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Increasing public perceived legitimacy of the European Union through the integration of psychological insights into law

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The psychological potential of Article 4(2) TEU: Bridging the gap between citizens' identities and the identity clause

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ABSTRACT

The rise of Eurosceptic and nationalist movements raises the question how public legitimacy of the EU can be safeguarded and enhanced. This chapter presents the conclusions from social psychological research and shows how those insights can inform EU law. Focusing on identity and values, it explores how a more evidence-based interpretation of Article 4(2) TEU – the EU's duty to respect the national identities of the Member States – can be formulated. We argue that there is a sufficiently strong EU identity, defined by shared values, to legitimately justify restricting national diversity when EU values are at stake. At the same time, perceived EU legitimacy is likely to improve if a stronger legal protection can be awarded to national identity than provided under the current interpretation of Article 4(2) TEU. We propose four practical suggestions for how this can be realized without undermining the core values of the EU legal order.

6.1 INTRODUCTION

In a European Union comprising 27 Member States, one of the ongoing challenges is to balance the functional need for deeper integration with the desire to preserve national diversity and identity. Although the EU has sought to strike a more effective balance, the recent rise of anti-EU populism indicates that demands for stronger safeguards of national identity are becoming increasingly pronounced. Given that a lack of public legitimacy could undermine the EU's effectiveness and long-term viability, a pressing question is what citizens need in order to perceive the EU as legitimate, and how the law can adapt to support their beliefs in EU legitimacy. The current chapter addresses this question from an integrated social psychological and EU legal perspective. It presents the conclusions from an interdisciplinary research project that sought to investigate how empirical, social psychological insights can be used to formulate a more evidence-based interpretation of Article 4(2) TEU – the EU's duty to respect the national identities of the Member States – that increases perceived legitimacy of the EU but also remains within the boundaries of the EU legal order.

The EU's explicit legal obligation to respect national identities was introduced in the Maastricht Treaty, as a response to the increasing push-back against European integration. In the early days of European integration, due to the devastating consequences of nationalism, national identity and sovereignty were frequently considered as rather dangerous concepts that should be overcome through a common, supranational economic system.¹ With the passage of time, however, the memories of world wars and atrocities lost salience and hence legitimizing power. In addition, the scope and depth of integration expanded significantly, especially after the fall of the wall, leading the EU into ever more contested and politically sensitive terrain. Ever more traditionally sovereign powers of the nation state were transferred to the EU, where the expansion of qualified majority voting meant states lost their veto power over how these competences were exercised at the European level.

In light of these developments and increasing Euroscepticism, the drafters of the Maastricht Treaty recognized the need to include mechanisms that ensure respect for national identity as a counterweight to the widening and deepening of EU integration.² Nevertheless, as demonstrated by the rejection of the Treaty establishing a Constitution for Europe, the perceived loss of national identity and sovereignty to the EU remained a growing public concern.³ To address the emerging Eurosceptic sentiment caused in part by

1 Leonard FM Besselink, 'National and Constitutional Identity before and after Lisbon' (2010) 6 *Utrecht Law Review* 36.

2 Monica Claes, 'National Identity: Trump Card or up for Negotiation?' in Alejandro Saiz Arnaiz and Carina Alcobarro Llivina (eds), *National constitutional identity and European integration* (Intersentia 2013). Other identity-protective tools include for example Articles 9, 10(2), 14(3), 27, 30, and 46-36 of the Charter of Fundamental Rights of the European Union.

3 Sara B Hobolt and Sylvain Brouard, 'Contesting the European Union? Why the Dutch and the French Rejected the European Constitution' (2011) 64 *Political Research Quarterly* 309.

this fear, the EU's duty to respect national identity was further emphasized and codified with the Lisbon Treaty in Article 4(2) TEU,⁴ requiring the Union to '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'.

However, far from soothing the tension between an ever more political union and national identity and sovereignty, this provision seems to have exacerbated the underlying conflict about judicial and political competences in the EU, or at least to have provided a platform for its legal contestation.⁵ Several national constitutional courts relied on Article 4(2) TEU to argue that they can review whether EU law conflicts with their national constitutional identity, and hence has no binding effect on them,⁶ some even going as far as openly challenging the primacy of EU law in the name of national identity.⁷ Yet, the Court of Justice of the European Union (CJEU) has so far interpreted the EU's duty to respect national identity under Article 4(2) TEU rather minimally.⁸ This, in turn, set the stage for further conflict, leading autocrats and populist sovereigntists to abuse the concept of national identity in political discourse,⁹ making it an 'inherently dividing and separating' concept.¹⁰ As this abuse was partly due to the CJEU's refusal to clarify the meaning of national identity in EU law – sometimes the CJEU even dismissed references from national courts and advocate generals¹¹ – scholars have consequently called on the CJEU to 'contain and control the effect of national identity by centralizing its meaning'.¹²

The CJEU has recently started to develop a clearer approach to the identity clause, possibly to combat its abuse and to find the right balance

4 Claes (n 2).

5 Leonard Besselink, 'The Persistence of a Contested Concept: Reflections on Ten Years Constitutional Identity in EU Law' (2021) 27 *European Public Law* 597; Bruno De Witte and Diane Fromage, 'National Constitutional Identity Ten Years on: State of Play and Future Perspectives' (2021) 27 *European Public Law* 411.

6 De Witte and Fromage (n 5); Luke Dimitrios Spieker, 'Framing and Managing Constitutional Identity Conflicts: How to Stabilize the *Modus Vivendi* between the Court of Justice and National Constitutional Courts' (2020) 57 *Common Market Law Review* 361; Besselink (n 5).

7 Case K3/21

8 Theodore 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.

9 R Daniel Kelemen and Laurent Pech, 'The Uses and Abuses of Constitutional Pluralism: Undermining the Rule of Law in the Name of Constitutional Identity in Hungary and Poland' (2019) 21 *Cambridge Yearbook of European Legal Studies* 59; Giuseppe Martinico, 'Taming National Identity: A Systematic Understanding of Article 4.2 TEU' (2021) 27 *European Public Law* 447.

10 Spieker (n 6).

11 For example in *Criminal proceedings against MAS and MB (Taricco II)* [2017] CJEU C-42/17. See on this Robbert Bruggeman and Joris Larik, 'The Elusive Contours of Constitutional Identity: Taricco as a Missed Opportunity' (2020) 35 *Utrecht Journal of International and European Law* 20; De Witte and Fromage (n 5).

12 Vlad Perju, 'On the (De-)Fragmentation of Statehood in Europe: Reflections on Ernst-Wolfgang Böckenförde's Work on European Integration' (2018) 19 *German Law Journal* 403.

between commonality and diversity.¹³ As we will discuss below, this approach seems to prioritize preventing the violation of core principles and values of EU law. The flip side of this focus on commonality and EU autonomy is that there is rather limited space left for national legal orders when it comes to ‘their’ constitutional identity. While this approach is understandable from an EU legal point of view, especially in light of the recent rule of law challenges, it raises the question whether it may turn Article 4(2) TEU from a protection of national identity into a threat to national identity, at least in the perception of EU citizens. If so, this rather strict and EU-centric interpretation of Article 4(2) TEU might inadvertently help those seeking to undermine EU legitimacy among the broader public,¹⁴ especially against the background of further intensifying integration – inter alia in defence, climate action, and geo-strategic fields – and the rise of right-wing populism.¹⁵

Therefore, in this chapter, we investigate how the current interpretation of Article 4(2) TEU affects the public’s perceived legitimacy of the EU, and if alternative interpretations might be available that lead to higher perceived legitimacy whilst also sufficiently safeguarding the core values and principles underpinning the EU legal order.¹⁶ We deem it important to understand the societal effects of the identity clause, since preventing Euroscepticism was one of its original intentions. In addition, the EU requires a high level of public perceived legitimacy to improve its problem-solving capacity.¹⁷ When people believe in the legitimacy of an authority, this belief remains relatively stable and is not easily swayed by temporary declines in performance, unlike support for specific policies or politicians.¹⁸ Given the growing number of supranational challenges that make European collaboration essential, including climate change, the digital transformation,

13 See on this also Serenella Quari, ‘Has the Court of Justice embraced the language of constitutional identity?’ (*Diritti Comparati*, 25 April 2022) <<https://www.diritticomparati.it/has-the-court-of-justice-embraced-the-language-of-constitutional-identity/>> accessed 22 May 2024.

14 Given the findings of our previous research, which indicate that perceived national identity threat from the EU undermine perceived EU legitimacy, Eva Grosfeld and others, ‘The Integration of Subgroups at the Supranational Level: The Relation between Social Identity, National Threat, and Perceived Legitimacy of the EU’ (2022) 10 *Journal of Social and Political Psychology* 607.

15 Thorbjørn Jagland, ‘An Analysis of Democracy, Human Rights and the Rule of Law in Europe, Based on the Findings of the Council of Europe Monitoring Mechanisms and Bodies’ (Council of Europe 2017).

16 Perceived EU legitimacy is defined as ‘the perception that the exercise of the EU is appropriate’, Eva Grosfeld, Armin Cuyvers and Daan Scheepers, ‘Towards Evidence-Based Legitimacy Interventions in EU Law: Challenges and Directions for Empirical Research’ (2023) 19 *Utrecht Law Review* 87.

17 Thomas Sommerer and Hans Agné, ‘Consequences of Legitimacy in Global Governance’ in Jonas Tallberg, Karin Bäckstrand and Jan Aart Scholte (eds), *Legitimacy in global governance: Sources, processes, and consequences* (Oxford Academic 2018).

18 Jonas Tallberg and Michael Zürn, ‘The Legitimacy and Legitimation of International Organizations: Introduction and Framework’ (2019) 14 *The Review of International Organizations* 581.

and the unstable geopolitical situation, the need for an EU that is perceived as legitimate by the wider public is self-evident. Briefly put, therefore, the aim is to empirically assess the impact of the CJEU's interpretation of Article 4(2) TEU on the perceived legitimacy of the EU, and to explore how these empirical insights can be used to formulate a more evidence-informed and legitimate interpretation of Article 4(2) TEU, one that can better perform its role as a legal and psychological hinge between the EU and national legal orders.

Based on our findings, we argue that there is a sufficient common EU identity, defined by shared values, to legitimately justify restricting respect for national identity when EU values are at stake. To reduce threat or increase perceived EU legitimacy, therefore, it is not necessary to always let national identity claims prevail. At the same time, public perceived legitimacy of the EU is likely to improve if a stronger legal protection can be awarded to national identity than provided under the current interpretation of Article 4(2) TEU. Such a stronger protection can take different forms to be psychologically effective without undermining the core values of the EU legal order, for example by allowing a larger margin of appreciation for national courts or an expanded procedural role in determining their national constitutional identity.

To support these claims, this chapter contains three parts. First, we present the empirical findings of several social psychological studies that investigated how citizens' national and EU identities, as well as their personal values, influence their beliefs in EU legitimacy. We then analyse and evaluate the CJEU's interpretation of Article 4(2) TEU in light of these empirical findings. The next section concludes with proposals on how to operationalise Article 4(2) TEU in a way that safeguards the public's perception of EU legitimacy, yet remains within the boundaries established by EU law, including its foundational values and principles. These proposals are based on the assumption that Article 4(2) TEU allows for extra-legal considerations due to its open and somewhat political nature as a general principle of EU law. While empirical psychological insights cannot settle the normative, legal debate on how to ensure respect for national identity in EU law, they can contribute to the legal discourse by providing an evidence-based, extra-legal argument on how to best interpret Article 4(2) TEU within the legal space available, rather than basing this interpretation on normative considerations alone, or on hunches about citizens' values and identities. As such, this chapter shows how empirical insights, grounded in social psychological theories, can be used to inform EU law.¹⁹ Since this raises fundamental questions on how to incorporate empirical insights into law, including on the fact-norm divide, we also reflect more generally on the question of how and to what extent psychological insights could and should be used in informing EU law.

19 Tom R Tyler, 'Methodology in Legal Research' (2017) 13 *Utrecht Law Review* 130.

6.2 PSYCHOLOGICAL INSIGHTS ON EU CITIZENS' IDENTITIES AND VALUES

6.2.1 Theoretical framework of the empirical studies

To determine how the current protection of national identity under Article 4(2) TEU affects the public's perceived legitimacy of the EU, it is essential to understand how identity influences human behaviour in general. In social psychology, a core theory to explain and address a wide range of social issues through identity is social identity theory.²⁰ The fundamental claim of social identity theory is that much of an individual's behaviour is determined by their subjective sense of group membership, or 'social identity'.²¹ Since both national identity and EU identity are forms of social identity, we used social identity theory to structure our analysis of how perceived legitimacy of the EU can be understood.

According to social identity theory, when people in a social situation see themselves as members of a certain group, they are motivated to achieve positive distinctiveness of that group in comparison to other groups.²² This motivation for a positive social identity arises from the basic need to have a positive self-concept and it strongly influences people's behaviours, in particular when they feel strongly committed to their group. Any threat to a group that people see as important to their self-concept will, accordingly, trigger defensive behaviours to restore and uphold a positive social identity.²³ Such a threat could concern, for example, the potential loss of distinct group boundaries due to the merging with other groups, or the risk of being perceived as less powerful or competent compared to other groups. Those highly-identified with the group tend to respond to these threats by increasing their commitment to the group or displaying other behaviours that reinforce commitment, while those more weakly-identified with the group tend to respond by disengaging themselves further from the ingroup (e.g., by focusing on other positive group memberships or emphasizing the high heterogeneity of ingroup members).²⁴

These premises of social identity theory guided the hypotheses of our empirical studies on how national identity and EU identity influence

20 Naomi Ellemers and S Alexander Haslam, 'Social Identity Theory' in Paul AM Van Lange, Arie W Kruglanski and E Tory Higgins (eds), *Handbook of theories of social psychology* (SAGE 2012); S Alexander Haslam, 'Making Good Theory Practical: Five Lessons for an Applied Social Identity Approach to Challenges of Organizational, Health, and Clinical Psychology' (2014) 53 *British Journal of Social Psychology* 1.

21 Henri Tajfel and John Turner, 'An Integrative Theory of Intergroup Conflict' in William G Austin and Stephen Worchel (eds), *The social psychology of intergroup relations* (Brooks/Cole 1979); Henri Tajfel, 'Social Identity and Intergroup Behaviour' (1974) 13 *Social Science Information* 65.

22 Ellemers and Alexander Haslam (n 20).

23 Nyla Branscombe and others, 'The Context and Content of Social Identity Threat' [1999] *Sepsis* 35.

24 *ibid.*

perceived EU legitimacy. Since social identity theory emphasizes that individual behaviours are influenced by social and contextual factors, these studies were designed with a focus on the EU legal context. For example, we assessed how people respond to the primacy of EU law. Since this is such a fundamental principle of the EU legal order that defines the relationship between the EU and Member States, and the CJEU extensively refers to it in case law where constitutional conflicts appear,²⁵ it forms a relevant contextual element that may influence how people view the EU.

In the following, we will outline the most important conclusions of our research, organized into three key insights, and explain the conclusions within the framework of social identity theory. It is important to note that the conclusions we draw are based on samples that are not representative of the entire population of EU citizens, in the sense that the samples are limited to at most twelve Member States and sometimes represent a relatively young and highly educated population. For detailed information on the samples, methods, and statistics, we cite the original articles where the empirical research is reported.

6.2.2 Key insight 1: a strong EU identity, rooted in shared values, exists and fosters perceived EU legitimacy

Our first main finding is that the higher someone's identification with the EU is, the more legitimate they perceive the EU to be.²⁶ Additionally, we found that EU citizens in general have a high identification with the EU. To understand what this means, it is necessary to dive deeper into the concept of social identification. Research describes that social identification consists of multiple dimensions.²⁷ For example, a widely used categorization distinguishes three dimensions.²⁸ First, there is a cognitive dimension, which concerns the categorization of oneself in a group and the centrality of that group to one's self-concept. Second, there is an affective dimension, which concerns a feeling of commitment or solidarity towards ingroup members. And third, there is an evaluative dimension, which concerns a feeling of pride or satisfaction with the ingroup. Our research showed that EU identification is relatively high on all of these dimensions, but in particular on the evaluative dimension: people are in general proud to be EU citizen.²⁹ The EU thus has the potential to provide people with a positive social identity.

25 For example *European Commission v Poland* [2023] CJEU C-204/21.

26 Grosfeld and others (n 14).

27 See for example Colin Wayne Leach and others, 'Group-Level Self-Definition and Self-Investment: A Hierarchical (Multicomponent) Model of in-Group Identification.' (2008) 95 *Journal of Personality and Social Psychology* 144; Naomi Ellemers, Paulien Kortekaas and Jaap Ouwerkerk, 'Self-Categorisation, Commitment to the Group and Group Self-Esteem as Related but Distinct Aspects of Social Identity' (1999) 29 *European Journal of Social Psychology*.

28 Ellemers, Kortekaas and Ouwerkerk (n 27).

29 Grosfeld and others (n 14).

Not only did we find that a stronger EU identity was related to higher perceived legitimacy of the EU, our studies also revealed that reflecting on positive aspects of the EU identity could increase perceived EU legitimacy. Participants who reflected on what makes them proud to be an EU citizen reported a lower experience of national identity threat from the EU and higher beliefs in EU legitimacy than participants who did not engage in this exercise. The aspects participants felt most proud of were the EU's commitment to fundamental rights, the freedom to live and work everywhere in the EU, and the principle of solidarity between Member States.³⁰ This suggests that values – in particular, the values of fundamental rights, freedom, and solidarity – constitute an important part of people's EU identity.

Supporting this finding, two other studies revealed that when people feel that the EU represents values similar to their own, they are more likely to perceive it as legitimate.³¹ Moreover, the EU values enshrined in Article 2 TEU were endorsed by the vast majority of participants in our sample (97.5%). EU values thus form a significant source of perceived EU legitimacy, likely because they enhance people's sense of belonging to the EU. In other words, people want to be part of the EU because they view it as moral, which in turn provides them with a positive social identity. This finding is consistent with research showing that group morality is the most important factor in positive group evaluation and that it fosters pride more than factors such as the competence or sociability of a group do.³²

6.2.3 Key insight 2: national identity undermines perceived EU legitimacy when it is seen as exclusive to EU identity or as threatened by the EU

Our second key insight is that, although EU identification appears to be generally high and a significant predictor of perceived EU legitimacy, national identification is also in general high and a significant predictor of perceived EU legitimacy. This means that when people highly identify with the EU, and when people highly identify with their Member State, they tend to have higher perceptions of EU legitimacy. However, the way in which national identification influences perceived EU legitimacy is different from the influence of EU identification.

Regarding levels of national identification, our research shows that, despite the presence of a strong EU identity, national identification was on average higher than EU identification on the affective and cognitive dimen-

30 Eva Grosfeld and others, 'Affirmation of EU Identity Reduces Perceived National Identity Threat and Increases Perceived Legitimacy of the European Union' (OSF, 29 November 2024) <<https://osf.io/ny3sz>>.

31 Eva Grosfeld, Daan Scheepers and Armin Cuyvers, 'Mapping the Moral Foundations of the European Union: Why a Lack of Moral Diversity May Undermine Perceived EU Legitimacy' [2024] PNAS Nexus pgae282.

32 Colin Wayne Leach, Naomi Ellemers and Manuela Barreto, 'Group Virtue: The Importance of Morality (vs. Competence and Sociability) in the Positive Evaluation of in-Groups' (2007) 93 *Journal of Personality and Social Psychology* 234.

sions, and participants scored relatively high on the evaluative dimension of national identity as well.³³ So, while scores of national and EU identification on the evaluation dimension (pride/satisfaction) were equally high, this implies that people feel more solidarity towards fellow national citizens than towards fellow EU citizens, and that national identity is more central to people's self-concept than EU identity. Furthermore, respect for national identity is an important value to most citizens. In one study, support for the value of respect for national authority ranged from medium to high.³⁴ In another study, participants read a brief description of Article 4(2) TEU, and 93.1% of them indicated that they believed this legal norm was right rather than wrong.³⁵ These findings are not entirely surprising, as nationality represents a well-defined and deeply ingrained form of group membership. National identity is rooted in a 'national story' that encompasses a shared history, language, and culture, and for many people, it remains the most significant and salient territorial identity.³⁶

Regarding the relationship between national identity and perceived EU legitimacy, the findings are somewhat more nuanced, however. EU identification and perceived EU legitimacy were consistently, positively related to each other. In contrast, national identification was either not related or positively related to perceived EU legitimacy, but not negatively related. This suggests that a higher national identification in itself does not undermine perceived EU legitimacy. Individuals can thus maintain a strong sense of national identity while still perceiving the EU to be legitimate.

However, once participants' national identity did not exist alongside a sense of identification with the EU – that is, when participants, in psychological terms, did not have a 'dual' identity in which there was room for both national and EU identification – national identification *negatively* affected perceived EU legitimacy. So, a higher national identity did not undermine perceived EU legitimacy, unless it was exclusive of EU identity. This finding aligns with earlier research demonstrating that exclusive national identification is negatively related to EU attitudes, such as support for EU membership or satisfaction with EU democracy.³⁷ In contrast, dual

33 Grosfeld and others (n 14).

34 Eva Grosfeld, Daan Scheepers and Armin Cuyvers, 'Value Alignment and Public Perceived Legitimacy of the European Union and the Court of Justice' (2022) 12 *Frontiers in Psychology*.

35 Grosfeld, Scheepers and Cuyvers (n 31).

36 Neil Fligstein, Alina Polyakova and Wayne Sandholtz, 'European Integration, Nationalism and European Identity' (2012) 50 *JCMS: Journal of Common Market Studies* 106; Denis Sindic, 'Psychological Citizenship and National Identity' (2011) 21 *Journal of Community & Applied Social Psychology* 202.

37 Hajo G Boomgaarden and others, 'Mapping EU Attitudes: Conceptual and Empirical Dimensions of Euroscepticism and EU Support' (2011) 12 *European Union Politics* 241; Liesbet Hooghe and Gary Marks, 'Calculation, Community and Cues: Public Opinion on European Integration' (2005) 6 *European Union Politics* 419; Martin Moland, 'Opting for Opt-Outs? National Identities and Support for a Differentiated EU' (2024) 62 *JCMS: Journal of Common Market Studies* 55; Chase Foster and Jeffrey Frieden, 'Crisis of Trust: Socio-Economic Determinants of Europeans' Confidence in Government' (2017) 18 *European Union Politics* 511.

national-EU identity was positively related to perceived EU legitimacy.³⁸ While average identification with the EU is relatively high, as previously noted, 17.3% of our sample identified exclusively with their nationality and not with the EU.³⁹ In a recent Eurobarometer study, which offers an adequate representation of all EU citizens, this number was even somewhat higher, reaching 25%.⁴⁰ Some research even shows that the number of people identifying exclusively with their nationality is growing.⁴¹ Considering the negative effect of exclusive national identification on perceived EU legitimacy, this trend is worrying for EU legitimacy.

In addition, across all studies, we found a strong negative relation between subjective *threat* to national identity and perceived EU legitimacy.⁴² This means that the more participants experienced that the EU threatens their national identity, the stronger their belief in EU legitimacy declined. This effect was observed regardless of whether people were inclusive or exclusive national identifiers. It was more pronounced among some groups than others, for example among right-wing ideologists and exclusive national identifiers, but it was consistent across various groups of society (i.e., regardless of age, gender, education, place of residence, ethnicity) and across Member States. Perceived legitimacy of the EU is, thus, affected not so much by how strong people's national identity is, but by the extent to which they perceive their national identity is threatened by the EU. In other words, to increase legitimacy it is not necessary to reduce how highly people identify with their Member State, but to reduce the threat people perceive from the EU to this national identity, as well as the exclusive way in which some citizens perceive their national identity.

In our research, we operationalized national identity threat as threat to national power or sovereignty and threat to national sociocultural identity, and we found no notable differences between how people respond to these two forms of threat.⁴³ It is important to emphasize that, on average, participants in our samples did not perceive a high threat to their national identity from the EU. Only when such a threat was felt – for example, due to the salience of the primacy of EU law over national law⁴⁴ – did participants

38 Grosfeld and others (n 14).

39 *ibid.*

40 European Commission, Directorate-General for Communication, 'Standard Eurobarometer STD101: Standard Eurobarometer 101 - Spring 2024', version v1.00, 2024, accessed 2024-05-31, http://data.europa.eu/88u/dataset/s3216_101_3_std101_eng.

41 Alina Polyakova and Neil Fligstein, 'Is European Integration Causing Europe to Become More Nationalist? Evidence from the 2007–9 Financial Crisis' (2016) 23 *Journal of European Public Policy* 60.

42 Grosfeld and others (n 14); Grosfeld and others (n 30).

43 Grosfeld and others (n 14); Grosfeld and others (n 30).

44 In a few studies, we let people read a description about the primacy of EU law over national law. After reading this description, participants reported higher experienced national identity threat from the EU than participants who did not read the description. We also compared the effects of two types of descriptions: one was a neutral description and the other one was a description using identity-related language, with the idea to more strongly trigger identity threat. Interestingly, the difference between these two descriptions was not significant.

report much lower perceptions of EU legitimacy. How can this be explained, especially given the high levels of EU identification that we found?

In research on social identity, the affective dimension of identity is found to be the strongest driver of behaviour.⁴⁵ So, the finding that people generally feel strongly committed to their national community could explain why people, regardless of their high satisfaction with EU group membership, respond defensively upon a potential threat to their national identity. In addition, threats to an important ingroup make that group more salient and other groups less salient.⁴⁶ Thus, while people may have a strong supranational EU identity, salience of this identity may become lower when people perceive a threat to their national identity, which then becomes more salient. As a result, they are likely to respond by protecting it or intensifying their commitment to it. Finally, feelings of threat and uncertainty, whether a dispositional personality characteristic or situationally evoked, have shown to make people resist change and value the preservation of the old political order.⁴⁷ All these processes may lead people to reject the legitimacy of the EU's authority when they perceive it as threatening, even if they support EU integration in itself when not threatened.

6.2.4 Key insight 3: respect for national identities is a source of perceived EU legitimacy among people with an exclusive or threatened national identity

Since people with an exclusive national identity, comprising about a fourth of all EU citizens, do not see the EU as part of who they are, the EU cannot serve as a source of positive identity to them. To illustrate, in one study, we found that reflecting on the positive aspects of EU identity increased perceived EU legitimacy among all participants, except those individuals who are highly proud of their national identity and view this identity as exclusive to other territorial identities (i.e., those having an ethnic conception of national identity).⁴⁸ If the EU seeks to acquire and maintain legitimacy among these individuals, it must therefore be for other reasons than a shared common identity.

One of those reasons could be instrumental; the EU may still be seen as legitimate because it provides them with security and economic benefits. In one study, we investigated whether emphasizing the economic benefits of a contested EU legal norm could enhance perceptions of EU legitimacy (Chapter 3 Study 3).⁴⁹ Specifically, we focused on the principle of primacy. We found that when participants who hold conservative moral values (e.g.,

45 Ellemers, Kortekaas and Ouwerkerk (n 27).

46 Sonia Roccas and Marilynn B Brewer, 'Social Identity Complexity' (2002) 6 *Personality and Social Psychology Review* 88.

47 John T Jost and others, 'Political Conservatism as Motivated Social Cognition.' (2003) 129 *Psychological Bulletin* 339.

48 Grosfeld and others (n 30).

49 Grosfeld, Scheepers and Cuyvers (n 31).

respect for authority, ingroup loyalty, religiosity) were informed that the primacy principle promotes economic growth and prosperity, their perceptions of EU legitimacy improved. This emphasis on economic benefits did not significantly affect perceived EU legitimacy among individuals with more progressive or liberal moral values; it neither increased nor decreased their perceptions of EU legitimacy.

However, the instrumental argument for the EU's legitimacy may (on its own) not be sufficiently compelling in an era dominated by identity politics, where it must compete with arguments centred on national identity and sovereignty.⁵⁰ As we have observed, national identities are high, salient, and can be easily mobilized in intergroup situations. The growing number of people with exclusive national identities and the rise in Euroscepticism may therefore be attributed to anti-EU populists who seek to delegitimize the EU by positioning it against the protection of national identity and sovereignty.⁵¹ The EU is portrayed as a threat to the national identity, which, according to our findings, risks undermining the perceived legitimacy of the EU. These identity arguments are particularly more compelling than instrumental arguments among people who experience poverty or uncertainty, as these individuals tend to seek security in the familiar.⁵²

To further build on these findings, we explored whether individuals perceive the EU as more legitimate if it is seen as protecting their national identity, and how different forms of protection affect different individuals.

In the study in which we tested the legitimating potential of economic benefits, for example, we also tested whether emphasizing the EU's respect for national identities could increase perceived EU legitimacy (Chapter 3 Study 3).⁵³ This was tested in two experimental conditions. In one, it was emphasized that the primacy of EU law ensures the protection of national constitutional identity and traditions, but without altering the primacy principle as it is currently applied in EU law. In the other, it was emphasized that EU law has no primacy over national constitutional identity and traditions of the Member States, altering the primacy principle to offer stronger protection for national identities. The difference between the two conditions was, thus, that the second was a reformulation of the primacy principle that violated caselaw of the CJEU as it currently stands, but would be theoretically possible.

50 Research has, for example, shown that conflicts about identity or values create more emotional involvement than instrumental conflicts, leading people to take an issue more personally and reducing the likelihood of perceived common ground between conflicting parties, Marina Kouzakova and others, 'The Implications of Value Conflict: How Disagreement on Values Affects Self-Involvement and Perceived Common Ground' (2012) 38 *Personality and Social Psychology Bulletin* 798.

51 As well as the media portraying it as such, see Andrew Anzur Clement, 'Reporting on the "Ever Closer Union": Narrative Framing in National News Medias and Resistance to EU Integration' (2015) 6 *Eastern Journal of European Studies* 123.

52 Jost and others (n 47).

53 Grosfeld, Scheepers and Cuyvers (n 31).

The findings revealed that perceived EU legitimacy was higher in the first condition among people with conservative moral values but remained unaffected among those with liberal moral values. Interestingly, perceived EU legitimacy was unaffected in the second condition among people with conservative moral values and was *lower* among those with liberal moral values. In other words, using language that appeals to the value of respect for national identity may increase perceived EU legitimacy among conservatives without harming legitimacy for other people, while actually limiting the primacy of EU law to respect national identity may not increase and even harm perceived EU legitimacy.

We also conducted another study to examine whether individuals perceive the EU as more legitimate if it is seen as protecting their national identity. In this study, we informed participants that EU law obligates the EU to respect and protect core elements of national identity (Chapter 5 Main Study).⁵⁴ They were then presented with a list of eight elements of their national identity and asked to rank them by importance, and reflect on why the top-ranked element makes them proud to be a national citizen. This intervention increased perceived EU legitimacy *only* among those participants who are highly proud of their national identity and view this identity as exclusive to other territorial identities. Notably, the intervention did not affect perceived EU legitimacy among other participants. Furthermore, the findings revealed that the elements making people proud to be a national citizen were primarily national values, the national language(s), and the national government. These elements were considered more important to national identity than, for example, national traditions or the national flag, and they topped the list for most participants, regardless of whether their conception of national identity was more ethnic or not.⁵⁵

In sum, a common EU identity rooted in shared values is unlikely to be a source of EU legitimacy among people with exclusive or ethnic national identities. Our research suggests that the legally more intrusive method of protecting national identity – limiting the absolute nature of primacy – does not enhance and may actually reduce perceived EU legitimacy. On the other hand, emphasizing respect for national identity in communications can increase legitimacy without harming the perceptions of those already inclined to view the EU as legitimate, because respect for national identity is a widely shared value. This may also be true for legally less intrusive methods, that is, legal safeguards that ensure respect for national identity but do not extend to the point that fundamental legal norms of the EU are violated.

54 Grosfeld and others (n 30).

55 *ibid.*

6.3 EVALUATING ARTICLE 4(2) TEU IN LIGHT OF PSYCHOLOGICAL INSIGHTS

As elaborated above, our social psychological studies provide three key insights: 1) a strong EU identity, rooted in shared values, exists and fosters perceived EU legitimacy; 2) national identity undermines perceived EU legitimacy when it is seen as exclusive to EU identity or as threatened by the EU; and 3) respect for national identities enhances perceived EU legitimacy among those with an exclusive or threatened national identity, while not reducing it for others. These psychological insights confirm what the drafters of the Lisbon Treaty intuitively sensed: respect for national identity is essential to keep citizens attached to the European project and safeguard the EU's legitimacy. At the same time, our findings indicate that national identity is not necessarily an obstacle to EU identity, and that EU identity and shared values can also be a powerful source of perceived EU legitimacy.

To remain legitimate in the eyes of the public, the EU must thus protect national identities and promote EU identity and values (i.e., foster a dual identity), two aims that are not inherently incompatible, though they may sometimes be framed as such. The question is whether the legal obligation to respect national identity has succeeded in achieving those aims. To address this question, we focus on Article 4(2) TEU. Acknowledging that respect for national identity is also manifested elsewhere in the EU legal order, Article 4(2) TEU is the legal provision that most clearly and explicitly embodies this aim, and transforms it into a legal obligation. To evaluate whether the current interpretation of this provision allows it to fulfil the psychological needs identified above, we will now first examine in closer detail how Article 4(2) TEU is interpreted by the CJEU.

6.3.1 The use of Article 4(2) TEU in the CJEU's case law

On the face of it, Article 4(2) TEU could serve as a clause to review the legality of all binding acts adopted by the EU.⁵⁶ Since the wording of this provision ('the EU shall respect (...)') obliges all EU acts to respect Member States' national identities, the CJEU could declare any act that does not comply with this obligation invalid on grounds of lack of competence or infringement of the Treaties. In such a way, Article 4(2) TEU would function as a competence clause. Some scholars argue that the *travaux préparatoires* of the provision, along with its textual and systematic reading, indicate that it was intended to serve this purpose: to define the boundaries of the EU's competences and to restrict their exercise in order to prevent competence

56 *Proceedings brought by Boriss Cilevičs and Others* [2020] CJEU C-391/20, Opinion of Advocate General Emiliou.

creep.⁵⁷ Although the CJEU has reflected on this operationalization of Article 4(2) TEU, and has emphasized that it is not for the national court but for the CJEU itself to disapply an EU norm or declare it invalid,⁵⁸ there has not yet been any case where it was applied as such.

Instead, the CJEU's dominant operationalization is that Article 4(2) TEU can serve as a justification of non-compliance with EU law by national measures. According to this approach, Member States can invoke Article 4(2) TEU to justify some limited derogations from EU law. Article 4(2) TEU is, accordingly, not a trump card which can be invoked to escape the primacy of EU law,⁵⁹ but may 'only' be used to justify a derogation from a certain norm of EU law by a Member State, and then only in limited cases, and in a way that may not add much to the already existing justificatory grounds for restrictions on EU norms.⁶⁰ Ultimately, moreover, it remains the CJEU that decides whether an appeal to Article 4(2) TEU is accepted, and hence what the correct balance between an element of national constitutional identity and EU law should be. This decision involves – in a somewhat simplified view – two considerations.

First, the CJEU evaluates whether the national measure in question pursues a legitimate objective under Article 4(2) TEU. Thus, the EU court – not the national court – decides what is part of a Member State's national identity. Case law shows that the CJEU only considers core elements of the national constitution as part of the national identity which may constitute a legitimate interest to allow a derogation or exception from EU law under Article 4(2) TEU. An example of such a legitimate interest is the objective of promoting and protecting a Member State's official language(s).⁶¹ Another is the constitutional status of a Member State. For example, in *Sayn-Wittgenstein*, the CJEU noted that the status of the Austrian State as a Republic is part of its national identity, which the EU ought to respect in accordance with Article 4(2) TEU.⁶² While national identity can be invoked as a legitimate ground of derogation autonomously, moreover, it is more common

57 For example, the first draft of the clause started with: 'When exercising its competencies, the Union shall respect the national identities of the Member states (...)', see Barbara Guastafarro, 'Beyond the Exceptionalism of Constitutional Conflicts: The Ordinary Functions of the Identity Clause' (2012) 31 Yearbook of European Law 263.

58 *Proceedings brought by RS* [2022] CJEU C-430/21.

59 Claes (n 2); Guastafarro (n 57); Besselink (n 1); François-Xavier Millet, 'Successfully Articulating National Constitutional Identity Claims: Strait Is the Gate and Narrow Is the Way' (2021) 27 European Public Law; Sacha Garben, 'Collective Identity as a Legal Limit to European Integration in Areas of Core State Powers' (2020) 58 JCMS: Journal of Common Market Studies 41; *European Commission v Poland* (n 25).

60 For example, as will be explained in detail below, national identity played only a supporting role in *Ilonka Sayn-Wittgenstein v Landeshauptmann von Wien* [2010] CJEU C-208/09; *Omega Spielhallen- und Automatenaufstellungs-GmbH v Oberbürgermeisterin der Bundesstadt Bonn* [2004] ECJ C-36/02.

61 *Anton Las v PSA Antwerp NV* [2013] CJEU C-202/11; *Malgożata Runevič-Vardyn v Vilniaus miesto savivaldybės administracija and Others* [2011] CJEU C-391/09.

62 *Ilonka Sayn-Wittgenstein v Landeshauptmann von Wien* (n 60).

that national identity is invoked as a legitimate aim to justify another ground of derogation, such as public policy.⁶³ In *Cilevics*, for example, the Latvian Constitutional Court invoked national identity directly, but the CJEU used it to interpret the public interest derogation.⁶⁴ In *Sayn-Wittgenstein* too, national identity was used to interpret the justification based on public policy under Article 45(3) of the Treaty on the Functioning of the European Union (TFEU), not as a self-standing justification.

Second, the CJEU balances the need to respect the relevant element of national identity with the need to ensure the effectiveness and uniformity of EU law, as well as the other purposes pursued by the EU norms at stake.⁶⁵ To do so, it applies a proportionality test. This means that the objective of protecting national identity can justify derogations from EU law, but that the national measures taken to achieve that objective must be suitable and may not go beyond what is necessary to attain it. For example, in *Anton Las*, the Belgian law that required cross-border employment contracts to be drawn up in Dutch exclusively was considered a disproportionate violation of the freedom of persons, which could not be justified by the need to protect the national language.⁶⁶

The CJEU's assessment of whether national measures are proportionate does not always follow a clear and systematic approach. Yet, what is clear is that, if a national measure undermines one of the fundamental freedoms, the CJEU usually applies a very strict proportionality test,⁶⁷ in line with its 'ordinary' free movement case law.⁶⁸ Only in *Runevic-Vardyn*,⁶⁹ the CJEU provided guidelines and left the proportionality assessment to the national court – possibly, because there was no fundamental right at stake, which is normally a reason for the CJEU to conduct an intensified review.⁷⁰ In addition, it seems that the CJEU applies a less strict proportionality test if a national measure aimed at protecting national identity promotes EU interests or values rather than harms them. For example, in *Sayn Wittgenstein*, the national measure with the objective of protecting the equality before the law of all Austrian citizens undermined the free movement of persons. Yet, the CJEU argued that this objective was also compatible with EU law, as the principle of equal treatment forms a general principle of law that is also

63 Guastaferrero (n 57).

64 *Proceedings brought by Boriss Cilevičs and Others* (n 56).

65 Darinka Piquani, 'In Search of Limits for the Protection of National Identities as a Member State Interest' in Marton Varju (ed), *Between Compliance and Particularism: Member State Interests and European Union Law* (Springer International Publishing 2019).

66 *Anton Las v PSA Antwerp NV* (n 61).

67 Takis Tridimas, 'The Principle of Proportionality: Review of National Measures' in Takis Tridimas (ed), *The General Principles of EU Law* (Oxford University Press 2006).

68 Janneke Gerards, 'Pluralism, Deference and the Margin of Appreciation Doctrine' (2011) 17 *European Law Journal* 80.

69 *Malgožata Runevič-Vardyn v Vilniaus miesto savivaldybės administracija and Others* (n 61).

70 Gerards (n 68).

enshrined in Article 20 of the Charter of Fundamental Rights.⁷¹ A similar reasoning also seems to play in *Omega*. This pre-Lisbon case concerned a prohibition of a violent game so as to protect human dignity, a fundamental value of particular importance to the German constitution. The prohibition was found to be proportionate, with the CJEU holding that ‘protecting human dignity is compatible with Community law, it being immaterial in that respect that, in Germany, the principle of respect for human dignity has a particular status as an independent fundamental right.’⁷²

Along the same lines, the EU has been clear with regards to the justification of the violation of EU values on grounds of national identity: Member States must always comply with the EU values defined in Article 2 TEU.⁷³ This reasoning is in part based on an identity argument. In *Hungary v Parliament and Council* and *Poland v Parliament and Council*, the CJEU emphasized that the EU must be able to defend EU values because they form the very identity of the EU as a common legal order.⁷⁴ It held that even though ‘the European Union respects the national identities of the Member States, inherent in their fundamental structures, political and constitutional, such that those States enjoy a certain degree of discretion in implementing the principles of the rule of law, it in no way follows that that obligation as to the result to be achieved may vary from one Member State to another’. Furthermore, the values defined in Article 2 TEU are not merely a statement of policy guidelines or intentions, but are given concrete expression in principles which contain legally binding obligations for the Member States.

In a more recent case on the rule of law in an action brought by the European Commission against Poland, the CJEU repeated that Member States must comply with Article 2 TEU.⁷⁵ What is interesting here is that while the Commission focused on a breach of Article 19 TEU, the CJEU introduced Article 2 TEU and extensively recalled its case law on the primacy of EU law. In addition, it held that because the EU’s foundational values are common, ‘there is no ground for maintaining that the requirements arising (...) from respect for [these] values (...) are capable of affecting the national identity of a Member State’. Therefore, Article 4(2) TEU cannot exempt Member States from the obligation to comply with EU values. It can thus be concluded that national identity cannot be invoked to escape from

71 *Ilonka Sayn-Wittgenstein v Landeshauptmann von Wien* (n 60).

72 *Omega Spielhallen- und Automatenaufstellungs-GmbH v Oberbürgermeisterin der Bundesstadt Bonn* (n 60).

73 ‘The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail.’

74 *Republic of Poland v European Parliament and Council of the European Union* [2022] CJEU C-157/21; *Hungary v European Parliament and Council of the European Union* [2022] CJEU Case C-156/21.

75 *European Commission v Poland* (n 25).

compliance with the common values in Article 2 TEU nor with the primacy of EU law.⁷⁶

In sum, developments in the CJEU's case law suggest that national identity has become fully conditional to EU values. While the CJEU claims to place EU identity and national identity on equal footing – for example, it has stated that Article 4(2) TEU holds the same rank as Article 2 TEU⁷⁷ – the balance seems to be tilting towards protection of supranational principles, identity, and values, in no small part because of the presumption that EU values can never conflict with national values. What is more, the CJEU is not willing to let national courts or Member States define 'their' national identities, as Article 4(2) TEU remains an autonomous concept of EU law over which the CJEU hence must retain the final say. The EU's overarching integration goals thus appear to be prioritized over the protection of national authority and diversity. National identity is sometimes *considered*, but not seriously *respected*.

6.3.2 The effect of Article 4(2) TEU on public perceived EU legitimacy

Given the conclusions of the previous section on the CJEU's interpretation of Article 4(2) TEU, the question is whether this interpretation is problematic, psychologically, in the sense that it will lead to a loss of legitimacy.

In one way, it is not. Our empirical evidence shows that citizens have a strong EU identity, that they strongly endorse EU values, and that emphasizing the positive aspects of EU membership, in particular EU values, increases perceived EU legitimacy among most citizens. Furthermore, restricting the primacy of EU law when EU law threatens national identity and traditions did not increase perceived EU legitimacy in our studies. Applying these psychological insights to the realm of law, it could be argued that limiting national diversity when fundamental EU values are at risk is not necessarily illegitimate from the perspective of most citizens, since it is supported by their shared EU identity. Most citizens will understand that a national measure which jeopardizes a fundamental EU value, even if it claims to protect national identity, cannot be accepted.

In another way, however, the CJEU's approach to Article 4(2) TEU may be problematic for a seemingly growing group of citizens. A common EU identity and values are not a source of legitimacy for citizens with an exclusive national identity, a group which, according to the latest Eurobarometer, comprises a quarter of all EU citizens. In addition, overall public perceived EU legitimacy may also benefit – and at least not suffer – from a stronger protection of national identity than is currently ensured by EU law. Citizens who identify with the EU – thus, the majority of citizens – find

76 Vestert Borger, 'Constitutional Identity, the Rule of Law, and the Power of the Purse: The ECJ Approves the Conditionality Mechanism to Protect the Union Budget: Hungary and Poland v. Parliament and Council' (2022) 59 Common Market Law Review.

77 *European Commission v Poland* (n 25).

respect for national identity an important value as well, and report higher perceived EU legitimacy when they believe that the EU does not threaten national identities. This suggests that the strong national allegiances citizens still have, demand respect for national identity. Moreover, since the EU is increasingly pitted against national identities in political rhetoric, national identities may only become a stronger point of reference for all citizens while judging the EU's legitimacy.

What each national identity entails is, however, not entirely clear from our research. Participants reported equal levels of threat on both instrumental (i.e., power or sovereignty) and symbolic (i.e. sociocultural identity) dimensions of national identity. Yet most participants were proudest of their national values, language(s), and form of government – more than of national traditions or holidays. This suggests that national identity, for citizens, primarily entails the core structures that define a nation, resembling the legal concept of national constitutional identity as defined by the CJEU.⁷⁸ In social psychology, this idea reflects the more existential need of national identity *continuity*.⁷⁹ It is therefore crucial to ensure and communicate that something of a national core, whether referred to as identity or sovereignty or some other suitable concept, is protected under EU law.

Various aspects of the CJEU's approach to Article 4(2) TEU, however, may cause subjective national identity threat. First, national identity seems relatively trivialized as it is used in rather limited cases and subjected to a generally strict proportionality test in those cases where it does appear.⁸⁰ This may threaten the value of people's national identities. Second, with very few exceptions,⁸¹ the CJEU confers on itself the competence to subject national identity to a proportionality test, instead of leaving it to the national court. This could create feelings of threat to national power, status, or autonomy. Third, if derogations from EU law are only accepted when they can be seen as promoting EU values, interests, or constitutional traditions common to the Member States, and not when they reflect a distinct,

78 According to the CJEU, national identities referred to in Article 4(2) TEU include, among others, 'the status of the State as a Republic' and 'a State's official national language', *Ilonka Sayn-Wittgenstein v Landeshauptmann von Wien* (n 60); *Malgožata Runevič-Vardyn v Vilniaus miesto savivaldybės administracija and Others* (n 61); *Anton Las v PSA Antwerp NV* (n 61).

79 See on this, for example, Constantina Badea, Michael Bender and Helene Korda, 'Threat to National Identity Continuity: When Affirmation Procedures Increase the Acceptance of Muslim Immigrants' (2020) 78 *International Journal of Intercultural Relations* 65; Anouk Smeekes and Maykel Verkuyten, 'Collective Self-Continuity, Group Identification and in-Group Defense' (2013) 49 *Journal of Experimental Social Psychology* 984; Vivian L Vignoles, Seth J Schwartz and Koen Luyckx, 'Introduction: Toward an Integrative View of Identity' in Seth J Schwartz, Koen Luyckx and Vivian L Vignoles (eds), *Handbook of Identity Theory and Research* (Springer 2011).

80 See on this argument also Loic Azoulai, 'The European Court of Justice and the Duty to Respect Sensitive National Interests' in Mark Dawson, Bruno De Witte and Elise Muir (eds), *Judicial activism at the European Court of Justice: Causes, responses and solutions* (Edward Elgar Publishing 2013).

81 *Malgožata Runevič-Vardyn v Vilniaus miesto savivaldybės administracija and Others* (n 61).

unique element of national identity, the aspects of national identity that make a Member State distinctive and unique can ultimately be jeopardized. This may threaten the distinctiveness and continuity – two highly important aspects of a positive social identity – of people’s national identities.

In sum, from a legal perspective, it is understandable why some have argued for abandoning Article 4(2) TEU and reformulating national identity claims as claims based on common EU values, given the limited legal weight of Article 4(2) TEU.⁸² However, we propose that the psychological potential of Article 4(2) TEU should not be underestimated. This does not imply that national identity should act as a limit to primacy – which, for both legal and empirical reasons, would be ill-advised – but rather that it can serve as a more developed and psychologically effective legal safeguard to protect citizens’ national identities and enhance the EU’s public perceived legitimacy. The follow-up question, which will be discussed in the next section, is *how* to walk this tightrope.

6.4 ADAPTING ARTICLE 4(2) TEU TO PSYCHOLOGICAL INSIGHTS: LEGAL IMPLICATIONS AND THE FACT-VALUE GAP

We have presented the findings of our social psychological research on how citizens’ perceptions of EU legitimacy are influenced by identity and values. We have also analysed how the current interpretation and application of Article 4(2) TEU by the CJEU might affect perceived EU legitimacy among citizens. In this section, we address the question of how these findings may be used to tweak the interpretation of Article 4(2) TEU in a way that would increase perceived EU legitimacy without exceeding the limits of EU law or undermining the stability, autonomy, and coherence of the EU legal order. This involves not only an examination of how the law can be adjusted to enhance perceived legitimacy of the EU, but also a careful consideration of the extent to which such adjustments *should* be made.

6.4.1 From citizens’ identities to the identity clause: how to bridge the gap

To start with the latter, our social psychological research has led to insights that would not have been achieved by traditional legal research methods. Yet, due to the fact-value gap, these insights on what *is* cannot be directly translated into recommendations on how the law *ought* to be. The fact-value gap refers to the distinction between descriptive findings (facts) and normative judgments (values). Just as values cannot lead to facts, facts alone do not and should not dictate values. The literature discusses several approaches to bridge the gap between descriptive findings and normative

82 Spieker (n 6); Matteo Bonelli, ‘National Identity and European Integration Beyond “Limited Fields”’ (2021) 27 European Public Law.

judgements.⁸³ In our opinion, there are three important take-aways of these approaches.

First, there should be a normative argument that justifies why an empirical argument ought to be used in the law. Our empirical conclusions imply that, to safeguard perceived EU legitimacy, it is important not only to promote the feeling of common identity and shared values among citizens, but also to better respect national identities. It is important to avoid practices and norms that may be perceived as threatening national identities, or to at least accompany those practices and norms with sufficient safeguards that maximize the positive potential of the EU identity. While these conclusions can be used to inform the interpretation of Article 4(2) TEU, there may be other normative arguments, which may contradict empirical conclusions, that are relevant to the interpretation of this provision as well. Therefore, a normative justification that argues why empirical findings should be considered in the law is required to bridge these two ends of the gap.

In our case, a normative justification is that a high level of public legitimacy of the EU is in itself normatively desirable and should also be pursued because it facilitates the EU's stability and problem-solving capacity.⁸⁴ Moreover, as captured by Article 4(2) TEU, as well as by the EU's credo to strive for unity in diversity, the EU has a normative obligation to respect national identities to the maximum level possible under EU law. Incorporating empirical insights into the interpretation of Article 4(2) TEU can therefore help the EU to meet its own objectives and protect its values of pluralism and diversity. If these arguments are accepted, it is justified that psychological insights on the sources of perceived EU legitimacy inform the law on respect for national identity, because it is desirable that citizens perceive the EU as legitimate and that the EU respects their diverse national identities as effectively as possible in real life, not just in theory.

Second, it is necessary to evaluate the robustness of the empirical findings.⁸⁵ This means that the empirical work should be sufficiently valid, reliable, objective, and reproducible. With regards to our own empirical work, we discuss the empirical robustness and limitations extensively in the articles cited.

Third, all relevant (legal and extra-legal) arguments should be defined and weighed against each other to evaluate a potential legal solution.⁸⁶ After all, even if there is a normative justification for using an empirically well-grounded argument, there may be other legal and extra-legal arguments that outweigh the empirical argument.

83 Frans L Leeuw, 'Empirical Legal Research: The Gap between Facts and Values and Legal Academic Training' [2015] *Utrecht Law Review* 19.

84 Tallberg and Zürn (n 18); Allen Buchanan and Robert O Keohane, 'The Legitimacy of Global Governance Institutions' (2006) 20 *Ethics & International Affairs* 405.

85 Ivo Giesen, 'The Use and Incorporation of Extralegal Insights in Legal Reasoning' (2015) 11 *Utrecht Law Review* 1.

86 For a discussion of how such a balancing exercise could be conducted, see Leeuw (n 83).

An important consideration in this regard is that perceived EU legitimacy is caused by psychological processes which may be influenced by volatile external factors. National identity threat was found to significantly undermine perceived EU legitimacy, but it could also be argued that experiences of such threat may be whims fuelled by populists. To the extent that experiences of national identity threat are driven by fleeting public opinion rather than genuine concerns, it would be unwise to base law and policy on such opinions. Public opinion may form an unstable foundation of law and policy if it reflects short-term thinking or the interests of the most vocal groups in society. Heeding public opinion may even carry the risk of conceding to populist demands, which may ultimately undermine democracy and the rule of law.

At the same time, it would be equally unwise to disregard psychological processes entirely, or to dismiss experiences of national identity threat as irrational or, worse, immoral. This would only add fuel to the fire, in particular because there is compelling evidence to believe that respect for national identity is a genuine concern of many people, not just those with an exclusive national identity. It has therefore been argued that the EU should be prepared for the growth of populist movements, and that EU law should learn to adapt to these political ideas.⁸⁷ In other words, EU law should do something about rising populism anyway to ensure the stability of the EU legal order. Without any empirically informed legal strategies to do so effectively, the EU could make itself vulnerable to the dangers of populism. Our empirical insights on identity and values could help to inform these strategies.

6.4.2 From citizens' identities to the identity clause: practical suggestions

Having discussed the core considerations and caveats with translating empirical insights into law, the following sub sections propose four practical suggestions for how our psychological insights can be translated to EU law to help realize the psychological potential of Article 4(2) to safeguard public perceived legitimacy. These suggestions build on previous proposals to improve the legitimacy of EU law, which were grounded in normative arguments, and provide those proposals empirical evidence and further directions for improvement. While presented as separate suggestions, they could be implemented together, reinforcing one another. Clearly our suggestions come with all the considerations and caveats outlined above, yet they are meant to spark debate and inspire further research in the future, as well as to provide some concrete legal bridgeheads to help translate our empirical findings into evidence-informed law.

87 Mark Dawson, 'How Can EU Law Respond to Populism?' (2020) 40 *Oxford Journal of Legal Studies* 183.

6.4.2.1 Improving judicial dialogue

Enhanced protection of national identity could be achieved by improving judicial dialogue. Currently, the concept of national identity has been ‘Europeanized’.⁸⁸ Since the CJEU cannot interpret national law, national identity is transformed into a concept of EU law, allowing the CJEU to referee the dispute concerning national identity and retain the final word.⁸⁹ However, the inherent risk in this kind of ‘judicial dialogue’ is that national courts feel marginalized, given that the CJEU retains ultimate jurisdiction over claims invoking national identity.⁹⁰ If the concerns of national courts are not adequately addressed, this could provoke reactions similar to those seen in, for example, *Gauweiler* and *Weiss*.⁹¹ Moreover, such judicial dynamics could spill over to public perceptions, potentially heightening the belief that national identity and sovereignty are under threat, with the national apex court pitted against the CJEU as the ultimate bulwark of national identity.

Alternatively, an improved judicial dialogue could involve a larger role for national courts in discussions concerning the meaning of national identity. Scholars have previously underscored the need for a deeper and more comprehensive dialogue between national and EU judges.⁹² We highlight two ways to promote judicial dialogue on national identity. Both suggestions are alterations of the core mechanism for judicial dialogue in the EU legal order: the preliminary reference procedure provided for in Article 267 TFEU. This procedure enables national courts to refer questions to the CJEU about the interpretation or validity of EU law.

First, as proposed in other areas of EU law, such as the single supervisory mechanism, the preliminary ruling procedure could be transformed from a unilateral exchange into a bilateral one: ‘a reverse preliminary ruling procedure’.⁹³ Under this procedure, the CJEU would be empowered to also refer questions to national courts about the content and interpretation of specific issues of national law, in this case: national identity. National courts, in turn, could articulate the core elements of national identity that merit protection. A crucial safeguard in this procedure would be mechanisms to prevent abuse or manipulation by national courts. For example, national courts should not have unlimited discretion in defining their national identity, but they must present a compelling argument, potentially supported by empirical evidence, regarding the core domains of national identity that ought to be protected.

88 Garben (n 59).

89 De Witte and Fromage (n 5).

90 Martinico (n 9).

91 *Proceedings brought by Heinrich Weiss and Others* [2018] CJEU C-493/17; *Peter Gauweiler and Others v Deutscher Bundestag* [2015] CJEU C-62/14, Opinion of AG Cruz Villalón.

92 Martinico (n 9); Guastaferrero (n 57); Bruggeman and Larik (n 11).

93 Ilaria Ottaviano, ‘Judicial Dialogue Between National Constitutional Judges and EU Judges in the Context of the Single Supervisory Mechanism: Opportunity for a Reverse Preliminary Ruling?’ (2022) 1 *Freedom, security & justice : european legal studies* 258.

Second, another, more far-reaching, way to improve the judicial dialogue on national identity could involve the creation of a separate chamber within the CJEU, where national and EU judges convene when issues of national identity arise. Such a ‘mixed constitutional chamber’, composed of national constitutional judges and judges of the CJEU, has been proposed as a means to resolve constitutional conflicts before.⁹⁴ In particular, it would provide a platform for Member States to voice their constitutional concerns. In this case, the suggestion would be to mobilize the mixed chamber if questions on national identity arise, improving the dialogue between judges on its meaning. It could even be argued that this procedure fosters more than just dialogue; it would transform national identity into a hybrid concept, co-created and jointly adjudicated by national and EU judges. While this gives a significant voice to national courts, procedural safeguards should ensure that the primacy of EU law or the CJEU’s final say on the validity of EU law will not be compromised. For example, it should only operate in exceptional situations as a special form of preliminary reference, following a standard preliminary ruling.⁹⁵ Given that national identity increasingly gives rise to constitutional conflicts,⁹⁶ a mixed chamber, while far-reaching, might offer a mechanism for resolving competence disputes and affirming the involvement of national actors in matters pertaining to national identity.

Although increasing the voice of national courts on the formulation of their constitutional identity might appear to have an insignificant effect on public perceptions, psychological research suggests that certain procedural aspects contained in this improved judicial dialogue are essential for a positive citizens’ experience. Research has shown that ‘perceived procedural justice’ increases people’s perceived legitimacy of legal authorities.⁹⁷ Key elements of perceived procedural justice include the opportunity to voice an opinion, being heard with due regard, and the presence of transparent, fair procedures. These elements may be missed out in the current dialogue, yet could be introduced through the two suggestions described above. An improved dialogue would, thus, offer a stronger voice to national courts, without undermining important principles as the primacy and autonomy of EU law, because the CJEU will have the final say. As such, while it may not fully resolve the conflict on judicial competences, it could be a way to circumvent it.

94 JHH Weiler and Daniel Sarmiento, ‘The EU Judiciary After Weiss – Proposing A New Mixed Chamber of the Court of Justice. A Reply to Our Critics’ (*EU Law Live*, 6 July 2020) <<https://eulawlive.com/the-eu-judiciary-after-weiss-proposing-a-new-mixed-chamber-of-the-court-of-justice-a-reply-to-our-critics-by-j-h-h-weiler-and-daniel-sarmiento/>> accessed 1 October 2024.

95 *ibid.*

96 For example *Criminal proceedings against M.A.S. and M.B. (Taricco II)* (n 11); *Lisbon-Urteil* [2009] Bundesverfassungsgericht 2/08; *European Commission v Poland* (n 25).

97 Tom R Tyler, ‘Procedural Justice, Legitimacy, and the Effective Rule of Law’ (2003) 3 *Crime and Justice* 283.

6.4.2.2 *Respecting substantive areas of national identity*

National identity might also be better protected substantively. For instance as a result of an enhanced dialogue between national constitutional courts and the CJEU, certain areas of national identity could be accorded special protective status by the CJEU. Determining *which* areas of national identity should receive such enhanced substantive protection is a matter to be decided by the CJEU in dialogue with the relevant national actors, but Article 4(2) TEU could be interpreted as reflecting the objective *that* certain domains, depending on the Member State, warrant a higher level of protection. This could imply that, for some Member States but not for others, the CJEU might adopt a more lenient approach regarding certain areas, a practice already evident in the current application of Article 4(2) TEU.

Moreover, the selection of these areas could also be informed by empirical findings. As suggested by our data, the most important areas of national identity for citizens are the national languages, values, and form of government. Accordingly, in practical terms, a stronger substantive protection of national identity may not result in substantial changes nor pose a significant threat to the uniformity of EU law, if citizens indeed predominantly wish to protect these three areas of national identity. To illustrate, as discussed above, the areas of language and form of government already receive differentiated treatment. And national values can be expected to, perhaps with some exceptions, largely overlap with the EU's common values, as EU values are based on the constitutional traditions of the Member States. Yet a stronger substantive protection of national identity would have a powerful symbolic impact, serving as a practical compromise between the two more extreme positions of national constitutional courts and the CJEU. This compromise could reduce resistance from both sides, easing tensions over the preservation of national identity as well as uniformity within the broader framework of EU law.

Compared to the previous suggestion of improving judicial dialogue, offering stronger protection for certain domains of national identity has a more direct impact on substantive law. This approach carries a higher risk, because if national courts claim that a particular national measure falls within the special protection category, they could assert the right to uphold this national measure, potentially challenging EU authority.

6.4.2.3 *Enlarging the margin of discretion for national courts*

A less pervasive suggestion, one that could also integrate nicely within the currently dominating function of Article 4(2) TEU in the CJEU's case law – as a justification of a derogation of a secondary EU legal norm – is that the CJEU shows more deference to national courts in certain areas. 'Deference' is a procedural mechanism to settle conflicts in a multilevel jurisdiction. It entails that the supranational court applies a more marginal review of national measures and leaves the decision to the national court.

The CJEU already shows varying levels of intensity of its review, often in cases where the principle of proportionality is applied, although the determination of the intensity of review is not following a clear doctrine.⁹⁸ This stands in contrast to the ‘margin of appreciation doctrine’ used by the European Court of Human Rights (ECHR). According to this doctrine, national courts will be allowed a narrower or wider margin of appreciation to assess interference with fundamental rights, depending on a set of factors that have been explicitly listed in its case law.⁹⁹ These include, for example, the nature of the affected Convention right, the nature of the interference, and the level of consensus within the Member States of the Council of Europe.¹⁰⁰

Similarly, if there is a conflict related to national identity, by means of a more deferential review, national courts could be given more leeway to 1) define the national identity and explain why it justifies a derogation of EU law, and 2) determine whether the derogation is proportionate.¹⁰¹ A more deferential review by the CJEU of such national assessments may better protect national identity, because it would lead to more respect for elements of the national identity that national courts consider relevant, and because it would communicate that the CJEU values respect for national identity. Accordingly, it would show more respect for national constitutional traditions, accommodating conflicts between national and EU courts and potentially preventing situations in which national courts will not accept the primacy of EU law,¹⁰² which would ultimately jeopardize the entire functioning of the EU legal order.¹⁰³ Moreover, being more aware of the national situation, national courts may be better placed to make the assessment of proportionality, an argument also endorsed by Advocate General Emiliou.¹⁰⁴

What could such a larger ‘margin of discretion’ for national courts look like? Drawing on the ECHR’s doctrine, an essential feature of the suggested approach is that the margin can be narrower or larger, depending on a set of factors that should be developed in the CJEU’s case law. For example, to protect EU values, the CJEU could apply a stricter review when such foundational EU values are at stake. If the CJEU acts as a ‘gatekeeper’ of EU values, it would ensure that national measures remain consistent with the EU’s foundational values. In a similar manner to how the ECHR approaches the margin of appreciation with regards to convention rights,¹⁰⁵ it could be

98 Gerards (n 68).

99 *ibid.*

100 *S and Marper v the United Kingdom* [2008] ECtHR [GC] 30562/04, 30566/04, para 102.

101 Guastaferro (n 57).

102 As in *Lisbon-Urteil* (n 96); *Slovak pensions* [2012] Czech Constitutional Court Pl. ÚS 5/12; *Assessment of the conformity to the Polish Constitution of selected provisions of the Treaty on European Union* [2021] Polish Constitutional Tribunal K 3/21.

103 Gerards (n 68).

104 *Proceedings brought by Boriss Cilevičs and Others* (n 56).

105 Gerards (n 68).

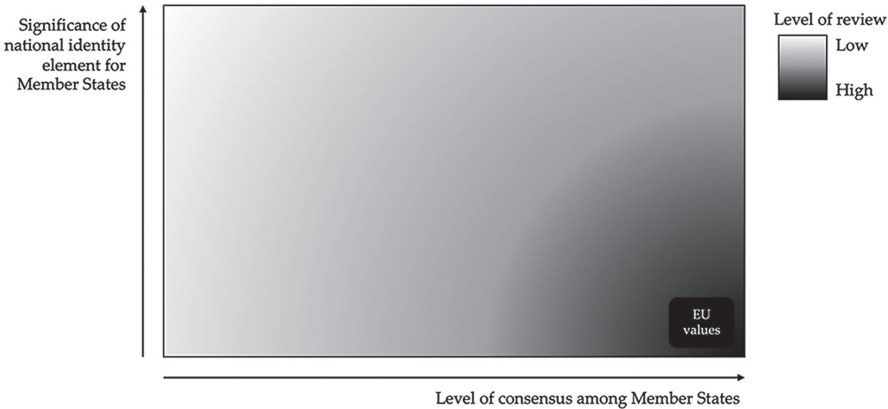
proposed that the closer a national measure comes to affecting the core of a shared EU value enshrined in Article 2 TEU, the narrower the margin of discretion will be for national courts.

In addition, also akin to the ECHR’s practices, the lower the consensus among Member States on a particular issue, the broader the margin of discretion afforded to national courts could be. Accordingly, for example, the protection of fundamental rights would not be threatened by this approach, because it enjoys a high degree of consensus among Member States. In contrast, the CJEU could be more deferent when a conflict concerns elements that are very specific to a distinct national identity, and on which there is less common ground between the Member States.

A final factor could be how significant the element of national identity in question is for Member States. Evidently, the more significant a measure is for a Member State’s national identity, the more deferential the CJEU could be to national courts. It is for the national courts to provide a well-supported and compelling argument on this factor of ‘significance’, which the CJEU could then assess. While the constitutional traditions of the Member States overlap to a large extent, this approach would also require recognition that, in certain areas, Member States have distinct identities and traditions, which ought to be respected as well.

Taking these factors into account in the assessment of the level of review could reduce the perceived threat to national identity, because it acknowledges that there are distinct national identities that are important to the Member States, offering the protection that Article 4(2) TEU promises. Yet it does not undermine core principles of EU law – such as EU values, the rule of law, non-discrimination, sincere cooperation, and mutual trust – to the extent that there is high consensus on the specific meaning of those principles or values (see Figure 1 for a graphical display).

Figure 1. Graphical illustration of how level of deferential review could be determined



6.4.2.4 Referring more explicitly to national identity in case law

Finally, the CJEU could also more explicitly acknowledge and engage with the significance of national identity in its reasoning. At present, the CJEU typically addresses national identity only briefly, an approach that, as previously noted, risks trivializing national identity in EU law. This is particularly striking considering the position of Article 4(2) TEU alongside other key provisions that govern the relationship between national and EU legal systems, as well as key provisions on the EU's fundamental values and goals. The placement of Article 4(2) TEU thus signals its centrality to EU law. To reflect this centrality and strengthen public perceived EU legitimacy, and to demonstrate that Article 4(2) TEU not merely serves a decorative or formal purpose, the CJEU should show its willingness to closely scrutinize claims based on national identity in a detailed and substantive manner.

6.5 CONCLUSION

To address the growing Eurosceptic sentiment triggered by deeper and wider European integration, the EU codified its duty to respect national identities in the Treaties. However, despite this effort, Eurosceptic voices have not diminished; in fact, concerns about the loss of national identity have only intensified. As a result, the political, psychological, and legal promise of Article 4(2) TEU remains unfulfilled. Therefore, in this chapter, we questioned how the current protection of national identity in EU law through Article 4(2) TEU affects perceived EU legitimacy among citizens, and whether alternative interpretations of this provision are possible and desired.

Our conclusion is that the public's perceived legitimacy of the EU could improve if EU law ensures and communicates that national identity is better protected, while also safeguarding and promoting EU identity and EU values. In other words, if EU law fosters a dual national-EU identity. Empirical evidence showed that citizens have a sufficiently strong common EU identity, defined by shared values, to restrict respect for national identity when EU values are at stake, but that they also deeply care about protecting a national core identity. Based on these empirical findings, we proposed approaches that the CJEU could take to more seriously respect national identity, whilst upholding core principles of EU law such as primacy and protection of common EU values. Thus, the law allows for an approach in which perceived legitimacy may be increased, without the CJEU having to compromise on core principles.

We do not argue that the legal debate on the interpretation of Article 4(2) TEU can or should be resolved solely by psychological insights, but that these insights form a relevant extra-legal argument in the debate on how to give expression to respect for national identity in EU law. This is more informative than guessing what citizens want and need. That being said,

we end with noting several remarks that point to limitations of the current research, as well as set the agenda for future research, psychological and legal.

First, any attempt to formulate a general theory of how citizens' beliefs in EU legitimacy arise inevitably runs into the complexity of these processes in real life. To name just a few shortcomings, we did not study the influence of regional identity. Secessionist movements, such as those in Scotland and Catalonia, also rely on a national identity narrative, and reflect the desire for stronger national sovereignty.¹⁰⁶ However, unlike for national nationalist movements, this narrative is combined with support for the EU.¹⁰⁷ For citizens who identify with secessionist movements, national identity has a different content and may trigger different social psychological processes. Furthermore, we did not investigate how these processes play out for people from ethnic minorities, nor did we dive into the potential differences between citizens from different Member States. Although focusing on general mechanisms enables identification of the main psychological drivers of perceived EU legitimacy, future research could expand our 'general theory' to encompass more individual and societal factors.

Second, we have only briefly reflected on the concepts of identity and values, which carry different connotations in psychology and law. Due to conceptual differences, it may be harder to bridge the fact-value gap. Although we have described how social identity is conceptualized in social psychology and have studied it indirectly, we have not directly asked citizens what they understand under national identity or EU identity. This leaves room for future, possibly qualitative, psychological research to study how individuals interpret these identities, and which substantive areas should be specifically protected to generate the biggest positive effect on perceived EU legitimacy. In legal scholarship, too, it remains ambiguous what national identity precisely entails. While some scholars interpret Article 4(2) TEU as referring to a Member State's political and constitutional structures,¹⁰⁸ others have a more cultural understanding of national identity.¹⁰⁹ More insight on the meaning of national identity in both disciplines is necessary to better inform the law with psychological insights.

106 Marc Sanjaume-Calvet, Daniel Cetrà and Núria Franco-Guillén, 'Leaving Europe, Leaving Spain: Comparing Secessionism from and within the European Union' 47 *West European Politics* 1121.

107 Niklas Bremberg and Richard Gillespie, *Catalonia, Scotland and the EU: Visions of Independence and Integration* (Routledge, Taylor & Francis Group 2022).

108 For example, De Witte and Fromage (n 5); Armin Von Bogdandy and Stephan W Schill, 'Overcoming Absolute Primacy: Respect for National Identity under the Lisbon Treaty' (2011) 48 *Common Market Law Review* 1417.

109 For example, Mary Dobbs, 'The Shifting Battleground of Article 4(2) TEU: Evolving National Identities and the Corresponding Need for EU Management?' (2015) 21 *European Journal of Current Legal Issues*; Besselink (n 1); Elke Cloots, 'National Identity, Constitutional Identity, and Sovereignty in the EU' (2016) 45 *Netherlands Journal of Legal Philosophy* 82.

The open wording of the concept values entails a similar interpretation and translation problem. In psychology, values are guiding principles of what people consider important, while moral values are guiding principles of what people consider right (as opposed to wrong). The Treaty refers to 'values', which, although they are not 'moral', contain legally binding obligations.¹¹⁰ Yet, since endorsing these values is a condition for acceding to the EU,¹¹¹ they define group membership, just as moral values in social psychology. In this way, psychological findings on morality could be linked to the legal discussion on values.

Third, although we explored how perceived EU legitimacy could be enhanced through legal practices, there is an important role to play for communicative practices as well. Possibly, legitimization through communication is even more important and effective, since people are primarily informed about EU affairs through the media, and their trust in the EU is significantly influenced by these communications.¹¹² Our own research also suggested that people are more strongly affected by discursive legitimization strategies than institutional legitimization strategies.¹¹³ An important area for future research is therefore to investigate how communication can effectively foster perceptions of EU legitimacy. At the same time, EU communication should always truthfully reflect what the law says. Improving EU communication about respect for national identity therefore also requires the actual protection for national identity under EU law.

110 *Republic of Poland v European Parliament and Council of the European Union* (n 74); *Hungary v European Parliament and Council of the European Union* (n 74).

111 Article 49 TEU.

112 Erika J Van Elsas and others, 'How Political Malpractice Affects Trust in EU Institutions' (2020) 43 *West European Politics* 944.

113 Grosfeld, Scheepers and Cuyvers (n 31).