Przegląd Prawa Konstytucyjnego
---------ISSN 2082-1212---------
DOI 10.15804/ppk.2017.06.10
---------Nr 6 (40)/2017---------

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The Position of the Principle of Respect for Constitutional Identity in EU Law

Keywords: European Union, The Court of Justice, the principle of respect of constitutional identity, the principle of respect of national identity, the principle of entrusted competence.
Słowa klucze: Unia Europejska, Trybunał Sprawiedliwości, zasada poszanowania tożsamości narodowej, zasada poszanowania tożsamości konstytucyjnej, zasada kompetencji powierzonych

Summary

The present article is an attempt to answer the question about the position of the principle of respect for constitutional identities of Member States and its impact on the application of EU law in the national legal order. For this purpose three areas will be considered. Firstly, the analysis of the principle of respect for national identity in EU law and in the case law of the Court of Justice will be conducted.

Secondly, the principle of competence entrusted to the EU will be analysed, together with its interpretation at the EU level.

Thirdly, the understanding of the notion of constitutional identity in the case law of Constitutional Courts of selected Member States will be considered.

It proved that the principle of respect for constitutional identity is treated both at national and EU level as an integral part of the concept of "*national identity*". The national identity has a broad meaning and refers to values that are cherished by a particular nation, which it considers to be an element distinguishing that nation from other na-

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tions. The constitutional identity narrows the scope and concentrates on the constitutional achievements, the expression of the legal culture and the achievements of the political thought of the nation, which were shaped by the history of a given nation. These two aspects jointly determine the position of the state and nation in international relations. The principle of respect for national identity is one of the constitutional principles of the EU. On one hand, it implies the EU's duty to undertake activities which do not affect national identity, including constitutional identity, of Member States. On the other hand, it obligates it to ensure the diversity of Member States.

Streszczenie

Pozycja zasady poszanowania tożsamości konstytucyjnej w prawie Unii Europejskiej

Niniejszy artykuł stanowi próbę udzielenia odpowiedzi na pytanie dotyczące pozycji zasady poszanowania tożsamości konstytucyjnej państw członkowskich oraz jej wpływ na stosowanie prawa unijnego w krajowym porządku prawnym. W tym celu podjęte zostały rozważania w trzech obszarach.

Po pierwsze analiza zasady poszanowania tożsamości narodowej w prawie UE oraz w orzecznictwie Trybunału Sprawiedliwości.

Po drugie analiza zasady kompetencji przyznanych wraz z jej wykładnią na poziomie unijnym.

Po trzecie rozumienie pojęcia tożsamości konstytucyjnej w orzecznictwie trybunałów konstytucyjnych wybranych państw członkowskich.

Rozważania zawarte w artykule dowodzą, że zasada poszanowania tożsamości konstytucyjnej jest traktowana zarówno na poziomie krajowym jak i unijnym jako integralna część pojęcia „tożsamości narodowej". Pierwsza ma szerokie znaczenie i odnosi się do wartościach cennych dla danego narodu, które uważa on za element wyróżniając go spośród innych narodów. Druga ma charakter zawężający i koncentruje się na dorobku konstytucyjnym, stanowi wyraz kultury prawnej oraz osiągnięć myśli politycznych narodu, który kształtował się wraz z historią konkretnego narodu. Obydwa te aspekty wspólnie wyznaczają miejsce państwa i narodu w stosunkach międzynarodowych. Zasada poszanowania tożsamości narodowej stanowi jedną z zasad konstytucyjnych UE. Oznacza ona z jednej strony jej obowiązek do podejmowania działań, które nie naruszają tożsamości narodowej w tym konstytucyjnej państw członkowskich. Z drugiej strony nakłada na nią obowiązek zapewnienia zachowania różnorodności państw członkowskich.

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I. The position of the principle of respect for constitutional identity of Member States in the Union law

The catalogue of the systemic and structural rules of the European Union (hereinafter EU) has been regulated in the provisions of the TEU[2] and expressed more precisely in the TFEU[3]. The literal interpretation of these provisions does not explicitly point to the principle of respect for constitutional identity. It was partly referred to in Art. 4 TEU, which, de facto, defines two principles: the equality of Member States and respect for national identities of Member States. It would seem to indicate that it is derived from the principle of respect for national identities of Member States. Thus, it should be assumed that the principle of respect for constitutional identity is not a self-contained principle of EU law, but it complements the principle of respect for national identities of Member States. The analysis of the case law of the Member States' Constitutional Courts links this principle directly with the principle of competence entrusted to the EU, which fundamentally defines the scope of EU competences.

The present article is an attempt to answer the question about the position of the principle of respect for constitutional identities of Member States and its impact on the application of EU law in the national legal order. For this purpose three areas will be considered.

Firstly, the analysis of the principle of respect for national identity in EU law and in the case law of the Court of Justice will be conducted.

Secondly, the principle of competence entrusted to the EU will be analysed, together with its interpretation at the EU level.

Thirdly, the understanding of the notion of constitutional identity in the case law of Constitutional Courts of selected Member States will be considered.

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[2] Consolidated version of the Treaty on European Union, Official Journal of the European Union 2016 C 202 (hereinafter TEU).

[3] Consolidated version of the Treaty on the Functioning of the European Union, Official Journal of the European Union 2016 C 202 (hereinafter TFEU).

II. The principle of respect for national identities of Member States

The principle of respect for national identity does not have its source in the founding treaties. It was first introduced in the provisions of the Maastricht Treaty[4]. According to the 1991 Treaty on European Union, "The Union shall respect the national identities of its Member States, whose systems of government are founded on the principles of democracy". The next treaty – the Treaty of Amsterdam – introduced Art. 6 TEU, which is a catalogue of EU values, and specified the importance of the principle of respect for national identities of Member States. There is the view in the literature on the subject that such a regulation supports the thesis that the discussed principle has become a binding rule of the EU. It is the source of positive and negative EU obligations[5]. The Treaty of Lisbon made a broad reference to this principle. It changed it and supplemented its content by referring to basic political and constitutional structures of the state, including regional and local self-government. Attention should also be paid to the content of the Preamble to the Treaty on European Union, which emphasizes that one of the EU objectives is to deepen solidarity between its nations with due respect for their history, culture and traditions[6]. Polish Constitutional Court stressed that the indicated reference is the idea of keeping individual national identities of Member States in solidarity with other states. It is the "fundamental axiological basis of the European Union in the light of the Treaty of Lisbon"[7].

The reference to national identity was also introduced into the provisions of the Charter of Fundamental Rights of the European Union (hereinafter CFR)[8]. According to the wording of the Preamble "The Union contributes to the preservation and to the development of these common values while

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[4] The Treaty on European Union, Art. F TEU, http://www.lexnet.dk/law/download/treaties/Maa-1992.pdf (10.11.2017).

[5] J. Maliszewska-Nastorowicz, *Zasada poszanowania tożsamości narodowej państw członkowskich*, [in:] *Zasady ustrojowe Unii Europejskiej*, ed. J. Barcz, Warszawa 2010, pp. 168–169.

[6] Consolidated version of the Treaty on European Union, Official Journal of the European Union C 326 of 26 Oct. 2012, pp. 1–390.

[7] Judgement of the Constitutional Court of the Republic of Poland of 24 Nov. 2010 K 32/09 (hereinafter K 32/09).

[8] Charter of Fundamental Rights of the European Union, Official Journal of the European Union C 326 of 26 Oct. 2012 (hereinafter CFR).

respecting the diversity of the cultures and traditions of the peoples of Europe as well as the national identities of the Member States and the organisation of their public authorities at national, regional and local levels"[9], and "the Union shall respect cultural, religious and linguistic diversity"[10]. The indicated provisions focus primarily on the concept of national identity in the context of the diversity of cultures and traditions of European nations. They point to the EU's dependence on individual, diverse countries, each of which is distinct and has its own culture and tradition. This is the added value of the whole EU.

The analysis of the case law of the Court of Justice (hereinafter CJ) shows that the issue of respect for national identities of Member States is invoked mainly in the context of restrictions on the freedoms of the internal market. The subject of deliberations is the problem of the so-called national identity in both ethical and institutional context.

The first group of judgements focuses on premises like protection of a Member State's language[11], protection of history, tradition and culture[12], protection of public morality[13].

The second group of judgements focuses on the premise of respect for constitutional identity of Member States. In this area two other distinct situations need to be identified. Firstly, the CJ refers to the requirement to respect the public order of the Member States where the exercise of the internal market freedoms would result in the violation of one of the goods protected by the Constitution. Secondly, when the use of them poses a direct threat to the exclusive competences of Member States.

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[9] Paragraph 3 of the CFR Preamble.

[10] Art. 22 CFR.

[11] Cf.: C 379/78 Groener. It is also worth paying attention to the CJ judgement in the case C 391/09 Malgožata Runevič-Vardyn, Łukasz Paweł Wardyn.

[12] Cf.: Cases C 154/89 The Commission v. France, C 180/89 The Commission v. Italy, C 198/89 The Commission v. Greece.

[13] Cf.: Cases C 34/79 Henn and Darby, C 121/85 Conagate limited v. HM Custom&-Excise. For more analysis on the discussed judgements see: E. Krzysztofik, *Poszanowanie wartości narodowych przesłanką uzasadniającą ograniczenie swobód rynku wewnętrznego*, [in:] *Unia Europejska, zjednoczeni w różnorodności*, ed. C. Mik, Warszawa 2012, pp. 446–449; E. Krzysztofik, *Ograniczenia swobód personalnych rynku wewnętrznego w Unii Europejskiej,* [in:] *Prawo materialne Unii Europejskiej*, ed. A. Kuś, Lublin 2011, pp. 232–234.

Two judgements of the CJ connected with constitutional protection of fundamental rights will be used as examples illustrating the first situation. The argumentation used by the CJ in the case of *Schmidberger*[14] clearly shows that in the discussed case a collision of two values appears. On one hand, there is one of the basic aims of EU, i.e. the free movement of goods. On the other hand, there is the fulfilment of a fundamental right, i.e. the freedom of speech and assembly. When referring to the facts of the case, the Court of Justice stressed that "the protection of those rights is a legitimate interest which, in principle, justifies a restriction of the obligations imposed by Community law, also under one of the fundamental freedoms guaranteed by the Community law, even under a fundamental freedom guaranteed by the Treaty such as the free movement of goods". It also emphasized that the purpose for which the assembly was organized was not limiting the free movement of goods, but "manifesting in public an opinion which they considered to be of importance to society".

In the judgement in the case of *Omega*[15] the Court emphasized that "Since both the Community and its Member States are required to respect fundamental rights, the protection of those rights is a legitimate interest which, in principle, justifies a restriction of the obligations imposed by Community law, even under a fundamental freedom guaranteed by the Treaty such as the freedom to provide services"[16]. It considered that the "killing game" at

[14] Judgement of the Court of Justice of 12 June 2003 on C 112/00 *Eugen Schmidberger, Internationale Transporte und Planzüg v. The Republic of Austria,* ECR 2003, pp. I–5659. The facts of the case concerned permission to assemble, which caused a complete stoppage of traffic on the Brenner motorway during that period. The Schmidberger company lodged a complaint with the Landesgericht Innsbruck (Austria), requesting compensation from the Republic of Austria for damages and interest, due to the fact that five of their trucks were not able to use the Brenner motorway for four successive days (a holiday, followed by the assembly and two consecutive days off, while truck transport is banned from streets on public holidays). The Austrian court referred questions to the Court of Justice for a preliminary ruling concerning the influence of the permission granted for the free movement of goods on the EU internal market.

[15] Judgement of the Court of Justice of 14 Oct. 2004 in the case C-36/02 *Omega Spielhallen – und Automatenaufstellungs – GmbH v. Oberbürgermeisterin der Bundesstadt Bonn 1,* ECR 2004, pp. I–9609. The subject of the dispute was German law prohibiting the provision of services consisting in providing rooms for the so-called "killing games", i.e. aiming at other people with imitation laser weapons. The German government referred to the constitutional obligation to respect the dignity of the human being.

[16] Ibidem.

issue "infringed a fundamental value enshrined in the national constitution, namely human dignity". The Court stated that "It is not indispensable in that respect for the restrictive measure issued by the authorities of a Member State to correspond to a conception shared by all Member States as regards the precise way in which the fundamental right or legitimate interest in question is to be protected". It acknowledged Germany's right to restrict the freedom of movement of services on the basis of the protection of a constitutional value, i.e. the protection of human dignity. At the same time it highlighted that the applied measure was proportionate in the context of the intended purpose.

While acknowledging the arguments of the CJ, it should be emphasized that Member States have the capacity to restrict one of the freedoms of the internal market when it is a threat to public order and safety. At the same time, each Member State defines the indications in accordance with its constitutional standards[17].

The second area that should be distinguished in the case law of the CJ is the respect for constitutional identity of Member States in the context of the protection of the exclusive competences of Member States. There is no. doubt that the EU acts only in the scope of the powers delegated to it in the founding Treaties, as justified in the treaties and in the case law of the CJ.

The provisions of the Treaties refer to the principle of entrusting, contained in Art. 5 sec. 1 and 2 TEU. According to their wording, the EU only acts on the powers conferred on it in the Treaties by Member States to achieve the treaty objectives. Non-delegated powers remain the exclusive competence of Member States. On the other hand, the provisions of TFEU that specify the exclusive[18], shared[19] and coordination[20] competences regulate the methods of the exercise of the powers conferred on the EU[21].

The principle of entrusted competence is one of the structural principles of the EU and it makes the foundation for EU's functioning and exercise of powers. The Court of Justice, while defining the nature of Union law, empha-

[17] Opinion of the Advocate General Christine Stix-Hackl presented on 18 March 2004 in the case C-36/02 Omega.

[18] Art. 3 TFEU.

[19] Art. 4 TFEU.

[20] Art. 6 TFEU.

[21] K. Lenaerts, P. Van Nuffel, *Constitutional Law of The EU*, London 1999, p. 89.

sized that EU has been equipped with competences conferred on it by Member States. None of the EU's competences has its scope specified at the level of the Court. In individual cases the Court makes a statement concerning the transfer of sovereign powers of Member States. Referring to one of the first CJ judgements in the Van Gend & Loos case[22], it emphasized that "The European economic community constitutes a new legal order of international law for the benefit of which the states have limited their sovereign rights, albeit within limited fields, and the subjects of which comprise not only the member states but also their nationals". This position highlights three key issues. Firstly, it assigns the EU order to international law. This internationalist approach was subsequently amended in the Costa v. ENEL judgement[23]. Secondly, it refers to the principle of entrusted competence by emphasizing the fact that the states have limited their sovereign powers to a restricted extent. Therefore, the EU has acquired certain competences conferred on it by Member States. Thirdly, within the scope of the received competences, the EU makes laws that have a direct effect in the national legal system. These three elements allow one to assume that the EU has created a legal system that, although derived from international law, has its own distinctive features that distinguish it from the international system. These features are the specific scope of competence that has been entrusted to it and the way in which EU law is enforced.

In the next milestone judgement in the Costa v. ENEL case, the Court modified its previous position and stressed that "By contrast with ordinary international treaties, the EEC Treaty has created its own legal system which, on the entry into force of the Treaty, became an integral part of the legal systems of the Member States and which their courts are bound to apply". EU law not only binds Member States, but also acts as national law. At the same time, this law does not lose its distinct character. It binds the bodies governed by national law (and, of course, the EU) and applies in the territory of Member States. The Court explained that "By creating a Community of unlimited duration, having its own institutions, its own personality, its own legal capacity and capacity of representation on the international plane and, more particularly, real powers stemming from a limitation of sovereignty or a transfer

[22] Judgement of 5 March 1963 in the case C 26/62 Van Gend&Loos.

[23] Judgement of 15 July 1964 in the case Costa v. ENEL.

of powers from the States to the Community, the Member States have limited their sovereign rights, albeit within limited fields, and have thus created a body of law which binds both their nationals and themselves".

The EU has created an autonomous and independent legal system that is binding next to the national systems. Within the boundaries of entrusted competences it has created a legal system which the States are obligated to apply the same as their national law. However, in the Court's opinion "The integration into the laws of each Member State of provisions which derive from the Community, and more generally the terms and the spirit of the Treaty, make it impossible for the States, as a corollary, to accord precedence to a unilateral and subsequent measure over a legal system accepted by them on a basis of reciprocity. Such a measure cannot therefore be inconsistent with that legal system". This means that it has a higher normative power in relation to national law and that, in the event of a collision of the standards of the indicated systems, priority should be given to EU law. In addition, the above-mentioned thesis from the CJ judgement emphasizes one important reference. When interpreting EU law, the EU appeals to the terms and the spirit of the Treaty. This reinforces argumentation in conflict situations. The European Union, acting through its institutions, makes law within the scope of competence whose boundaries are defined by the terms and the spirit of the Treaty. In other words, the aims (and the spirit) of the Treaty are realized through actions within the competence[24].

The above considerations of the CJ indicate that the concept of competence should be viewed from the perspective of the executing entity. Generally speaking, in the relationship between the EU and the Member States,

[24] The issue of EU competence has been widely commented in literature in the context of the nature of EU law. In this scope it is worth consulting the following works: e.g. R.M. Pal, *Charakter prawa Unii Europejskiej*, [in:] *Prawo instytucjonalne Unii Europejskiej*, ed. A. Kuś, Lublin 2012, pp. 316–318; S. Biernat, *Zasada pierwszeństwa prawa unijnego po Traktacie z Lizbony*, "Gdańskie Studia Prawnicze" 2011, vol. XXV, pp. 49–61; P. Mikłasiewicz, *Zasada pierwszeństwa w krajowych porządkach prawnych według orzecznictwa ETS i Sądu I Instancji*, Biuro Trybunału Konstytucyjnego, Zespół orzecznictwa i studiów, 2005, http://www.trybunal.gov.pl/epublikacje/download/PIERWSZENSTWO.pdf (10.11.2017); B. Banaszkiewicz, *Węzłowe problemy w orzecznictwie Trybunału Sprawiedliwości Wspólnot Europejskich, Biuro Trybunału Konstytucyjnego*, Zespół orzecznictwa i studiów, 2003, http://www.trybunal.gov.pl/epublikacje/download/Trybunal_sprawiedliwosci.pdf (10.11.2017).

the EU and, more precisely, its institutions are in the place of the state understood as a legislative body.

In this context it is worth referring to the judgement of the Court of Justice on the issue of the attribution of surnames. It should be emphasized that "The rules governing a person's surname are matters coming within the competence of the Member States, the latter must none the less, when exercising that competence, comply with Community law [...], in particular the Treaty provisions on the freedom of every citizen of the Union to move and reside in the territory of the Member States [...]"[25],

The CJ judgement in the case C 208/09 Ilonka Sayn-Wittgenstein[26] seems worth using here as an example. The Court emphasized that "[...] public policy may be relied on only if there is a genuine and sufficiently serious threat to a fundamental interest of society [...]". Additionally, it indicated that "[...] the specific circumstances which may justify recourse to the concept of public policy may vary from one Member State to another and from one era to another. The competent national authorities must therefore be allowed a margin of discretion within the limits imposed by the Treaty [...]". Each Member State is characterised by its distinct culture, history, tradition and defines its individual supreme values. Their specificity may affect the contents of the limiting condition. The Court also indicated that "[...] it is not indispensable for the restrictive measure issued by the authorities of a Member State to correspond to a conception shared by all Member States as regards the precise way in which the fundamental right or legitimate interest in question is to be protected and that, on the contrary, the need for, and proportionality of, the provisions adopted are not excluded merely because one Member State has chosen a system of protection different from that adopted by another State [...]".

Summing up the above considerations one should assume that the content of the concept of national identity includes ethical and institutional dimen-

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[25] C 148/02 Garcia Avello v Belgian State.

[26] The CJ judgement of 22 Dec. 2010 in the case C-208/09 Ilonka Sayn-Wittgenstein v. Landeshauptmann von Wien. The questions directed to the CJ concerned the interpretation of the provisions of Art. 21 TFEU in the context of Austrian regulations of constitutional rank on the abolition of nobility, the associated privileges, titles and ranks granted purely for distinction, not connected with any official function, profession or scientific or artistic services. In the discussed case Austria invoked the premise of public order.

sions. The first is related to culture, language, religion, customs, history and tradition. The second should be understood as the fundamental principles of the system that formed together with the history and political consciousness of the nation[27]. Respect for national identity should be seen in two aspects. The first (negative) is the EU's commitment to refrain from activities that, according to Member States, affect national identity. In this context, it should be assumed that this applies to the possibility of applying exceptions to EU rgulations. The second (positive) is understood as the duty of the EU to take action to preserve the diversity of the Member States[28].

III. The concept of constitutional identity in the case law of the Member States' Constitutional Courts

On the other hand, one should look at the principle of respect for constitutional identity from the perspective of the Member States. This issue was widely analysed in the case law of Constitutional Courts. Basically, in the first period of operation of the EU, references to the discussed issue were outlined in the context of the principle of primacy of EU law[29]. The first judgements focused on the relationship between EU law and the constitution in relation to the protection of fundamental rights[30]. This problem was addressed more broadly in the judgements of Constitutional Courts after the entry into force of the Maastricht Treaty[31]. The main issue highlighted in the case law is the scope of EU competences and how they are exercised. As an example the position of the Federal Constitutional Court should be indicated, which stressed that the EU did not have the creative capacity to establish its own competences. It referred to the principle of entrusted competence, which "does not exclude the interpretation of the provisions of the Treaties, which are intended to confer Community tasks or competences, in the light of the objectives of

[27] Cf.: A. Wróbel, *Objaśnienia do preambuły,* [in:] *Karta Praw Podstawowych Unii Europejskiej. Komentarz,* ed. A. Wróbel, Warszawa 2013, p. 22.

[28] J. Maliszewska-Nienartowicz, op.cit., pp. 172–173.

[29] Case law of CJEU and CC.

[30] e.g. Solange I and II.

[31] The Treaty on European Union, signed in Maastricht on 7 Feb. 1992, Official Journal of the EU 1992 C 191.

those Treaties, yet these objectives do not constitute a sufficient basis for the development of new tasks and powers or for the extension of the tasks and powers conferred". This position will be the starting point for the deliberations made after the entry into force of the Lisbon Treaty.

In these judgements the Constitutional Courts, starting with the principle of sovereignty, focused on the scope of the concept of constitutional identity. In this group of judgements two points should be indicated.

The first of them states that it stresses the transfer of competences to the EU with the caveat that it is not absolute, but provides for its limitation. On the other hand, they do not specify the limitations, they refer only to the general character of relations between the EU and the national legal order[32]. For instance, the Constitutional Court of the Czech Republic emphasized that defining the limits of the transfer of competences "is a political issue, generally decided by the legislator who has a wide margin of discretion in this case [...]. It may (Constitutional Court) scrutinize these decisions after they are actually taken at the political level. [...] The Constitutional Court can verify whether the EU legislation goes beyond the powers that the Czech Republic has conferred on the EU"[33].

The second approach illustrates the position of the Polish Constitutional Court and the Federal Constitutional Court.

With reference to the Treaty of Lisbon[34], the Polish Constitutional Court, focusing on the dependence between the national identity and the constitutional identity, stated that "constitutional identity is linked to the concept of national identity that also includes tradition and culture"[35]. According to the Constitutional Court, national identity is a broad concept that includes the constitutional identity, the tradition and culture of the nation. It stressed that under the concept of constitutional identity one should understand the values on which the Constitution is based[36]. This concept thus delineates the area

[32] K. Wójtowicz, *Poszanowanie tożsamości konstytucyjnej państw członkowskich Unii Europejskiej,* "Przegląd Sejmowy" 2010, no. 4(99), p. 16.

[33] Ibidem, p. 16.

[34] Judgement of the Constitutional Court of the Republic of Poland of 24 Nov. 2010, K 32/09.

[35] Ibidem.

[36] Cf.: L. Garlicki, *Normy konstytucyjne relatywnie niezmieniane,* [in:] *Charakter i struktura norm Konstytucji*, ed. J. Trzciński, Warszawa 1997, p. 148.

of exclusion from the sphere of the conferred competence, i.e. areas which constitute the foundation, the basis of the Polish state system. Działocha emphasizes that constitutional identity defines the boundaries of "the exclusion of the transfer of matter belonging to [...] the 'permanent core', fundamental to the constitution of the state"[37]. On the other hand, according to the Constitutional Court the scope of the non-transferable competences includes "primary rules of the Constitution, provisions on the rights of individuals that determine the identity of the state, provisions on the protection of human dignity and constitutional rights, the principle of statehood, the principle of democracy, the rule of law, the principle of social justice, the principle of subsidiarity and the requirement to ensure better implementation of constitutional values and the prohibition of the transfer of constitutional power and the competence to create competences"[38].

A similar position on the content of the concept of "constitutional identity" was taken by the German Constitutional Court, stating that "the basic components of constitutional identity should include, in particular: citizenship, civil and military monopoly in the use of force, public revenue and expenditure, interference in the exercise of fundamental rights (especially in the form of deprivation of liberty on the basis of penal law), the right to language, the right to shaping of living conditions in the family, education, freedom of the press, assembly and expression, freedom of religion and dissemination of ideology. The understanding of the determinants of identity follows from the context of historical and cultural experiences"[39].

There is the view in the literature on the subject that the indicated position does not solve the problem, does not define it and does not specify the meaning and content of the concept[40]. The situation is dictated by the fact that the Constitutional Court focuses essentially on defining the scope of EU competences, and not on the concept of national or constitutional identity. From

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[37] K. Działocha, *uwagi do Art. 8 Konstytucji RP*, [in:] *Konstytucja Rzeczypospolitej Polskiej. Komentarz*, vol. 5, ed. L. Garlicki, Warszawa 2007, p. 34.

[38] Ibidem.

[39] Judgement of the Germany Federal Constitutional Court of 30 June 2009, 2 BvE 2/08, 2 BvE 5/08, 2 BvR 1010/08, 2 BvR 1022/08, 2 BvR 1259/08, 2 BvR 182/09, p. 249.

[40] M. Safjan, *Prawo Unii Europejskiej w porządkach prawnych państw członkowskich*, [in:] R. Adam, M. Safjan, A. Tizzano, *Zarys prawa Unii Europejskiej*, Warszawa 2014, p. 232.

this perspective, it is perceived as the boundary of competence between transferable and non-transferable competences. On the other hand, it is important to define the content and scope of the concept of competence identity when EU law is applied and this can lead to the violation of the national identity of a Member State. According to Safjan, the application of protection of constitutional identity can exceptionally result in "in casu reduction of the effectiveness and consistency of European regulations"[41]. In the discussed situation, this does not constitute a breach of the principle of primacy of EU law. The principle of respect for national identity has its source in the Treaty, is the principle of European Union law and, as indicated above, obligates it to refrain from activities that could affect national identity. Thereby, by invoking it a Member State can protect its constitutional distinctiveness. To that end, derogation clauses or imperative requirements are invoked, which are identified at national level but are subject to assessment at EU level in the case law of the the Court of Justice.

IV. Conclusion

Summing up the above considerations it should be emphasized that the principle of respect for constitutional identity is treated both at national and EU level as an integral part of the concept of "national identity". The national identity has a broad meaning and refers to values that are cherished by a particular nation, which it considers to be an element distinguishing that nation from other nations. The constitutional identity narrows the scope and concentrates on the constitutional achievements, the expression of the legal culture and the achievements of the political thought of the nation, which were shaped by the history of a given nation. These two aspects jointly determine the position of the state and nation in international relations. The principle of respect for national identity is one of the constitutional principles of the EU. On one hand, it implies the EU's duty to undertake activities which do not affect national identity, including constitutional identity, of Member States. On the other hand, it obligates it to ensure the diversity of Member States.

[41] Ibidem, p. 232.

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