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THE DYNAMICS OF THE EUROPEAN UNION'S IDENTITY IN TERMS OF EQUALITY AND NON-DISCRIMINATION

A b s t r a c t

The article aimed to determine how the process of shaping, maintaining, and changing the EU identity in the field of equality and non-discrimination took place in a situation where this process had to face both internal and external challenges. The analyses also aimed to explain the behaviour of political actors participating in the aforementioned process. The research material comprised the EU treaties, CJEU judgments, and other documents from the leading EU institutions. The analyses conducted allowed us to capture two trends. First, the identity of the EU as a legal community is losing its clear outline, as internal factors are making the ideas of equality and non--discrimination less specific. There have also been a few actions to reverse this effect. Second, the EU is taking action to confirm its identity as a normative actor in the international environment and to prevent changes in its identity. Challenges within the EU do not constitute a sufficiently strong incentive for the EU to take decisive action to confirm its identity. Factors challenging the EU's identity are more effective in maintaining the EU's identity, but they also slow down its dynamics. The political actors' motivations in these processes are complex, from cost-benefit calculations through institutional conditions to acting based on accepted ideas.

K e y w o r d s: EU identity, equality, non-discrimination, legal community, normative actor, the othering process.

INTRODUCTION

Equality and non-discrimination are among the most critical determinants of the European Union's (EU) identity. The Union intentionally shapes the meaning of these values and also acts to implement them within and beyond its borders. The identity of the EU is dynamic and is impacted by any changes in the field of equality and non-discrimination. The study aimed to determine how the process of shaping, maintaining, and changing the EU identity took place in the mentioned period when it had to face both internal and external challenges and explain the behaviour of political actors who participated in this process. Internal challenges include the EU's decisions regarding its equality and non-discrimination policy and the way the Member States refer to these decisions. External challenges, on the other hand, include the actions of third countries regarding equality and non-discrimination. The study assumed that the EU identity is shaped, in particular, by political discourse at the supranational level. Hence, the research material consisted of the EU treaties, judgments of the Court of Justice of the European Union, and documents of the leading EU institutions: the Commission, the Council, and the European Parliament from the entire period of the existence of EU equality and anti-discrimination policy. The literature on the subject was also used. The primary method used in study was qualitative content analysis. First, the concept of EU identity was conceptualized, the determinants of which are equality and non--discrimination. Then, three dimensions of EU identity were analysed in order to determine its dynamics in the face of emerging challenges. Finally, an attempt was made to explain the behaviour of political actors who participated in the process of shaping the EU identity, referring to the assumptions adopted in the study of theoretical approaches.

EU IDENTITY IN THEORETICAL TERMS

Two theoretical perspectives were used to conduct the analyses presented in this article: institutionalism (in its various varieties) and constructivism. The first focuses on the role of relatively permanent patterns of behaviour, rules, and norms, and the second on the ideational dimension, in particular cognitive and intersubjective

elements. The concept of identity essentially refers to the ideational dimension, but it is not isolated from institutional elements, e.g., identities can be grounded in institutions or interact with them in various ways.

In these analyses, three dimensions of the EU's identity were considered. The distinction of the first one is related to the fact that the EU has a rich legal acquis, which was created within the framework of its equality and anti-discrimination policy. The EU sees it as its characteristic feature, what is more, it is a matter of its pride. One of the European Commission documents states that equality between women and men is a core value of the EU, and the EU is proud to defend it. In addition, it is said that the EU has significant achievements in gender equality, is home to societies with the highest degree of equality, and is a global model in this respect.[1] In connection with the fact of having the aforementioned acquis, the EU can be perceived as a community of law. It should be noted that being a community of law, the EU is shaped by an axiological community, the identity of which is created by the values listed in Article 2 of the Treaty on European Union (TEU), such as human dignity, freedom, democracy, equality, the rule of law, etc. This understanding of the EU's identity was adopted by the Court of Justice of the EU (CJEU) in its 2022 rulings when it found that the values listed in Article 2 of the TEU constitute the EU's identity and when it ruled that these values define the EU's identity as a common legal order.[2] However, if it is considered that the above-mentioned values are constitutional, i.e., they are among the foundations of the Community legal order and constitute an expression of its individuality, then the EU's identity in the dimension of the legal community is referred to as the EU's constitutional identity.[3]

The second dimension of the EU's identity is its reference to the domain of international relations. Then, in line with the findings of

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[1] *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions. A Roadmap for Women's Rights*, European Commission, COM (2025) 97 final, Brussels, 07/03/2025, p. 1.

[2] *Hungary v. European Parliament and Council of the European Union*, Judgment of the CJEU, C-16/21, EU:C:2022:97, paragraph 127; *Republic of Poland v. European Parliament and Council of the European Union*, C Judgment of the CJEU, -157/21, EU:C:2022:98, paragraph 145.

[3] Nina Półtorak, 'Od zasad ogólnych do tożsamości Unii Europejskiej – normy konstytucyjne w orzecznictwie Trybunału Sprawiedliwości Unii Europejskiej', *Studia Prawnicze* 226: 2, 2022, p. 204; Gerhard van der Schyff, 'Constitutional Identity of the EU Legal Order: Delineating its Roles and Contours', *Ancilla Iuris* 1, 2021, p. 3.

constructivism, the EU is seen as a normative power. It can be included in the category of identity, understood as the basis or foundation of undertaken political and social actions. Identity understood in this way emphasizes how actions result from the self-understanding of the acting entity. It is close to the type of identity defined by the role that the entity wants to play, and other actors in relation to it recognize or attribute to it.[4] Perceiving the EU identity in the field of international relations as a normative power means that there are values that in international relations constitute a political community with a separate identity (i.e., the EU), and the specificity of this identity consists in the ability to shape European political and legal standards in the international environment, or, in other words, the ability to exert ideological, cultural and symbolic influence on actors in international relations.[5]

Constructivism assumes that the EU's identity is shaped by interactions between actors in international relations. One aspect of this process is the shaping of the EU's identity by distinguishing it from other entities. For this purpose, a symbolic boundary is drawn separating 'us' from 'them' or 'we' from 'them'. It is based on the difference between 'we' and 'they'. It shows what the EU is not. It is not enough to construct the EU's identity through internal processes; it is also defined through the process of defining 'others' (*othering process*) to show how the EU differs from them.[6]

The theoretical perspectives adopted have determined the direction of the analyses presented here. Constructivism not only allowed for the conceptualization of the EU identity but also indicated that it is worth examining the issue of how the values promoted by the EU are adopted, the mutual perception of the EU and other actors in the international environment, etc. Institutionalism has prompted the examination of the durability of the EU legal acquis (historical institutionalism), drawing attention to the fact that political actors can use institutions to pursue their interests (rational choice institutionalism), that there are relations between institutions and actors' beliefs (sociological institutionalism), etc.

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[4]   Anna Skolimowska, 'Tożsamość aktora normatywnego a strategie obecności Unii Europejskiej w stosunkach międzynarodowych', *Roczniki Nauk Społecznych* 10 (46): 1, 2018, pp. 36–38.

[5]   Ibid., pp. 40–41.

[6]   Koen Slootmaeckers, 'Constructing EU Identity through LGBT Equality Promotion: Crises and Shifting Othering Processes in the EU Enlargement', *Political Studies Review* 18: 3, 2019, pp. 349–51.

CHALLENGES TO THE IDENTITY OF THE EU
AS A LEGAL COMMUNITY

The establishment of the EU by the Maastricht Treaty meant the realization of integration as a political project in the sense of a political whole. The Maastricht Treaty strengthened the supranational element but also opened up the question of the final nature of European integration. All this directed attention to the meaning and role of European identity as a necessary element of the project of political unity. Within the EU, a strong longing for the emergence of an unambiguous, specific European identity as a form of confirmation emerged. As one can assume, this longing could stem from the strong influence of the experience of national state identity in European culture and political tradition. Moreover, a common European identity for the EU was to be a necessary element of the process of legitimizing the EU. It was decided then to abandon the previous practice of concealing common values, the aim of which was to avoid conflicts of a normative nature, and instead to openly explicate shared European values as the basis of a common identity. In other words, there was a turn towards a substantial and, therefore, strong and clearly outlined EU identity.[7] The shared values on which the EU is based are currently specified in Article 2 TEU, including equality and non-discrimination.

The meaning of the concepts of equality and non-discrimination shaped within the EU's equality and anti-discrimination policy is far from the unambiguity that was supposed to characterise the substantive identity of the EU. In the context of EU policy, we encounter many different ways of understanding equality and non--discrimination. EU law is based on three concepts of equality: formal, causal (equality of opportunities and possibilities), and final (equality of result), with causal equality dominating.[8] We are, therefore, dealing with a hybrid composed of elements of the liberal concept (formal equality and equality of opportunities and possibilities) with a component usually associated with the socialist tradition (equality of result, assuming so-called positive actions for the benefit of historically, socially or politically excluded and oppressed groups).

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[7]   Marek Cichocki, 'Od funkcjonalnej do substancjalnej europejskiej tożsamości – zmiana podejścia do roli europejskich wartości', *Sprawy Międzynarodowe* 2, 2018, pp. 46–54.

[8]   Giovanni Zaccaroni, *Equality and Non-Discrimination in the EU. The Foundations of the EU Legal Order* (Cheltenham–Northampton, MA: Edward Elgar Publishing, 2021), pp. 8–11.

The understanding of non-discrimination shaped at the EU level is similarly ambiguous. EU law distinguishes several types of prohibited discrimination: direct, indirect, discrimination by association, harassment, sexual harassment, gender-based violence, instruction to discriminate, and multiple discrimination has appeared in EU *soft law*. Some of these concepts concern the different treatment of people (groups) in comparable situations (e.g., direct discrimination), others do not assume comparison, it is enough that a given person experiences a specific disadvantage (e.g., harassment). Some of them were created to prohibit intentional behaviour (e.g., direct discrimination, harassment), and others are intended to exclude unintentional actions in which structural factors cause a disadvantage (indirect discrimination).[9]

The ambiguity also concerns the subjective dimension to which equality and non-discrimination refer. According to Article 21 of the Charter of Fundamental Rights of the EU, the list of characteristics based on which discrimination is prohibited is open-ended. However, EU legislation only concerns six criteria: sex, race or ethnic origin, religion or belief, disability, age, and sexual orientation. These criteria, introduced in 1999 by the Treaty of Amsterdam (now Article 19 of the Treaty on the Functioning of the European Union, TFEU), indicate social groups that are exposed to unequal treatment and, as such, are the addressees of the EU's equality and anti-discrimination policy. In the course of the development of this policy, some of the aforementioned criteria have acquired new meanings. For example, the gender criterion has included people who have changed their gender, so the equality between women and men declared in Article 3(3) TEU and Article 157 TFEU also applies to transwomen and transmen.[10] There has also been a change in the understanding of the criterion of disability, consisting in a departure from the medical model, in which it was defined as a physical impairment, and the adoption of a social model, in which disability is understood as a limitation resulting from physical, mental and psychological damage, revealed in interaction with various barriers that make it difficult for a person to participate in professional life on an equal basis with other employees.[11] Another

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[9] Ibid., pp. 34–37.

[10] For example, Judgment of the CJEU, 'Richards', C-423/04, EU:C:2006:256, paragraphs 29–38.

[11] *Ring and Others*, Judgment of the CJEU, Joined Cases C-335/11 and C-337/11, EU:C:2013:222, paragraph 38.

criterion has appeared in EU *soft law*, namely gender identity.[12] In the equality and anti-discrimination policy of the EU in general, there is a noticeable tendency to distinguish new groups that are perceived as actual or potential victims of discrimination. For example, to combat discrimination on the grounds of racial and ethnic origin, groups such as migrant women, Muslim women, people of Arab origin, people of African origin, and black people have been distinguished among immigrants from third countries, which indicates the desire to build equality between a larger number of segments of society than the one assumed in the Treaty of Amsterdam, introducing six criteria for prohibited discrimination.[13]

With the development of EU equality and anti-discrimination policy, its subject matter has been expanded, while at the same time, there has been a hierarchy of characteristics protected by EU law. Initially, EU law concerned the sphere of employment and later covered other areas of life: social security, access to goods and services, and education. In addition, it also began to cover the private sector, i.e., relations between individuals.[14] However, not all criteria of prohibited discrimination apply to the entire subject matter scope specified above. EU law prohibiting discrimination on the grounds of racial and ethnic origin covers all the areas mentioned; in terms of gender, it does not apply to education, and in terms of religion or belief, age, disability, and sexual orientation, it applies only to the sphere of employment. However, with the introduction of the idea of *mainstreaming*, i.e., the principle that issues of equality and non-discrimination should be considered in the creation of all EU policies, the boundaries of equality and non--discrimination policy have significantly shifted so that it has covered new problems and new areas (e.g., human trafficking, development, environment, etc.). Moreover, the literature on the subject describes the practice of shrinking, stretching, and bending the meaning of equality and non-discrimination in various areas. An example of shrinking is the reference to EU actions for gender equality, mainly in the labour market, hence, most EU instruments aim to implement equal opportunities for women and men in the sphere of employment

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[12] E.g., *EU Guidelines to Promote and Protect the Enjoyment of All Human Rights by LGBTI Persons*, p. 3 https://www.eeas.europa.eu/sites/default/files/07hrguidelines lgbtien.pdf (access: 15 March 2025).

[13] Piotr Burgoński, 'Zmiany w polityce antyrasistowskiej Unii Europejskiej w latach 2000–2020', *Rocznik Integracji Europejskiej* 15, 2021, p. 138.

[14] Stefan Kadelbach, 'Are Equality and Non-Discrimination Part of the EU's Constitutional Identity?', in Thomas Giegerich, ed., *European Union as Protector and Promoter of Equality* (Cham: Springer, 2020), p. 18.

and work. An example of stretching is the expansion of the original understanding of equality as formal equality with the concepts of substantive equality (equality of opportunities, material equality). An example of bending is the EU's actions to create equal opportunities for women and men in the labour market by implementing the idea of sharing household duties between spouses, which was eventually replaced by the concept of reconciling professional and family life.[15] It is also worth mentioning another process that has contributed to a change in the understanding of equality and non-discrimination, namely the evolution of how equality and anti-discrimination policies are conducted from a social approach towards a more abstract approach, based on rights (i.e., the right to equal treatment, the right not to be discriminated against, etc.).[16]

It is also worth noting the efforts to transform the dimension of EU identity discussed here into a constitutional identity. Examples of this include the inclusion of equality and non-discrimination in the EU Charter of Fundamental Rights, as well as two judgments of the ECJ, in which it raised the prohibition of discrimination on grounds of sex[17] and age[18] to the rank of general principles of EU law, thus giving them constitutional value. These seem to be attempts to disambiguate the EU identity in the face of its 'blurring' by EU laws.

The process of the EU losing its clear identity as a legal community, as a result of changes in equality and anti-discrimination law, described above, has been met with a reaction from some Member States, concerned about the possibility of the EU's identity being redefined in a direction that is not in line with their legal tradition. For example, the German Federal Constitutional Court (FCC) assessed the CJEU judgment in the Mangold case, in which the prohibition of age discrimination was recognised as a general principle of European law. Although the FCC found in its judgment of 6 July 2010 that the CJEU had not exceeded the EU's competencies in a way that raised constitutional concerns, it is worth noting that the FCC's assessment was motivated by the conviction that the EU cannot guarantee that the German concept of constitution law will not be violated in the

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[15] Emanuela Lombardo, Petra Meier and Mieke Verloo, 'Stretching and Bending Gender Equality. A Discursive Politics Approach', in Emanuela Lombardo, Petra Meier and Mieke Verloo, eds, *The Discursive Politics of Gender Equality. Stretching, Bending and Policymaking* (London and New York: Routledge, 2009), pp. 4-6.

[16] Sophie Jacquot, *Transformations in EU Gender Equality. From Emergence to Dismantling* (Basingstoke, Hampshire: Palgrave Macmillan, 2015), p. 169.

[17] *Defrenne II*, Judgment of the ECJ, C-149/77, EU:C:1978:130.

[18] *Mangold*, Judgment of the CJEU, C-144/04, *Mangold*, EU:C:2005:709.

course of the development of EU law, for example by a change in the CJEU's case law, and, therefore, it must continuously monitor and assess the development of EU law.[19]

CHALLENGES TO THE EU'S IDENTITY IN THE DOMAIN OF INTERNATIONAL RELATIONS

Equality and non-discrimination are also determinants of the EU's identity when it acts as an actor in international relations. In other words, they are important for the EU's self-understanding, an inalienable dimension of which is the role that the EU wants to play in relations with other actors in the international environment. This type of identity can be derived, among other things, from the provisions of primary EU law introduced by the Lisbon Treaty. In the EU treaties, equality and non-discrimination are recognised as values, guiding principles, and objectives of the EU's external action (Articles 2 and 3 (5) TEU, 8, 21 (1) and 21 (2) TFEU). The EU's commitment to eliminating inequalities and to strengthening, supporting, and promoting equality and non-discrimination is to be horizontal, i.e., it applies to all external actions and policies (Articles 3 (5) and 21 (3) TEU, 8 TFEU), including development cooperation (Article 208 (1) TFEU), the field of humanitarian aid (Article 214 (1) TFEU) and agreements with third countries or international organisations (Article 216 (1) TFEU). As indicated by the provisions cited above, the identity of the EU in the domain of international relations is to play the role of a normative actor that has the will and the conviction to be able to implement equality and non-discrimination in the international environment. In theory, this role of the EU is defined by the term 'normative power'.[20] It is worth emphasising that, according to the provisions of the Treaty, the EU in its external action should be consistent with its internal EU values and principles (Article 21 (3) TEU), which means that internal EU equality and anti-discrimination law is to be a model for the EU's external action in the protection and promotion of equality and non-discrimination.

The analysis of EU instruments in the field of equality and anti--discrimination policy reveals that the EU, as a normative actor, should not only use its *soft power* to promote equality and non--discrimination but also to work very actively to implement them in

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[19]   The discussion of the FCC judgment is quoted from Marek Zirk-Sadowski, 'Tożsamość konstytucyjna a prawo europejskie', *Analizy Natolińskie* 53: 1, 2012, pp. 14–15.

[20]   See Anna Skolimowska, 'The European Union as a Normative Power in International Relations. Theoretical and Empirical Challenges', *Yearbook of Polish European Studies* 18, 2015.

third countries. For example, the EU aims to be a global leader in promoting gender equality as a key objective of its external action in addition to implementing its Gender Action Plan in partner countries and supporting the transformation of gender equality in every region of the world.[21] In defining its role in the international environment, the EU very often adopts a human rights-based approach, and in the case of criteria for prohibited discrimination such as age, disability, religion, belief, race, national origin, and sexual orientation almost exclusively. For example, in disability strategies, there is no reference to equality. Instead, there is a declaration that the EU will uphold the respect of the human rights of persons with disabilities in all its external actions.[22] As for discrimination, the EU sees its role as an actor that determinedly combats all its manifestations both within its borders and worldwide.[23]

The first challenge to the dimension of EU identity discussed here is the pressure from within the EU for the EU to better comply with internal equality and non-discrimination standards in its external action, i.e., not to try to deviate from its identity and to be more effective in implementing these standards in third countries. An example of this is the resolution of the European Parliament of 31 May 2018, in which it criticised the European Commission and the European External Action Service for shortcomings in the implementation of the EU's gender equality action plans, such as insufficient consideration of multiple discrimination (paragraph 8), neglecting the problem of harassment (paragraph 18), and not taking action in all areas related to gender equality (paragraph 20).[24] The 'flattening' of the EU's identity may occur not only through neglect but also as a result of the strategy aimed at ensuring the EU's effectiveness, consisting of hiding the full range of equality and non-discrimination standards under the

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[21] High Representative of the Union for Foreign Affairs and Security Policy, 'Joint Communication to the European Parliament and the Council. EU Gender Action Plan (GAP) III – An Ambitious Agenda for Gender Equality and Women's Empowerment in EU External Action', JOIN (2020) 17 final, Brussels, 25.11.2020, pp. 1 and 7.

[22] *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions. Union of Equality. Strategy for the Rights of Persons with Disabilities 2021–2030*, European Commission, COM (2021) 101 final, Brussels, 03.03.2021, p. 23.

[23] *EU Human Rights Guidelines on Non-discrimination in External Action*, Council of the European Union, 6337/19, Brussels, 18 March 2019, p. 3.

[24] *Gender Equality and Women's Empowerment: Transforming the Lives of Girls and Women through EU External Relations 2016–2020. European Parliament Resolution of 31 May 2018 on the Implementation of the Joint Staff Working Document (SWD (2015)0182) – Gender Equality and Women's Empowerment: Transforming the Lives of Girls and Women through EU External Relations 2016–2020* European Parliament, (2017/2012(INI)), 31 May 2018, 2020/C 76/20, point 8, 18, 20.

guise of clauses containing provisions on respect for human rights. Such actions are used especially when there is strong resistance from the political opposition or societies in third countries that are the addressees of EU actions.[25]

Secondly, the EU's identity comes into contact with the norms propagated by other international actors, sometimes leading to their incorporation, and as a result, the EU's identity gains new features that now begin to distinguish it. This is the case with international organisations such as the UN, the Council of Europe, and the International Labour Organisation, whose equality and anti--discrimination norms have become a model for the standards adopted by the EU. Although the EU has not acceded to the European Convention on Human Rights, this convention constitutes the minimum standard adopted by the EU in terms of equality and non-discrimination. The same applies to the UN Convention on the Elimination of All Forms of Discrimination against Women and the conventions of the International Labour Organisation. The EU is not a party to them, but in the trade agreements, it concludes with third countries it accepts the obligations arising from these conventions. In 2017, the EU signed the Council of Europe Convention on Preventing and Combating Violence Against Women and Domestic Violence, which entered into force for the EU in 2023, and since then, the standards set out in this document have shaped the EU's legal framework, including external actions. The EU has also supported several other international instruments aimed at promoting equality and non-discrimination, such as the Beijing Declaration adopted in 1995 by a conference held under the auspices of the UN. The adoption and promotion by the EU of equality and non--discrimination standards promoted by the UN, the Council of Europe, and the International Labour Organisation have resulted in a process of gradual convergence of the distinctive features of the EU's identity of these entities. Furthermore, the EU thus seeks to make the realisation of equality and non-discrimination in the world, which is an important dimension of the role it has assigned itself, more effective.[26]

Not all third countries adopt the equality and anti-discrimination standards promoted by the EU, and the greatest resistance is generated by the promotion of LGBT rights. The standards are rejected for reasons

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[25] Markus Thiel, *The European Union's International Promotion of LGBTI Rights. Promises and Pitfalls* (London and New York: Routledge, 2022), p. 97.

[26] Anne Thies, 'The EU's Law and Policy Framework for the Promotion of Gender Equality in the World', in Thomas Giegerich, ed., *European Union as Protector and Promoter of Equality* (Cham: Springer, 2020), pp. 437–39.

of identity, politics (e.g., Russia), incompatibility with local standards (e.g., Ghana, which refused to implement LGBT rights), or out of aversion to foreign influence (e.g., Gambia).[27] Sometimes, countries that are the addressees of EU actions do not adopt European standards in the form promoted by the EU, such as the courts in Uganda and Zimbabwe, which, in cases of discrimination on the grounds of religion, granted greater autonomy to religious organizations than is provided for in EU solutions.[28] Some countries adopt EU equality and non--discrimination standards for utilitarian reasons and only as a facade, such as Ukraine, which wanted to tie itself to the West in this way in order to avoid Russian aggression.[29] Sometimes, a third country incorporates EU norms into its legislation, but there is resistance to them at the local level, as in Turkey, which adopted EU solutions for women's economic independence while applying for EU accession and then was confronted with Turkish realities, i.e., the lack of consent to an ideational change at the local level. Such reactions from third countries do not have much impact on the EU's understanding of the role it wants to play globally. However, they may cause third countries to start to doubt the EU's power or the norms it promotes. The EU's reaction is usually a critical assessment of countries that do not adopt EU norms in the way the EU would like and/or an intensification of efforts and the search for new tools (e.g., financial, control, etc.) that are supposed to contribute to a more effective realization of its equal and non-discriminatory ideas.[30]

A specific challenge for the EU's role as a normative actor in the international environment is when the addressee of EU actions, inspired by its norms, adopts more progressive standards than the EU itself. This was the case in the 2014 NALSA judgment of the Supreme Court of India, in which it ruled that the Indian Constitution's prohibition of discrimination based on sex should also be interpreted as prohibiting discrimination based on gender identity. The Supreme Court cited the CJEU judgment in the P. v. S. case, which stated that the EU ban on discrimination on the grounds of sex also means a ban

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[27] Thiel, *The European Union's International Promotion of LGBTI Rights*, pp. 34, 38 and 101.

[28] Rosaan Krüger, 'From Hierarchy to Dialogue: EU–Africa Exchange on the Right to Equality and the Prohibition of Discrimination by Religious Organisations', in Thomas Giegerich, ed., *European Union as Protector and Promoter of Equality* (Cham: Springer, 2020), pp. 469–71.

[29] Thiel, *The European Union's International Promotion of LGBTI Rights*, p. 38.

[30] Sinem Bal, 'Clash of Norms: The Limits of EU's Normative Power in Gender Equality', *Marmara Journal of European Studies* 27: 1, 2019, pp. 140–41.

on discrimination against transgender persons who are undergoing or have undergone a medical gender reassignment procedure.[31] The EU, which does not include a ban on discrimination on the grounds of gender identity in its laws or the CJEU rulings, has never referred to the aforementioned judgment of the Supreme Court of India, which may lead to the accusation that the transmission of its norms is unilateral because it does not assume dialogue with the addressees of its actions. It seems that the above example shows that the EU is not willing to change the understanding of its role as an entity that disseminates norms into a perception of itself as an entity that co-shapes the norms transmitted in dialogue.

The EU, as a promoter of equality and non-discrimination in international relations, exposes itself to the accusation of imposing its internal standards on non-EU actors. To avoid such criticism, the EU undertakes, among other things, the actions described above, consisting of adopting and promoting international equality and anti--discrimination standards, which it considers universal.[32] Criticism of the EU for imposing its standards is also shared by progressive groups, such as feminists from the Global South, who believe that European equality standards are a kind of concession granted by white men, serve only to assimilate and integrate women into the neoliberal system, and do not guarantee the rights of racialized women, especially those from the South.[33] In principle, the EU is not inclined to respond directly to such criticism, and although it works for social change as a normative actor, it prefers a long-term approach, not striving for a revolutionary reconstruction of power relations shaped in societies.[34]

Although the EU claims to be a global promoter of equality and non-discrimination, the question arises whether it is accepted by other participants in the international environment. It has already been mentioned that the EU in this role is criticized for Eurocentrism, perceived as an actor that treats its understanding of equality and non-discrimination norms as correct, does not enter into dialogue,

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[31] I quote the text of the judgment of the Supreme Court of India in the NALSA case after: Holning Lau and Kelley Loper, 'The European Union as Promoter of Equality in Asia: Beyond Economic Tools of Influence', in Thomas Giegerich, ed., *European Union as Protector and Promoter of Equality* (Cham: Springer, 2020), p. 495.

[32] Ibid., p. 439.

[33] Françoise Vergès, 'Co to jest feminizm dekolonialny?', tłum. Urszula Kropiwiec, *Le Monde Diplomatique. Polish Edition* 190: 6, 2024, p. 41.

[34] See Carolin Müller, 'Anti-Racism in Europe: An Intersectional Approach to the Discourse on Empowerment through the EU Anti-Racism Action Plan 2020–2025', *Social Sciences* 137: 10, 2021, pp. 1–18.

applies one measure to all addressees of its actions, looks at them with superiority, or finally, in the event of failure, seems to be an actor whose strength, and perhaps even the values promoted, should be doubted. A specific challenge is the conditionality mechanism that the EU uses when negotiating with third countries their accession to the EU, trade agreements, or agreements on development aid. Then, it promises benefits in the form of EU membership, liberalization of visa regulations, and access to the EU market or development funds, which is usually conditioned by the implementation of the equality and non-discrimination norms that it promotes. The EU then acts from a position of strength rather than as a normative actor that encourages and relies on the voluntary participation of third countries. It thereby loses its aspirational-normative power, which stems from the attractiveness of its principles, not from its strength.[35]

CHALLENGES TO THE EU IDENTITY CONSTRUCTED IN RELATION TO THE 'OTHERS'

In one of its dimensions, the EU identity is conceptualized in relation to the 'others'. Establishing the boundary between 'us' and 'others', or in other words, defining 'others' (*the othering process*), is a continuous process. On the basis of theory (T. Diez), several types of 'others' are distinguished, placed in opposition to how the EU defines itself. 'Others' are perceived as a past 'I' (what Europe was in the past), an existential threat to the EU, someone lower in civilizational development than the EU, an entity breaking universal norms.[36] In opposition to 'others' constructed in this way, the EU would be perceived as a peace project and a defender of fundamental rights. Based on theory, there is also an approach (K. Slootmaeckers) indicating three areas in which the process of shaping the 'other' takes place: geopolitical, normative, and temporal. In the first of them, the 'other' is constructed by referring to the issue of security, in the second, by showing differences in the adopted norms, and in the third, by placing it in a different time, most often in the past.[37]

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[35]   Thiel, *The European Union's International Promotion of LGBTI Rights*, pp. 38–39.

[36]   Thomas Diez, 'Constructing the Self and Changing Others: Reconsidering "Normative Power Europe"', *Millennium: Journal of International Studies* 33: 3, 2005, p. 629.

[37]   Slootmaeckers, 'Constructing EU Identity', p. 349.

The process of EU enlargement is a convenient place to examine how the EU defines itself through its relations to 'others' because, at that time, the EU defines and redefines not only its physical borders but also its symbolic ones. In the case of equality and non-discrimination, an important moment when the 'other' was defined was the adoption by the European Council in 1993 of the so-called Copenhagen criteria as conditions for membership. According to them, candidate countries should have stable institutions guaranteeing, among other things, human rights and respect for and protection of minorities.[38] This was the time when the countries of Central and Eastern Europe began to apply for EU membership, and the aforementioned criteria were addressed to them as 'others' in the normative dimension and, therefore, usually considered to be slightly lower in terms of civilizational development. In the light of the Copenhagen criteria, on the other hand, the distinguishing features of the EU's identity were the guarantee of human rights and the protection of minorities. Currently, the membership criteria are referred to in Article 49 (1) TEU, which refers to the values specified in Article 2 TEU, which include respect for equality (including equality between women and men), non-discrimination, and human rights, including those of persons belonging to minorities. Since countries aspiring to EU membership are required to meet these criteria, it means that the boundary between the EU's self-understanding and its understanding of 'others' is not impenetrable and can be overcome.

The EU identity constructed in relation to the above-presented way of understanding the 'others' is challenged when those who formally met the membership criteria reveal a different understanding of them than the one officially adopted in the EU. Shortly after the EU enlargement in 2004, it turned out that there was strong resistance from the governments of some Central and Eastern European countries (including Lithuania, Latvia, Poland, Romania, and Hungary) to the EU identity defined by the EU's policy for gender equality and LGBT people. As for the former, the reason for the opposition was primarily the cultural and social understanding of gender adopted by the EU and the sources of violence against women indicated by the EU (tradition, religion, family),[39] while in the case of the latter—the very choice of the group that is the addressee of the EU policy, as well as

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[38] European Council, 'Conclusions', 21–22 June 1993, Copenhagen, point A iii.

[39] See Roman Kuhar and David Paternotte, eds., *Anti-Gender Campaigns in Europe. Mobilizing against Equality* (London and New York: Rowman & Littlefield, 2017).

the actions taken within its framework, especially concerning same-
-sex relationships.[40]

The EU's response to internal opposition to its identity was
twofold. First, it attempted to eliminate elements of 'otherness' within
the EU. An example of this is the European Parliament's resolutions,
which stigmatized cases of discriminatory practices against LGBT
people in European countries[41]. They mainly mentioned Central
and Eastern European countries by name: Member States such as
Lithuania, Latvia, Poland, and Hungary, and outside the EU, Croatia,
Moldova, Russia, and Ukraine. It is significant that in the context
of discrimination against LGBT people, only one Western European
country was mentioned by name, namely Belgium. A particularly
critical assessment was made of the Polish government. This selection
of examples of discrimination based on sexual orientation indicates
that the European Parliament considered that the problem concerns,
in principle, only Central and Eastern Europe and that Western
Europe is free from it. It can, therefore, be said that in this way,
it indicated the 'other' who is within the EU (Central and Eastern
European countries), as well as those who are bearers of the EU's
identity (Western European countries)[42]. Actions aimed at constructing
internal 'others' can also be seen in the resolutions of the European
Parliament condemning the practice of female genital mutilation,
treating it as a type of gender-based violence. The resolutions indicate
that the perpetrators of such actions are 'immigrant and refugee
families living in Europe, where circumcision is customary' but do
not mention their countries of origin or which religious communities
they belong to, although it is emphasized that the presence of religion
in these communities is very significant[43].

The second response to the opposition of the Central and Eastern
European countries to how equality and non-discrimination were
understood was to work towards strengthening the symbolic boundary
between the EU and the 'others'. For example, in the accession

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[40] Slootmaeckers, 'Constructing EU Identity', p. 351.

[41] European Parliament, 'Homophobia in Europe. European Parliament Resolution on
Homophobia in Europe' (2007/2543(RSP)), 23.04.2007; idem, 'Fight against Homophobia in
Europe. European Parliament Resolution of 24 May 2012 on the Fight against Homophobia
in Europe' (2012/2657(RSP)), 24.05.2012.

[42] Slootmaeckers, 'Constructing EU Identity', pp. 352–53.

[43] *Combating Female Genital Mutilation in the EU. European Parliament Resolution of
24 March 2009 on Combating Female Genital Mutilation in the EU*, European Parliament,
(2008/2071(INI), 24.03.2009.

negotiations of the Western Balkan countries and Turkey, meeting the Copenhagen criteria was made a central issue[44]. In addition, very strict guidelines were issued showing what services responsible for the EU's external action should be required from third countries in terms of implementing equality and non-discrimination[45].

The external crisis also poses a challenge to the dimension of EU identity discussed here, in response to which the EU may change its established hierarchy of ways of constructing the 'others'. An example is the Russian invasion of Ukraine in early 2022, which made it more important for the EU to construct Russia as the 'other' in the geopolitical (security) dimension than in the normative dimension. However, the former has not completely replaced the latter.

Very often, countries perceived by the EU as 'others' construct their identity in relation to the EU as its 'other', as exemplified by Russia and Serbia.[46] It seems that such a situation, when the 'other' accepts its position, does not require a great effort from the EU to establish and maintain a symbolic boundary. It is probably more difficult to do so if the 'other' questions its position and, consequently, the identity of the EU.

AN ATTEMPT TO EXPLAIN THE BEHAVIOUR OF POLITICAL ACTORS

Regarding the identity of the EU as a legal community, referring to the assumptions of rational choice institutionalism, it can be stated that the loss of the clear contours of the EU's identity as a legal community, which is taking place due to the multiplication of types of equality and discrimination, as well as the expansion of the scope of the subject matter (areas of life) and the scope of the subjects (vulnerable groups), results from the fact that it is in the interest of the EU legislature to maintain the possibility of decision-making and legitimise its actions on the part of EU citizens, as they gain greater protection (legitimisation through effect, not identity). From the point of view of the CJEU, the ambiguity of the provisions does not constitute a particular

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[44] *Communication from the Commission to the European Parliament and the Council, Enlargement Strategy and Main Challenges 2013–2014*, European Commission, COM (2013) 700 final, Brussels, 16.10.2013.

[45] E.g., *EU Guidelines to Promote and Protect the Enjoyment of All Human Rights by LGBTI Persons*, https://www.eeas.europa.eu/sites/default/files/07_hr_guidelines_lgbti_en.pdf (access: 15 March 2025).

[46] See Leandra Bias, 'Authoritarian Othering Back and Feminist Subversion: Rethinking Transnational Feminism in Russia and Serbia', *Social Politics* 31: 1, 2024, pp. 202–25.

disadvantage, as it allows it to consolidate its competence to decide on the way they are interpreted. Based on historical institutionalism, the behaviour of the EU legislature can be explained by the dependence on the previously adopted method of action, i.e., the development of equality and anti-discrimination policy through the multiplication of concepts concerning it. Referring to the assumptions of sociological institutionalism and constructivism, it can be concluded that EU decision-makers operating in a normative environment such as the EU consider it appropriate to implement the norms of this environment (which they also share). Moreover, these actors adopt a teleological approach, and the goal is predetermined (realization of equality and elimination of discrimination), so all actions aimed at its implementation seem appropriate to them. Meanwhile, the actions of the CJEU aimed at unifying the identity of the EU by constitutionalizing equality and non-discrimination may result from the formation of an ethos based on the idea of supranationalism within the CJEU.

In the case of the EU's identity, which means fulfilling the role of a normative actor in international relations, as well as an identity constructed in relation to 'others', the EU's behaviour (confirming identity, lack of openness to dialogue, getting rid of elements of 'otherness', etc.) can be explained based on sociological institutionalism and constructivism by fulfilling the role that has been entrusted to the EU in the treaties, as well as by the fact that the EU is guided by the logic of appropriateness, i.e., it adapts to the expectations of the system (EU and global, which promotes universal norms). Moreover, the EU has shaped the understanding of its role in interaction with other entities and has adopted equal and anti-discrimination norms, which constitute it and create the world in which the EU operates. If the ideas that create this world were to change, the EU would behave differently. As for third-country governments that reject the norms promoted by the EU, their behaviour can be explained by referring to the principles of rational choice institutionalism, namely that their political interest does not allow them to do so. However, according to the assumptions of historical institutionalism, their actions would be conditioned by norms formed in the past and, as such, difficult to change abruptly. Finally, it can be pointed out that many third countries belong to subsystems other than the EU, in which their own norms apply, and guided by the logic of appropriateness, actors adapt their actions to the expectations and norms of these subsystems.

CONCLUSIONS

The analyses presented in this article aimed to determine how the process of shaping, maintaining, and changing the EU identity in the field of equality and non-discrimination took place in a situation where this process had to face both internal and external challenges. The analyses also aimed to explain the behaviour of political actors who participated in the aforementioned process. The analyses conducted allow us to capture two trends emerging in relation to the dynamics of the EU identity. First, the identity of the EU as a legal community is losing its clear outline, as internal factors are making the ideas of equality and non-discrimination less specific. There have also been a few actions to reverse this effect by trying to return to rooting the EU identity in the constitutional traditions of the Member States, as well as through a stronger constitutionalization of equality and non-discrimination. Second, the EU is taking action to confirm its identity as a normative actor in the international environment and to prevent changes in its identity, despite the critical perception of its behaviour by other actors. The latter trend dominated the period under review. Challenges from within the EU do not constitute a sufficiently strong incentive for the EU to take decisive action to confirm its identity; rather, it is enough to legitimize it through the effects of its policies, not through a common identity. Factors challenging the EU's identity (internal or external) are more effective in maintaining the EU's identity, but they also slow down its dynamics, making change more difficult. The motivations of the political actors involved in these processes are complex, from cost-benefit calculations through institutional conditions to acting based on accepted ideas.

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