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EUROPEAN IDENTITY
AND THE FORTRESS
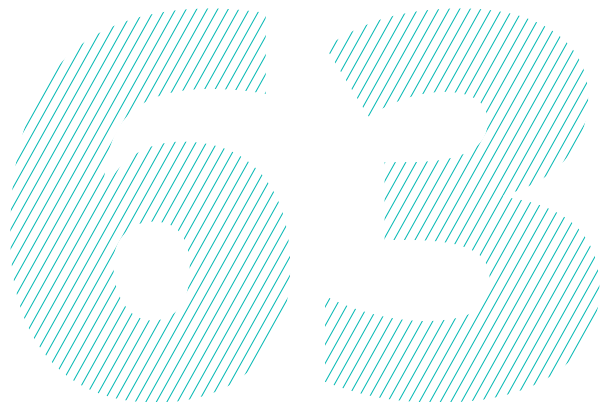EUROPE PARADIGM

EUROPEAN
UNION AND
IDENTITIES

THE PROCESSES OF
(DE)STABILISATION
IN THE BALKANS
THROUGH THE PRISM
OF THE EUROPEAN
INTEGRATION

CYBER SECURITY
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Vasko Naumovski

THE PROCESSES OF (DE) STABILISATION IN THE BALKANS THROUGH THE PRISM OF THE EUROPEAN INTEGRATION

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Introduction

While commemorating 70 years since the signing of the Paris Agreement[1], which established the European Coal and Steel Community, in 2021 the process of European integration is not living its best days, especially not in the Balkans. The internal functional inconsistencies in the Union, the slow pace of work (partly caused by the health and economic crisis), the strengthening of national versus supranational interests, and the clear lack of leadership have significantly changed the agenda of priorities, with the usual "victim" being the expansion.

At the same time, in the broader context of relations with its neighbours, the EU is facing a security crisis on its borders, and a situation which escalation would confront the Union with perhaps the greatest security challenge since its inception. The Russian-Ukrainian turmoil[2] undoubtedly causes concerns in many EU member states, especially those directly bordering one of these two potentially warring parties. The prolonged tensions are certainly compounded by the energy aspects of the relations with the Russian Federation, as well as the security crises at several critical points on Russia's borders with some of its neighbours.[3] The EU's ambitions to become an influential global actor will have to be based on its ability to resolve crises in its immediate surroundings.

At the same time, no visible progress can be registered in the Balkans in the approach of the countries in the region to the EU. Regarding the current membership negotiations, after a two-year break, at the end of 2021, Serbia opened five new chapters (four of which are from the so-called fourth cluster, according to the new methodology), and has closed only two chapters (after eight years of negotiations). Montenegro, meanwhile, entering the tenth year of negotiations, has closed only three chapters. Compared to the enlargement cycle with the countries of Central and Eastern Europe (2004/07), there is a drastic difference in the duration of the negotiations, which in turn causes a decrease in motivation, enthusiasm and commitment to the reforms needed to meet the membership criteria.

The situation in Bosnia and Herzegovina, as well as in Kosovo, does not indicate a final stabilization of these two societies. Namely, the radicalized rhetoric of the leadership of the Serbian entity in Bosnia and Herzegovina[4], calling into question the viability of the federation, as well as the stalemate in the Belgrade-Pristina dialogue, diminish the

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1   Signed on 18.04.1951 in Paris, and entered into force on 23.07.1952, establishing the European Coal and Steel Community.

2   Since March 2021, a series of security incidents have started on the territory of Ukraine under the control of pro-Russian armed groups, as well as on the border between Russia and Ukraine, accompanied by military deployment of troops on both sides of the border, and intensive diplomatic activities aimed at reducing tensions.

3   In mid-November 2021, the crisis between Armenia and Azerbaijan escalated again (albeit briefly), in January 2022, several days of protests erupted in Kazakhstan (resulting in dozens of casualties), and the internal political crisis in Georgia became more complicated (with possible implications on the relations with Russia).

4   Bosnian Serb leader Milorad Dodić has repeatedly announced that a break-up of the federation is possible (as well as that he will advocate a "peaceful break-up"), a renewal of the army of the Serbian entity, and a boycott of joint institutions.

prospects for progress in bringing these countries closer to the EU. The kind of "arms race" in the region[5] also highlights the security aspects of the relations in the region, reaffirming the need to focus on the EU.

Regarding the countries awaiting the start of negotiations, in the Macedonian and Albanian accession processes, in 2021 there was no progress in their status. If in 2019 the stalemate was a result of the need to reform the negotiation methodology[6], in 2020 and 2021 the start of the negotiations was conditioned by resolving the bilateral Macedonian-Bulgarian problem. Bulgaria is exercising its veto power at a time when it is unfavourable for the enlargement, stimulated further by the internal political developments. And after three election cycles[7], the fragile ruling coalition[8] is facing the challenge of creating a common position on the dispute, knowing that some of the government coalition partners have strong nationalist positions on this issue. On the other hand, the parliamentary majority maintained by the Macedonian government[9] largely depends on the start of the negotiations, given that it was the European perspective that was the reason for maintaining and increasing the parliamentary majority.

The absence of a clear progress in this direction will increase the internal pressure from the coalition partners, but also from the opposition and the general public, which would further problematize the political situation. In essence, the postponement of the start of the negotiations goes in favour of the political destabilization of the country, and further reduction of the support for EU membership, as well as in favour of the external actors who oppose the enlargement of the Union.

To what extent can the political stabilization of the Bulgarian political scene contribute to the closure of the bilateral dispute, which would mean diminishing the potential for creating a new, long-lasting "frozen" conflict in the Balkans? The influences of external actors are not alien to the Bulgarian society either, having in mind the long tradition of cooperation with countries outside the EU and NATO and other structures typical for past regimes, which have their share in the political developments[10], but also in the academic

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5 Serbia decided to procure 30 military helicopters in 2022 and 2023, and supported the domestic military industry with 145 million euros; Croatia is procuring 12 French-made warplanes; Hungary also procured 20 new military helicopters; Bulgaria, meanwhile, has decided to purchase eight F-16 fighter jets.

6 In October 2019, France stressed the need to reform the negotiation methodology before agreeing to a decision to start negotiations, while some member states opposed the start of negotiations with Albania due to the need for further reforms in this country.

7 Parliamentary elections in Bulgaria were held on April 4, July 11 and November 14, 2021, with the new government elected on December 13, 2021.

8 The Bulgarian government is made up of four political parties: "We are continuing the change", "Democratic Bulgaria", "There is such a people" and the Bulgarian Socialist Party.

9 The government consists of four parties/coalitions: SDSM, DUI and "Alternative", formed after the turmoil in the Parliament, where the party "Alternative" was part of the announced new majority, and then became part of the existing one.

10 For example, the former Deputy Prime Minister and Minister of Defence of Bulgaria, as well as a long-time chairman of the VMRO-BND party, Krasimir Karakachanov, is a registered collaborator of the Bulgarian secret services, under the pseudonyms "Doncho" and "Ivan", covering the issue of "pro-Macedonian nationalism"; see more in the "Register of State Security and Intelligence Service Associates": *https://agentibg.com/index.php/bg/2014-02-18-16-00-28/177-2014-12-12-13-49-48*

community, the media, and even among the Bulgarian clergy[11]. This phenomenon can also be seen in the formation of the new composition of the Bulgarian government[12]. After three parliamentary election cycles in one year, the formation of the new government is not without risks - the four political parties do not have fully harmonized positions on many issues, especially concerning the open issues with our country. The demand for a generally acceptable position from all coalition partners has resulted in an attitude that implies "maintaining the existing position, but also upgrading it." One of the challenges for the new Bulgarian Prime Minister will be to unite the coalition partners in the process of adapting their position, in order to create an atmosphere in which Bulgaria will give up its veto power.

The initial positions of the new Bulgarian government were accompanied by more moderate and constructive statements, which should be confirmed in practice in the coming months. Bulgaria has proposed setting up working groups[13], which should facilitate the realization of the potential of good-neighborliness, putting the debate on historical topics in the background. If the work of the new working groups is carried out in good faith, we will be able to improve the atmosphere in the bilateral relations. Expanding the topics discussed will open the door to progress, in contrast to the current situation dominated by historical topics. The allocated time period of up to six months may be acceptable if used for a new, honest approach, rather than as an alibi for a new delay.

Good-neighbourliness and friendship should be concretised through projects in the economy, trade, infrastructure, culture and other areas that are not burdened by the differences inherent in historical discussions. Finally, the essence of the criteria for EU membership is in meeting European standards in many areas[14], and not in historical disputes, which are often incomprehensible to most EU member states.

The European Union, for its part, seems to have no answer to the situation in which a member state uses its veto power over a bilateral dispute with a candidate country. Previously established precedents of enlargement blockades[15] have resulted in undermining the credibility of the process itself, but also of the European Union. In addition, the public opinion and support for EU membership is not high, which discourages the decisive moves of the European leaders to admit new members. In part, in some Member States the negative attitude towards the enlargement is a consequence

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11 "Bugarski episkopi kao tajni komunisticki agenti", Deutsche Welle, *https://www.dw.com/hr/bugarski-episkopi-kao-komunisti%C4%8Dki-ta-jni-agenti/av-17512904.*

12 "Bulgaria: Teodora Genchovska fills cabinet with secret service agents" *https://nezavisen.mk/bugarija-teodora-genchovska-go-napol-nila-kabinetot-so-bivshi-agenti-na-tajnata-sluzhba/*

13 It was announced that the working groups will cover the areas of: economy, infrastructure, European integration, culture and historical issues.

14 The membership criteria, known as the "Copenhagen Criteria", adopted in June 1993, refer to the fulfilment of the political criteria, the economic criteria, as well as the harmonization of legislation.

15 The Greek-Macedonian dispute, as well as the bilateral disputes between Slovenia and Croatia, Cyprus and Turkey, and others.

of the effects of the refugee-migrant crisis in recent years, because the admission of new members is associated with new migrant movements.

When it comes to the protection of the common European values, however, they seem to be promoted more to the candidate countries than to some of the member states, where national interests are dominant. The very negotiations for enlargement are the strongest impetus for reforms and Europeanization, which in turn will mean attaining a permanent stabilization of the region, and preventing new conflicts between states and peoples in this area.

The reforms aimed at meeting the membership criteria can, and should be, continued regardless of the start of negotiations, but still, the motivation for that process, its quality, as well as its results, will undoubtedly be at different levels if implemented within the framework of the negotiation process. Also, the accession of the countries from the region to the EU is in the best interest of the countries from the same region that are already members of the Union. That is, their real national interest is to have neighbours that are part of the same Union, in a conflict-free environment, in order to use their position for regional leadership and support for the enlargement.

The internal political situation in our country is also a factor that influences the resolution of the whole situation. The positive signals from Sofia should be followed by appropriate responses from Skopje, having in mind that the possible benefit from resolving the dispute would be greater for the candidate country, and not for the one that is already inside the Union. The election of a new government, although dominated by the same political parties, opens the possibility for a new episode in the approach to the dispute with Bulgaria, but also to the relations with the opposition and other social processes.

The start of the negotiations for membership seems to be one of the key factors in maintaining the current parliamentary majority, and if no progress is made in this area, the pressure will increase from within, from the coalition partners themselves, but also from the opposition and the general public. Hence, the government's contribution to the negotiations with Bulgaria is significant, and essential not only for the realization of its programme, but also for its survival.

In 2022, there are several election cycles ahead, the results of which will have an impact on the regional developments. The issue of the EU enlargement is unlikely to dominate the French presidential election campaign, which chairs the Council of the EU in the first half of the year, but will prevent decisive moves by this country regarding the process itself. The announcement of a European summit dedicated to the Balkans at the end of the presidency confirms that France will commit to the enlargement after the elections. The parliamentary elections in Hungary, Slovenia and Serbia will also be held in the first half of the year, and possible leadership changes there could affect the resolution

of some enlargement-related issues, as well as the relations of the region with the EU, including its wider co-operation.

The membership negotiations for the countries that are negotiating or will be negotiating for the next round of EU accession are very different from the negotiations that were conducted with the countries of Central and Eastern Europe. Namely, the various geo-political aspects, the economic dimension, and the modified methodology are only part of the factors that influence this process. It can be expected that, unlike previous cycles, the negotiations would now take more than ten years, which significantly changes the motivation, enthusiasm and support of public opinion in the candidate countries. If the goal to be achieved is further away - the mood for implementing unpopular reforms and compromises is lower.

Therefore, in order to amend the damaged credibility of the process itself, but also of the Union, it is advisable to consider alternative ways to accelerate the process, or its adaptation, so that countries and their citizens will remain focused on the Europeanization of their societies. Instruments that may be useful include increasing pre-accession assistance (especially its cross-border cooperation component), intensifying academic exchanges, broad support for reform processes in critical areas (rule of law, anti-corruption, environmental protection, etc.), as well as determining a proposed time frame for conducting the very negotiations (regardless of how flexible it may be).

The declarative commitments for the so-called European vocation of the Balkan countries have long been insufficient to maintain support for the EU accession among the citizens in the region. Similar to the monitoring of the reforms in the candidate countries, there is a need for visible and concrete results on the part of the EU, in order to confirm the commitment to include all Balkan countries in the EU.

SHORT BIOGRAPHIES

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EUROPEAN UNION AND IDENTITIES (CONSTITUTIONAL/ NATIONAL VS EUROPEAN DIMENSION)

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INTRODUCTION

Issues of national and constitutional importance often cause various dilemmas, situations, interpretations, controversies within the European Union (EU) due to which there is a constant need for their further explanation and refinement within the scientific discourse.

The topicality and vitality of these issues are important not only for the institutions of the Union and the Member States, but also for the EU membership candidate countries. The question of whether and to what extent the constitutional and national identities of the Union's member states can affect the quality of the EU's functioning and to what extent they have the capacity to make substantial shifts in its pillars has been appealing in the past and today as well.

The fact is that no founding treaty of the EU so far mentions the term constitutional identity, but everyone uses the term national identity. On the other hand, the Constitution as the highest legal act in a country, in addition to the legal, political and institutional elements of the system, also contains the elements of the historical continuum in the development of the nation and state, social, economic, political, legal, cultural and other core values which, in turn, are also part of national identity. It is a fact that the constitutional courts of several EU member states, regardless of whether the European institutions like it or not, develop and finalize the concept of constitutional identity in their relations with the Union.

In practice, three models, two legal approaches and one communication channel for detecting the constitutional identity in the Union have been differentiated so far. The three models range from a model of confrontation with EU law, a model of confrontational individual approach, to a model of cooperation with the embedded identity. The two legal approaches are diametrically opposed and range from an EU friendly approach to an EU antagonistic approach, while in terms of the communication channel the most important place is occupied by the EU Court of Justice preliminary ruling procedure.

Constitutional theory is a real treasure trove of different opinions, positions and concepts that determine the essence and meaning of the term constitutional identity. In the EU, but also in some member states of the Union, often in terms of synonymy, constitutional identity is considered as the identity of the Constitution. The connection of these concepts is from the aspect of the position that the constitutional identity of a state basically has, meaning institutionalized and collective political identity of the state with which all citizens living in it identify or connect. Having in mind the different views that exist on the relation of the national and the constitutional identity at the level of EU member states, on the one hand, and at the level of EU institutions and legal acts, on the

other, the need arises for in-depth analysis of lines and elements which connect or divide these categories in the European scientific and practical discourse.

The main hypothesis of the paper is to explore the differences, but also the similarities that exist in the explanation of the categories of constitutional and national identity in the EU member states, mostly through the prism of the work of the constitutional courts and EU institutions, especially anticipating the practice of the EU Court of Justice.

The hypothesis of the paper aims to create a common point from which we should start in resolving the disputed processes at the national-EU level, becoming more and more relevant in recent times. The argumentation of the questions in the paper is presented through an analysis first of all of the general identity notions and issues, moving towards the special and often controversial aspects of the constitutional and national identity within the EU. The paper aims to ascertain that the protection of the constitutional identity of the EU member states should not jeopardize the unity and integrity of EU law, nor of the Union itself, but rather strengthens the core of its current configuration. The differing views of national constitutional courts on constitutional and national identity issues should be considered through open dialogue and positive co-operation between Member States and the Union, especially in cases where there are controversial views and positions on certain segments, in order to find mutually acceptable solutions which would be to the benefit of the Union, but would also further nurture the constitutional values of its member states.

CONSTITUTIONAL IDENTITY - BEGINNINGS, DEVELOPMENT, ESSENCE, CONTINUITY

From a constitutional-legal point of view the constitutional identity[1] is considered as a self-identifying element of the collective identity as a constitutive factor (of the citizens, the nation, the people) mentioned in the Constitution. In a certain historical period of the development of the state, the people (peoples' sovereignty) and the nation (national sovereignty) were defined as a constitutional power exercised directly, through referendum and other forms of direct democracy or indirectly, through elections. The different definition of the constitutive factor in the country was dependent on other

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1 See: Roberto Toniatti, Sovereignty Lost, Constitutional Identity Regained, in National Constitutional Identity and European Integration, Alejandro Saiz Arnaiz & Carina Alcoberro Llivinia Eds., 2013.
The Polish Constitutional Tribunal considers the concept of constitutional identity to be equivalent or very close to the concept of national identity. The concept incorporates the traditions and cultural heritage of the country, drawing its own interpretation not only from Article 4 (2) of the EU Treaty, but also from the Preamble to the Treaty, where one of the Union's stated objectives is to deepen solidarity between the peoples through the respect for their history, culture and traditions. In this context, in the opinion of the Polish Constitutional Tribunal, "the idea of affirming one's national identity through solidarity with other nations, and not against them, constitutes the main axiological basis of the EU".
See: Case K 32/09, Pol. Const. Trib., Nov. 24, 2010.

identities on an individual or collective level - cultural, social, historical, religious and other identities.

The notion of constitutional identity is directly related to democracy, i.e. the concept of civic identity.[2]

Constitutional identity attracted much attention even since the ancient period in the works of Aristotle and Plato[3], but also later in the works of Hobbes, Jean-Jacques Rousseau, Calvin whose works found their reflection in the work of Bruce Ackerman, Ran Hirschl, Gary Jeffrey Jacobsohn, Mark Tush , Heinz Klug, Erik H. Erikson, Michael Rosenfeld, John E. Finn and many other authors.

"Constitutional identity can appear in various forms, it can constantly evolve as a result of the continuous process of substantial social change."[4] Thus, according to the American expert Rosenfeld, "constitutional identity is essentially a competing concept, given that there is no agreement on its meaning, or what it specifically refers to. Concepts of constitutional identity can be found in, for example, the constitutional provisions on systems of government (whether a parliamentary, presidential or mixed system, whether a republic or a federal state has been established), in provisions that explain the relationship between the constitution and the culture in which it operates, as well as in the relationship between the identity of the constitution and other relevant identities, such as national, religious or ideological identity".[5]

Constitutional identity means a constitutionally defined identity. While some authors consider the Constitution to be a reflection of the collective beliefs, positions, attitudes and values formed throughout the history of a nation as a result of the action of its culture and tradition in the country, which means that the Constitution is a recognition of the pre-existence of identities[6], others considered that the Constitution, culture and identities are in correlation with each other, i.e. they influence each other as a result of the direct connection of their different social aspects. This practically means that the Constitution is recognition and a basis for the creation of new identities. The majority of the authors agree that the constitutional identity is, in fact, composed of elements that create the political identity of the community, such as: civic awareness of the need to

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2 See: Clarissa Rile Hayward, Democracy's Identity Problem: Is "Constitutional Patriotism" the Answer?", http://polisci.wustl.edu/files/polisci/imce/democracys_identity_problem_compact.pdf.

3 In Aristotle's third book, Politics, the author asked: "On what principle can we say that the state retains its identity, or, conversely, that it has lost its identity and became a different state?". His response sought to distinguish between the physical identity of the state and its real identity. Thus, according to Aristotle, "The identity of the polis (city-state) is not constituted by its walls." Instead, the identity of the polis is enshrined in its constitution. See more details in: http://www.iep.utm.edu/aris-pol/#H9.

4 See: Michel Rosenfeld, "Modern Constitutionalism as Interplay between Identity and Diversity", in Constitutionalism, Identity, Difference, and Legitimacy, ed. Michel Rosenfeld (Durham: Duke University Press), 1994, (p.8).

5 See: Rosenfled, M., Constitutional Identity, in: M. Rosenfeld and A. Sajó (eds.), The Oxford Handbook of Comparative Constitutional Law, Oxford University Press, Oxford, 2012, (p. 756).

6 See: Hegel, G.W. Friedrich, in Arato, Andrew, Civil Society, Constitution and Legitimacy, (Maryland: Rowman and Littlefield Publishers), 2000, (p.169).

have a specific identity, a sense of belonging to a specific community, identification with the values of a specific political system, the sense of common interest and well-being of the citizens and so on. Hence, it is said that the constitutional identity can be considered from a formal and informal aspect.**[7]**

The formal aspect is by definition related to the citizens as direct bearers of sovereignty who are at the same time bearers of the constitutional identity. The informal aspect (cognitive and affective) of the constitutional identity is explained through the values and beliefs of the citizens in the specific state, who share the same identity.

There is an interesting idea found in almost all theories of constitutional identity which believes that the Constitution should not be considered only as a historical-legal document whose purpose of existence is to define the legal-political structure of the state, but the Constitution should be seen as a broader value system, as a particular system composed of a combination of legal relations between citizens and political institutions, and as a continuous political competition of ideas, values and sources.**[8]**

Or, as Mark Tushnet explicitly stated: "The constitutional order (or regime) is a reasonable and stable set of institutions through which fundamental national decisions are made, as well as the principles on which these decisions are based."[9]

Of course, the constitutional identity is directly linked to the idea of the constitutional order, as well as to the issues related to the differences and conflicts that can make changes in the system. His idea of the constitutional order is that it is a "dominant set of institutions and principles" to understand constitutional change through the processes of constant constructions and transformations. The key to his concept of constitutional order (as well as constitutional identity) is in "the idea that the constitutional order is a combination of institutions and principles (values)"**.[10]**

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7 See: Gary Jeffrey Jacobsohn, Constitutional Identity, Michel Rosenfeld, *Constitutional Identity*, in The Oxford Handbook of Comparative Constitutional Law, 2010, p.756–76, as well as in: Michel Rosenfeld, The Identity of the Constitutional Subject: Selfhood, Citizenship, Culture and Community, 2010. https://www.routledge.com/The-Identity-of-the-Constitutional-Subject-Selfhood-Citizenship-Culture/Rosenfeld/p/book/9780415949743.
http://digitalcommons.law.utulsa.edu/cgi/viewcontent.cgi?article=2760&content=tlr. Rosenfeld posed simpler questions than those stated above, stating that "constitutional identity must answer the three most important questions: To whom does the Constitution apply, what should the Constitution provide, and finally, how can the Constitution be justified."

8 See: Heinz Klug, "Constitutional Identity and Change", Volume 47, Issue 1 Book Review Issue, Tulsa Law Review 41, Article 5, (2011).

9 See: Mark Tushnet, New Constitutional Order 1, Princeton: Princeton University Press, 2003, http://www.gvpt.umd.edu/lpbr/subpages/reviews/tushnet-mark.htm.

10 His conception also includes the idea that the guiding principles of the constitutional order are reflected not only in the legal and philosophical principles articulated in judicial opinions, but also in the laws and policies adopted and promulgated by the legislature and the executive. Thus, he defines the 1944 Franklin D. Roosevelt's State of the Union Address, the 1964 Civil Rights Act, the 1965 Voting Rights Act, and health care policy as "guiding principles of the prevailing New Deal-Great Society program in the US constitutional order from 1930 to 1980 ". See: Tushnet, supra note 4, at 1.

ABOUT NATIONAL IDENTITY
- CONCEPTS AND VISIONS

Within the contemporary political philosophy, national identity is considered through two most pronounced concepts. According to the first, national identity is a set of individual beliefs of people who have common roots, history, culture, tradition, in a word, people of the same ethnicity. This term was originally coined in the works of Max Weber and Walker Connor.[11]

The second concept considers national identity as a broader term anticipated through the principle of national self-determination and self-identification. This concept is analyzed in the works of David Miller, Kai Nielsen, Yael Tamir and others.[12]

Regardless of the applied concepts, it is considered that the national identity is built on the sum of individual feelings of the citizens for their common belonging to a nation. Being a member of a nation is an essential dimension of the broader social-psychological theory of social identity defined as an individual awareness of belonging to a particular group and a psychological sense of group connection.[13]

This means that national identity in a broader sense takes into account the sociological aspects of citizens' individual feelings of belonging to a particular nation, the sense of broader attachment of people to a particular national group in the cultural, historical, linguistic, religious sense of the word.

In the context of the EU, the question of how compatible national identity stories are with European integration and with the hybridization of identity that EU membership entails is still being raised.[14]

The concept of national identity is considered differently from the concept of creating or changing the constitution where the constitutional definition is framed, but also the content of the law of nations. In Western Europe, national identity is built on the principle of demos, while in the tradition of Southeast European countries it is built on cultural identity based on ethnicity. These two principles are part of the constitutions of the countries in Western and Southeastern Europe where the national identity is defined

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11 See: Omar Dahbour, National Identity: An Argument for the Strict Definition, Public Affairs Quarterly, Vol. 16, No. 1, January 2002, (p. 17-19).

12 Ibid (p.17).

13 There are different understandings of the term "identity". See: Huddy, L, Khatib, N, American patriotism, national identity, and political involvement. American Journal of Political Science 51(1), 2007, (p. 63–77). The term "national identity" indicates that citizens have an individual and collective sense of belonging to their nation.

14 The thoughts of Neumann, who participated in the negotiations for the formation of the Norwegian national identity, i.e. in the process of institutionalization of the relationship between Norway and the EU, are interesting. The question of the extent in which the stories of the national "I" are compatible with the institutional integrations and the hybridization of the identity that the EU membership entails was crystalized during the negotiations. Attempts to implement pluralist policy lost the battle against the nationalist policy in Norway. For more see: J.B.Neumann, Upotrebe drugog, "Istok" u formiranju evropskog identiteta, Sluzbeni glasnik, Beograd, 2011, (p. 237).

as the collective identity of the constituent entity that assumes values and consensus present at the time of drafting the constitution. Although constitutional and national identities are not synonymous, the fact is that they are causally related to each other.

National identity is enshrined in the Constitution at the time of its writing. Thus, the preamble of the Constitution contains all the historical events, happenings and circumstances important for the constituent, while the content of the Constitution incorporates all the most important connective tissues of the national identity. That is why it is said that national identity is the basis for formulating the constitutional identity.

The constitutional identity due to the integrative function of the constitution should not only be generally accepted, but also the constituent people themselves, i.e. the nation must identify with it regardless of the differences that exist in the society. It is for this reason that constitutional texts in multinational, multiethnic societies use different tools to frame the different identities. The constitutional identity aims to define and strengthen the national identity of the constituent.

Respect for the uniqueness, but at the same time the connection between the national and the constitutional identity of the EU member states, in recent years has become a very important issue for the further development of European constitutionalism.[15]

Many papers by renowned legal theorists and judges have been written on this subject. The approach to studying this issue varies depending on whether the topic is considered from a conceptual or philosophical approach,[16] from an EU law-based approach or from an analysis of the "case law" of several constitutional courts of the EU Member States.

As we have seen, the concepts of constitutional identity are mainly of a competitive nature and there is no generally accepted agreement between them on its meaning. While some concepts emphasize the current features and provisions of the Constitution, for example, what system of organization of government is established in the Constitution, what is the form of internal organization of the state (federal, confederal or republican), how the relationship between the Constitution and the culture in the country is considered, the relationship between the constitutional identity and the identity of

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15 The term "national identity" was introduced for the first time in the Treaty on European Union (Maastricht text), July 29, 1992, 1992 O.J. (C 191) 1. Article F (1) of the Treaty sets out the obligation for the Union to respect the national identity of the Member States. This Article was later replaced by Article 6 (3) of the Treaty of Amsterdam amending the Treaty on European Union, the Treaties Establishing the European Communities and Certain Related Acts, 1997, O.J. (C 340) that then paved the way for the wording of Article 4(2) TEU of the Lisbon Treaty in 2009), now being used (Consolidated Version of the Treaty on European Union art. 4(2), 2010 O.J. (C 83). "National identity" as a general principle was introduced into EU law in 1992 by the Maastricht Treaty. Article F (1) states: "The Union shall respect the national identities of its Member States whose systems of government are based on the principles of democracy." This clause was later revised in the 1997 Amsterdam Treaty by removing the second part of the sentence: "The Union will respect the national identities of its member states". The latest amendment not only re-enumerates the articles of the EU Treaty, but also establishes the existing form of Article 4 (2) which reads: " The Union shall respect the equality of Member States before the Treaties as well as their national identities, inherent in their fundamental structures, political an constitutional, inclusive of regional and local self-government. It will respect their essential State functions, including ensuring the territorial integrity of the State, maintaining law and order and safeguarding national security. In particular, national security remains the sole responsibility of each Member State."

16 See: Appadurai, A., Modernity at large: Cultural dimensions in globalization, University of Minnesota Press, 1997.

the creation of the Constitution, other concepts emphasize the identity of the different constitutional models, the identity of the creation of the Constitution, the identity created through the constitutional interpretations and the like.

Third conceptions examine constitutional identity through the identity contained in the supranational constitutions. Despite the different approaches in the analysis, the approach of legal conceptualization based on regional European jurisprudence and doctrine seems to be dominant.

Constitutional identity in the legal sense of the word is considered as "identity of the Constitution". These two terms are considered synonymous. Although there are dilemmas as to why the identity of the Constitution is needed at all and how the Constitution can have an identity, the answer to this question lies in the socio-psychological significance of identity and in the essence and role of the Constitution as the highest legal act in constitutional democracy. Given the fact that the term "identity" itself has cultural, sociological, psychological, political significance, the term "constitutional identity" is also considered through a multidimensional prism.

We can draw an appropriate conclusion that the constitutional identity in a country is a result not only of the content of the existing constitutional provisions, but also of the judicial jurisprudence dominant at the time of writing the Constitution, but also later, in the eventual drafting of constitutional amendments. It should be noted that constitutional identity and national identity are analyzed in the national context differently than in the context of EU and European integration.

While constitutional identity in national terms is viewed through the prism of the three mentioned concepts, constitutional identity in the EU context takes into account only those articles of the national constitution that are in the context of EU law.[17] Thus, according to the jurisprudence of the Hungarian Constitutional Court, it is an identity that "confronts the EU legal model". On the other hand, according to the jurisprudence of the Italian Constitutional Court, it is a "cooperative model", a model of cooperation that has previously defined a built-in constitutional identity.

EU AND THE NATIONAL/CONSTITUTIONAL IDENTITY OF THE MEMBER COUNTRIES - LEGAL FACTS VS LEGAL INTERPRETATIONS

Today, the content of the "identity of the Constitution" of a particular EU member state is often protected through the model of active and cooperative dialogue between supranational courts and national constitutional courts.

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[17] See: Nick W. Barber, "Legal Pluralism and the European Union", European Law Journal 12, 2006, (p.306).

Another more unacceptable way is by demonstrating a pronounced uniqueness of the national constitutional identity content of one versus the other member states. The issue of constitutional identity is a topic of great importance for modern constitutional democracy. Its legal conceptualization from the perspective of European integration is still insufficiently analyzed. There is an identification of constitutional and/or national identity through different interpretations of Article 4 (2) of the EU Treaty.

Although the said article is decisive and refers to the national identity of the member states, the constitutional courts of Hungary, Germany, Spain, Poland and Italy present a different interpretation.

As already mentioned, formally, constitutional identity is not part of Article 4 (2) of the EU Treaty. On the other hand, the national constitutions of the EU member states do not contain a strict constitutional provision that defines the constitutional identity.[18] This notion is often the product of the constitutional interpretation of national constitutional courts in order to establish precise boundaries between the national constitution, on the one hand, and the application of EU law in domestic legal systems, on the other.

The position of the EU Court of Justice is certainly important in this context. Article 4 (2) of the Treaty has been active since 2009 when the Treaty of Lisbon entered into force, although the issue of national identity is contained ever since the Maastricht Treaty. Although Article 4 (2) of the EU Treaty does not contain the values that constitute national identity, the fact is that the range of values is not limited and that each EU member state has the right to decide which values are important to it in order to enter into the content of this principle. EU member states often rely on this article, especially in cases related to the protection of the official national language, or, for example, the need to abolish nobility in Austria, for which the EU Court of Justice has emphasized the need to respect " national identity ".

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18 However, in the constitutional practice of four EU member states, arisen as a result of the constitutional courts' activism, the term "constitutional identity" is mentioned. The concept of Germany's constitutional identity was first mentioned in 1928 in the theories of Carl Schmitt and Carl Belfinger to justify the limits of the constitutional amendments to the Weimar Constitution. Under the German regime, the legal doctrine of constitutional identity was restored, which was used by the Constitutional Court versus EU law.

We will first briefly address the position of the Constitutional Courts of Germany, Hungary, Italy and Poland[19] on constitutional identity, and then move on to the case law of the EU Court of Justice.[20]

The term "identity of the Constitution" was first mentioned by the Federal Constitutional Court of Germany in its decision on the Lisbon Treaty, although the Court did not give a specific description.[21]

The "identity of the Constitution" as a term differs from the "identity of the Federal Republic of Germany", which, in turn, is practically equated with the sovereignty of the state. The German Constitutional Court ("BVerfG") has ruled that the content of Germany's constitutional identity is in Article 23 (1)[22], in the third sentence - the EU clause - and in Article 79 (3), the article on "eternity clauses" of the German Constitution. With the creation of the EU, apart from the apparent abolition of sovereign German statehood, the German Constitutional Court has reaffirmed only a few specific powers that belong to the national sovereign government and the sovereign people. These competencies are related to the "eternity clauses" where the "identity of the Constitution of FR of Germany" is visible.

It is interesting to note that in the preliminary reference decision of 2014 related to Outright Monetary Transactions ("OMT"), the German Constitutional Court confirmed that despite the need for its compliance with EU law, the Court has the right to assess it from aspect of respecting the identity of the Constitution. According to the Court democracy as a constituent element of the identity of the Constitution and the national

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19 The term "constitutional identity" is not defined in the Constitution of Poland, but was developed and upgraded by the Constitutional Court. Constitutional identity has grown normatively and descriptively into a concept of the Polish constitutional jurisprudence. The tribunal used the concept of constitutional identity to define the boundaries of competencies shared with the EU as well as to mark axiological similarities, equivalents, or convergences between the EU and the Polish legal order.

20 "According to the three countries that have already developed and applied the legal term 'constitutional identity' in the EU, there are three models (the German model of confrontation with the model of EU law (Lisbon decision, BVerfG, Judgment of the Second Senate of 30 June 2009, 2 BvE 2/08), OMT reference decision, BVerfG, 14 January 2014, 2 BvR 2728/137), the Italian model of cooperation with the embedded model of identity (decision n 24/2017 of the ICC8), and the Hungarian confrontational individualist model (22/2016 (XII.5) Decision of the HCC, Dissenting Opinion to 23/2015 (VII.7) Decision of the HCC9), two positions (EU-friendly and antagonistic), three legal procedures (against EU and international human rights law and constitutional amendments), and a communication channel (preliminary procedure) where one can identify which "constitutional identity" has legal significance. The term constitutional identity refers to the "identity of the Constitution". (BVerfG, 2009, Judgment of the Second Senate, paragraphs 208)". Quoted according to: Timea Drinoczi, "The identity of the constitution and constitutional identity Opening up a discourse between the Global South and Global North", https://www.usfq.edu.ec/publicaciones/iurisDictio/archivo_de_contenidos/Documents/IurisDictio_21/iu21_05.p.

21 See: Lisbon decision, BVerfG, Judgment of the Second Senate of 30 June 2009, 2 BvE, 5. „In this respect, the guarantee of national constitutional identity under constitutional and under Union law go hand in hand in the European legal area". https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2014/01/rs20140114_2bvr272813en.html. See also: Hector Lopez Bofill, What is not Constitutional Pluralism in the EU: National Constitutional Identity in the German Lisbon Decision, in National Constitutional Identity and European Integration, (стр.221–242), во: Alejandro Saiz Arnaiz & Carina Alcoberro Llivina eds., 2013.

22 Article 23: [European Union - Protection of basic rights - Principle of subsidiarity] • Regional group(s) 1. 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 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. https://www.constituteproject.org/constitution/German_Federal_Republic_2014.pdf?lang=en.

identity of Germany would be violated if Parliament renounced budgetary autonomy. The Constitutional Court recalled that the EU Court of Justice (CJEU) is obliged to ensure proportionate protection of national identity.

In the context of judicial consistency towards this position is its decision regarding the application of the European Arrest Warrant ("EAW"). It should be reminded that it was the German Constitutional Court that did not allow the application of the order with the explanation that it means a violation of human dignity.[23] A detailed analysis of the importance of the "identity of the German Constitution" was made by the Constitutional Court in 2016 when it examined whether the constitutional principles contained in Article 79 (3), together with those of Articles 1 and 20 of the German Constitution could be violated by the transfer of the sovereign power of the German parliament in the EU institutions.

A similar analysis was made by the Hungarian Constitutional Court in 2016, in the context of the government's policy to disapprove the refugee quota, arrived from official Brussels as a legal obligation.[24] A referendum on this issue was held in Hungary and the results were politically interpreted as the will of the majority of citizens in Hungary who oppose the admission of migrants in their country. The Hungarian authorities appropriately addressed this will in a constitutional amendment which did not get the approval of the required 2/3 majority in the Hungarian Parliament.

Immediately after the unsuccessful attempt with an constitutional amendment to prevent the acceptance of the migrant quota, the Constitutional Court of Hungary examined the possible violations of fundamental rights other than human dignity, also ruled by the German Constitutional Court. The Court included in the other fundamental rights Hungary's sovereignty, or Hungary's self-identification based on its historical constitution.

The Court ruled that Hungary was obliged to respect the inviolable and inalienable fundamental rights of its citizens as a primary obligation. This obligation is mandatory not only in cases of internal legal transactions, but also for all matters exercised jointly with the EU institutions or with other Member States. The Hungarian Constitutional Court has set two precise limits in the exercise of the conferred or jointly exercised powers with the EU.

The first limit is the inviolability of Hungary's sovereignty and the second is the inviolability of the country's constitutional identity. The Constitutional Court considered that the EU Court of Justice should protect the constitutional identity of the member states on the principles of continuous cooperation, mutual respect and equality of the EU member states.

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23 See: https://www.cambridge.org/core/journals/german-law-journal/article/constitutional-identity-in-europe-the-identity-of-the-constitu-tion-a-regional-approach/83D8D1737788756FEF098CF9485D7B1C%20-%20fn26.

24 Council Decision 2015/1601 of September 22, 2015, eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32015D1523&from=EN.

The Constitutional Court of Hungary has declared the constitutional identity as a fundamental value identical to the constitutional identity of Hungary, which means a deeper concept than that of the German Constitutional Court. It is interesting to note that in Hungary an exhaustive list of values that are included in the constitutional identity of the country has not been established, but the following are mentioned as general values: the rights and freedoms of citizens, division of powers, republican character of the state, respect for the autonomy of public law, freedom of religion, principle of legality, parliamentarism, equality of all before the law, respect for the independence of the judiciary and respect for the rights of national minorities living in Hungary. These values are in fact universally accepted constitutional values.[25]

The Italian Constitutional Court used for the first time the term constitutional identity in decision no. 24 of 2017 when it asked the EU Court of Justice to explain whether its action in the *Taricco* case left national courts with the power to disregard domestic legal norms even to the extent of disregarding the fundamental principle contained in the Constitution, the principle of legality.

The Italian Constitutional Court had earlier in 2014 ruled that retroactive application of the institute of statute of limitations was prohibited, even though the statute of limitations in Italy is part of the substantive criminal law.

The Constitutional Court has held that the rule laid down in Article 325 of the Treaty on European Union (TFEU) is applicable only where it is in accordance with the constitutional identity of the Member State where the assessment of such compliance falls within the jurisdiction of the national authority.[26]

Apart from the case of Lithuania for the protection of its official language, the case of Austria for the abolition of nobility[27], in the context of the protection of the republican identity, the EU Court of Justice is known for other examples of cases where it defended the national identity of Member States. These are the case of Spain for the defense of the system of organization of government at central, regional and local level[28], the case of Italy for establishing rules for access to specific professions, as well as the case of Slovakia for the protection of statehood and sovereignty.

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25 See: Timea Drinóczi, Constitutional Identity in Europe: The Identity of the Constitution. A Regional Approach, German Law Journal, Vol. 21, Issue 2, Published online by Cambridge University Press: 10 February, 2020, https://www.cambridge.org/core/journals/german-law-journal/article/constitutional-identity-in-europe-the-identity-of-the-constitution-a-regional-approach/83D8D1737788756FEF-098CF9485D7B1C.

26 In the Taricco II judgment, the EU Court of Justice did not use the term "identity", but in accordance with EU law the more friendly language and approach of the Italian Constitutional Court which recognized that the principle nullum crimen and nulla poena is part of the common constitutional tradition of member states.

27 In the Sayn-Wittgenstein case, the EU Court of Justice upheld the Austrian Constitutional Court's assertion that the right to abolish the nobility was intended to protect the constitutional republican identity. The EU Court of Justice has agreed that the law on the abolition of nobility is a fundamental decision in favor of the formal equality of all citizens before the law.

28 Declaration of the Spanish Constitutional Court 1/2004, 13 December 2004, paras 37, 47, 50 и 58.

In 2004, in connection with the EU Constitutional Treaty, the Spanish Constitutional Court emphasized that the Spanish state, more specifically the Spanish nation, reserves the right to sovereignty, and that state sovereign power can be limited only if EU law is compatible with its fundamental national foundations, that being the identity of the Spanish constitution. This doctrine was later confirmed in the *Melloni* case.[29]

An analogous line of reasoning is also followed in the practice of other Eastern European constitutional courts. Thus, emphasizing the sovereignty of the Czech Republic and portraying the EU member states as "masters of the Treaties", the Czech Constitutional Court concluded that the "material substance" of the Constitution takes precedence over EU law.[30] This finding empowers constitutional courts to assess the compatibility of EU law with national/constitutional identity.

In this sense, the Polish Constitutional Tribunal, in its 2010 decision on the European Arrest Warrant, portrayed the EU as an international organization of sovereign states, emphasizing that the power deriving from the Polish constitutional identity could not be delegated, transferred or alienated to the Union.[31]

It is worth mentioning that the British Supreme Court also spoke openly about the value of the United Kingdom's constitutional identity. The position of this court was based on the concept that national sovereignty remains with the state, i.e. the British Parliament.

In summary, the views of national courts formulate the doctrine of constitutional identity based on the principle of state sovereignty. On the other hand, the national identity contained in Article 4 (2) of the Treaty as a contrast should be seen as a gradation of the basic principles for which the EU as a multinational political community must show respect.

Despite the relatively small case law on this issue, the EU Court of Justice seems to accept the view that constitutional identity is part of the test of proportionality, or as Werner Vandenbruwaene puts it, "the closer the question is to the essence of the "constitutional identity" of the member states the greater the margin of discretion."[32]

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29 The EU Court of Justice has ruled that Spain will not be able to extradite Mr Maloni if his conviction is open to review, as this would compromise the principle of the primacy and effectiveness of EU law.
http://curia.europa.eu/juris/document/document.jsf?text=&docid=134203&pageIndex=0&doclang=EN&mode=req&dir=&occ=-first&part=1&cid=234017.

30 The position of the Czech Constitutional Court is more open to EU law, but still has some similarities with the German interpretation. The Court has recognized the principle of the EU conformist interpretation of constitutional law, but only in the event of a conflict between EU law and the Czech Constitution - especially in the area of its material core, when it should prevail. The identification of the "material core" of the Czech Constitution comes to the fore not only in terms of respect for EU law, but also in the part of the internal forum in declaring unconstitutionality with constitutional amendments.
See: https://europeanlawblog.eu/2012/03/04/primacy-and-the-czech-constitutional-court/

31 See: http://www.europeanrights.eu/public/sentenze/Polonia-24novembre2010.pdf (p.22-23).

32 See: W Vandenbruwaene, François-Xavier Millet. L'Union européenne et l'identité constitutionnelle des États membres. [The EU and the constitutional identity of the Member States], 12 ICON (2014), (p. 503).

We would like to emphasize that both terms "constitutional identity" and "national identity" refer to the same obligation to the EU institutions, which is an obligation to respect the core of the constitutional values of each member state separately. On the other hand, it is a fact that the approach of the EU Court of Justice and of the national courts on this issue is different.

The term "national identity" in Article 4 (2) of the EU Treaty is used in order to determine whether the actions taken by the EU institutions are legitimate, while the term "constitutional identity" as defined in the jurisprudence of the highest national or constitutional courts aims at defending the national constitution and national constitutionality. In the constitutional theory there are attempts[33] to connect the two concepts in one - national constitutional identity.

In addition to the above, in other EU member states the issue of constitutional identity retains attention in theory and case law, and this must not be neglected or denied. In this regard, we would like to emphasize the thinking of François-Xavier Millet[34] according to whom the French constitutional identity is not based only on the principles contained in the text of the Constitution, but contains elements related to the cultural and historical circumstances that are part of the country. Hence, national identity is considered part of the constitutional identity, and vice versa.

The constitutional identity originates from the past, but at the same time it contains obligations towards the future. The elements of the constitutional identity are not established once and for all, they evolve, develop, and in the case of France are part of the French constitutional tradition. This term has no basis in the jurisprudence of the French Council of State, as in the already mentioned member states, but it is part of the legal literature in which there are academic attempts to explain the principles inherent in the constitutional identity of France.

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33 It refers to an analysis made in 2013 in which several authors, and even the editors of the text themselves, use the symbiotic concept of "national constitutional identity". According to Toniatti, constitutional identity is a "transformed use of sovereignty". According to Claes, however, the term is "closely related to the concepts of sovereignty, independence and national democracy," while according to Bofill, the term is the primary source of political legitimacy. Retrieved from the publication: National Constitutional Identity and European Integration, Alejandro Saiz Arnaiz & Carina Alcoberro Llivina eds., 2013, intersentia.com/en/national-constitutional-identity-and-europe-an-integration.html, (p. 75).

34 See, also, W Vandenbruwaene, François-Xavier Millet.

4. THE COURT OF JUSTICE OF THE EU AND THE IDENTITIES OF THE MEMBER STATES OF THE UNION

In European constitutional practice and theory it is common for the use of the terms national identity[35] and constitutional identity to be considered interrelated.

On the one hand, several General Advocates[36] of the EU Court of Justice have applied the concept of constitutional identity in order to draw on what is protected by Article 4 (2) of the EU Treaty, although to be precise, that article refers to the national identity of the EU member states, inherent in their fundamental structures.

Although the identification, the connection between these two concepts is not based on any theory of legal interpretation, it should be noted that the obligation arising from the EU Treaty to respect the national identities of the Member States is based on certain normative assumptions.

First of all, as already elaborated above, these are the claims of several national constitutional courts that EU law must be in accordance with the constitutional identity of the Member State in order to be applied in the domestic legal order. The EU's obligation to pay attention to national identity is based on the Union's concern for the dignified treatment of member states in the multinational political community, while the preoccupation of national constitutional courts with constitutional identity is based on the specific concept of sovereignty protection. In other words, the demands for simultaneous respect for the national and constitutional identity of the EU member states stem from different theoretical narratives.

The drafters of the Treaty are considered to have had better reasons for stating the demand for respect for the national identities of the Member States than for the sovereignty of the States or their constitutional identities. The Treaty focuses on national identity. In the absence of a theory of sovereignty with which both the EU and the Member States could agree, it is quite safe to expect that any reference in the Treaty to sovereignty would be a new source of tension or conflict within the Union.

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35 Some legal authors explain "national identity" as a general principle of EU law that derives from the jurisprudence of the EU Court of Justice and is based on a clear legal position. Article 4 (2) of the EU Treaty states that the Union shall respect their essential State functions, including ensuring the territorial integrity of the State, maintaining law and order and safeguarding national security. The list of values covered by the principle of national identity is open and it is up to the member states to decide which values will be protected through their national identity. The EU Court of Justice assesses only the significance of national identity under EU law. See: Marek Rzotkiewicz, "National Identity as a General Principle of EU Law and Its Impact on the Obligation to Recover State Aid, https://www.researchgate.net/publication/323972802_National_Identity_as_a_General_Principle_of_EU_Law_and_Its_Impact_on_the_Obligation_to_Recover_State_Aid.

36 For example, Miguel Maduro. http://robertgrzeszczak.bio.wpia.uw.edu.pl/files/2012/12/Maduro-JUDICIAL-ADJUDICATION-IN-A-CONTEXT-of-constitutional-Pluralism.pdf

In this respect the EU is different from the United States, where the US Constitution shares a widely accepted narrative of sovereignty. Namely, the federal Constitution permanently divides the sovereignty between the nation and the federal states. It should be noted that in the United States, too, the agreement over the location of sovereignty between the rival theories did not come overnight.

Unfortunately, there are no signs in the EU that a common European theory of sovereignty would emerge, despite numerous valuable attempts by experts to develop such a theory. Contrary to this, as already stated above, national constitutional courts have repeatedly resorted to the rhetoric of constitutional identity based on the claim of state sovereignty, while the EU Court of Justice has not relinquished the idea that the Union also has sovereign status. In response to the conflict that exists between legal opinions in the EU and in the Member States, a new approach capable of adapting/softening the rival sovereignty between the EU and the Member States needs to be developed in European legal theory.

Giving a deliberate focus on EU sovereignty, the EU Treaty puts the focus on national identity as an attractive alternative. In fact, Article 4 (2) of the EU Treaty prevents the attempt of the constitutional courts or the EU Court of Justice to rely on their own sovereignty, but also on firm positions on supremacy. In other words, this article should have prevented the dominance of the losers' strategy and the development of a "zero-sum-game" which would facilitate the work of judicial bodies at both levels to accept this provision of the Treaty, and even to turn the identity clause as an instrument of judicial dialogue.

A third reason for favoring the approach of national identity over the approach of state sovereignty in treaties, as in the United States, is the emergence of considerations that the exclusive spheres of sovereign power that coexist at the national and state levels are gradually declining. According to Robert Schütze, the model of dual federalism was abandoned in the 20th century and replaced by the model of cooperative federalism.

In Schütze's view, cooperative federalism is also an appropriate constitutional theory for Europe. In the EU, the state's exclusive sphere of power is progressively shrinking, with the two levels of government cooperating intensively in the spheres of shared power. The principle of subsidiarity enshrined in Article 5 (3) of the EU Treaty can be considered a constitutional solution to reduce tensions and strengthen the spirit of cooperation between the Union and the Member States.[37]

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37 Article 5, paragraph 3 of the Treaty reads: „ Under the principle of subsidiarity, in areas which do not fall within its exclusive competence, the Union shall act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level."

It is a legal fact that the principle of "national identity" is not defined in any founding treaty of the EU, in any regulation or other legal act of the Union. That is why it is considered to be the result of EU jurisprudence. The Court of Justice has developed a relatively autonomous opinion on its essence.[38]

Article 4 paragraph 2 of the EU Treaty is cited for the first time in the *Sayn-Wittgenstein case*[39] in the context of the relationship between primary law (in the case of Article 21 of the Treaty) and national law (in the case of the Austrian Law on the Abolition of Nobility). The key question in this case was whether the decision of the Austrian authorities to change the surnames of Austrian citizens living in Germany under the Law on the Abolition of Nobility from "Fürstin von Sayn-Wittgenstein"("Princess of Sayn-Wittgenstein") to "Sayn-Wittgenstein" is contrary to Article 21 of the EU Treaty, given that, according to the Austrian Government, these legal provisions were aimed at protecting the constitutional identity of the Republic of Austria. According to the EU Court of Justice, measures restricting fundamental freedom can be justified at the level of public policy only if they are necessary to protect the interests and only in cases where these objectives cannot be achieved by less restrictive measures. According to the Court, in the context of Austrian constitutional history, the Law on the Abolition of Nobility, as an element of national identity, can be taken into account when striking a balance between the legitimate interests of the country and the right of free movement of people recognized by EU law. In this regard, the EU Court of Justice has interpreted the constitutional basis of the law as an element of Austrian public policy, emphasizing that "the concept of public policy as a justification for the deviation from fundamental freedom must be interpreted strictly so that its scope cannot be determined unilaterally by each Member State without any control by the EU institutions".[40]

The Court of Justice has emphasized the importance of national identity in several other cases[41] although without success for the parties invoking the principle. Despite case law, national identity remains insufficiently clear, at least in the EU context.[42]

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38 C-473/93 Commission v. Luxemburg, ECLI:EU:C:1996:263, para. 36. In this case, the Court of Justice of the EU rejected the arguments based on the principle due to the disproportion of the national measures in question.
Maduro in Michaniki, C-213/07, ECLI:EU:C:2008:544, para. 31; C-208/09 Sayn-Wittgenstein, ECLI:EU:C:2010:806, para. 83 and 92; C-391/09 Runevič-Vardyn, ECLI:EU:C:2011:291, para. 86; C-51/08 Commission v. Luxemburg, ECLI:EU:C:2011:336, para. 124; C-393/10 O'Brien, ECLI:EU:C:2012:110, para. 49; C-202/11 Las, ECLI:EU:C:2013:239, para. 26; C-58/13 and C-59/13 Torresi, ECLI:EU:C:2014:2088, para. 56-59. In the Torresi case, the Court of Justice of the EU considered that Article 3 of Directive 98/543 refers only to the right to establish a legal practice in the Member States of the Union in order to practice the profession of lawyer as a professional title acquired in the national system of the Member State. This provision does not regulate either access to the legal profession or the practice of that profession, which is why it cannot affect the national identity of the Member States.

39 See: Case C-208/09 Sayn-Wittgenstein [2010] ECLI:EU:C:2010:806, available at: http://curia.europa.eu/juris/celex.jsf?celex=62009C-J0208&lang1=en&type=TXT&ancre=

40 See: Von Bogdandy, S. Schill, Overcoming Absolute Primacy: Respect for National Identity under the Lisbon Treaty, Common Market Law Review, Vol. 48, 2011, (p. 1425).

41 C-208/09 Sayn-Wittgenstein, para. 83 and 92; C-391/09 Runevič-Vardyn, para. 86; C-51/08 Commission v. Luxemburg, para. 124; C-393/10 O'Brien, para. 49; C-202/11 Las, para. 26; C-58/13 and C-59/1 Torresi, para. 56–59.

42 See: Elke Cloots, *National Identity in EU Law*, Oxford: Oxford University Press, 2015, (p. 127–134).

There is an explicit mention of Article 4 paragraph 2 of the EU Treaty by the Court of Justice in the case of *Malgožata Runevič-Vardyn*,[43] related to a Lithuanian citizen as the first applicant belonging to the Polish minority (with the Polish name "Małgorzata" and surname "Runiewicz"), married to a Polish citizen (as second applicant) who appealed to a Lithuanian court after the Vilnius Civil Registry Office refused to change her name according to the name written on her birth certificate, i.e. the name and surname "Malgožata Runevič" to be changed to "Małgorzata Runiewicz", finding that she had been discriminated on the grounds of race, citing Article 21 of the Treaty for the functioning of the EU and Directive 2000/43.[44]

According to Lithuanian law, changes in citizenship status certificates must be made in the language of the state of Lithuania, i.e. surnames, first names and place of birth must be written in Lithuanian (Article 3,282 of the Civil Code of Lithuania). This rule was also confirmed by the Constitutional Court of Lithuania, which confirmed that the personal name and surname should be entered in the passport in accordance with the rules of the official language of the country in order not to violate the constitutional status of that language. In this case, the EU Court of Justice has found that it is legitimate for each Member State to ensure the protection of its national official language in order to defend national unity and preserve social cohesion.

The position of the Lithuanian Government was also evaluated, as it considered that the Lithuanian language is a constitutional treasure of the country that protects the national identity, strengthens the integration of citizens and ensures the expression of national sovereignty, indivisibility of the state, and proper functioning of state services of local authorities.[45]

The Court of Justice in this case invoked respect for Article 4, paragraph 2 of the EU Treaty, reaffirming that the EU should respect the national identity of its member states, which of course includes the protection of Lithuania's official language. The Court also emphasized that, under national law, this was a "legitimate aim capable of justifying restrictions on the rights related to the freedom of movement and residence of citizens set out in Article 21 of the Treaty on the Functioning of the EU and could take into account when legitimate interests are "measured" against the rights set out in EU law. Measures restricting fundamental freedom, in accordance with Article 21 of the TFEU, can be justified only if they are necessary to protect the interests with which security is to be ensured and only if those objectives cannot be secured by the application of less restrictive measures.[46]

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43 See: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:62009CJ0391_SUM&from=CS.

44 See: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32000L0043

45 See: Anita Blagojević, Procedures Regarding National Identity Clause in the National Constitutional Court's and the CJEU's Case-Law, EU and Comparative Law Issues and Challenges, file:///C:/Users/%D0%A2%D0%B0%D1%9A%D0%B0%20%D0%9A%D0%B0%D1%80%D0%B0%D0%BA%D0%B0%D0%BC%D0%B8%D1%88%D0%B5%D0%B2%D0%B0/Downloads/6529-Article%20Text-20619-1-10-20180315.pdf

46 See, also, (p. 22).

Another interesting case concerning Article 4 paragraph 2 of the TEU is the *O'Brien case*[47] in which the British Ministry of Justice refused to pay Mr. O'Brien (a former royal adviser and interim judge at the Royal Court) a pension in which the pro rata temporis, paid to all permanent judges over 65 years of age, would be calculated. In this case, too, several important questions were raised, such as, who defines the concept of employees with concluded employment contracts or other types of employment, and who determines whether judges fall under this concept.

The Court of Justice of the EU has emphasized that Member States define the concept of employees having employment contracts or having established another type of employment and each Member State decides whether or not judges should be included in such a concept. The second question raised by the Court was whether under national law judges fall under the category of workers entitled to conclude employment contract or other type of employment set out in Clause 2.1 of the Part-time Framework Agreement.

According to the Court of Justice, the Part-Time Framework Agreement must be interpreted in a way that would mean that in order to achieve the goal of securing access to the pension scheme, national law should preclude the distinction between full-time and part-time judges paid on a daily basis, unless this difference in treatment is justified by objective reasons determined by a particular national court.[48]

The Court of Justice of the EU also replied to the Latvian Government (which intervened in the case) that the application of EU law in the judiciary was a result of the fact that the Court had found that the national identities of the Member States had not been respected, contrary to Article 4, paragraph 2 of the TEU. The Court further considered that the application of part-time judges paid on a daily basis, in accordance with Directive 97/81 and the Part-time Framework Agreement, could not have any effect on national identity, but further stated that the purpose of the Court's reaction was to ensure the principle of equal treatment of all judges, both full-time and part-time workers, i.e. to protect all part-time employees from possible discrimination against full time employees.. As can be seen in this case, Article 4, paragraph 2 of the TFEU can be used by different entities, not only by the litigants, but also by some external, intervening entities.

The interpretation of the identity clause is essentially the most promising path the Court is taking. When the content of the identity clause cannot be determined, the Court should read it in accordance with the principles and values contained in it. These values vary from country to country and depend on both normative assumptions based on the doctrine of constitutional identity and on their articulation by national constitutional

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47 https://www.supremecourt.uk/cases/docs/uksc-2009-0123-judgment.pdf.

48 Ibid, https://www.supremecourt.uk/cases/docs/uksc-2009-0123-judgment.pdf

courts. Although Article 4 paragraph 2 of the TEU does not define the national identity of the EU Member States, from the above it can be concluded that its content is set out in the relevant national constitutional provisions, the relevant case law of the national constitutional courts and the relevant case law of the EU Court of Justice.

Seen from a national perspective, the constitutional identity of the member states always has as its starting point the constitution, or more specifically, the specific principles, values and rules contained in the constitutions. Special emphasis is placed on the principles of state organization, state sovereignty and the principle of democracy, state symbols, state goals, protection of human dignity, fundamental rights and the rule of law.[49]

CONCLUSION

The protection of national identity is an impossible mission without insisting on protecting its constitutional specifics, or in other words national identity is the second face of constitutional identity. Without a protected constitutional identity, there is no complete national identity of the country and vice versa. Although no founding treaty of the EU mentions the constitutional identity, it is found and confirmed in a broader axiological meaning in the national identity of each member state of the Union. And again the same question posed above in the analysis: what is national identity if not part of the constitutional identity, and can we talk about the national identity of a country without it being partially or completely perceived through the prism of the continuity of the constitutional identity development of the country if it is known that exactly that constitutional development contains the contours and values of the national identity of the country?

From the analysis we can conclude that the connection of the national with the constitutional identity is part of the practice of the EU member states' constitutional courts that favor that relation as a natural course of society's development.

The question of constitutional identity becomes more complicated when viewed through the lens of the functioning of the EU and, in that sense, the position of the EU Court of Justice. Although Article 4 (2) of the EU Treaty does not contain the values that make up national identity, the fact is that the range of values is not limited with each EU member state having the right to decide which values are important to enter into the content of this principle.

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49 See: https://www.europarl.europa.eu/RegData/etudes/etudes/join/2014/493046/IPOL-JURI_ET%282014%29493046_EN.pdf.

The fact is that the views of national courts formulate the doctrine of constitutional identity based on the principle of state sovereignty. On the other hand, as a contrast the national identity contained in Article 4 (2) of the Treaty should be seen as a gradation of the basic principles that the multinational political community must respect.

Here, of course, the identity of its constitutional national group is crucial. Despite the relatively small case law on this issue, the EU Court of Justice seems to accept the view that constitutional identity is part of the principle of subsidiarity and proportionality test, whereas the closer the question is to the essence of the constitutional identity of the member states the greater the margin of discretion.

It seems that the practice of the EU Court of Justice, which must take into account the views of the constitutional courts of the member states, is crucial for understanding the relations of constitutional-national identity for both the members of the Union and the EU membership candidate countries. Both the terms "constitutional identity" and "national identity" refer to the same obligation to the EU institutions, which is an obligation to respect the core of the constitutional values of each member state individually. On the other hand, it is a fact that the approach of the EU Court of Justice and of the national courts on this issue is different.

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SHORT BIOGRAPHY

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EUROPEAN IDENTITY AND THE FORTRESS EUROPE PARADIGM

"Europe is said to be a third of the whole world, and has its name from Europa, daughter of Agenor, King of Libya. Jupiter ravished this Europa and brought her to Crete and called most of the land after her Europa…Europe begins on the river Tanay (Don) and stretches along the Northern Ocean to the end of Spain. The East and south parts rises from the sea called Pontus (Black Sea) and is all joined to the Great Sea (the Mediterranean) and ends at the islands of Cadiz (Gibraltar)…"[1]

NOTES ON THE EUROPEAN IDENTITY

Every so often, Europe has been celebrated as a postnational space, or a space built around cosmopolitan values rather than on culturally and/or ethnically specific factors[2]. In effect, geographical Europe has always had to compete with notions of Europe as a cultural community and in the absence of common political structures, European civilization could only be defined by cultural criteria[3]. Yet, contemporary Europe, stands more for the political[4] than for the geographical denotation of the continent. It is in fact a political construction and as Oudenaren underlines, a myth created to overcome the divisions and conflict of the XX-th century[5]. The real Europe, according to him, has enormous cultural, linguistic and religious diversity and it has never been united on the scale planned for the XXI century, from Finland to Portugal and from Ireland to the Balkans[6].

The hesitation in the success of the European identity is shared by many[7], and the rationale is grounded on the doubt that European identity is stronger than the old national identities it was supposed to supersede[8], whether there is a possibility to

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1   Cited from Norman Davies, *Europe-A History* (London: Pimlico, 1997), 9. For more see R. Barber, *The Penguin Guide to Medieval Europe* (London: Penguin, 1984), 30.

2   Marco Antonsich, "The Narration of Europe in `National' and `Post-national' Terms: Gauging the Gap between Normative Discourses and People's Views", *European Journal of Social Theory* 11 (4), 2008, 505-522.

3   Davies, 9.

4   According to Jiska Engelbert, Isabel Awad and Jacco van Sterkenburg: 'Europe' is a political project that ideologically (re-)produces Europe not only in terms of territory, but also, and arguably increasingly more, in terms of a population connected in its 'Europe-anness'. See more in Jiska Engelbert, Isabel Awad and Jacco van Sterkenburg, "Everyday practices and the (un)making of 'Fortress Europe': Introduction to the special issue", *European Journal of Cultural Studies*, Volume: 22 issue: 2, 133-143, 2019; https://doi.org/10.1177/1367549418823055

5   John Van Oudenaren, *Uniting Europe: European Integration and the Post-Cold War World*, (Lanham: Rowan and Littlefield Publishers, 2000), 16.

6   Ibid.

7   For example, in light of the economic/financial crisis in the past decade, Westle and Segatti claimed that the European identity seems to be in retreat. See in Paolo Segatti and Bettina Westle, "Introduction". In *European Identity in the Context of National Identity: Questions of Identity in Sixteen European Countries in the Wake of the Financial Crisis*, edited by Bettina Westle and Paolo Segatti, Oxford University Press, Oxford, 2016. White asserts that "the European identity is an illusion, and some would say a foolish one. But it has been invented to respond to a genuine problem, one that will persist as long as efforts to govern Europe as one". See in Jonathan White, "A common European identity is an illusion". In *Key Controversies in European Integration. The European Union Series*. Basingstoke, edited by Zimmermann, Hubert and Dür, Andreas, (UK: Palgrave Macmillan, 2012), 103-111. Also see Sean Carey "Undivided Loyalties: Is National Identity an Obstacle to European Integration?", *European Union Politics* 3, no. 4 (December 2002), 387–413. DOI: 10.1177/1465116502003004001.

8   Francis Fukuyama, *Identity- Contemporary Identity Politics and the Struggle for Recognition*, (London: Profile Books, 2019).

create and foster European identity on a common history of Europe bearing in mind the closeness among European peoples[9] or that the putative absence of European identity and belonging on the continent has implications for the future of Europe[10].

Similarly, many other also claim that the European identity has not displaced national identities in the EU, but, for a significant share of EU citizens, a European identity exists alongside a national identity[11], and that the quasi-national conception of European identity can be conducive to the rise of a democratic political union of Europe[12]. There is no doubt that the relationship between the nation-state and the European Union have always been ambiguous[13], however research illustrates that strong support for national identity does not oppose or negate European identity, and by doing so, showing less trust in the European Union. In fact, research shows that rationality rather than identity seems to play the key role when trust is in question[14].

Moreover According to Oudenaren, the European diversity is so great that could set the limits to the development of the European identity and the main questions that will remain open are to do with the extent to which the European identity emerges and whether there are geographical and cultural limits to how far an identity can be stretched[15]. Analogous is the claim put forward by Bessel, who notes that the European society and European culture have become so fragile and diffuse and at the same time so greatly influenced by extra-European impulses that it no longer is certain to what these terms refer[16].

Nevertheless, the truth is that one would not commonly engage into debate on identity if the latter has not impacted or influenced a particular political discourse. And the European identity has been high on the agenda for decades primarily due to its relation to the two most significant EU policies – deepening and widening. Accordingly, the interest for the discourse on European identity's crisis is matched. Some pinpoint that the revival of populism and extremism is a strong symptom of the identity crisis that

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9 See in Florian Pichler, "Affection to and Exploitation of Europe: European Identity in the EU", IHS Working Paper, Institute for Advanced Studies, Vienna, 2005. For more see in Burgess, J. P., "What's so European about the European Union? Legitimacy between Institution and Identity", *European Journal of Social Theory* 5(4), 2002, 467–481; G. Delanty, *Inventing Europe. Idea, Identity, Reality*, (Houndmills, Basingstoke and Hampshire: Macmillan Press, 1995); B. Stråth, "A European Identity. To the Historical Limits of a Concept", *European Journal of Social Theory* 5(4), 2002, 387–401; E. Harris, "New Forms of Identity in Contemporary Europe", *Perspectives on European Politics and Society* 4(1), 2003, 13–33; J. R. Llobera, "The Concept of Europe as an Idée-force", *Critique of Anthropology* 23(2), 2003, 155–74..

10 Thierry Chopin, "Europe and the identity challenge: who are "we"?", *European Issues*, n°466, 19th March 2018, 2.

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14 Harteveld Eelco, Tom van der Meer, and Catherine E De Vries, "In Europe we trust? Exploring three logics of trust in the European Union", *European Union Politics* 14, no. 4 (December 2013), 542–565, DOI: 10.1177/1465116513491018.

15 Oudenaren, 16.

16 Richard Bessel, "European Society in the Twentieth Century". In *The Oxford History of Modern Europe*, edited by T. C. W. Blanning, (Oxford: Oxford University Press, 2000), 234–260, 235.

is affecting many of the European Union's Member States[17] and others that despite six decades of the European project on the 'ever closer union of peoples' began, a shared, pan-European consciousness remains conspicuously absent, which implies that the lack of an extant European demos in the European Union means, in effect, a Europe without Europeans[18].

Europe of today is yet again faced with the dilemma, to open up its borders and frontiers to an increased flow of people, along with all of the uncertainties that it may bring or to close them and engage on maintaining the European way of life. Contemporary Europe is on a crossroad faced with a predicament to close itself and by doing it may prevent anxiety, fear and other potential affectations to the European societies or push for open and humanitarian society[19]. As some authors claim, fortress Europe is in the making[20]! As its physical barriers and stronghold features are becoming more visible, its psychological barriers are more feasible, so one can discuss about the remaking of European identity both by pressures (internal and external) and perimeters. The paper aims to contribute to the ongoing debate on the influence of the migrant crisis on the European identity by denoting the main challenges and issues raised both by the proponent and opponents of the fortress Europe paradigm.

FRONTIERS, BARRIERS AND BORDERS

During the course of centuries, the borders of Europe were questioned principally in relation to its geography and geopolitics, both linked to the dilemmas embedded in the core of the European identity: where does Europe end, and who are the ones that are to be counted as Europeans?

The first dilemma has been haunting Europe for centuries mainly related to particular entities – such as Russia, Turkey and others, and is tightly related to the second one. Namely, as Pavković affirms, the debate is about who counts as a European and the present European Union members are assumed to be, without any doubt, Europeans[21]. Therefore, according to Pavković, what is in doubt is the membership of other border nations in and the outer boundaries of the European identity[22].

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17 Chopin, 1.

18 Mafalda Dâmaso, Luke John Davies, Kuba Jablonowski, Seamus Montgomery, "*Acting European: Identity, Belonging and the EU of Tomorrow*", FEPS YAN 6th Cycle, June 2019, 7.

19 A. Junemann, N. Fromm and N. Scherer, "The Kaleidoscope of Migration: Theoretical Perspectives and conceptual Considerations". In *Fortress Europe? Challenges and Failures of Migration and Asylum Policies*, edited by A. Junemann, N. Fromm and N. Scherer, (Wiesbaden: Springer, 2017), 1-11, 1.

20 Ibid.

21 Pavković A., Constructing a European Identity: Problems of Supranationalism. In: *Why Europe? Problems of Culture and Identity*, edited by Andrew J., Crook M., Waller M. (London: Palgrave Macmillan, 2000). https://doi.org/10.1057/9780333983065_10

22 Ibid.

While most of Europe's outline is determined by its extensive sea coasts, historians argue that the delineation of its land frontier was long in the making[23], particularly its eastern border – the border with Asia. According to history, the idea that Europe can and should extend beyond the Don, all the way to the Ural Mountains and Ural river, was promoted in late XVIII century and widely accepted one century later as result of the rise of the Russian empire. However, according to Davies, the idea was also widely criticized, especially by analytical geographers such as Reynold who spoke of Russia as the geographical antithesis of Europe[24]. Davies also pinpoints that the decline of Russian power could invoke a revision resulting in the so called "tidal Europe" whose frontiers ebb and flow[25].

European history is filled with narratives of war and peace. Yet, as never before, during the Cold War were the borders so vivid and the barriers, delimiting two distinct parts of the continent, so permanent[26]. The Cold War paradigm dominated the political space of the continent, since as Reynolds underlines, post-war Europe became an arena of contending ideologies as well as powers[27]. For decades, Europe was divided into two blocks which were stuck into postures of "deterrence" for evermore[28] and the newly erected wall in the city of Berlin stood as the most forbidding symbol of Europe's division[29]. The Berlin Wall was more than an archetypal presentation of a political border distinguishing two separate entities and two divergent identities. It was a segment of the so called Iron Curtain that was drawn from the Baltic to the Adriatic Sea in a manner of unnatural defensive barrier separating the capitalist West and the communist East. The Wall stood tall from 1961 to 1989 and its famous border crossing the so called Checkpoint Charlie, became a symbol of the highly guarded concrete barrier which divided not just Berlin but the continent, physically and ideologically. The checkpoint was situated in the American sector at the Berlin Wall in West Germany. Its exclusivity was grounded on the fact that it was the only crossing point available to non-Germans and was manned and operated in a simultaneous manner by American, British and France military police. In a way, Checkpoint Charlie epitomized a visible representation of possible crossing over a Wall that had political ideology emanating from it[30].

Then in 1989 Europe experienced a "rebirth of history". Namely, according to Reynolds, the year 1989 and the change it brought for the continent mark it as momentous in European history as 1789[31]. The Cold War era ended with the collapse of one of the blocs

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23 Davies, 8.

24 Ibid.

25 Ibid. 9.

26 Reynolds, 282.

27 Ibid. 284.

28 Ibid. 282.

29 Ibid. 301.

30 Tim Marshall, *The Age of Walls: How Barriers Between Nations are changing or World*, (New York: Scribner, 2018), 15.

31 Reynolds, 302.

and one of the protagonists and once again it started to seem meaningful to talk about Europe as a single entity[32].

EU AND THE EUROPEAN IDENTITY

According to Delanty, Europe as an idea that has forever been in a process of invention and reinvention as determined by the pressure of new collective identities[33]. Europe is not a synonym for the EU, since Europe refers to something larger than the EU[34] and as Saward notes, Europe as an institutional assemblage [is] irreducible to the EU[35]. Furthermore, according to Damaso et alia, there is a difference between the EU and European nation-states, which is qualitative rather that quantitative, one more profound than simply the matter of the EU not involving all nation states that make up the European continent[36].

At the beginning of the European integration project included six countries that were located in a compact region of northwest Europe (apart from Italy), were predominantly Roman Catholic (apart from West Germany and the Netherlands that had large Protestant populations), were all part of the Charlemagne's empire and had economic coherence[37]. In a few decades, this Carolingian Europe grew by adding members, territory, citizens, borders, languages and many more facets of an elaborate and complex political, economic and social identity. The Brussels officials commonly used Europe to denote the Community and later the Union, but the anxiety and opposition by non-member European states began to rise[38]. However, since the integration expanded further, aspirant countries mainly from central and eastern Europe started to see the membership process as a ticket to their full acceptance into "Europe" which is now perceived as a community of value, not as geographical expression and goes far beyond the practical benefits that include economic cooperation, trade, peace, and so forth[39].

At present times, the consolidation of European citizens identification with the European integration in general and EU institutions and policies in particular, is one of the major challenges for the Union[40]. Some claim that the European integration

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32   Ibid. 302-303.

33   Delanty, 1.

34   Dâmaso et alia, 8.

35   Michael Saward, Enacting citizenship and democracy in Europe. In *Enacting European Citizenship*, edited by Engin Isin and Michael Saward. (Cambridge and New York: Cambridge University Press, 2013), 220-237, 220.

36   Dâmaso et alia, 9.

37   Oudenaren, 15.

38   Ibid.

39   Ibid. More on the perceptions outside the EU see in Schilde, K.E., Who are the Europeans? European Identity Outside of European Integration". *J Common Mark Stud*, 52: 2014, 650-667. https://doi.org/10.1111/jcms.12090

40   Latcheva R., Datler G., Rossbacher E., The Concept of European Identity: Overused and Underspecified?. In *Methods, Theories, and Empirical Applications in the Social Sciences*, edited by Salzborn S., Davidov E., Reinecke J., (VS Verlag für Sozialwissenschaften, 2012), https://doi.org/10.1007/978-3-531-18898-0_29

facilitates the flourishing of diverse national identities rather than convergence around a single homogeneous European Union identity[41]. In reality the Union was created as a community of values shared by the member states (freedom, equality, democracy, rule of law, etc.), but the member states have identities and histories and naturally borders[42]. In addition, the EU embodies a plethora of identities (linguistic, ethnic, religious, ideological, and so forth) that may but to the contrary do not commonly overlap. So, the integration process plays an indispensable role in mitigation of a whole range of identities. In that aspect Cram is right when denoting that the role of the EU as facilitator for diverse understandings of collective identities encourages the enhabitation of the EU at an everyday level and the reinforcement of a sense of banal Europeanism which is a crucial aspect of the European integration process[43].

Conversely, the diversity of nations that are part of the EU today is far greater that the one of the original six member states. Bearing in mind that this diversity is multidimensional and that there is a rise of skepticism and nationalism, especially when prompted by crisis, one cannot overlook the jealous manner of acting, employed by EU member states, in defense of national interest. This however, would not be an issue if the primary movement towards integration in Europe was not animated by a strong desire to circumscribe nationalism, which has been the driving force in the ruinous and self-destructive struggle between European countries and has managed to ruin the possibilities for any kind of lasting form of cooperation among them[44].

The European identity was grounded on the "postnational" European consciousness, which according to Fukuyama was an antidote to the aggressive ethno-nationalisms of the first half of the XXth century[45]. Yet, the project was not completely successful especially when challenged by issues that emanate from different stances of member states. More precisely, when dealing with the crisis over the euro and above all when immigration and refugees were in question[46]. Fukuyama speaks of the ghosts of the older national identities that hung around like unwanted guests at the dinner party and started emerging at critical junctures where they have created an existential threat to the EU as a whole[47].

Questioning the success of the European identity project is most commonly grounded on the suspicion that the idea of cultural reconciliation and inclusion can neutralize not only nationalism but ones of cultural superiority. As in general, when the construction

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[41] L. Cram, Identity and European integration: diversity as a source of integration. Nations and Nationalism, 15: 2009, 109-128. https://doi.org/10.1111/j.1469-8129.2009.00367.x

[42] Chopin, 2.

[43] Cram.

[44] Bakardjieva et alia, 4.

[45] Fukuyama, 143.

[46] Ibid. 145.

[47] Ibid.

of collective identities is in question, the European identity politics as well, implies that the formation of European identity involves cultural power struggles[48]. The management of the 2015 refugee crisis and its aftermath, the overall standing in regard to the EU integration policies and the public discourse on migration, attest to the predicaments faced by the EU. In this aspect, Engelbert et alia, are spot-on when asserting that The borders of Europe are erected and guarded through cultural practices as much as through border control and security technologies[49].

FORTRESS EUROPE

The discourse on the limits of European identity is closely related to the European attitude towards migration and asylum in general and EU's policy specifically. European history is settled upon a rich and fruitful export of European cultural influence, European imperialism and migration of millions of Europeans that had spread European society around the globe[50]. During the twentieth century Europe, as never before, became more fragmented and more diverse. Even though European society has always been in flux, fragmented and diverse it was precisely during the European integration project's formative years, that the continent became a home of millions of people whose origin and culture were non-European[51]. Much has changed in the last century compared to Europe and its political standing, its demography, economy and cultural influence in the XIX century. Most significantly, Europe came to house the world's oldest and slowest growing population[52], so immigrants were welcomed and its immigration policies propagated an essential impact. However, as Delanty points, Europe is ambivalent in that it is not always about unity and inclusion, but is also about exclusion and the construction of difference based on norms of exclusion[53]. The latter became especially true when European nations experienced a rapid change due to immigration, and as result the attitudes towards immigrants have hardened and the support for virulent nationalist parties grew[54]. The refugee crisis that peaked in 2015 has contributed to the excel of fear, hate and calls for exclusion of the "other", that was perceived as treat. This resulted in a rise on nationalist, populist, chauvinist, radical voices across all Europe, shift in the political response and the eventual creation of a "Fortress Europe" - a citadel against

48 Szaló, C., European Identity Politics. In *The Encyclopedia of Political Thought,* edited by M.T. Gibbons, (Hoboken: John Wiley & Sons, 2014), https://doi.org/10.1002/9781118474396.wbept0337.

49 Engelbert, et alia.

50 Bessel, 234.

51 Ibid. 236.

52 Ibid. 257.

53 Delanty. 1.

54 Marshall, 200.

immigration, watched over by a hi-tech surveillance system of satellites and drones and protected by fences and warships[55].

These stances were grounded on voices opposing migration throughout the continent, and although European opinions vary greatly on the issue of accepting migrants, research has shown that months after the crisis developed, there was an apparent consensus on certain ideas or predictions. Namely, according to the research conducted by Fourquet on the pull factor risk, between 70% and 80% of respondents in different countries agreed that "if we accept large numbers of migrants into our country and into Europe, it will create a pull factor and cause many people living in Africa, Syria, Iraq or Afghanistan to move to Europe". Furthermore, according to him, this concern was of course most acute in the countries that are most resistant to welcoming migrants (such as UK with 80% and France with 79% in France), yet also in countries that are most in favour of accepting migrants: Italy with 78% and Germany and Spain with 69%[56].

In other research presented by Volk[57] on Fortress Europe – a far-right bottom-up protest movement, it has been highlighted that this movement constructs Europe as a society at war against the immigrant "other" and its "elites". According to her, by doing so, the discursive construction of Europe is set under the lens of transnational populism, the success of the "European people" and the overall achievements and failures of the alliance.

On balance, as Bermúdez asserts, during 2015 and afterwards, immigration was highlighted by European citizens as one of the most important issues facing the EU and their national states[58]. From the outlooks presented above, it is clear that the issue has raised political interest and was high on the political agenda. The anti-immigrant arguments presented by some far right, populist and authoritarian political actors across Europe was fully in line with their general positon to restrict immigration and refugees and restrictive positions regarding multiculturalism[59]. Still, as Bermúdez notes, the left-wing parties were also doing so only when their supporters become more negative about immigrants or when the parties themselves lose votes to their right-wing opponents[60].

[55] Malik Kenan. 2018. "How we all colluded in Fortress Europe", *The Guardian*, 10.06.2018, https://www.theguardian.com/commentis-free/2018/jun/10/sunday-essay-how-we-colluded-in-fortress-europe-immigration (visited on 22.11.2021)

[56] Fourquet, Jérôme. "*European reactions to the migrant crisis.*" Foundation Jean Jaures en Foundation for European Progressive Studies (2015). p. 2. https://www.feps-europe.eu/Assets/Publications/PostFiles/348.pdf (visited on 22.12.2021)

[57] Sabine Volk, "Speaking for "the European people"? How the transnational alliance Fortress Europe constructs a populist counter-narrative to European integration", *Politique européenne*, vol. 66, no. 4, 2019, 120-149.

[58] Sandra Bermúdez, *Refugees welcome? Cross-European public opinion on asylum seekers following the 2015 crisis.* ARI 119/2020 - 27/10/2020 - Elcano Royal Institute, available at http://www.realinstitutoelcano.org/wps/portal/rielcano_en/contenido?WCM_GLOB-AL_CONTEXT=/elcano/elcano_in/zonas_in/demography+population/ari119-2020-bermudez-refugees-welcome-cross-european-pub-lic-opinion-on-asylum-seekers-following-2015-crisis (visited on 23.12.2021)

[59] Ibid.

[60] Ibid.

Relevant studies and data[61] from EU countries show that in relation to the migration crisis in 2015 the scale of support of the public opinion varied from country to country and as it is underlined - it had nothing to do with a country's wealth or the geographic proximity between the groups of countries[62]. Furthermore, the rationale behind the support was based on different logic – so Germany as the primary destination for migrants had 79% and Italy (as the main gateway into Europe together with Greece) had 77 % in favor of migration[63]. The latter is in line with the German welcoming policy, which according to Koenig should not solely be seen as a display of altruism, but also in light of Germany's demographic development and of a clear shortage of skilled labor in the country[64]. In contrast, France for example has a negative stance which (among a whole set of other features) can be traced back to semantic differences as well: in Germany people talk about a "refugee crisis" in Europe (and the concept of "refugee" suggests an empathetic link to the crisis that is also grounded in Germany's history), while in France, people rather tend to talk about a "migration crisis", thus amalgamating different categories of migrants[65]. There is no doubt the failure on EU's part to react in a unified manner to the refugee crisis is also related to the named divergence since it shows a particular viewpoint on the policy and is not necessarily associated to particular ideology. Furthermore, when the 2015 refugee crisis is in question, one should reevaluate the overall accomplishment of the EU's asylum policy from the point of success when dealing with the external pressures that saw a dramatic rise in the numbers of asylum seekers and from the point of failure to build a fully-functioning asylum system[66], such as Servent suggests. Undeniably, the 2015 refugee and migrant crisis came to be one of the most salient and contentious issues in the history of European politics, affecting not only the daily politics but citizens' attitudes and public reaction. Apart from the multifaceted character, asymmetric nature, it also managed to add a new layer of instability to the already unstable European Union as Karolewski and Benedikter indicate[67]. The reasons for EU dire state include the shrugging off and frequent rejection of its principles, the

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61 See for example: Sergio Carrera, Steven Blockmans, Daniel Gros and Elspeth Guild, *The EU's Response to the Refugee Crisis Taking Stock and Setting Policy Priorities*, CEPS, 16.12.2015, available at https://www.ceps.eu/ceps-publications/eus-response-refugee-crisis-taking-stock-and-setting-policy-priorities/ (visited on 23.12.2021); European Social Survey Studies, ESS 1 (2002), ESS7 (2014) and ESS8 (2016); Fourquet, op. cit.

62 Fourquet.

63 Ibid.

64 Nicole Koenig, *France And Germany In The Refugee Crisis: United In Diversity*?, 21.10.2016, Jacques Delors Institut, Berlin, available at https://institutdelors.eu/wp-content/uploads/2020/08/refugeecrisis-koenig-jdib-oct16.pdf (visited od 22.12.2021). Also see more in Ayoub, M.A. (2019), "Understanding Germany's response to the 2015 refugee crisis", *Review of Economics and Political Science*, Vol. ahead-of-print No. ahead-of-print. https://doi.org/10.1108/REPS-03-2019-0024

65 See more in Annick Beddiar, Tim Dixon, Jérôme Fourquet, Stephen Hawkins, Míriam Juan-Torres, Mathieu Lefevre, Anne-Laure Marchal, Vincent Wolff, *Attitudes-towards-refugees-immigrants-and-identity-in-France*, More in Common and Purpose Europe, July 2017, available at https://www.humandignity.foundation/wp-content/uploads/2018/11/Attitudes-towards-refugees-immigrants-and-identity-in-France.pdf (visited on 23.12.2021)

66 Ariadna Ripoll Servent, "The EU's refugee 'crisis': Framing policy failure as an opportunity for success", *Politique Européenne*, Volume 65, Issue 3, 2019, 178-210.

67 Karolewski, Ireneusz Pawel, et Roland Benedikter. "Europe's refugee and migrant crisis. Political responses to asymmetrical pressures", *Politique européenne*, vol. 60, no. 2, 2018, 98-132.

incomplete status of its citizenship, and its integration being hamstrung by local or national identity-seeking and poor legitimation of common institutions[68].

During and after the refugee crisis, the anti-immigration sentiment in Europe easily coupled with the rise of nationalist rhetoric, manifestations of chauvinist attitudes from mainly far-right, populist and authoritarian political actors and in some cases resonated with the erections of temporary and most importantly permanent structures at the borders of many European nations. These anti-immigrant sentiments were grounded on diverse yet interconnected preferences about, and demand for the preservation of the national or supranational identity, often promoting exclusion on the grounds of cultural incompatibility. All of them combined and the last one expressly, do resound familiar concerns and endorse advocacy against the foundation of the European identity. These voices among other, negate reconciliation (in general and cultural in particular) in the core of European identity and promote paradigms of cultural and even civilizational antagonism. For this reason, the impact of the refugee crisis is valued as grave contribution to the already troubled state of the Union not only with regard to the European identity project but also with regard to European non-unified stand on migration and asylum policy and its response to migrant and refugee flows. Additionally, it is important to note that Voegele is right, when stating that the framing of refugees and migrants as threats to the Western, most notably European life, has increased their precarity and exacerbated right-wing politics of fear and hate[69]. Yet, Fortress Europe paradigm has reentered the political stage as result of the 2015 refugee crisis, as a showcase of the mentality reflected by extreme right, populist and authoritarian, but also Eurosceptic and Europhobic political groups and should be critically discussed against the backdrop of European mainstream politics.

PROSPECTS AND CONCLUSION

The question on who counts as a European and where are the outer frontiers of Europe, has been present for most of the European history and especially after the creation of the European community and later on European Union. These uncertainties that, as Pavković asserts, are surrounding these 'hard' or 'frontier' cases do not present any insurmountable obstacles to the constructing of a European supranational identity. In line with this, for an identity in the process of construction, the controversies over its outer boundaries are not only natural but also welcome and as Pavković notes, they appear to assume that there is a core European identity which allows us to debate the exact location of its outer boundaries[70]. The external border of the EU is in fact a more

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68 Rouet, Gilles. "Hopes and Fears in the European Union", Hermès, *La Revue*, vol. 77, no. 1, 2017, 179-190.

69 Hannah Voegele, Precarious borders: Frames of (im)migration and the potentiality of affect", *Raisons politiques*, Volume 76, Issue 4, 2019, 121-143.

70 Pavković.

complex matter than that outlined by security fences and shipwreck sites[71], or stipulated by bilateral or supranational provisions. It is, as Loyer asserts, both ideological operation and a frontline[72].

On the other hand, political reality has shown that there is a new, actually restored perception that the stalling of the EU enlargement process, especially in regard to the Western Balkan has to do with imposing an imaginary barrier for nations and identities outside the established European identity. The later has been reaffirmed by subsequent absence of decisions to move forward and indicate that Europe is going through an incremental and not too subtle revival of historical prejudices and condescension of northern and western European states and peoples towards their southern and eastern neighbors[73].

Manifestly the European identity is a process and work in progress[74], similarly to the European Union or Europe envisioned as a political construct. As in every project, all partners and factors must play its role and continuously reaffirm their willingness to cooperate and their readiness to perform for the common good. The most outspoken segment of the current crisis of the European identity project is related to skepticism, populism and nationalism and their proponents are some political parties that by asserting more traditional nationalist identities and policies have directed their dissatisfaction not just against the EU but also against immigrants and foreigners[75]. However, as it was mentioned before, the opposition on migration was detected in political groups across the whole political spectrum. So Lehne is correct when stating that migration happens to be one of the main battlegrounds where different conceptions of organizing life in Europe clash. His further arguments underline that the European response to the refugee crisis is rooted in deep-seated structural factors and that an important one is the tension between the EU's economically driven liberalization agenda and the ongoing renationalization of European politics[76]. According to this view this is in fact a peculiar situation because Europe decided to remove internal borders in order to secure a free movement and did so by eliminating one of the key functions of traditional statehood – the control over its territory without creating a common political space and a sense of European identity that could and should anchor this creation. And if anything, the migration crisis sparkled an elevated discourse on national interest, nation-state and national interest and reopened the debate on European identity. The proponents and opponents, equally, touched upon the issue of European identity from the national,

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71 Barbara Loyer, "The European Union: A territory under construction. Thoughts on the 2015 refugees crisis", *Hérodote* Volume 164, Issue 1, 2017, 11-42.

72 Ibid.

73 Eran Fraenkel, "The EU and the Western Balkans: do they share a future?", *Notes Internacionals* 145, CIDOB, 03/2016.

74 Dâmaso et alia, 7.

75 Fligstein et alia.

76 Stefan Lehne, *The Tempting Trap of Fortress Europe, Carnegie Europe*, 21 APRIL 2016, available at https://carnegieeurope.eu/2016/04/21/tempting-trap-of-fortress-europe-pub-63400 (visited on 23.12.2021)

ideological, cultural, political and economic perspective. Nationalism and localism, evidently, can narrow the viewpoint and thus endanger the European identity construct since those who participate in 'Europe' are more likely to develop a European identity, while those whose economic and social horizons are essentially local are more likely to assert nationalist identities[77]. Accordingly, how can these challenges be exceeded? The European project is futurist in vision and orientation, unlike more traditional nationalisms which gaze back to the airbrushed past[78]. At the same time Cram is correct when asserting that the European Union identity is viewed as an ongoing process which is banal, contingent and contextual[79]. Europe is much likely to keep on its attractiveness and feasibility for migration for decades to come and facilitating diversity may thus provide a vital source of dynamism for the integration process[80]. As the discourse on the Future of Europe is opened, the solution must be found within Europe (in geographical terms) and the Union (in political terms).

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[77] Fligstein et alia.
[78] Dâmaso et alia, 7.
[79] Cram.
[80] Ibid.

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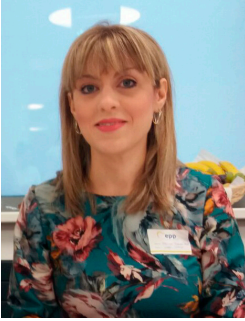
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CYBER SECURITY MANAGEMENT POLICIES IN THE MACEDONIAN LEGAL SYSTEM: THREATS AND CHALLENGES

POLITICAL THOUGHT

63

1. INTRODUCTION

Cyber security is a multidimensional realm that can be analyzed from many different aspects. The need to analyze it from an informational or technical point of view today is complemented by the inevitable legal and sociological approach, but also through the prism of policy making. This dynamic subject matter is constantly undergoing many changes due to its direct connection with the online space that is exposed to permanent development and change. Privacy and data protection are exposed to a number of risks and very often they are subject to different types of cyber threats. The Internet offers endless possibilities, but at the same time when using it we must be aware of the potential risks and threats that go along with the benefits of the virtual world.

Cyber security is one of the newest areas in national security policy and is gaining ground in global security structures. Cyber security policy makers face many challenges such as the inability to keep up with technological innovations, new types of security threats, inability to monitor and control the Internet space due to its nature, and so on. At the same time, cyber security management also imposes the serious challenge of precisely defining the roles and responsibilities of various actors in international law. Hence, the question arises as to who establishes control over the security standards for infrastructure or Internet content and whether this type of control over cyberspace can be established at all. Macedonian communication networks are part of the global communication networks, which means that cyber security incidents elsewhere can affect the Macedonian cyberspace and services, and vice versa.[1]

Countries' security systems are constantly seeking prompt action from policymakers to create appropriate legal and policy frameworks in response to cyber threats. Policies of good cyberspace management should provide a safe environment for every individual, by guaranteeing human rights, protecting state integrity, consistent law enforcement and crime prevention within the Internet.

In this paper we will address the types of cyber threats on the Internet, the legal framework in the Macedonian legal system, cyber security management policies in our country and institutional capacity, as well as the need to find an effective model to deal with these modern threats and challenges.

For the purposes of the research, a combined methodological approach will be applied based on the analysis of the latest trends in the field of cyber threats and the strengthening of cyber security globally, as well as analysis of domestic legal sources in

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1   National Cyber Security Strategy of the Republic of Macedonia 2018-2022, July 2018. Available at: https://www.mioa.gov.mk/sites/default/files/pbl_files/documents/strategies/ns_sajber_bezbednost_2018-2022.pdf . Accessed on 25.12.2021.

this field, in order to determine the current situation in the domestic legal system and to detect the needs, weaknesses and directions for further policy-making processes.

2. TYPES OF CYBER THREATS

Today we are undoubtedly faced with increased dependence on the services provided by the cyberspace. Hence, inadequate protection of ICT systems and their non-functionality can have a significant negative impact on the public and private sector, as well as the on the overall social activity. The growing use of services in cyberspace leads to an increasing need to identify cyber threats, to increase awareness of them, but also to pay more attention to the importance of data privacy and the risks of their violation.

Cyber security is the practice of protecting systems, networks and programs from digital attacks. These cyber-attacks are usually aimed at accessing, altering or destroying sensitive information; extortion of money from users; or interruption of normal business processes.[2] Establishing effective cyber security measures is one of the most complex challenges today due to the fact that the number of devices has long exceeded the population, and attackers have an increasingly innovative and creative approach to cyber attacks. The latest IBM report, which estimates the cost of data breaches on the Internet on global level, indicates an increase from $ 3.86 million in 2020 to $ 4.24 million in 2021, which is the highest average total cost to date.[3]

According to several authors[4], the most common cyber threats are:

> ***Malware and distribution of computer viruses (Trojan horses, worms, viruses) and ransomware attacks.*** Malware is software that performs malicious tasks on a device or network, such as destroying data or taking control of a system. It is activated when the user clicks on a malicious link or attachment, leading to the installation of dangerous software. Malicious software also includes spyware, computer viruses (Trojan horses, worms, viruses), and ransomware attacks. Ransomware attacks are becoming a more serious and frequently used cyber threat. These attacks infect the network and hold data and computer systems hostage until ransom is paid. The ransom costs are accompanied by additional damage due to lost productivity and data loss which can be most detrimental to the business.[5]

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2 What is Cybersecurity? CISCO. Available at: https://www.cisco.com/c/en/us/products/security/what-is-cybersecurity.html. Accessed on 17.12.2021.

3 Cost of a Data Breach Report 2021. IBM. Available at: https://www.ibm.com/security/data-breach. Accessed on 20.12.2021.

4 CISCO. Types of Cybersecurity Threats. Available at:https://www.cisco.com/c/en/us/products/security/what-is-cybersecurity.html#~-types-of-threats; IT Governance UK. Types of Cyber Threats Available at:https://www.itgovernance.co.uk/what-is-cybersecurity?promo_name=megamenu-cybersecurity&promo_id=info-cybersec; IBM. Common Cyber Threats. Available at:https://www.ibm.com/topics/cybersecurity. Accessed on 20.12.2021.

5 The Top 10 Cyber Threats to Know in 2022. Available at: https://prowritersins.com/cyber-insurance-blog/top-10-common-cybersecurity-threats/. Accessed on 20.12.2021.

> **Phishing.** Phishing attacks use fake communications, such as e-mail, to trick the recipient into opening the message and carrying out instructions inside, such as giving out a credit card number. The purpose is to steal sensitive data such as personal identification data, bank and credit card details and passwords or to install malware on the victim's device.[6]

> **A Distributed Denial of Service Attack (DDoS attack)**. These attacks aim to disrupt the computer network by flooding it with redundant requests thus overloading the system and preventing legitimate requests being met.[7]

> **Zero-Day Exploits**. It is a cyber-attack that exploits vulnerability, i.e. a vulnerability in software, hardware or firmware that is unknown to the manufacturer which can be used to install various types of malware, steal sensitive data or credit card numbers thus causing a breach of data privacy.[8]

> **Spyware programs**. This is a form of malware that hides on a device that provides real-time information sharing with attackers, allowing them to steal personal information such as bank accounts and passwords.[9]

> **Adware programs**. It is a form of computer program that allows the sudden appearance of certain content, usually a desktop advertisement or their integration into the communication software. Uninstalling it is possible only with special software.[10]

> **Social Engineering**. Attackers use social interactions to gain access to valuable data. At the heart of social engineering attacks is fraud, and these attacks are on the rise. Cybercriminals deceive and manipulate victims in order to circumvent security measures or disclose the desired personal information. Even the best cybersecurity systems cannot prevent a social engineering attack.[11]

However, the list of cyber threats is constantly expanding due to the anonymous nature of cyberspace, its easy access and insufficient regulation. Cyber-terrorism and hacktivism, which are the focus of interest due to their pronounced political dimension, are becoming more prevalent in recent years.

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6 "Seven Types of Cyber Security Threats". University of North Dacota. Available at: https://onlinedegrees.und.edu/blog/types-of-cyber-security-threats/ . Accessed on 20.12.2021.

7 Tungal, Abi Tuas. "What is a Cyber Threat?". Upguard. Available at: https://www.upguard.com/blog/cyber-threat. Accessed on 20.12.2021.

8 Tungal, Abi Tuas. "What is a Zero-Day?". Upguard. Available at: https://www.upguard.com/blog/zero-day. Accessed on 20.12.2021.

9 Tungal, Abi Tuas. "What is a Cyber Threat?". Upguard. Available at: https://www.upguard.com/blog/cyber-threat. Accessed on 20.12.2021.

10 For more see in Наумовски, Гоце. „Право на информатичка технологија", Правен факултет „Јустинијан Први", Skopje, 2013, p. 122.

11 The Top 10 Cyber Threats to Know in 2022. Available at: https://prowritersins.com/cyber-insurance-blog/top-10-common-cybersecurity-threats/. Accessed on 20.12.2021.

Namely, **cyber terrorism** is an attack that uses electronic means to penetrate and/
or seriously obstruct the critical national infrastructure.[12] Scenarios of cyber-terrorism
threats include paralyzing important urban areas, the public health sector, or disrupting
the financial sector by "shifting several units and zeros."[13]

Cyber-terrorism is thought to result in the most common criminal offenses by terrorist
organizations that would bring about fraud, unauthorized access and unauthorized
interference with a computer system, and is less likely to cause physical destruction
similar to the classical form of terrorism. Hence, it is becoming increasingly difficult to
draw a clear line between cybercrime and cyber terrorism.

Hactivism is a hybrid attack consisting of a combination of hacking and traditional
activism. Hactivism provides new forms of mobilization for Internet activists in their
struggle for a particular cause (e.g. human rights, freedom of speech, etc.). Hactivism
easily mobilizes large groups, but according to its effects it is included in cyber threats
with little harm, and only a small number of hacktivists end up being criminally
prosecuted. Its detrimental effects include the use of tactics such as spreading viruses
and worms, distributed denial of service (DDoS) attacks, downloading user accounts on
Facebook pages or Twitter accounts, and stealing or disclosing personal information from
the systems they attack. The trend in recent years indicates the cooperation of hacktivists
with cybercriminals, as well as their direct threats against governments, institutions and
individuals, causing more and more fear and panic among the civilian population. The
latest suppositions lead to the existence of the so-called state-sponsored hacktivism[14]
that is difficult to prove, but there are serious indications of its existence.

3. MACEDONIAN CYBER SECURITY LEGAL FRAMEWORK

The Macedonian cyber ecosystem is still at an early stage of its development. According
to the 2018 Cyber Security Capacity Survey[15] some government agencies and leading
companies have begun to develop an interest in cyber security.

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12 Види повеќе кај Клопфер Ф. et. al „Вовед во управувањето со сајбер безбедност". DCAF Geneva Centre for Security Sector Governance, стр. 18. Available at: https://www.dcaf.ch/sites/default/files/publications/documents/CyberPolicyToolMACEDONIAN%28Cyrillic%29.pdf

13 Ген. Вотел, Јозеф Л., јули 2015.Разбирање на тероризмот денес и утре. ЦТЦ Сентинел 8. Издание 7, стр. 2–6, во Клопфер Ф. et. al „Вовед во управувањето со сајбер безбедност". DCAF Geneva Centre for Security Sector Governance, стр. 18. Available at: https://www.dcaf.ch/sites/default/files/publications/documents/CyberPolicyToolMACEDONIAN%28Cyrillic%29.pdf

14 For more see Клопфер Ф. et. al „Вовед во управувањето со сајбер безбедност". DCAF Geneva Centre for Security Sector Governance, стр. 21-23. Available at: https://www.dcaf.ch/sites/default/files/publications/documents/CyberPolicyToolMACEDONIAN%28Cyrillic%29.pdf

15 Weisser Harris, Carolin and Nagyfejeo, Eva, Cybersecurity Capacity Review Former Yugoslav Republic of Macedonia (FYR Macedonia) (July 1, 2018). Available at: SSRN: https://ssrn.com/abstract=3658462 or http://dx.doi.org/10.2139/ssrn.3658462. Accessed on 17.12.2021.

The mindset of cybersecurity consists of values, attitudes and practices, including habits of individual users, experts and other actors in the cybersecurity ecosystem that increase users' resilience to threats to their cyber security.

However, the culture of cybersecurity is generally not very advanced and often users are not aware of the risks associated with the use of Internet. Awareness of the need to protect personal data and become aware of security threats is generally low.[16]

The Macedonian legal system does not have a comprehensive law that deals exclusively with cyber security. [17]

The key international source that provides guidance for regulating cybercrime in Macedonian legislation is the Budapest Convention on Cybercrime[18] adopted by the Council of Europe in 2001 and ratified by the Macedonian Parliament in 2004. The Additional Protocol to the Convention on Cybercrime[19] dealing with the criminalization of acts of a racist and xenophobic nature committed through computer systems was ratified in November 2005.

Although there is no single comprehensive legal framework that explicitly addresses cybersecurity, there are several laws that cover the basics of cyber security in the country - the Personal Data Law, the Electronic Commerce Law, the Electronic Communications Law, the Communications Surveillance Law, the Law for free access to public information, the Law on Data in Electronic Form and Electronic Signature. Also, the amendments to the Law on Criminal Procedure adopted in 2013 specifically address the regulation of cybercrime and crimes committed using computers, as well as the collection of digital evidence by law enforcement agencies.[20]

In July 2018, a National Cyber Security Strategy was developed and adopted[21]and later in 2018 it was supplemented with the adoption of the Action Plan for the implementation of the Strategy.[22]

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16 Ibid.

17 DiploFoundation (2016) Cybersecurity in the Western Balkans: Policy gaps and cooperation opportunities. Available at: https://www.diplomacy.edu/sites/default/files/Cybersecurity%20in%20Western%20Balkans.pdf, Accessed on 15.12.2021

18 Council of Europe (2001) Convention on Cybercrime, 23 November 2001.
https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/185, Accessed on 15.12.2021

19 Council of Europe (2006) Additional Protocol to the Convention on Cybercrime, concerning the criminalization of acts of a racist and xenophobic nature committed through computer systems.
https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/189, Accessed on 15.12.2021

20 DiploFoundation (2016) Cybersecurity in the Western Balkans: Policy gaps and cooperation opportunities. Available at: https://www.diplomacy.edu/sites/default/files/Cybersecurity%20in%20Western%20Balkans.pdf., Accessed on 15.12.2021.

21 National Cyber Security Strategy 2018-2022, MIOA, Available at: https://mioa.gov.mk/sites/default/files/pbl_files/documents/strategies/cyber_security_strategy_macedonia_2018-2022_-_eng.pdf, Accessed on 15.12.2021

22 National Cyber Security Action Plan 2018-2022, MIOA. Available at: https://mioa.gov.mk/sites/default/files/pbl_files/documents/strategies/ap_cybersec_v1.13_eng.pdf, Accessed on 15.12.2021

The most important source of cybercrime legislation in the country is the Criminal Code. Its provisions cover cybercrime such as misuse of personal data, copyright infringement and piracy, production and distribution of child pornography through computer systems, computer viruses, damage and unauthorized access to computer systems, computer fraud and computer forgery.

At the same time, the amendments adopted in 2013 refer to the collection of digital evidence by law enforcement agencies. Following the adoption of the Budapest Convention in 2004, the approach changed in 2011 with a lesser focus on cybercrime investigations and more on the collection of electronic evidence in general.[23] Building the capacity of the Ministry of Interior to conduct and support all types of investigations related to cybercrime should remain one of the highest priorities in the coming years.

There are also no legal acts governing human rights online, but the country is a signatory to international human rights instruments such as the European Convention on Human Rights and the UN Geneva Convention on the Status of Refugees and the Convention against Torture.

Comprehensive child online protection legislation has been adopted and implemented in accordance with Articles 193, 193a and 193b of the Criminal Code.[24] It refers to Article 9 of the Budapest Convention, which regulates the distribution of child abuse materials via the Internet. Since 2010, new amendments have been added to the Criminal Code that include legal provisions for online child pornography and online decoy for rape or other child sexual activity. These provisions became the focus of the domestic public with the Public Room case, which has aroused strong public interest and raised many issues related to privacy and the Internet.[25]

In addition, following the ratification of the Budapest Convention in 2004, the Criminal Code was amended to meet obligations related to consumer protection and intellectual property on the Internet.[26] In 2016, new legal provisions were added to the 2004 Consumer Protection Act[27] to bring it into line with EU Consumer Protection Directive 2011/83 / EU.

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23   Ibid.

24   Law on Criminal Code, Official Gazette No .37/1996, 80/1999, 4/2002, 43/2003, 19/2004, 81/2005, 50/2006, 60/2006, 73/2006, 87/2007, 7/2008, 139/2008, 114/2009, 51/2011, 51/2011, 135/2011, 185/2011, 142/2012, 143/2012, 166/2012, 55/2013, 82/2013.

25   For more see the Public Room case in: Јанкулоска, Гордана. „Јавна соба со мрачни тајни", Дојче Веле. 27.1.2021. Available at: https://www.dw.com/mk/јавна-соба-со-мрачни-тајни/a-56363266. Accessed on 25.12.2021. „Телеграм ја затвори „Јавна соба", полицијата уапси дел од членовите", Дојче Веле, 28.1.2021. Available at: https://www.dw.com/mk/интернет-телеграм-јавна-соба-порнографија-македонија/a-56373954. Accessed on 25.12.2021.

26   Criminal offenses whose object of protection is intellectual property according to the amendments to the Criminal Code are: Violation of copyright or related rights (Article 157); Unauthorized use of someone else's invention or software (Article 286); Piracy of an audiovisual work (Article 157-b) and Piracy of a phonogram (Article 157-c).

27   The changes introduced enhanced consumer protection in e-commerce. The provisions regulate the rules for consumers and traders when purchasing products and services, especially through means of remote communication (such as the Internet or contracts concluded outside the business premises of the trader). It allows consumers to have the same rights no matter where they bought the product or service, and provides traders with clearer operating rules.

The Ministry of Interior (MOI) was involved in drafting the legal provisions in the Criminal Code and is in charge of their implementation. At national level, the Macedonian Customs and the Coordinating Body for Intellectual Property are institutions responsible for regulating the intellectual property of online products and services.

The provisions of the Budapest Convention have been transposed into the Criminal Code and the Code of Criminal Procedure, and are considered to be the most important legal acts in tackling cybercrime. [28]

4. INSTITUTIONAL CAPACITIES

Regarding the institutional capacities for dealing with cybercrime issues, the cybercrime unit located within the Department for Suppression of Organized and Serious Crime and the Forensic Department of the Ministry of Interior merged into a single Department for Cybercrime and Digital Forensics, thus forming more efficient and effective investigative unit.[29]

The Department for Cyber Crime and Digital Forensics at the Ministry of Interior is the only unit in the country that can investigate cases of computer crime. Digital forensics experts focus on forensic investigations and are organized into two departments: computer forensics and mobile forensics.

This department examines data from digital equipment seized at the crime scene. Any field inspector together with an order from a public prosecutor or judge may request a digital device test. The request contains information about who owns the equipment, what is the evidence related to it, what should be found, passwords, encrypted data. The reports of digital forensics experts are presented in court and accepted as evidence.[30]

The unit also handles content and/or data traffic requests. Such orders from the public prosecutor are sent to the service provider and all data - content and data traffic - are taken over by the experts of the unit. When requesting information from a bank, the administrator provides the logs to the law enforcement agencies - packaged and encrypted.[31]

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28 Cybersecurity Capacity Review FYR Macedonia 2018. Available at: https://ssrn.com/abstract=3658462. Accessed on 15.12.2021.

29 DiploFoundation (2016) Cybersecurity in the Western Balkans: Policy gaps and cooperation opportunities. Available at: https://www.diplomacy.edu/wp-content/uploads/2021/06/Cybersecurity-in-Western-Balkans_0.pdf Accessed on 15.12.2021.

30 Report Advisory mission and workshop on online fraud and other cybercrime reporting mechanisms 20 - 21 February 2017, Skopje "The former Yugoslav Republic of Macedonia", Provided under the iPROCEEDS project, 2017, CoE and EU. Available at:https://rm.coe.int/3156-26-iproceeds-report-reporting-mechanisms-mk/16807be381. Accessed on 15.12.2021.

31 Ibid.

According to the Law on Criminal Procedure, the Ministry of Interior cooperates with the prosecutor who has the main role in the investigation of cybercrime. Unfortunately, due to lack of capacity, the Ministry of Interior is not able to support all prosecutors in the country to collect digital evidence from electronic devices. They work with only two forensic laboratories (one for mobile devices and the other for computer forensics).

Capacities need to be strengthened in various institutions such as the Financial Police and the Ministry of Finance, where currently only one investigator is working.[32] This process should be followed by decentralization of the digital forensics department among several institutions. The investigation into financial cybercrime cases should be delegated to the Financial Police as an appropriate investigative body, supported by the Public Revenue Office.

The institutional capacity of judges and prosecutors to deal with cybercrime cases and cases involving digital evidence is also limited. This is due to budget constraints and insufficient level of required technical equipment. In the country there are no specialized courts dealing with computer crime cases. Judges and prosecutors have no specialized training in cybercrime or digital evidence.

With the implementation of the Action Plan of the 2017 Cybercrime Strategy, the Ministry of Interior is developing MC4 (Macedonian Platform for Cybercrime/Complaints Center) to provide citizens with information and updates on issues related to cybercrime, such as news of how Internet offenses are committed, as well as offering citizens the opportunity to report anonymously any cybercrime-related activity (e.g., suspicious activity on the Darknet or forums.[33]

Despite the efforts, due to the limited institutional capacity and the lack of qualified staff, advanced investigative procedures for serious cases of cybercrime are still not possible.

There is also a need for training of police officers on the nature and requirements of digital evidence. At the same time, additional training is needed for cryptocurrency investigations, as there is not enough experience in this area.[34]

Within the institutional capacity for cyber security incidents, the Macedonian Computer Incident Response Team (MKD-CIRT) has been established. It serves as the national coordinating body for reporting and managing cyber security incidents to authorities and public sector institutions. In 2015, MKD-CIRT was established within the Agency for Electronic Communications as an "official national point of contact and coordination in

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32 Cybersecurity Capacity Review FYR Macedonia 2018. Available at: https://ssrn.com/abstract=3658462. Accessed on 15.12.2021.

33 Ibid.

34 Report Advisory mission and workshop on online fraud and other cybercrime reporting mechanisms 20 - 21 February 2017, Skopje "The former Yugoslav Republic of Macedonia", Provided under the iPROCEEDS project, 2017, CoE and EU. Available at: https://rm.coe.int/3156-26-iproceeds-report-reporting-mechanisms-mk/16807be381. Accessed on 15.12.2021.

dealing with security incidents in networks and information systems" in accordance with the Law on Electronic Communications.[35]

5. NATIONAL CYBER SECURITY STRATEGY - GOALS AND EXPECTATIONS

Political and economic instability in the Western Balkans creates a space vulnerable to numerous threats and challenges. Cyberspace is no exception, with an increasing number of cyber-attacks putting this threat at the top of national priorities to be addressed. Strengthening Macedonia's cybersecurity capacity has also been on the government's agenda for the past decade, despite complex political and socio-economic relations in the country. The transformational process of raising awareness of risks and opportunities in cyber security has become a regional trend and was accompanied by evaluations of cyber security, development of new operational and strategic plans, establishment of bodies and entities for cyber security, development of educational programs to meet the demand for cyber security professionals in the current and future labor market, etc.

The Macedonian National Cyber Security Strategy is based on five key (5C) objectives that correspond to the general objectives and guidelines for improving cyber security:[36]

1. **Cyber resistance**: existence of a national ICT infrastructure resistant to cyber attacks and identification and implementation of appropriate solutions to protect national interests;

2. **Cyber capacity and cyber security culture:** The public, private sector and Macedonian society as a whole must have a comprehensive understanding of cyber threats and provide the necessary capacity to protect themselves.

3. **Combating cybercrime**: Strengthen the country's capacity for cybercrime prevention, research and response.

4. **Cyber defense**: strengthen national capacities in order to protect national interests and reduce current and future risks in cyberspace.

5. **Cooperation and exchange of information**: protect the cyberspace of the country through cooperation and exchange of information at national and international level, maintain an open, free, stable and secure cyberspace.

The goals 5C should be achieved by implementing numerous activities, and priority is given to the preparation of the Law on Security of Networks and Information Systems (for implementation of the EU NIS Directive 2016/1149) which is in legislative procedure

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35 Agency for Electronic Communications. MKD-CIRT. Available at: https://mkd-cirt.mk/?lang=en, Accessed on 20.12.2021.

36 National Cyber Security Strategy 2018-2022, MIOA, Available at: https://mioa.gov.mk/sites/default/files/pbl_files/documents/strategies/ cyber_security_strategy_macedonia_2018-2022_-_eng.pdf, Accessed on 15.12.2021.

from 2019 and has not yet been adopted[37]. Priority is also given to the implementation of the Action Plan of the National Cyber Security Strategy, which includes the establishment of a Regional Cyber Security Center for training and research, enhanced international cooperation, institutional capacity building, education and raising awareness of cyber security. The National ICT and Cyber Security Council as a body with operational capacities for cyber security was established in 2019, in order to realize one of the priorities of the Strategy and Action Plan.

CONCLUSION

Macedonian cyberspace shows tendencies towards a comprehensive understanding of cyber threats. However, there is a need to improve the necessary capacities and better implement the strategy and the activities to prevent cyber-attacks. It is necessary for the processes to take place simultaneously and in a coordinated manner in several areas.

Cyber security poses a number of challenges as it is subject to constant change, so strategic documents need to be constantly revised and updated. Rapid and effective institutional responses require adequate cyber security capabilities, which should be a long-term goal.

This requires a significant increase in budget resources, and very often budget constraints are an obstacle to the effective implementation of the adopted strategic documents. Investing in human and technological resources is unfortunately often considered an unnecessary investment.

At present, cyber security awareness efforts are sporadic and are mainly made voluntarily and with limited resources by civil society organizations and occasional government support.

Ensuring effective and efficient cyber protection requires cooperation between the various stakeholders (government, legislature, private sector, civil society, technical and academic community) who have a role to play in cybersecurity policy-making processes at various stages of the process.

Education and awareness rising among Internet users is not less important than cyber security, based on good technology. Investments and strengthening of resources are needed in the field of education related to cyber security, as well as international cooperation in this field. Namely, there is a need for training of professionals as well

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37 Law on Security of Networks and Information Systems. Available at: https://ener.gov.mk/Default.aspx?item=pub_regulation&sub-item=view_reg_detail&itemid=51471. Accessed on 20.12.2021.

as their engagement in conducting cyber security trainings in the public sector where knowledge in this area is very limited.

The Covid-19 pandemic has imposed more and more frequent use of online commerce, further emphasizing the need to adopt legal solutions to prevent incidents such as online fraud, phishing, spam, etc.

The cyber security culture needs to be improved and regional co-operation in dealing with cyber threats strengthened in order to ensure an open, free, stable and secure cyberspace. Regional cooperation should be supported by legal solutions that will enable the investigation and successful detection of cross-border cybercrime. Regional cooperation in this context can facilitate access to secure cyberspace for countries facing similar cyber security threats. The implementation of joint cyber security awareness campaigns, together with public stakeholder engagement, education and sharing of good practices, would have a significant impact if implemented at the regional level.

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12. *National Cyber Security Action Plan 2018-2022*, MIOA. Available at:https://mioa.gov.mk/sites/default/files/pbl_files/documents/strategies/ap_cybersec_v1.13_eng.pdf, Accessed on 15.12.2021.

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