



Where culture, language and politics meet: Is there any place for national identity in the EEA legal system?

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ABSTRACT: Over recent years, most particularly with the entry into force of the Lisbon Treaty, the protection of national identity or constitutional identity has become a bone of contention between the Court of Justice of the European Union and the courts of EU Member States. While of obvious relevance to the development of the Union legal order, this concept has implications beyond the borders of the Union especially with respect to those EFTA states which are also members of the European Economic Area. With its own court, the EFTA Court, having successfully transposed (to varying degrees) fundamental EU law principles into the sui generis EEA system, this article considers whether or not it might repeat the process with national identity and, if so, the extent to which it might be successful.

KEYWORDS: national identity - constitutional identity - EEA Agreement - judicial activism - judicial dialogue.

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This work is partially based on the author's earlier ideas in A.F. Tatham, "National identity and EEA law: The next constitutional step for the EFTA Court?" in AA.VV. (eds.), *Democratic and Social State under the Rule of Law – Society, Politics, Economy: Festschrift for the 45th Academic Anniversary of Prof. Zbigniew Maciag*, AFMKU/Jagiellonian University, Kraków, 2014). The author hereby gratefully acknowledges the assistance and advice given in preparing the present article by Prof. Dr. Peter-Christian Müller-Graf, Ruprecht-Karls-Universität Heidelberg. The usual disclaimer applies.

1. Introduction

The treaty recognition of the respect for national identity in the EU legal order and the concomitant emergence of constitutional identity as a (potential) yardstick for review of EU law by national constitutional courts – e.g., through the case-law of the German Federal Constitutional Court regarding the Maastricht and Lisbon treaties¹ – continues to have ramifications in the Union. It has led, for instance, to an intensification of the judicial dialogue in the EU both vertically between national courts and the Court of Justice of the European Union (“CJEU”) and horizontally between national courts.

Against this background of an ever-changing landscape, stand the ostensibly immutable provisions of the Agreement of the European Economic Area (“EEA”) signed in 1992, a year before the eventual entry into force of the Maastricht Treaty. Agreed to in the era immediately preceding the creation of the EU, the EEA Agreement essentially extends the provisions of what became known as the Internal Market to the EFTA-EEA states of Iceland, Liechtenstein and Norway. Charged with authoritatively interpreting the Agreement’s provisions for those EFTA-EEA states is the EFTA Court,² the remit of which is to ensure the continuing homogeneity between EU law and EEA law and thus to avoid future divergences in interpretation between the two legal systems. As will be seen in this article, the EFTA Court has responded to these challenges by developing the principle of “dynamic interpretation” in its approach to its decision-making.

Within this framework, then, the present article seeks to address one particular issue of the horizontal judicial dialogue of the CJEU and the EFTA Court,³ related to the possible migration of constitutional ideas⁴ between the EU and the EFTA-EEA states. That is the putative reception – mediated by the EFTA Court – into the EEA legal order of the principle of the respect of national identity, most recently articulated in treaty form in Art 4(2) TEU. It will be argued that such principle – although currently indeterminate in scope – is likely to come to play a greater role in the Internal Market and the CJEU’s own decision-making and will thus impact, in due course, on the EEA legal order. How such impact might play out will also be briefly considered.

¹ A.F. Tatham, *Central European Constitutional Courts in the Face of EU Membership: The Influence of the German Model of Integration in Hungary and Poland*, 2013, 106-112. Some courts have followed the specific German lead, including Hungary (Tatham, *ibid*, 186-189) and Poland (Tatham, *ibid*, 245-252), while other national constitutional tribunals have developed their own understandings of the core of national sovereignty immune from EU law: these include the French Constitutional Council with its concept of “the essential conditions for the exercise of national sovereignty,” developed in such cases as the *Schengen Agreement* case (Cons. constit. 25 juillet 1991, n. 294, Rec. 91) and the *EU Constitutional Treaty* case (Cons. constit. 19 novembre 2004, n. 505, Rec. 173); the Italian Constitutional Court with its counter-limits doctrine (for a lucid exposition of this doctrine, see M. Cartabia & J.H.H. Weiler, *L’Italia in Europa. Profili istituzionali e costituzionali*, il Mulino, Bologna, 2000, 129-133 and 171-172); and, more recently though less distinctly so far, the UK Supreme Court with its understanding of “constitutional statutes” in its ruling in *R (HS2 Action Alliance Ltd) v. Secretary of State for Transport* [2014] UKSC 3, [2014] 1 WLR 324.

² See the excellent and varied contributions to the volume commemorating the 20th year of the Court’s operation in EFTA Court (ed), *The EEA and the EFTA Court: Decentred Integration*, Hart Publishing, Oxford, 2015.

³ C. Baudenbacher, “The EFTA Court: An Actor in the European Judicial Dialogue”, in *Fordham International Law Journal*, Vol. 28:353, 2005.

⁴ On the notion of the migration of constitutional ideas, see S. Choudhry (ed.), *The Migration of Constitutional Ideas*, Cambridge University Press, Cambridge, 2007.

2. National identity and the European Union

The recognition of national identity as a discrete concept was originally introduced by the Maastricht Treaty and provided under then Art F(1) TEU that: “The Union shall respect the national identities of the Member States, whose systems of government are founded on the principles of democracy.” The Amsterdam Treaty revised the numbering, Art 6(3) TEU, and removed the dependent clause.

Further development was proposed through Art I-5 of the draft Constitutional Treaty, the progenitor of Art 4(2) TEU, quoted below. The relevant Working Group in the Convention noted⁵ that its discussions, when dealing with the wording of this provision, had centred on two core areas of national responsibilities, viz.: (1) fundamental structures and essential functions of a Member State which were included in Art I-5 CT (and later retained in Art 4(2) TEU); and (2) basic public policy choices and social values of a Member State including tax policies; social welfare benefits system; educational system; public health care system; and cultural preservation and development. Interestingly, choice of languages was considered as part of the first group, not the second. Nevertheless, as a result of its deliberations, the Working Group members generally agreed that the revised clause would not require any specific mentioning of the latter basic policy choices of the Member States.

The Lisbon Treaty largely kept the wording of Art I-5 CT (adding the point on equality) and now provides in Art 4(2) TEU:

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.

Van der Schyff has argued⁶ that Union respect for national identities is to be understood as meaning exclusively the protection of the individual constitutional identity of the Member States. Nevertheless, the Working Group’s approach to basic policy choices as part of national identity contextualizes the wording of Art I-5 CT/ Art 4(2) TEU, so that a narrow, “constitutional” interpretation of national identities does not represent the intention of the drafters of that provision. In fact, “national identity” must be seen as a much broader concept within the context of the Union.⁷

3. Protection of national identity in the Internal Market

(a) An inherent, broad and inclusive notion of national identity

Treaty-based protection of national identity may be seen to have a progeny

⁵ G. Amato & J. Ziller, “The European Constitution: Cases and Materials”, in *EU and Member States’ Law*, 2007, 157-158.

⁶ 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”, in *European law review*, 37(5):563-583 • 2012, 567-571.

⁷ Support for this contention may be found through examining the clause’s history: B. Guastaferrro, “Beyond the *Exceptionalism* of Constitutional Conflicts: The *Ordinary* Function of the Identity Clause”, in *Yearbook of European Law*, 31 (1), 2012, 263-318.

dating back to the very beginnings of European integration. The views of Póitares Maduro AG in *Michaniki*, where he elaborated on the notion of Member State identity, are worthwhile considering in detail as they form the framework for the ensuing discussion:⁸

It is true that the European Union is obliged to respect the constitutional identity of the Member States. That obligation has existed from the outset. It indeed forms part of the very essence of the European project initiated at the beginning of the 1950s, which consists of following the path of integration whilst maintaining the political existence of the States. That is shown by the fact that the obligation was explicitly stated for the first time upon a revision of the treaties, a reminder of the obligation being regarded as necessary by the Member States in view of the further integration provided for. Thus, Article F(1) of the Maastricht Treaty, now Article 6(3) of the Treaty on European Union, provides that “the Union shall respect the national identities of its Member States.” The national identity concerned clearly includes the constitutional identity of the Member State. That is confirmed, if such was necessary, by the explanation of the aspects of national identity put forward in Article I-5 of the Treaty establishing a Constitution for Europe and Article 4(2) of the Treaty on European Union as amended by the Treaty of Lisbon. It appears, indeed, from the identical wording of those two instruments that the Union respects the “national identities [of Member States], inherent in their fundamental structures, political and constitutional.”

The case-law has already drawn certain conclusions from that obligation imposed on the European Union by the founding instruments to respect the national identity of the Member States, including at the level of their constitutions. It is apparent from a close reading of that case-law that a Member State may, in certain cases and subject, evidently, to review by the Court, assert the protection of its national identity in order to justify a derogation from the application of the fundamental freedoms of movement. It may, first of all, explicitly rely on it as a legitimate and independent ground of derogation. [Emphasis supplied.]

Póitares Maduro’s contentions may be restated as follows: (i) the obligation to respect the constitutional identity of Member States existed from the outset of the European project and is therefore inherent in the Treaties; (ii) since the Lisbon Treaty amendments entered into force, it is now a separate ground for justifying derogation from the freedoms of the Internal Market; and (iii) national identity “includes” constitutional identity. These three points are all vital components of the arguments in this study to which further reference will be made later. Echoing the words of Póitares Maduro, Besselink’s views are also interesting when he considers “national identity” in a broader manner, comprising multiple identities and encapsulating cultural identities as well.⁹ It might therefore be considered that the notion of “national identity” is one which the CJEU may imbue with further

⁸ Opinion of Póitares Maduro AG in Judgment *Michaniki*, Case C-213/07, ECLI:EU:C:2008:544, paras. 31-32.

⁹ L. Besselink, “National and constitutional identity before and after Lisbon”, in *Utrecht Law Review*, 6(3), 2010, 42-44.

content through its case-law or that it acts as an umbrella under which a variety of issues might coalesce together.

(b) Free movement and Member States' margin of appreciation

The protection of national identity in a broad sense has therefore existed from the outset of integration within the context of the Internal Market¹⁰ and was intended to be retained under the Constitutional Treaty and subsequent Lisbon Treaty.

Understood in this way, “national identity” has been protected under a series of Treaty exceptions allowing Member States a degree of discretion to keep in place national rules that, while forming a barrier to the exercise of the free movement rights, may nevertheless be justified on the basis of those exceptions. Sweeney¹¹ has analysed this “margin of appreciation” through the CJEU’s case-law on the four freedoms, demonstrating that the doctrine plays a role across the different categories of restriction. In balancing European (ostensibly economic but increasingly socio-political) aims against more local values, the CJEU has inevitably been drawn into a discussion about the suitability, necessity and proportionality of the national measures in question.

On the one hand, for example, Art 36 TFEU permits national measures that infringe the right to free movement of goods where they can be justified, *inter alia*, on grounds of public morality, public policy or public health. Free movement of persons and the freedoms of establishment and to provide (and receive) services are subject to limitations justified on the grounds of public policy, public security or public health;¹² moreover, none of these rights can be applied to employment in the public service or to activities which in the relevant Member State are connected with the exercise of official authority.¹³ However, these exceptions must not – in effect – amount to disguised restrictions on these free movement rights and the CJEU remains vigilant to the claims of Member States in these situations and polices the limits to these exceptions.¹⁴ Thus, while the Treaties and CJEU case-law allow the Member States a margin of appreciation in protecting their national identity, the exercise and extent of the applicability of such exceptions are kept firmly within the competence of the CJEU: such approach is mirrored in the CJEU case-law under Art 4(2) TEU which will be considered later.¹⁵

The general requirement on EU Member States, to ensure no national impediments exist to the exercise of the free movement rights, can be tempered with the need to protect the State’s identity. In *Schmidberger*,¹⁶ the Austrian authorities’ failure to ban a demonstration (thereby causing a 30-hour closure of a major motorway) was capable of restricting intra-Union trade in goods under Arts 34 and 35 TFEU but could be objectively justified on the grounds of the fundamental rights to freedom of expression and assembly. Since both the Union and its Member States

¹⁰ J. Hojnik, “The EU Internal Market and National Tradition and Culture: Any Room for Market Decentralisation?”, in *Croatian yearbook of European law & policy*, Vol. 8, No. 8, 2012, 123-134.

¹¹ J.A. Sweeney, “A ‘Margin of Appreciation’ in the Internal Market: Lessons from the European Court of Human Rights”, in *Legal issues of economic integration*, 34 (1), 2007, 32-48.

¹² Workers, Art 45(3) TFEU; establishment, Art 52 TFEU; services, Art 62 TFEU.

¹³ Workers, Art 45(4) TFEU; establishment, Art 51 TFEU; services, Art 62 TFEU.

¹⁴ Case 13/68 *Salgoil* ECLI:EU:C:1968:54, 463.

¹⁵ Besselink, footnote 9, 44-45, who emphasizes the need for dialogue between the national courts and CJEU in calibrating the balance between EU freedoms and national identity.

¹⁶ Judgment *Schmidberger*, Case C-112/00, ECLI:EU:C:2003:333.

were required to respect fundamental rights, their protection was a legitimate interest which justified the restriction of a fundamental freedom guaranteed by the Treaty, such as the free movement of goods.

Protection of national identity possesses a certain progeny in CJEU case-law: in *Groener*,¹⁷ the relevant Irish law provided that teachers in vocational schools in Ireland were required to be proficient in the Irish language. The CJEU ultimately ruled the language proficiency requirements permissible – in view of a clear policy of national law to maintain and promote the use of the language as a means of expressing national identity and culture – provided they were not disproportionate to their objectives.

On the other hand, the *Cassis de Dijon* case¹⁸ has also allowed the CJEU to elaborate further on the field of discretion left to Member States in their ability to create or maintain in place non-discriminatory measures.¹⁹ These measures, having equivalent effect to quantitative restrictions, which are indistinctly applicable and infringe the free movement of goods under Art 34 TFEU might be found to be lawful under EU law if they are both objectively justified and proportionate.

The CJEU consequently regarded as objective justifications the legitimate interests of social and economic policy²⁰ as well as cultural interests.²¹ National rules on shop opening hours were also covered,²² provided their purpose was to ensure that working and non-working hours were so arranged as to accord with “national or regional socio-cultural characteristics” which phrase was subsequently held to include laws for the protection of workers.²³

Consequently, despite the presumption in favour of free trade in the Internal Market, the Treaties and CJEU case-law already allowed the Member States to retain a strictly-defined competence lawfully to limit free trade, in order to protect certain important domestic interests related to national identity *before* the EEA Agreement was signed.

(c) Protection of national identity since Maastricht

As mentioned above, the express mention of the Union’s respect for national identity dates from the Maastricht Treaty and has been developed in ensuing amendments. In *Commission v. Luxembourg*,²⁴ a pre-Lisbon case, the CJEU considered that the protection of national identities of Member States was a legitimate objective that the EU legal order had to respect.²⁵ In other cases, e.g., *UTECA*,²⁶ respect for national identity encompassed other values protected by the Treaty such as cultural and linguistic diversity.

¹⁷ Judgment *Groener*, Case 379/87, ECLI:EU:C:1989:599.

¹⁸ Judgment *Rewe-Zentral AG v Bundesmonopolverwaltung für Branntwein*, “*Cassis de Dijon*”, Case C-120/78 ECLI:EU:C:1979:42.

¹⁹ Judgment *Gebhard*, Case C-55/94, ECLI:EU:C:1995:411.

²⁰ Judgment *Oebel*, Case 155/80, ECLI:EU:C:1981:177.

²¹ Judgment *Cinéthèque*, Cases 60 and 61/84, ECLI:EU:C:1985:329.

²² Judgment *Torfaen BC v. B & Q PLC*, Case 145/88, ECLI:EU:C:1989:593.

²³ Judgment *UCGT*, Case C-312/89, ECLI:EU:C:1991:93; and Judgment *Marchandise*, Case C-332/89, ECLI:EU:C:1991:94.

²⁴ Judgment *Commission v. Luxembourg*, Case C-473/93 ECLI:EU:C:1996:263, para. 35.

²⁵ Subsequently affirmed in Judgment, *Commission v. Luxembourg*, Case C-51/08 ECLI:EU:C:2011:336, para. 124: protection of the Luxembourgish language, however, could be achieved in a more proportionate way than by generally excluding nationals of other Member States from performing activities as notaries.

²⁶ Judgment *UTECA*, Case C-222/07, ECLI:EU:C:2009:124.

Guastafarro considers²⁷ that Art 4(2) TEU (and its predecessors) has been used by the CJEU in two ways: first, as an autonomous internal market ground of derogation, i.e., as a justification for a national measure that had been found to be inconsistent with a fundamental freedom under the Treaty; and secondly and more importantly for the present argument, the identity clause has been employed as a rule of interpretation of existing internal market grounds for derogation.

The CJEU has evolved its case-law on the identity clause;²⁸ in the *Omega* case, it balanced the right to human dignity (under German Constitution Art 1) with the freedom to provide services holding that:²⁹ “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.”

Further in *Laval*, the CJEU made an express reference to the importance of the right to collective action enshrined in Art 17 of the Swedish Constitution and pointed out³⁰ that exercising the right to take collective action “for the protection of the workers of the host State against possible social dumping may constitute an overriding reason of public interest within the meaning of the case law of the Court which, in principle, justifies a restriction of one of the fundamental freedoms guaranteed by the Treaty.”

The CJEU returned to the issue of national identity in *Sayn-Wittgenstein*, in which the complainant had argued that an Austrian constitutional rule prohibiting use of noble titles infringed her free movement rights. In considering the issue, the CJEU stated:³¹ “[I]n accordance with Article 4(2) TEU, the European Union is to respect the national identities of its Member States, which include the status of the State as a Republic.” It further noted:³² “[A]ny restriction 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.” The CJEU in *Sayn-Wittgenstein* appears impliedly to have used Art 4(2) TEU to support the justification of the restriction on EU rights caused by the Austrian constitutional prohibition on noble titles.³³ Through *Runevič-Vardya*, the CJEU extended the concept of national identity under Art 4(2) TEU to cover protection of the official language of a Member State³⁴ being a legitimate aim capable of justifying restrictions on EU free movement rights.³⁵

The concept of protection of national identity received support from the CJEU

²⁷ Guastafarro, footnote 7, 290-299.

²⁸ For an extensive and detailed analysis of CJEU case-law related to this subject, see T. Konstadinides, “Constitutional Identity as a Shield and as a Sword: The European Legal Order within the Framework of National Constitutional Settlement”, in *Cambridge Yearbook of European Legal Studies*, Vol. 13, 2010-2011, 195-218.

²⁹ Judgment *Omega*, Case C-36/02, ECLI:EU:C:2004:614, para. 35.

³⁰ Judgment *Laval*, Case C-341/05, ECLI:EU:C:2007:809, para. 103.

³¹ Judgment *Sayn-Wittgenstein*, Case C-208/09, ECLI:EU:C:2010:806, para. 96.

³² *Ibid*, para. 75.

³³ A. von Bogdandy & S. Schill, “Overcoming absolute primacy: Respect for national identity under the Lisbon Treaty”, in *Common Market Law Review*, 48, Issue 5, 2011, 1417–1453, 1424.

³⁴ Judgment *Runevič-Vardya*, Case C-391/09, ECLI:EU:C:2011:291, para. 86.

³⁵ See more recently, Judgment *O’Brien*, Case C-393/10, ECLI:EU:C:2012:110, para. 49, regarding the Latvian Government’s objection to EU law on part-time work and pay being applied to judges as amounting to an infringement of national identity.

– echoing its earlier ruling in *Omega*³⁶ – when it stated in *Sayn-Wittgenstein* that:³⁷ “[T]he 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.” In *Gambelli*, the CJEU had previously said:³⁸ “[M]oral, religious and cultural factors ... could serve to justify the existence on the part of the national authority of a margin of appreciation sufficient to enable them to require what consumer protection and the preservation of public order require.” Although this would appear to mean that national identity as a ground for justification might be invoked with respect to specific national interests, this does not imply a blanket acceptance of all national rules (when claimed by Member States) as furnishing the appropriate basis for justifiable restrictions on (the exercise of) EU law rights.³⁹

4. National identity and the EFTA Court

(a) *Guaranteeing homogeneity between the Union and the EFTA-EEA*

In view of the international law nature of the EEA Agreement and the need to avoid divergences between the decision-making of the CJEU and the EFTA Court, the drafters of the Agreement created special homogeneity rules. According to the Agreement,⁴⁰ the EFTA Court is supposed: (a) to interpret provisions of that Agreement that are identical in substance to corresponding rules in the TFEU in conformity with the relevant rulings of the CJEU rendered before the Agreement was signed on 2 May 1992; and (b) to pay due account to relevant CJEU rulings after that date.

However, the EFTA Court recognized⁴¹ that the establishment of a dynamic and homogeneous market was inherent in the general objective of the EEA Agreement and, in turn, took the view that EEA law might be dynamically interpreted if this were necessary in order to achieve judicial homogeneity.⁴² In practice, the EFTA Court does not distinguish between pre- and post-May 1992 CJEU case-law, thereby respecting it in its entirety⁴³ and applying it directly without temporal discrimination in cases before it.

In addition, the principle of homogeneity has led to “a presumption that provisions framed identically in the EEA Agreement and the EC Treaty are to be construed in the same way”⁴⁴ while also acknowledging that there were “certain differences in the scope and purpose of the EEA Agreement as compared to the EC

³⁶ Judgment *Omega*, Case C-36/02, footnote 29, para. 31.

³⁷ Judgment *Sayn-Wittgenstein*, Case C-208/09, footnote 31, para. 87.

³⁸ Judgment *Gambelli*, Case C-243/01, ECLI:EU:C:2003:597, para. 63.

³⁹ On the balancing between EU law and the common constitutional traditions of the Member States, and between EU law and specific national constitutional provisions, G. Martinico & O. Pollicino, *The Interaction between Europe's Legal Systems: Judicial Dialogue and the Creation of Supranational Law*, 2012, 228-238.

⁴⁰ Article 6 EEA and Art 3(2) of the EFTA Surveillance and Court Agreement.

⁴¹ Judgment *Karlsson*, Case E-4/01, [2002] EFTA Ct Rep 240.

⁴² Judgment *Pedicek*, Case E-4/04, [2005] EFTA Ct Rep 1.

⁴³ V. Skouris, “The ECJ and the EFTA Court under the EEA Agreement: A Paradigm for International Cooperation between Judicial Institutions”, in *The EFTA Court: Ten Years On*, C. Baudenbacher, P. Tresselt & T. Örylgsson (eds), 123, 2005, 124-125.

⁴⁴ Judgment *Surveillance Authority v. Norway*, Case E-2/06, EFTA [2007] EFTA Ct Rep 163, para. 59, Emphasis supplied.

Treaty which may under specific circumstances lead to a different interpretation.”⁴⁵ Nevertheless, in *L’Oréal*, the EFTA Court concluded that only “compelling reasons”⁴⁶ could justify divergent interpretations of the same rule under EU and EEA law: in so doing it also raised the threshold for allowing differences in purpose and context to justify derogation from the homogeneity principle.⁴⁷

The EFTA Court in its case-law has therefore overcome the apparent temporal limitations imposed by the EEA Agreement on its acceptance and use of CJEU case-law and, through the “compelling reasons” test of *L’Oréal*, has set an even higher threshold for divergent interpretations of the same or similarly-worded legal rules in the EU and EEA legal orders. As Fredriksen has contended:⁴⁸ “Thus, we can safely assume that it will be very difficult for the EFTA States to advance differences in context and purpose between EEA law and EU law in order to secure greater political leeway than the ECJ allows the EU Member States.”

(b) Creation of the EEA legal order by the EFTA Court

Having asserted in *Sveinbjörnsdóttir*⁴⁹ that the EEA Agreement was an international treaty *sui generis* which contained a distinct legal order of its own, in words reminiscent of the CJEU in *Van Gend en Loos*,⁵⁰ the EFTA Court subsequently recognized⁵¹ that this distinct legal order was characterized by the creation of an internal market, the protection of the rights of individuals and economic operators and an institutional framework providing for effective surveillance and judicial review.

In fleshing out this economic constitutional order of the EEA – much in the same way the CJEU attempted to do with the EU legal order from the 1960s onwards⁵² – the EFTA Court has been inspired by the CJEU-created fundamentals of the Union legal order. However the EFTA Court evidently works in a different policy universe and has to maintain the axiomatic dichotomy of membership of the Internal Market (and thus the core of the European project) with the respect for (Nordic) notions of sovereignty vis-à-vis the inherent supranationalism of the EU institutional system.⁵³

While the EFTA Court has rejected the direct “importation” of the principles of primacy and direct effect⁵⁴ from the EU system since the necessary supranational element is absent from the EEA system, it has nevertheless introduced EEA-

⁴⁵ Judgment *Rainford-Tonning*, Case E-3/98, [1998] EFTA Ct Rep 205, para. 21.

⁴⁶ Judgment *L’Oréal*, Joined Cases E-9/07 and E-10/07, [2008] EFTA Ct Rep 258, para. 37.

⁴⁷ H.H. Fredriksen, “The EFTA Court 15 Years On”, in *International and Comparative Law Quarterly*, Vol. 59, 2010, 731-760, 741.

⁴⁸ *Ibid*, 743.

⁴⁹ Judgment, *Sveinbjörnsdóttir*, Case E-9/97, [1998] EFTA Ct Rep 95, para. 59.

⁵⁰ Judgment *Van Gend en Loos*, Case 26/62, ECLI:EU:C:1963:1, 12.

⁵¹ Judgment *Ásgeirsson*, Case E-2/03, [2003] EFTA Ct Rep 185, para. 28.

⁵² K. Alter, *Establishing the Supremacy of European Law: The Making of an International Rule of Law in Europe*, Oxford University Press, 2001.

⁵³ H.P. Graver, “Mission Impossible: Supranationality and National Legal Autonomy in the EEA Agreement”, in *European Foreign Affairs Review*, Vol. 7, Issue 1, 2002, 73–90, 74-76.

⁵⁴ W. van Gerven, “The Genesis of EEA Law and the Principles of Primacy and Direct Effect”, in *Fordham International Law Journal*, 1992-1993, 955, 985-989; and L. Sevón & M. Johansson, “The protection of the rights of individuals under the EEA Agreement”, in *European Law Review*, 24, 1999, 378-383.

equivalent concepts⁵⁵ of “quasi-direct effect,”⁵⁶ “quasi-supremacy,”⁵⁷ full state liability,⁵⁸ indirect effect or consistent interpretation,⁵⁹ effectiveness of remedies protecting infringement of rights under EEA law,⁶⁰ general principles of law⁶¹ (including fundamental rights)⁶² and even the emergence of an EEA citizenship in line with the parallel EU citizenship.⁶³ Such activism has allowed the EFTA Court to emulate some of the main constitutional bases of the Union legal order set out in CJEU rulings,⁶⁴ albeit in a circumscribed manner and based on the fact that, whilst the depth of integration under the EEA Agreement is less far-reaching than under the TEU and TFEU, the scope and objective of the EEA nevertheless go beyond what is usual for an agreement under public international law.⁶⁵

(c) Protection of national identity in the EEA

It will be recalled from Pólares Maduro’s earlier proposition that national identity protection has been inherent in the Union Treaties from the very beginning. If that is the case, then respect for such identity was transferred from the Union to the EEA system through the same or similarly-worded provisions, at least to the extent where that is guaranteed under the Internal Market.

The EEA Agreement for its part replicates the free movement provisions of the Internal Market and the Treaty exceptions to them:⁶⁶ thus, following the earlier scheme, Art 13 EEA permits national measures that infringe the right to free movement of goods where they can be justified, *inter alia*, on grounds of public morality, public policy or public health.⁶⁷ Free movement of persons and the freedoms of establishment and services are subject to limitations justified on the grounds of public policy, public security or public health,⁶⁸ and the public service exception is also maintained in respect of the same freedoms.⁶⁹ Moreover, the EFTA Court has also seen fit to approve the *Cassis de Dijon* jurisprudence in its own decision-making.⁷⁰

Within the framework of the EEA Agreement and the relevant CJEU case-

⁵⁵ C. Baudenbacher, *The EFTA Court Ten Years On*, Baudenbacher, Tresselt & Örlygsson (eds), footnote 43, 13, 25-26.

⁵⁶ Judgment *Restamark*, Case E-1/94, [1994-1995] EFTA Ct Rep 15.

⁵⁷ Judgment *Einarsson*, Case E-1/01, [2002] EFTA Ct Rep 1.

⁵⁸ Judgment *Sveinbjörnsdóttir*, Case E-9/97, n° 49.

⁵⁹ Judgment *Karlsson*, Case E-4/01, n° 41.

⁶⁰ Judgment *Ásgeirsson*, Case E-2/03, n° 51, para. 28.

⁶¹ Judgment *Sigmarsson*, Case E-3/11, [2011] EFTA Ct Rep 430.

⁶² Judgment *TV 1000*, Case E-8/97, [1998] EFTA Ct Rep 68; Judgment *Bellona*, Case E-2/02 [2003] EFTA Ct Rep 52; and Judgment *Ásgeirsson*, Case E-2/03, footnote 51.

⁶³ Judgment *Clauder*, Case E-4/11, [2011] EFTA Ct Rep 218, para. 49.

⁶⁴ The arguments on the possible parallel constitutionalization of the EEA legal order are set out in T. Burri & B. Pirker, “Constitutionalization by Association? The Doubtful Case of the European Economic Area”, in *Yearbook of European Law*, 32 (1), 2013, 207-229. The authors ultimately consider the EEA to fall short of a true constitutional regime, at this time.

⁶⁵ Judgment *Sveinbjörnsdóttir*, Case E-9/97, footnote 49.

⁶⁶ P.-C. Müller-Graff, “The Impact of Climate, Geography and Other Non-Legal Factors on EC Law and EEA Law”, in *The EFTA Court Ten Years On*, Baudenbacher, Tresselt & Örlygsson (eds), footnote 43, 55, 65-66.

⁶⁷ Following the similarly-worded Art 36 TFEU, the EFTA Court has ensured that such exceptions to free movement of goods are construed restrictively: Judgment *Restamark*, Case E-1/94, footnote 56.

⁶⁸ Workers, Art 28(3) EEA; establishment, Art 33 EEA; services, Art 39 EEA.

⁶⁹ Workers, Art 28(4) EEA; establishment, Art 32 EEA; services, Art 39 EEA.

⁷⁰ Judgment *Restamark*, Case E-1/94, footnote 56.

law, then, the EFTA Court has already deal extensively with the economic freedoms and their permissible limitations;⁷¹ on a number of occasions, it has been faced with claims that such freedoms should not apply because of an objectively justifiable reason related to national identity. In fact, it has been argued that the lack of supranationality of the EEA Agreement might allow for some further leeway in the conduct of EFTA-EEA states with a dualistic approach to international law⁷² in respect of national identity than would be available to EU Member States. Commentators have variously grouped these mandatory requirements together in terms of features related to geography, population and culture.⁷³

Thus the deep-rooted Nordic public health policies regarding alcohol consumption were considered in the context of national alcohol monopolies;⁷⁴ public health also came into play on food labelling and food additives.⁷⁵ Similarly, the strong Nordic tradition of workers' protection⁷⁶ as well as ensuring gender equality⁷⁷ have been argued as justifying national restrictions on the exercise of EEA rights. Even intellectual property rights in the context of free trade and the protection of consumer interests may be proffered as examples of national identity.⁷⁸

Lastly, the geographical situation in all three EFTA-EEA states has been called into play, in reality as examples of national identity justifying domestic measures that otherwise impinge upon the economic freedoms under the EEA Agreement: Norwegian state aid policy used in trying to improve working conditions in underpopulated and remote regions,⁷⁹ Icelandic tax differences on internal and external flights,⁸⁰ and the scarcity of (building) land in Liechtenstein⁸¹ are all features that have been argued before the EFTA Court as objectively justifying national restrictions on free movement rights.

Taking these examples and the earlier arguments on the broad concept of "national identity," inherent in the Treaties and encompassing the "constitutional identity" of Member States, it is conceivable that this concept is already part of the EFTA-EEA legal order.

(d) Limiting national identity protection in the EEA

Nevertheless, despite its predisposition towards reception of EU principles

⁷¹ Judgment *EFTA Surveillance Authority v. Norway* ("Kellogg's"), Case E-3/00, [2000-2001] EFTA Ct Rep 73; Judgment *Piazzola*, Case E-10/04, [2005] EFTA Ct Rep 76.

⁷² Müller-Graf, footnote 66, 64.

⁷³ Baudenbacher, footnote 55, 16-20; and Müller-Graf, footnote 66, 67-68.

⁷⁴ Judgment *Restamark*, Case E-1/94, footnote 56 (Finnish import monopoly contrary to free movement of goods) and Judgment *Wilhelmsen*, Case E-6/96, [1997] EFTA Ct Rep 53 (Norwegian retail monopoly upheld subject to conditions).

⁷⁵ Judgment *CIBA*, Case E-6/01, [2002] EFTA Ct Rep 281; Judgment *Allied Colloids*, Case E-2/00, [2000-2001] EFTA Ct Rep 35; and Judgment *EFTA Surveillance Authority v. Norway*, Case E-3/00, footnote 71.

⁷⁶ Judgment *Samuelsson*, Case E-1/95, [1994-1995] EFTA Ct Rep 145; Judgment *Sveinbjörnsdóttir*, Case E-9/97, footnote 49; and Judgment *LO*, Case E-8/00, [2002] EFTA Ct Rep 114.

⁷⁷ Judgment *EFTA Surveillance Authority v. Norway*, "Postdoc", Case E-1/02, [2003] EFTA Ct Rep 1.

⁷⁸ Judgment *Maglite*, Case E-2/97, [1997] EFTA Ct Rep 127; Judgment *Astra Norge*, Case E-1/98, [1998] EFTA Ct Rep 140; Judgment *Merck v. Paranova*, Case E-3/02, [2003] EFTA Ct Rep 101; and Judgment *TV 1000*, Case E-8/97, footnote 62.

⁷⁹ Judgment *Norway v. EFTA Surveillance Authority*, Case E-6/98, [1999] EFTA Ct Rep 74.

⁸⁰ Judgment *Surveillance Authority v. Iceland*, Case E-1/03, EFTA [2003] EFTA Ct Rep 143.

⁸¹ Judgment *Rainford-Towning*, Case E-3/98, footnote 45; Judgment *Brändle*, Case E-4/00, [2000-2001] EFTA Ct Rep 123; and Judgment *Pucher*, Case E-2/01, [2002] EFTA Ct Rep 44.

enunciated by the CJEU, the EFTA Court has been very wary of attempts to extend the range of legitimate considerations that can be used to justify restrictions on the four freedoms⁸² and has thus effectively circumscribed national identity protection more acutely than may be found in CJEU case-law. The EFTA Court's approach thus appears to be designed to limit EFTA-EEA States' political latitude on policy grounds:⁸³ having inserted a certain "safety margin" into its interpretation of EEA law and interpreted any respect for or protection of national identity in a stricter way – within the area of free movement rights – than allowed by the CJEU under EU law (cf *Groener with Einarsson* in the next paragraph), the EFTA Court has consciously avoided provoking possible CJEU reactions to imbalances between the Contracting Parties' obligations.⁸⁴

In fact, the EFTA Court has so far ignored use of a broad or innovative concept of "respect for national identities" in its decision-making.⁸⁵ In *Einarsson*,⁸⁶ the Icelandic and Norwegian governments argued unsuccessfully that the preservation of the Icelandic language as a central component of that state's cultural heritage and national identity should be allowed to justify derogation from the prohibition against discriminatory taxation in Art 14 EEA. The EFTA Court was unable to use cultural policy by analogous application to Art 151(4) EC (now Art 167(4) TFEU)⁸⁷ as there was no parallel provision in the EEA Agreement. Moreover when referring to the predecessor of Art 4(2) TEU (Art 6(3) TEU, pre-Lisbon), the EFTA Court further stuck to the limitations imposed by the wording of the relevant treaties:⁸⁸

It has further been suggested that Article 6(3) TEU might offer a basis for derogation, since language is central to the maintenance of the national identity of a State. The Court notes that the EEA Agreement contains no corresponding provision. Since the Treaty on European Union was negotiated before the conclusion of the EEA Agreement, it must be assumed that this discrepancy is intentional. The Court cannot base its reasoning on the analogous application of Article 6(3) TEU in the instant case.

In rejecting such analogous application of both provisions, the EFTA Court held⁸⁹ that "it would not be a proper exercise of the judicial function to seek to extend the scope of application of the EEA Agreement on that basis." The EFTA Court took the same position the following year in the *Postdoc* case⁹⁰ when it noted that what is now Art 157(4) TFEU, upon which the Norwegian Government based

⁸² C. Baudenbacher, "Zur Auslegung des EWR-Rechts durch den EFTA-Gerichtshof", in *Festschrift für Günter Hirsch*, G. Müller et al (eds), 2008, 27, 49.

⁸³ Fredriksen, footnote 47, 757-758.

⁸⁴ Problems concerning the direct effect of provisions of the EEC-Portugal Free Trade Agreement are relevant here: Judgment *Polydor*, Case 270/80 ECLI:EU:C:1982:43; and Judgment *Kupferberg*, Case 104/81 ECLI:EU:C:1982:362.

⁸⁵ The limits to transfers in general are discussed by the Court in Judgment *Karlsson*, Case E-4/01, footnote 41, paras. 28-30; and Judgment *L'Oréal*, Joined Cases E-9/07 and E-10/07, footnote 46, para. 28.

⁸⁶ Judgment *Einarsson*, Case E-1/01, footnote 57.

⁸⁷ "The Union shall take cultural aspects into account in its action under other provisions of the Treaties, in particular in order to respect and to promote the diversity of its cultures."

⁸⁸ Judgment *Einarsson*, Case E-1/01, footnote 57, para. 43.

⁸⁹ *Ibid*, para. 45.

⁹⁰ Judgment *EFTA Surveillance Authority v. Norway*, "Postdoc", Case E-1/02, footnote 77.

its arguments, had not been made part of the EEA Agreement. As a result, that provision could not be applied⁹¹ as “a legal basis to decide the present application either directly or by analogy.”

These decisions would seem to draw a line under any future efforts by the EFTA Court to interpret the EEA legal system so as to be able to adapt such system to the challenges of the new, post-Lisbon environment. Consequently, Fredriksen & Franklin have indicated⁹² that the Court’s statements in both preceding cases “ought to be interpreted primarily as a warning to the contracting parties of the need to revise the main part of the EEA Agreement,” a point which has so far not been heeded. In fact, they claimed⁹³ that such view receives strong support from the way in which the EFTA Court actually interprets EEA law in the light of new EU rules in cases where this is required so that homogeneity can be maintained between EU and EEA law.

Indeed, as Fredriksen & Franklin have cogently argued,⁹⁴ the lack of an EEA parallel either to the concept of EU citizenship (Arts 20-25 TFEU) or to the EU Charter on Fundamental Rights, as interpreted by the CJEU, has not stopped the EFTA Court from attaining the same practical results in individual cases before it,⁹⁵ thereby ensuring the continuing dynamic homogeneity between the two systems. Further, more recently, Wahl has noted⁹⁶ that the EFTA Court, following the entry into force of the Lisbon Treaty, stated in *IBR Corp. v. Kaupping*⁹⁷ that “[t]he objective of establishing a dynamic and homogeneous European Economic Area can only be achieved if EFTA and EU citizens and economic operators enjoy, relying on EEA law, the same rights in both the EU and EFTA pillars of the EEA.” Moreover, according to the EFTA Court in *Schenker*,⁹⁸ “[t]he application of homogeneity cannot be restricted to the interpretation of the provisions whose wording is identical in substance to parallel provisions of EU law.” These later positions adopted by the EFTA Court seem to be in spirit at variance, to some extent, with its earlier views in *Einarsson* and *Postdoc*.

It may therefore be wondered why the EFTA Court would use its evident interpretative dexterity to bridge the gap between the EU and EFTA-EEA legal orders in these fields but not in relation to national identity which is a concept – as shown previously in this article – that also existed in an earlier incarnation in the pre-Maastricht EEC legal order, i.e., at the time of the signature of the EEA Agreement.

⁹¹ *Ibid*, para. 55.

⁹² H.H. Fredriksen and C.N.K. Franklin, “Of pragmatism and principles: the EEA Agreement 20 years on”, in *Common Market Law Review*, 52, Issue 3, 2015, 629–684, 629, 637.

⁹³ *Ibid* (citing as examples Judgment *LO*, Case E-8/00, footnote 76; and Judgment *Sigmarsson*, Case E-3/11, footnote 61).

⁹⁴ *Ibid*, 638-650.

⁹⁵ See as an example of the former situation, Judgment *Gunnarsson*, Case E-26/13, [2014] EFTA Ct Rep 254, and as an example of the latter situation, Judgment *Deveci*, Case E-10/14, [2014] EFTA Ct Rep 1364.

⁹⁶ N. Wahl, “Uncharted Waters: Reflections on the Legal Significance of the Charter under EEA Law and Judicial Cross-Fertilisation in the Field of Fundamental Rights,” in *The EEA and the EFTA Court: Decentred Integration*, EFTA Court (ed.), chap 23, 2014, 281, 283-284.

⁹⁷ Judgment *Irish Bank Resolution Corporation v. Kaupping*, Case E-18/11, [2012] EFTA Ct Rep 592, 629, para. 122.

⁹⁸ Judgment *Schenker North AB v. EFTA Surveillance Authority*, Case E-14/11, [2012] EFTA Ct Rep 1178, 1204, para. 78.

One answer to that was provided by Fredriksen⁹⁹ who proposed that the EFTA Court in *Einarsson* and *Postdoc* had rejected an analogous interpretation of the more recent provisions on national identity and positive discrimination in the EU Treaty since such interpretation would have been at the expense of private rights under the EEA Agreement. Accordingly, he posited, recognition of the principle of legal certainty as a barrier to an “excessively” dynamic interpretation of EEA law was an unavoidable position if individuals’ rights under the EEA Agreement were to be taken seriously.

5. Conclusion

Absent a revision to the EEA Agreement,¹⁰⁰ the EFTA Court apparently refuses to consider any CJEU development of the content of “national identity” following on from Art 4(2) TEU. But such position would clearly run counter to the EFTA Court’s avowed assertion of the dynamic and homogeneous nature of the EEA.

This position presupposes that Art. 4(2) TEU has the same effect as former Art. 6(3)/F(1) TEU: but while the CJEU in *Commission v. Luxembourg*¹⁰¹ noted that the preservation of national identity in the latter Article a legitimate aim respected by the Community legal order, it seems to imply that it was not justiciable on its own.

The Lisbon Treaty has altered the context of the identity clause¹⁰² and has determined a possible change in usage by the CJEU so that, while sometimes used on its own as a justification for a national restriction on a free movement right, Art 4(2) TEU usually operates as a way of imbuing content into free movement exceptions contained in the TFEU or perhaps through precedent CJEU case-law (e.g., *Cassis de Dijon*). In such way, the CJEU interpretation of the justifiable domestic restrictions on free movement is evolving beyond a clause determining constitutional competence (“constitutional identity”) into a more nuanced clause deployed in the “ordinary” course of Internal Market litigation to add a further dimension to national limitations or even to provide a broader conceptual framework encompassing both the constitutional and ordinary aspects.

Such evolution has repercussions for the EEA and the EFTA Court. Under Recital 15 of the Preamble to the EEA Agreement, it states:

[I]n full deference to the independence of the courts, the objective of the Contracting Parties is to arrive at, and maintain, a uniform interpretation and application of this Agreement and those provisions of Community legislation which are substantially reproduced in this Agreement and to arrive at an equal treatment of individuals and economic operators as regards the four freedoms and the conditions of competition.

In order to maintain the homogeneity, the EFTA Court may be called on again to revise its approach and interpret EEA law to conform to the new CJEU mandatory requirements founded on respect of national identity. Granted that the identity clause was not in the original EEA Agreement but neither were other (constitutional)

⁹⁹ H.H. Fredriksen, “Bridging the Widening Gap between the EU Treaties and the Agreement on the European Economic Area”, in *European Law Journal*, Vol. 18, Issue 6, 2012, 868-886, 883.

¹⁰⁰ Fredriksen, *ibid*, 884-885; Graver, footnote 53, 86.

¹⁰¹ Judgment *Commission v. Luxembourg*, Case C-473/93, footnote 24, para. 35.

¹⁰² Guastaferrro, footnote 7, 287-289.

principles: EFTA Court interpretative dexterity in *Sveinbjörnsdóttir* is enough authority to show what can be achieved where the need to maintain homogeneity and protect economic operators is concerned. Moreover, its ability to go further in certain areas, in what has been termed “creative homogeneity,”¹⁰³ indicates a general preparedness on the part of the EFTA Court to consider such a possibility. Any alternative, thereby allowing a divergence in interpretation between EU and EEA law to emerge of the permissible national restrictions on free movement – through use or ignorance of preserving national identity – would lead to differences in the Internal Market which may be difficult to bridge.¹⁰⁴

In order to preserve the overall coherence in the Internal Market, then, the EFTA Court could overcome its reticence to recognize a broad or general principle of respect for national identity in the EFTA-EEA system, much in the same way the CJEU is progressing in the Union. Thus national identity – although contested at the penumbrae – would remain at its core an essentially-agreed concept¹⁰⁵ covering a plethora of constitutional, political and socio-economic aspects derived, inter alia, from public policy preferences in the Internal Market and evolved by dialogue between the CJEU, EFTA Court and the national courts of the 31 EEA states. Clearly the EFTA Court needs to play a continuing and active role in that dialogue.¹⁰⁶

Nevertheless, limitations remain as to how far the EFTA Court may progress this inter-judicial discourse. Indeed, given the difference in objectives between the two systems, it is conceivable that the EFTA Court would (at most) be able – echoing the words of Baudenbacher’s previous extrajudicial formulae – to recognize the existence of a “quasi-national identity” in the EEA legal order.¹⁰⁷

¹⁰³ C. Timmermans, “Creative Homogeneity” in M. Johansson, N. Wahl & U. Bernitz (eds), in *Liber Amicorum in Honour of Sven Norberg: A European for all seasons*, 2006, 471-484. And yet, it would appear that creative homogeneity is coming towards the end of its shelf life, at least under the present EEA Agreement. Fredriksen & Franklin (footnote 93, 681-684) have cogently argued for revisions in this Agreement contingent upon the changes wrought to the EU legal order over the time of the Agreement’s operation since 1992 which increasingly make it necessary for the EFTA Court to go to ever greater lengths in its commitment to ensuring continuing homogeneity. So far it has managed to keep the EFTA-EEA States on track with the developments in the EU but allegedly at some cost to the coherence in its decision-making.

¹⁰⁴ Fredriksen, footnote 99.

¹⁰⁵ Tatham, footnote 1, 19-30.

¹⁰⁶ Baudenbacher, footnote 3, on judicial dialogue within the EU, see Tatham, footnote 1, 30-39.

¹⁰⁷ Baudenbacher, footnote 43, 13, 25-26.