

SCOPE AND EXERCISE OF THE EXCLUSIVE COMPETENCES OF THE MEMBER STATES OF THE EUROPEAN UNION

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ABSTRACT

The process of European integration has introduced the Member States into a new legal reality. The existing exclusivity in the area of competence implementation has been replaced by a two-stage model of their exercise. The Member States, when conferring part of their supervisory powers, did not specify the scope of their own competences. The so-called European clauses were analysed in the Constitutions of selected Member States, which showed that they define the recipient of the conferral and, in a non-uniform manner, specify the subject of the conferral. The analysis of the indicated provisions clearly shows that the Constitutions of the Member States exclude full conferral of competences on the European Union. There is no specification of the scope of competences that may be conferred. However, this issue was addressed by Constitutional Courts of the Member States. The article refers to the judgements of the German Federal Constitutional Court and the Polish Constitutional Court. It has been shown that they equate exclusive competences of the Member States with the scope of the concept of constitutional identity reduced to basic principles of the state. The Court of Justice of the European Union analysed the scope of competences of both entities. The article presents the analysis of judgements on: entries in Civil Registry regarding transcription of surnames, the issue of recognition of same-sex marriages, reform of the judiciary system in Poland, and the application of the Charter of Fundamen-

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tal Rights in the areas that do not fall under EU competence. Regardless of the division of competences, the EU is bound by the principle of respect for national identity of the Member States, including constitutional identity. It both obligates the EU to respect the exclusive competences of the Member States and is a premise restricting the achievement of EU objectives.

Keywords: European Union, exclusive competences, European clause, homogeneity clause, serious inconvenience

1. INTRODUCTION

The process of European integration is based on a special method of cooperation between the Member States and an international organisation, i.e. the European Union. The Member States that demonstrated their will to jointly achieve their goals, initially only economic, at a supranational level, delegated, in accordance with their constitutional order, a part of sovereign powers to the Communities, and ultimately to the European Union. The consequence of integration processes is the two-level exercise of the Member States' competences. The first level covers exclusive competences of the Member States that have not been conferred on the European Union. They are at the sole disposal of the Member States. The second refers to competences exercised jointly with other Member States at a supranational level, where the European Union institutions have their specific powers.

The subject of the analysis undertaken in this article is the scope and the exercise of the exclusive competences of the Member States. The issue of competence has been the subject of many scientific studies, however, they focus primarily on the scope of conferred competences and the manner in which they are exercised. The development of integration processes, in particular the activity of EU institutions (European Commission) and the sanctioning of such practice by the Court of Justice, shift the direction of interest towards analysis of the scope of exclusive competences of the Member States. Consequently, several issues will be discussed here.

Firstly, the author will address constitutional foundations of the conferral of competences to the European Union and the attempt to determine the scope of exclusive competences of the Member States from the perspective of the Constitutional Courts of the Member States.

Secondly, the rules for exercising the exclusive competences of the Member States from the perspective of European Union law will be discussed. The considerations will cover the issue of the principle of conferral and the discussion of selected judgements of the Court of Justice related to the analysed problem. In addition, the issue of the exercise of the exclusive competences of the Member States and the implementation of EU values will be considered.

2. THE BASIS FOR CONFERRAL OF COMPETENCES ON THE EUROPEAN UNION IN LEGAL REGULATIONS OF THE MEMBER STATES

Conferral of competences is a secondary act that is a consequence of the accession of the Member States to the European Union. The States expressed their will to accede, which meant that a specific scope of competences would be conferred on/entrusted to an international organisation.

2.1. The basis for conferral of competences of the Member States on the European Union

The basis for the accession of the Member States to the European Union are the so-called European clauses that are contained in the Constitutions of the Member States. They do not have a uniform wording and were introduced in different conditions. Basically there are two types of powers: general and specific. The first model, which also appears in the Constitution of the Republic of Poland¹, contains a general delegation to confer abstractly defined competences on an international organisation or an international body, without indicating a specific entity or scope of competence². Similar solutions exist in the Constitution of the Czech Re-

¹ The Constitution of the Republic of Poland of 2 April 1997, Journal of Law 1997, No 78, item 483, as amended, Art. 90 „*The Republic of Poland may, by virtue of international agreements, delegate to an international organization or international institution the competence of organs of State authority in relation to certain matters.*”

² Krzysztof Wojtyczek, *Przekazanie kompetencji państwa organizacjom międzynarodowym, Wybrane zagadnienia konstytucyjne* (Cracow: Wydawnictwo Uniwersytetu Jagiellońskiego, 2007), 121 ff.

public of 2001³. The founding countries, i.e. France, Germany, Italy and the Netherlands also acceded to the European Communities on the basis of a general authorisation relating to broadly understood international organisations. However, the Basic Law for the Federal Republic of Germany additionally introduced the condition that such organisation should work for the maintenance of peace and security.⁴

The second method refers to the Constitutions of the Member States that precisely indicated the European Union or the European Communities as the beneficiary of the conferred competences. As an example, it is worth referring to the provisions of the Constitution of the Slovak Republic. According to Art. 7 para. 2 „*The Slovak Republic may, by an international treaty, which was ratified and promulgated in the way laid down by a law, or on the basis of such treaty, transfer the exercise of a part of its powers to the European Communities and the European Union. Legally binding acts of the European Communities and of the European Union shall have precedence over laws of the Slovak Republic. The transposition of legally binding acts which require implementation shall be realized through a law or a regulation of the Government according to Art. 120, para. 2*”⁵.

A more extensive formula was adopted in Germany, France, Lithuania and Portugal.⁶ Firstly, these countries amended their Constitutions by in-

³ The Constitutional Act of the Czech National Council of 16 December 1992, The Constitution of the Czech Republic, Sbíрка Zákonů České Republiky 1993 No. 1. Art. 10a (1) „*Certain powers of Czech Republic authorities may be transferred by treaty to an international organization or institution*”.

⁴ Art. 24 of the Basic Law for the Federal Republic of Germany, as amended, December 28, 2019 <https://www.btg-bestellservice.de/pdf/80201000.pdf> .

⁵ Art. 7 para. 2 of the Constitution of the Slovak Republic of 1 September 1992, Zbierka zákonov Slovenskej republiky 1998, No. 244, as amended, December 28, 2019 <https://www.prezident.sk/upload-files/46422.pdf>.

⁶ Art. 7 para. 6 of the Constitution of the Portuguese Republic – „*Subject to reciprocity and with respect for the fundamental principles of a democratic state based on the rule of law and for the principle of subsidiarity, and with a view to the achievement of the economic, social and territorial cohesion of an area of freedom, security and justice and the definition and implementation of a common external, security and defence policy, Portugal may agree to the joint exercise, in cooperation or by the Union's institutions, of the powers needed to construct and deepen the European Union*” . December 28, 2019 <https://www.wipo.int/edocs/lexdocs/laws/en/pt/pt045en.pdf> .

roducing detailed solutions regarding EU membership. The amendment to the Constitution of the Portuguese Republic, dictated by the opening of this country to integration processes, was related to the introduction of the provisions of Art. 7 para. 5 and 6 of the Constitution.⁷ The first of these commits Portugal to „reinforcing the European identity and to strengthening the European states' actions in favour of democracy, peace, economic progress and justice in the relations between peoples”.⁸ Paragraph 6, on the other hand, refers directly to the issue of conferral of powers and stipulates that „Subject to reciprocity and with respect for the fundamental principles of a democratic state based on the rule of law and for the principle of subsidiarity, and with a view to the achievement of the economic, social and territorial cohesion of an area of freedom, security and justice and the definition and implementation of a common external, security and defence policy, Portugal may agree to the joint exercise, in cooperation or by the Union's institutions, of the powers needed to construct and deepen the European Union”.⁹

As indicated above, Germany acceded to the European Communities by virtue of the general authorisation contained in Art. 24 of the Basic Law for the Federal Republic of Germany, according to which „the Federation may, by a law, transfer sovereign powers to international organisations”. Then, in 1992, the provisions of Art. 23 of the Basic Law were added. They emphasise that the Republic of Germany cooperates in European integration and creates the European Union with other countries and, at the same time, they specify the political features to which the Union itself is subject, e.g. respect for the principle of democracy, the rule of law, social rule, federation, subsidiarity and ensuring fundamental rights at the level comparable to those contained in the Basic Law¹⁰.

⁷ Anna Łabno, „Europeizacja Konstytucji Portugalii z 1979 r.,” in *Europeizacja konstytucji państw Unii Europejskiej (Europeanisation of the Constitutions of the States of the European Union)*, ed. Katarzyna Kubuj, Jan Wawrzyniak (Warsaw: Wydawnictwo Naukowe SCHOLAR, 2011), 241 ff.

⁸ Art. 7 para 5 of the Constitution of the Portuguese Republic.

⁹ Art. 7 para. 6 of the Constitution of the Portuguese Republic.

¹⁰ „With a view to establishing a united Europe, the Federal Republic of Germany shall participate in the development of the European Union that is committed to democratic, social and federal principles, to the rule of law and to the principle of subsidiarity and that guarantees a level of protection of basic rights essentially comparable to that afforded by this Basic Law. To

In France, under the amendment of 1992, Chapter XV “On European Communities and the European Union” was added. It stipulates in Art. 88 – 1 that „*The Republic shall participate in the European Communities and in the European Union constituted by States which have freely chosen by virtue of the treaties which established them to exercise some of their powers in common*”.¹¹

A very interesting solution was adopted in Lithuania. The prospect of joining the European Union resulted in the need to amend the Constitution in areas concerning the possibility and the scope of conferring powers on the European Union. After several years of work, it was decided to supplement the Constitution of the Republic of Lithuania with a Constitutional Act that, pursuant to Art. 150, is its integral part.¹² The indicated Act stipulates in point 1 that „*The Republic of Lithuania as a Member State of the European Union shall share with or confer on the European Union the competences of its State institutions in the areas provided for in the founding Treaties of the European Union and to the extent it would, together with the other Member States of the European Union, jointly meet its membership commitments in those areas as well as enjoy the membership rights*”.¹³

this end the Federation may transfer sovereign powers by a law with the consent of the Bundesrat. The establishment of the European Union, as well as changes in its treaty foundations and comparable regulations that amend or supplement this Basic Law or make such amendments or supplements possible, shall be subject to paragraphs (2) and (3) of Article 79.”, Art. 23 para. 1 of the “Basic Law for the Federal Republic of Germany”. For more: Magdalena Balczyk, *Polski i Niemiecki Trybunał Konstytucyjny wobec członkostwa państwa w Unii Europejskiej* (Wrocław: E – Wydawnictwo Uniwersytetu Wrocławskiego, 2017), 51 ff.

¹¹ Art. 88-1 of the Constitution of the French Fifth Republic, December 28, 2019 https://www.conseil-constitutionnel.fr/sites/default/files/as/root/bank_mm/anglais/constitution_anglais_oct2009.pdf. For more on the Europeanisation of the French Constitution, see: Katarzyna Kubuj, „Europeizacja konstytucji w świetle zmian Konstytucji V Republiki Francuskiej,” in *Europeizacja konstytucji państw Unii Europejskiej (Europeanisation of the Constitutions of the States of the European Union)*, ed. Katarzyna Kubuj, and Jan Wawrzyniak (Warsaw: Wydawnictwo Naukowe SCHOLAR, 2011), 99.

¹² Krzysztof Budziło, „Europeizacja Konstytucji Republiki Litewskiej,” in *Europeizacja konstytucji państw Unii Europejskiej*, ed. Katarzyna Kubuj, and Jan Wawrzyniak (Warsaw: Wydawnictwo Naukowe SCHOLAR, 2011), 168–169.

¹³ The Constitutional Act of the Republic of Lithuania on Membership of the Republic of Lithuania in the European Union of 13 July 2004, December 29, 2019

In conclusion, the Constitutions of the Member States contain different methods of conferral of competences on the European Union. First, the Constitution is the basis for conferral of some of the competences on an international organisation (Poland); second, the conferral of competences on the European Union (Slovakia) or third, joint exercise of some sovereign powers at the EU level, e.g. France, and fourth, conferral of sovereign powers with the obligation to implement certain principles at the EU level, e.g. Germany. The analysis of the indicated provisions clearly shows that the Constitutions of the Member States exclude full conferral of competence on the European Union, yet there is no specification of the scope of competences that may be conferred. However, this issue was addressed by Constitutional Courts of the Member States.

2.2. The scope of conferred competences from the perspective of Constitutional Courts of the Member States.

The analysis of the judgements of Constitutional Courts of the Member States indicates two periods. The first is related to defining the principles of application of EU law in national legal orders, and the second is devoted to the interaction between EU and national law, including in particular the issue of exclusive competences of the Member States.¹⁴ Consistently, the considerations of the Courts focused on the scope of cooperation in the area of economic integration, which gradually expanded to areas belonging to the traditional exclusive prerogatives of the state. It is worth emphasizing that the broadening of EU competences has caused greater activity of Constitutional Courts in the sphere of protection of the exclusive competences of the Member States.

The analysis of the indicated issue should begin with the position of the German Federal Constitutional Court in the Maastricht judgement. The basic issue addressed in the case law was the scope of EU competences

https://www.lrs.lt/upl_files/Lietuvos_pirmininkavimas_ES/dokumentai/CONSTITUTIONAL_ACT.pdf

¹⁴ The author has broadly analyzed the indicated issue in: Edyta Krzysztofik, "Charakter prawa unijnego w orzecznictwie Trybunału Sprawiedliwości i sądów konstytucyjnych państw członkowskich," *Roczniki Nauk Prawnych* 24, no. 2 (2014): 7–30.

and the way they are exercised. The Federal Constitutional Court emphasized that the EU does not have creative capacity to establish its own competences. Under the provisions of their Constitutions, the Member States have conferred part of their powers on the EU. Therefore, it is the holder of competences, the scope of which is determined by the Member States. Recognizing the competence of the Court of Justice in the sole lawful interpretation of EU law, the Federal Court emphasized that *„it is indeed possible for an individual provision which accords functions or powers to be interpreted in the context of the objectives of the Treaty; however, this objective does not by itself constitute sufficient grounds for the establishment or extension of functions or powers”*¹⁵. In addition, it noted the distinction between „conferring” and „transferring”. This indicates a conditional character; the possibility of a reverse action involving its withdrawal. The Court emphasized that *„Germany is one of the “High contracting parties” which have given as the reason for their commitment to the Maastricht Treaty, concluded “for an unlimited period” (Art. Q [51] TEU), their desire to be members of the European Union for a lengthy period; such membership may, however, be terminated by means of an appropriate act being passed”*¹⁶. In conclusion, the Member States provide the EU with competences established in the Treaty that constitute the exclusive scope of its activity. Their catalogue cannot be extended by the EU itself because it has no creative capacity. The scope of EU competences and the time when they are exercised depends on the will of the Member States.

Another group of judgements of Constitutional Courts have already directly affected the scope of the exclusive competences of the Member States, namely the problem of non-conferrable competences with the obligation to respect constitutional identity of the Member States. Two positions should be indicated in this group of judgements.

The first emphasizes conferral of competences on the EU with the proviso that it is not absolute, but its limits are provided for. However,

¹⁵ German Federal Constitutional Court, Judgement of 12 October 1993: 31, December 28, 2019 <https://iow.eui.eu/wp-content/uploads/sites/18/2013/04/06-Von-Bogdandy-German-Federal-Constitutional-Court.pdf>.

¹⁶ German Federal Constitutional Court, Judgement of 12 October 1993: 21, December 28, 2019 <https://iow.eui.eu/wp-content/uploads/sites/18/2013/04/06-Von-Bogdandy-German-Federal-Constitutional-Court.pdf>.

the limits are not specified, but reference is made to the general characteristics of the relationship between the EU and national legal orders.¹⁷ K. Wójtowicz stated that, e.g. the Constitutional Court of the Czech Republic emphasized that defining the limits of conferral of competences „*is a political issue, which is essentially decided by the legislator, who in this case has a wide margin of discretion [...]. It (CC) can, however, review these decisions after they are actually taken at the political level. [...] The Constitutional Court can verify whether an EU legal act goes beyond the powers that the Czech Republic has conferred on the EU*”¹⁸.

The second approach illustrates, among others, the position of the Polish Constitutional Court and the German Federal Constitutional Court. The Polish Constitutional Court, in the case of the Treaty of Lisbon¹⁹, focused on the concept of national and constitutional identity, which is also the scope of the non-conferrable competence of the Member States. The Polish Constitutional Court emphasized that the term constitutional identity should mean the values on which the Constitution is based.²⁰ Thereby this delimits the area of exclusion from the scope of conferred competences in those fields that constitute the foundation and the basis of the Polish system. Działocha emphasizes that constitutional identity sets limits to “*exclusion from the conferral of matters belonging to [...] the “core” of cardinal foundations of a given state’s system*”²¹. On the other hand, the scope of the non-conferrable competences, according to the Constitutional Court, includes: „*the supreme principles of the Constitution, provisions regarding the rights of an individual that determine the identity of the State, protection of human dignity and constitutional rights, the principle of statehood, the principle of democracy, the rule of law, the principle of social justice, the principle*

¹⁷ Krzysztof Wójtowicz, „Poszanowanie tożsamości konstytucyjnej państw członkowskich Unii Europejskiej,” *Przegląd Sejmowy* 99, no. 4 (2010): 16.

¹⁸ Krzysztof Wójtowicz, „Poszanowanie tożsamości konstytucyjnej państw członkowskich Unii Europejskiej,” 16.

¹⁹ Constitutional Court of the Republic of Poland, Judgement of 24 November 2010, Ref. No. K 32/09, Journal of Law 2010, No 229, item 1506.

²⁰ Cf.: Lech Garlicki, „Normy konstytucyjne relatywnie niezmienniane,” in *Charakter i struktura norm Konstytucji*, ed. Jan Trzcziński (Warsaw: Wydawnictwo Sejmowe, 1997), 148.

²¹ Krzysztof Działocha, „Uwagi do art. 8 Konstytucji RP,” in *Konstytucja RP. Komentarz* Vol.5, ed. Lech Garlicki (Warsaw: Wolters Kluwers, 2007), 34.

of subsidiarity, and the requirement to ensure better implementation of constitutional values and a prohibition of the delegation of constitutional power and powers to create competences"²².

A similar position was taken by the German Federal Constitutional Court which stated that „*This applies in particular to areas which shape the citizens' living conditions, in particular the private sphere of their own responsibility and of political and social security, protected by fundamental rights, as well as to political decisions that rely especially on cultural, historical and linguistic perceptions and which develop in public discourse in the party political and parliamentary sphere of public politics. Essential areas of democratic formative action comprise, inter alia, citizenship, the civil and the military monopoly on the use of force, revenue and expenditure including external financing and all elements of encroachment that are decisive for the realization of fundamental rights, above all in major encroachments on fundamental rights such as deprivation of liberty in the administration of criminal law or placement in an institution. These important areas also include cultural issues such as the disposition of language, the shaping of circumstances concerning the family and education, the ordering of the freedom of opinion, press and of association and the dealing with the profession of faith or ideology*”.²³

3. SCOPE OF EXCLUSIVE COMPETENCES OF THE MEMBER STATES FROM THE PERSPECTIVE OF EUROPEAN UNION LAW

The Court of Justice has repeatedly emphasized that Member States have at least partly limited their sovereignty by conferring some of their powers on the European Union.²⁴ Consequently, it has the capacity to take legislative action only within the competences conferred on it by

²² Krzysztof Działocha, „Uwagi do art. 8 Konstytucji RP,” 34.

²³ Federal Constitutional Court, Judgement of 30 June 2009, case No. 2 BvE 2/08, 2 BvE 5/08, 2 BvR 1010/08, 2 BvR 1022/08, 2 BvR 1259/08, 2 BvR 182/09”, p. 249.

²⁴ For more see: e.g.: Roman Kwiecień, *Suwerenność państwa, rekonstrukcja i znaczenie idei w prawie międzynarodowym* (Cracow: Zakamycze, 2004), 143–144; Stanisław Biernat, „Zasada pierwszeństwa prawa unijnego po Traktacie z Lizbony,” *Gdańskie Studia Prawnicze*, no. 25 (2011): 49–61.

the Member States. This thesis was confirmed by the provisions of Art. 5 para. 2 of the Treaty on European Union²⁵ which states that „*Under the principle of conferral, the Union shall act only within the limits of the competences conferred upon it by the Member States in the Treaties to attain the objectives set out therein. Competences not conferred upon the Union in the Treaties remain with the Member States.*”²⁶ The competences were further divided into exclusive, shared and coordinating.²⁷ Therefore, there is no doubt that such defining of the types of competences indicates how those conferred on the European Union by the Member States are exercised. The initial action is to limit the sovereignty and equip the European Union with specific competences, which are then exercised as exclusive, shared or coordinating competences.²⁸ Separation of the competences of the European Union from those of the Member States was also reflected in the provisions of Art. 6 (1) TEU that refer to the scope of application of the provisions of the Charter of Fundamental Rights. It states that „*The provisions of the Charter shall not extend in any way the competences of the Union as defined in the Treaties*”, and in Art. 51 (1) of the Charter itself, which clearly indicates that „*The provisions of this Charter are addressed to [...] the Member States only when they are implementing Union law*”. In addition, provisions of the Charter do not extend the scope of application of European Union law beyond EU competences, do not establish new competences or tasks, and do not change the competences and tasks specified in the Treaties.²⁹

²⁵ The Treaty on European Union, OJ EU C 202 of 7 June 2016 (consolidated version, hereinafter: TEU).

²⁶ For more on the principle of conferral see: Tomasz Tadeusz Koncewicz, *Zasada jurysdykcji powierzonej Trybunałowi Sprawiedliwości Wspólnot Europejskich* (Warsaw: Wolters Kluwers 2009), 83–91.

²⁷ Art. 2 of the „Treaty on the Functioning of the European Union”, OJ EU 202/47 of 7 June 2016 (consolidated version, hereinafter: TFEU).

²⁸ For more on EU competences and the principles of their exercise see: Artur Kuś, *Kompetencje wyłączne Unii Europejskiej w zakresie Wspólnej Polityki Handlowej i Unii Celnej* (Lublin, Wydawnictwo KUL, 2012), 64–81.

²⁹ For more see: Mirosław Wróblewski, „Karta Praw Podstawowych w polskim sądownictwie – problemy i wyzwania,” *Krajowa Rada Sądownicza*, no. 2 (2015): 18 ff.; Andrzej Wróbel, „Komentarz do art. 51 Karty Praw Podstawowych,” in *Karta Praw Podstawowych Unii Europejskiej. Komentarz*, ed. Andrzej Wróbel (Warsaw: C. H. Beck, 2013), 1312 ff.

3.1. The exercise of the exclusive competences of the Member States from the perspective of the case law of the Court of Justice

The question here is whether the division of competences established in the Treaty means total freedom in exercising the exclusive competences of the Member States. The analysis of the case law of the Court of Justice in this respect indicates different situations. One may use as an example the position of the Court of Justice expressed in its extensive case-law on marital status files, namely the problem of transcription or conferral of surnames of migrant citizens. In the analyzed judgements concerning the problem in question the Court of Justice clearly emphasized that „[...] *the rules governing a person's surname are matters coming within the competence of the Member States, the latter must none the less, when exercising that competence, comply with Community law [...], in particular the Treaty provisions on the freedom of every citizen of the Union to move and reside in the territory of the Member States [...]*”³⁰ Therefore, there is no doubt that the Member States issue decisions on conferral of surnames in accordance with their own laws. However, according to the thesis cited, the manner of exercise of a given competence should take EU law into account. While referring directly to the competences in the field of Civil Registry Offices and conferral of surnames, as emphasized by the Court of Justice, this is the competence of the Member States, but it should be exercised taking into account the special situation of migrant citizens. There is no doubt that the subject matter directly affects one of the fundamental freedoms of the Internal Market, i.e. free movement of persons.

The crucial question that arises in the context of the exercise of the Member States' competences in the field of Civil Registry relates to the moment when the State excludes or restricts the free movement of migrant citizens. In its judgements on the issue the Court of Justice emphasized that the application of national provisions governing the issue of conferral of surnames or their recognition constitute a restrictive measure if they cause „serious inconvenience” for the migrant citizen. In the Court's opinion „[...] *a discrepancy in surnames is liable to cause*

³⁰ Cf.: e.g.: CJEU Judgement of 2 October 2003, Garcia Avello v. Belgian State, Case C 148/02, ECLI:EU:C:2003:539.

serious inconvenience for those concerned at both professional and private levels resulting from, inter alia, difficulties in benefiting, in the Member State of which they are nationals, from the legal effects of diplomas or documents drawn up in the surname recognized in another Member State of which they are also nationals".³¹ Thus, if the refusal to recognize a surname causes serious difficulties in the sphere of public and private law, it constitutes serious inconvenience, which is a premise of applying a different rule than that arising from national provisions. However, the Court of Justice also provided for derogations in this situation by referring to the doctrine of imperative requirements, which may be invoked by the State in order to protect important state interests.

Another example is related to the exercise of the exclusive competences of the Member States regarding the fundamental value of the concept of marriage. The Court considered this problem in the Coman judgement.³² The subject matter of the case was the possibility of obtaining the right to stay on the territory of Romania of a spouse of a migrant citizen of that country who entered into a same-sex marriage under Belgian law. Romanian law explicitly prohibits such relationships and, which seems very important from the perspective of the exclusive competences of the Member States, had introduced a legal definition of marriage as a relationship between a man and a woman. The Court of Justice recalled the above arguments as grounds justifying the need for a derivative right of residence. It emphasized the exclusive competence of the State, but its absolute exercise caused serious inconvenience in the exercise of the freedom of movement. It should be emphasized, however, that in this case the Court indicated that the scope of the right granted was limited only to residence matters. The Court of Justice did not find that the national law was incompatible with EU law, nor did it obligate Romania to amend its legislation regarding the recognition of same-sex marriages. However, it limited the effect of the provisions in the aforementioned case, but only in

³¹ Cf.: CJEU, Judgement of 14 October 2008, Stefan Grunkin, Dorothee Regina Paul, Case C 353/06 ECLI:EU:C:2008:559.

³² CJEU, Judgement of 5 July 2018, Relu Adrian Coman, Robert Clabourn Hamilton v. Inspectoratul General pentru Imigrari (Romania)", Case C 673/16, ECLI:EU:C:2018:385.

the sphere of the right to legal residence of a spouse who is a third-country national with the status of a family member of a migrant citizen.³³ There is no doubt that this case is an example of the impact of the Court of Justice on the exclusive competences of the Member States.

The issue of the exercise of the exclusive competences of the Member States was analyzed by the Court of Justice in case C 618/19³⁴ as well as in joined cases C-585/18, C-624/18 and C-625/18³⁵ that addressed the controversial matter of the structure of a national judicial system in the context of the Polish judicial reform. In the first of these cases, C 619/18, the Court emphasized that the organization of justice systems falls within the competences of the Member States, yet when exercising them they are still required to comply with their obligations under the Treaties (in this particular case the provisions of the CFR regarding the right to a fair trial). The Court of Justice expressly stated that „[...] *the Member States are required to comply with their obligations deriving from EU law [...] and, in particular, from the second subparagraph of Article 19 (1) TEU [...]. Moreover, by requiring the Member States thus to comply with those obligations, the European Union is not in any way claiming to exercise that competence itself, nor is it [...] arrogating that competence*”.³⁶ In exercising their competences, the Member States must accept that in such a situation the Union verifies compliance with the standards it has set. Consequently, „*the Union imposes effective restrictions on the Member States in exercising their competences, combines a material and legal standard with a coercive mechanism*”.³⁷

³³ For more see: Edyta Krzysztofik, „Gloss to Judgement of the Court of Justice of the European Union in Case C 673/16 *Relu Adrian Coman, Robert Clabourn Hamilton v. Inspectoratul General pentru Imigrari (Romania)*,” *Przegląd Prawa Konstytucyjnego* 51, no. 5 (2019): 438.

³⁴ CJEU Judgement of 24 June 2019, *European Commission v Republic of Poland (Indépendance de la Cour suprême)*”, Case C 619/18, ECLI:EU:C:2019:531.

³⁵ CJEU, Judgement of 19 November, *A. K. v Krajowa Rada Sądownictwa*, Case C-585/18 and *CP v. Sąd Najwyższy*, Case C-624/18 and *DO v. Sąd Najwyższy*, Case C-625/18, ECLI:EU:C:2019:982.

³⁶ Case C 619/18, p. 52.

³⁷ Paweł Filipek, „Nieuusuwalność sędziów i granice kompetencji państwa członkowskiego do regulowania krajowego wymiaru sprawiedliwości – uwagi na tle wyroku Trybu-

The next judgement referred directly to the issue of judicial independence and violation of Art. 47 CFR. As indicated above, the CFR is binding on the Member States when they take measures to implement EU law and only within the scope of EU competence. Premises justifying reference to Art. 47 CFR should be considered from the perspective of the position of national courts in the structure of the EU justice system, which is characterized by systemic dualism. On the one hand, it includes the Court of Justice of the European Union, which has a well-defined jurisdiction expressed in the Treaties. On the other hand, it relies on the courts of the Member States, which are obligated to guarantee direct application of EU law in their national legal orders. The problem that has been consistently analyzed should be considered in two dimensions. Firstly, as the exclusive competence of the Member States in the organization of the justice system in terms of the structural approach. Secondly, it cannot be overlooked that when ruling under EU law, the national court becomes an 'EU court' as part of the EU justice system. Then it must meet the conditions defined by the Court of Justice itself.³⁸ Following the interpretation indicated above, the organization of justice systems is an exclusive competence of the Member States, but it cannot violate EU standards. In the discussed case, the Member States, when defining the organizational structure of the judicial system, exercise their exclusive competences, while the solutions adopted cannot violate EU standards, including the standard of judicial independence established by the Court of Justice. It should also be emphasized that the Court did not independently assess Polish solutions, but indicated the criteria for reviewing

nału Sprawiedliwości z 24.06.2019 r. C 618/18, Komisja Europejska przeciwko Rzeczypospolita Polska," *Europejski Przegląd Sądowy*, no. 12 (2019): 8.

³⁸ The issue of the definition of a national court was widely discussed in the judgements of the Court of Justice in the context of requests submitted for preliminary ruling. Cf. E.g.: Andrzej Wasilewski, „Pojęcie sądu w prawie polskim i w świetle standardów europejskich,” in *Sąd Najwyższy wobec prawa i praktyki Unii Europejskiej*, ed. Walerian Sanetra (Wrocław: Wydawnictwo Uniwersytetu Wrocławskiego, 2003), 9–46; Edyta Krzysztofik, „Pytanie prejudycjalne a praktyka sądów w latach 2004 – 2013,” in *Wpływ *acquis communautaire* i *acquis Schengen* na prawo polskie – doświadczenia i perspektywy* Vol. I, ed. Anna Szachon-Pszenny, (Lublin: Wydawnictwo KUL, 2014), 109–122; Dagmara Kornobis-Romanowska, *Sąd krajowy jako sąd wspólnotowy* (Warsaw: Wolters Kluwers, 2007).

the condition of independence of the national court, leaving the final decision to domestic courts.

A separate matter is cases where the Court of Justice excluded its own jurisdiction on the basis of lack of competence of the European Union. As an example, reference should be made to decision C 28/14 regarding a request submitted for a preliminary ruling by the Częstochowa District Court³⁹ in connection with the so-called „UB-eks Removal Act”⁴⁰. The Court of Justice left the request without further procedural steps arguing its decision by lack of competence. It recalled the rules governing the application of the CFR provisions and emphasized that the domestic court had not demonstrated the connection between the facts and the implementation of EU law by the Member States, or EU competence in this respect.

3.2 The doctrine of imperative requirements and the exercise of the exclusive competences of the Member States

When undertaking the analysis of the possibility for Member States to exercise their exclusive competences, reference should be made to the provisions of Art. 4 para. 2 TEU, which, in addition to the principle of equality of the Member States, introduces the principle of respect for national identity „inherent in their fundamental structures, political and constitutional”. Reference to this principle was made for the first time in the provisions of the Maastricht Treaty.⁴¹ As emphasized above, this principle was

³⁹ CJEU Order of 12 June 2014, *Ryszard Pańczyk v. Dyrektor Zakładu Emerytalno Rentowego Ministerstwa Spraw Wewnętrznych i Administracji w Warszawie*, Case C 28/14, ECLI:EU:C:2014:2003.

⁴⁰ Act on Retirement Benefit for Police Officers, the Internal Security Agency, the Foreign Intelligence Agency, the Military Counter-Intelligence Service, the Military Intelligence Service, the Central Anti-Corruption Bureau, the Border Guard, the State Protection Service, the State Fire Service, the Customs and Tax Service, Prison Service and their Families. OJ 2019 item 288.

⁴¹ For more on the evolution of the principle of respect for national identity of the Member States see: Edyta Krzysztofik, „The Position of the Principle of Respect for Constitutional Identity in EU Law,” *Przegląd Prawa Konstytucyjnego* 40, no. 6 (2017): 158 ff.; Marek Rzotkiewicz, „National Identity as a General Principle of EU Law and Its Impact on

normalized together with the principle of equality of the Member States. This solution is not accidental. The assumption that all countries have the same position from the perspective of integration processes also entails the commitment that as the process progresses, they do not lose their identity in both the national and constitutional contexts. On the other hand, the key issue seems to be the impact of this principle on the application of EU law in the national legal order and on the exercise of the exclusive competence of the Member States. At this point a distinction should be made between these two situations. First, reference to the principle in question as a premise restricting the application of EU law. In this aspect, the element that is de facto indicated is the theory of imperative requirements, which is already well-established in the case law of the Court of Justice. In the second case, reference should be made to the principle of respect for national identity, namely one of its aspects, i.e. constitutional identity, as an instrument for protecting the scope of the exclusive competence of the Member States.

The doctrine of imperative requirements was proposed by the Court of Justice in the *Cassis de Dijon* case.⁴² Its primary purpose is to safeguard a specific good protected by the law of a Member State. It is important to emphasize the nature of the good that is individually identified at the level of each Member State. The analysis of the judgements of the Court of Justice shows that it has repeatedly referred to the principle of respect for national identity as a premise of restricting the application of EU law. In its judgements the Court indicated individual elements that shape the definition of national identity in both ethical and institutional aspects.⁴³ The Court assumed, inter alia, that protection of the national language⁴⁴,

the Obligation to Recover State Aid,” *Yearbook of Antitrust and Regulatory Studies* 13, no. 9 (2016): 48 ff.

⁴² CJEU Judgement of 20 February 1979, *Rewe-Zentral AG v. Bundesmonopolverwaltung für Branntwein (Cassis de Dijon)*, Case C 120/78, ECR 0649.

⁴³ Reinhard Arnold, „Tożsamość narodowa i ponadnarodowa w Traktacie z Lizbony,” in *Quo Vadis Europa III?*, ed. Eugeniusz Piontek, Krzysztof Karasiewicz (Warsaw: UKIE, 2009), 56–58.

⁴⁴ CJEU Judgement of 28 November 1989, *Anita Groener v. Minister for Education in the City of Dublin Vocational Education Committee*, Case C 379/87, ECR (1989): 3967.

cultural goods⁴⁵, commercial customs⁴⁶, human dignity⁴⁷ and fundamental rights⁴⁸ constitute grounds justifying the restriction of the freedoms of the Internal Market, provided that the principles of proportionality and non-discrimination⁴⁹ are observed.

A separate and a controversial issue is the assumption that the principle of respect for national and constitutional identity is a premise justifying protection of the exclusive competence of the Member States. It has been indicated above that Constitutional Courts identify the scope of non-conferrable competences with the notion of constitutional identity.⁵⁰ Guided by this interpretation, one should assume that the European Union has a double obligation to respect the scope of competence of the Member States: on the basis of the principle of conferral and the principle of respect for national identity of the Member States. It is worth emphasizing, however, that the principle of conferral is of general nature because it regulates the scope of competences that the Member States conferred on the European Union in the Founding Treaties. Therefore, it should be a catalogue to which all Member States have agreed under specific provisions of their own legislative acts. However, it seems that the principle of respect for national identity, including constitutional identity, should be perceived differently. The responsibility lies with the European Union and that is beyond doubt. However, the scope of the concept of constitutional

⁴⁵ CJEU Judgement of 26 February 1991, *Commission of the European Communities v French Republic*, Case C 154/89, ECR 1991, p. I-3265; CJEU Judgement of 26 February 1991, *Commission of the European Communities v Italian Republic*, Case C 180/89, ECR 1991, I-709; CJEU Judgement of 26 February 1991, *Commission of the European Communities v Hellenic Republic*, Case C 198/89, ECR (1991): I-727.

⁴⁶ CJEU Judgement of 23 November 1989, *Torfaen Borough Council v. B&Q*”, Case C145/88 ECR (1989): 3851.

⁴⁷ CJEU Judgement of 14 October 2004, *Omega Spielhallen und Automatenaufstellungs-GmbH v. Oberbürgermeisterin der Bundesstadt Bonn 1*, Case C-36/02, ECR (2004): I-9609.

⁴⁸ CJEU Judgement of 12 June 2003, *Eugen Schmidberger, Internationale Transporte und Plan-züge v. Republik Austria*, Case C 112/00, ECR (2003): I-5659.

⁴⁹ For more see: Edyta Krzysztofik, ”Poszanowanie wartości narodowych przesłanką uzasadniająca ograniczenie swobód rynku wewnętrznego,” in *Europa, zjednoczeni w różnorodności*, ed. Cezary Mik, (Warsaw: Wydawnictwo Sejmowe, 2012), 434–452.

⁵⁰ Cf.: The Constitutional Court of the Republic of Poland.

national identity will be different. It will be individually defined in specific cases. The European Union emphasizes that its value is the diversity of the Member States, which is why its preservation is possible only while respecting the specificity and individuality of each State. In this regard, it should be assumed that the principle of respect for national identity in this context will be activated when the exclusive competences of the Member States are violated.⁵¹

A separate issue is the possibility of applying the doctrine of imperative requirements when, in exercising its own competence, a Member State causes „serious inconvenience”. As indicated above, it occurs when the State’s activity affects the implementation of the objectives of the Treaties. In this context it is worth referring to the judgement of the Court of Justice in case C 208/09 *Ilonka Sayn-Wittgenstein*⁵², where it emphasized that „public policy may be relied on only if there is a genuine and sufficiently serious threat to a fundamental interest of society”. In addition, it indicated that „the specific circumstances which may justify recourse to the concept of public policy may vary from one Member State to another and from one era to another. The competent national authorities must therefore be allowed a margin of discretion within the limits imposed by the Treaty”. Each Member State has its own culture, history, tradition and defines its own superior values. Their specificity may affect the content of the restrictive premise. The Court also indicated that „it is not indispensable for the restrictive measure issued by the authorities of a Member State to correspond to a conception shared by all Member States as regards the precise way in which the fundamental right or legitimate interest in question is to be protected and that, on the contrary, the need for, and proportionality of, the provisions adopted are not excluded merely

⁵¹ Marek Safjan, „Prawo Unii Europejskiej w porządkach prawnych państw członkowskich” („European Union Law in Legal Orders of the Member States”), in *Zarys prawa Unii Europejskiej (An Outline of European Union Law)*, ed. Roberto Adam, Marek Safjan, Antonio Tizzano, (Warsaw, Wolters Kluwers, 2014), 232.

⁵² CJEU Judgement of 22 December 2010, *Ilonka Sayn-Wittgenstein v. Landeshauptmann von Wien*, Case C-208/09, ECR: 2010, I – 13693. The requests submitted to the Court of Justice referred to the interpretation of Art. 21 TFEU in the context of the Austrian regulations of constitutional status that abolished the nobility, associated privileges, titles and honours granted solely for distinction, not related to office, profession or scientific or artistic merits. In the discussed case Austria referred to the concept of public policy.

because one Member State has chosen a system of protection different from that adopted by another State”.

3.3 Exercise of the exclusive competences of the Member States and the values of the European Union

Another issue that needs to be highlighted is the importance of the homogeneity clause and its impact on the exercise of the exclusive competences by the Member States. According to Art. 2 TEU, it obligates the Member States to respect the values on which the European Union is founded. They include *„respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities”*. Moreover, Art. 2 indicates the premises of interpretation of these values, i.e. *„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”*. The homogeneity clause assumes the existence of common values that are the axiological basis of the European Union itself and of all Member States. It should also be noted that the indicated catalogue refers in its content to documents of public international law, primarily to the Charter of the United Nations and the European Convention for the Protection of Human Rights and Fundamental Freedoms, which bind the Member States.⁵³ It is based on the achievements of European constitutionalism, which has been evolving since the eighteenth century. From this perspective, it should be assumed that Art. 2 TEU contains a catalogue of values that are the constitutional basis of each Member State, form the foundation and the binder of the entire European Union. At the same time, it forms the basis and sets the criteria, a unique test, which is relevant from the perspective of new countries seeking accession with the European Union. The homogeneity clause binds the Member States and the European Union itself. Consequently, every activity of the European Union and its institutions is undertaken while respecting the catalogue of

⁵³ For more on the homogeneity clause see: Robert Krzysztof Tabaszewski, *„Dopuszczalność egzekwowania klauzuli homogeniczności Unii Europejskiej w świetle zasady suwerenności państwa członkowskiego,”* *Journal of Modern Science* 41, no. 2 (2019): 141–156.

values specified in it. Therefore, it should be assumed that the homogeneity clause reinforces the importance of the principle of conferral.

Specific control instruments have been created for Member States to implement the values listed in the clause: the procedure under Art. 7 TEU that introduces the State's political responsibility for violation of values under Art. 2 TEU and „A New EU Framework to Strengthen the Rule of Law”⁵⁴. When analyzing the meaning of Art. 2 TEU from the perspective of the exercise of the exclusive competences of the Member States, it should be emphasized that the values expressed in the indicated provisions are of fundamental importance for the legal systems of the Member States. Consequently, from the perspective of the Member States, they are implemented regardless of the nature of the States' competences, and their implementation is controlled constantly at the national level. Given that each of the Member States' legal systems is based on the joint *acquis* of European constitutionalism, the criteria for control are shared by European countries. Launching the control procedures indicated above would mean that the values that are fundamental to a given Member State have been violated there and that national control instruments are ineffective. Therefore, it seems that Art. 2 TEU is not a restriction for the Member States as regards the exercise of their exclusive competences, but an instrument that strengthens the freedom to exercise them. In implementing fundamental values, the European Union should not exceed the scope of the competences conferred and thus affect the scope of the competences of the Member States.

4. CONCLUSIONS

The process of European integration has introduced the Member States into a new legal reality. The existing exclusivity in the area of competence implementation has been replaced by a two-stage model of their

⁵⁴ „Communication from the Commission to the European Parliament and the Council, A New EU Framework to Strengthen the Rule of Law”, COM(2014) 158 final. 11 March 2014, December 29, 2019 <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52014DC0158&from=PL>.

exercise. The States retained part of their own competences – the exclusive competences of the Member States that are only exercised by them. The second group includes competences exercised jointly with other Member States at the European Union level. The division of competences is not definitive, despite the introduction of this division and the creation of a partial catalogue of EU competences after the Treaty of Lisbon. The Member States, when conferring part of their supervisory powers, did not specify the scope of their own competences. A general principle was adopted that competences not conferred on the EU are the exclusive competences of the Member States. However, this issue was addressed by Constitutional Courts of the Member States that equate the exclusive competences of the Member States with the scope of the concept of constitutional identity reduced to basic constitutional principles of the State. The Court of Justice, which monitors the correct implementation of EU law, analyses the scope of competences of both entities. As regards the exercise of the exclusive competences of the Member States, it has established general directives. First, The States exercise their exclusive competences in accordance with their own constitutional principles while respecting EU values that are shared by all Member States and constitute the achievements of European constitutionalism. However, the free exercise of the exclusive competences of the Member States is limited to the extent to which they affect EU objectives and activities. Regardless of the division of competences, the EU is bound by the principle of respect for national identity of the Member States, including constitutional identity. On the one hand, it obligates the EU to respect the exclusive competences of the Member States, while on the other it is a premise that restricts achievement of EU objectives. It should be emphasized, however, that protection of constitutional identity understood as a restrictive premise must be interpreted individually for each Member State.

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