union interest, which may consist in: the effective implementation of common rules, the preservation of their *effet utile*, the facilitation of the exercise of EU competences, and the unity if external representation.

[183] See section III.C on loyalty in comparative perspective.

[184] AG Sharpston, nevertheless, sees in TEU art 4 an 'excellent programme' for a conception of federalism which, in the words of US Supreme Court, rests on the 'counterintuitive insights that freedom is enhanced by the creation of two governments, not one'. See E. Sharpston, 'Preface' in Cloots, De Baere, and Sottiaux (eds), *Federalism in the European Union* (n 68) viii.