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Cultural Diversity and National Identity: Can Relevant Competing Interests be Balanced ‘Fairly’ in EU Internal Market Law?

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1. Introduction

For our contribution to this volume, we take up characteristically straightforward questions posed by Bruno de Witte himself: ‘[d]oes [the European Union] accept that the EU Member States define their cultural policies in the way they wish? Does it consider that cultural goods or services should not be subject to the logic of the internal market, or at least not in the same way as other goods and services?’¹ Straightforward to ask, but not to answer. To investigate these questions, we mined and now bring together three main strands of Bruno’s work: first, his extensive analysis of cultural diversity and EU law; second, his perspective on the EU’s protection of fundamental rights; and third, his overarching concern for the EU constitution generally and, in more recent work, for the potentially destabilizing role of national identity within that framework more specifically.

The span of Bruno’s research across these areas is remarkably broad, and we settled on national language laws that restrict EU internal market freedoms as a case study to refine the scope of the problem. We also agreed not to focus on the underlying though extremely complex, and still unresolved, question about whether (and if so why) cultural diversity might qualify as a *special* category of exception from the free movement dynamics of the EU’s internal market.² Instead, we have constructed this chapter around the ruling of the Court of Justice in *Cilevičs*,³ which illustrates so well the internal market, fundamental rights, and national identity elements

¹ De Witte, ‘Market Integration and Cultural Diversity in EU Law’, in B. de Witte and V. Vadi (eds), *Culture and International Economic Law* (2015) 193-194.

² Culture as a public interest justification for restrictions of free movement law is examined further in Section 4 below. The significance of culture as a legitimate expression of national differences has been explored in a range of EU policy contexts, see e.g., Gruyters and Michaux, ‘Cultural State Aid: A Myriad of Approaches’, in E. Psychogiopoulou and S. Schoenmaekers (eds), *European Union Economic Law and Culture* (2024) 200.

³ Case C-391/20, *Cilevičs* (EU:C:2022:638).

of Bruno’s scholarship. As Bruno would do himself, the analysis begins with the Treaty framework within which the protection of cultural and linguistic diversity at national level falls to be evaluated as a public interest justification when internal market freedoms are restricted.⁴ That discussion introduces our core questions about balancing different provisions of EU primary law—provisions that address cultural diversity and internal market freedoms respectively as well as, reflecting Bruno’s more recent work, Article 4(2) TEU’s requirement that the EU is required to respect the national identities of its Member States. Together, these elements constitute what Tridimas calls the ‘conflicts universe’ within which the Court of Justice undertakes its balancing exercise.⁵

In Section 2, we first present the questions referred and the ruling in *Cilevičs* from a fairly standard linguistic diversity versus internal market freedoms perspective while, at the same time, locating that dilemma, as the Court did, in the wider constitutional space of respect for national identity. However, to build on that analysis, and using the same case study, the chapter then explores how the EU Charter of Fundamental Rights would significantly affect the *fair* balancing of the interests at stake when national language laws are tested for compliance with the fundamental freedoms guaranteed by the EU’s internal market (Section 3). The fair balance method is employed by the Court to resolve the questions that Bruno has identified yet, in our view, it exposes rather than overcomes their complexity.

⁴ There is a wider debate, of course, the importance of which we acknowledge but do not have space to address i.e., how culture is defined and what it does, and does not, include. For example, we are grateful to Joanne Scott for highlighting the fact that, following public surveys, ‘European culture’ was selected as one of two themes (and the favourite among seven proposed themes) for the redesign of euro banknotes: for more information on the redesign process and the public consultation underpinning it, see further, https://www.ecb.europa.eu/euro/banknotes/future_banknotes/html/index.en.html (last visited 31 January 2025). For present purposes, we take as our starting point that, as the Court of Justice has expressed it, ‘language and culture are intrinsically linked, as pointed out by, *inter alia*, the Convention on the Protection and Promotion of the Diversity of Cultural Expressions, adopted at the General Conference of UNESCO in Paris on 20 October 2005 and approved on behalf of the Community by Council Decision 2006/515/EC of 18 May 2006 (OJ 2006 L 201, p. 15), which states in paragraph 14 of its preamble that “linguistic diversity is a fundamental element of cultural diversity”’ (Case C-222/07 *UTECA* (EU:C:2009:124), para. 33). See generally, de Witte, ‘Language as cultural heritage’, in F. Francioni and A.F. Vrdoljak (eds), *The Oxford Handbook of International Cultural Heritage Law* (2020) 371.

⁵ Tridimas, ‘Wreaking the Wrongs: Balancing Rights and the Public Interest the EU Way’, 29 *Columbia Journal of European Law* (CJEL) (2023) 185, at 189. In this work, Tridimas provides a general taxonomy or systemization of the conflicts that the Court of Justice is called on to adjudicate under EU law, within which he distinguishes the categories of public interest objectives conflicting with fundamental rights, on the one hand, and between two or more fundamental rights, on the other. He further investigates the significance of whether the relevant public interest is ‘defined by EU law’ or is a national public interest (see esp. 189-192).

By assessing the *Cilevičs* ruling in terms of what the Court *did* but just as importantly *did not* discuss, we gradually build up ‘layers’ of (legal) interests that should be evaluated in a situation where different interests unavoidably coincide. In this example, several fundamental rights were left out of the balancing exercise, including the (minority) language rights of others. We are not saying that fundamental rights do not feature in balancing exercises under EU internal market law: they do.⁶ Instead, we revisit the fundamentals of the ‘fair balance method’ itself to call attention to selective—thus, *unfair?*—balancing. In that light, we review suggestions on how the Court’s fair balance methodology might be improved (Section 4). We consider whether national identity can be both meaningfully (from the perspective of the Member States) yet not destructively (from the perspective of the EU’s internal market and, more generally, of its legal order) accommodated when national language policy is reviewed for compliance with EU internal market law. We also look at fair balance methodology more generally (as applied outside EU law), the question of (formal) hierarchical rank, and the resulting weight ascribed to the interests to be balanced in a given situation. For example, we note that the Treaties and the Charter have equal legal status per Article 6 TEU, yet, according to Article 52(2) CFR, the Treaties are privileged in some respects when rights provided for in both the Treaties and Charter.

Overall, we admit from the outset that, fundamentally, law does not provide sufficient answers to Bruno’s questions. In our review of relevant case law, we found inconsistencies with respect to the ‘logic of the internal market’, few clues as to what makes the necessary balancing of relevant interests *fair*, and a tendency towards compression rather than full airing of relevant interests for the balancing task. We appreciate that the balance accorded to different elements will produce different outcomes in different cases and, in many respects, that is as it should be. Indeed, fairness itself requires that very flexibility since, at its essence, it requires that different situations should not be treated similarly. We therefore recognize that in such a sensitive area as national language policy, determining whether fair balancing was achieved is not something that can be solely worked out through law.⁷

⁶ E.g., Case C-36/02, *Omega* (EU:C:2004:614).

⁷ For example, Tridimas (n. 5) at 194 provides a (non-exhaustive) list of factors, entailing both legal and non-legal character, that ‘may play a role in judicial assessment’, i.e., ‘1) The importance of the right at stake; 2) The extent to which the right has been the subject of legislative elaboration; 3) The seriousness and extent of its restriction; 4) Whether the restriction emanates from EU or national law; 5) The importance of the countervailing public interest or the countervailing right at stake; 6) Process considerations; 7) The perceived degree of consensus among the laws of the Member States on the issue at stake’.

At the same time, however, we echo work that calls for more open and complete communication of the complexity of the interests at stake in each relevant case. We further argue that improving *how* balancing is undertaken is only part of the problem: prior to this, *relevant* elements that should be balanced must be articulated and included in the exercise. Finally, we also raise broader questions about hierarchies within EU primary law, which call for further reflection on whether activating such hierarchies more formally would be a welcome or problematic development of EU law.

2. Cultural Diversity, Freedom of Movement, and National Identity: An Impossible Equation? Introducing the *Cilevičs* case

Tracing the evolution of case law that assesses national language policy for compliance with EU free movement law, this section draws from Bruno's work on both the protection of cultural and linguistic diversity and his more recent concern with Article 4(2) TEU and the respect for the national identities of the Member States that it mandates. The central question is this: can these interests be reconciled in some way or are they inevitably, fundamentally, and persistently, in tension? As introduced in Section 1 above, we use the issues raised by the *Cilevičs* case to structure our exploration of that question since they so resonantly distil the threads of Bruno's work that we seek to reflect on and develop in this contribution.

A. The *Cilevičs* Case: Facts and Preliminary Ruling

Cilevičs concerned proceedings in Latvia brought by 20 members of the Latvian Parliament seeking review of the constitutionality of the Law on higher education institutions. Article 4 of the Latvian Constitution establishes that Latvian is the official language of the Republic of Latvia. Engaging the protection extended by the Latvian Constitution to property rights (Article 105), the right to education (Article 112), and copyright and patent rights (Article 113), the action for review contested amendments to Article 5(1) (providing *inter alia* that '[a]s part of their activities, [higher education institutions] shall promote and develop the sciences, the arts

and the official language'), Article 56(3),⁸ and point 49 of the transitional provisions of the Law.⁹

The applicants argued that these amendments infringed the right to education: fundamentally, for our purposes, '[s]ince those provisions require private higher education institutions to promote and develop the official language of the Republic of Latvia, thereby limiting the opportunities for those institutions to offer courses of study in foreign languages, they restrict the independence of those institutions and the academic freedom of their teaching staff and students'.¹⁰ However, they also raised the issue of restrictions on freedom to provide services and freedom of establishment, i.e.,

by creating a barrier to entry to the higher education market and preventing the nationals and undertakings from other Member States from providing higher education services in foreign languages, Article 5(1), third sentence, and Article 56(3) of the Law on higher education institutions and point 49 of the transitional provisions of that law undermine the freedom of establishment and the free movement of services guaranteed by Article 49 TFEU and Article 56 TFEU respectively, and also the freedom to conduct a business enshrined in Article 16 of the Charter'.¹¹

That argument produced a preliminary reference asking two questions on the interpretation of EU law:

- (1) Does legislation such as that at issue in the main proceedings constitute a restriction on the freedom of establishment enshrined in Article 49 [TFEU] or, in the alternative, on the freedom to provide services guaranteed in Article 56 [TFEU], and on the freedom to conduct a business recognised in Article 16 of the [Charter]?
- (2) What considerations should be taken into account when assessing whether the legislation in question is justified, suitable and proportionate with regard to its

⁸ 'In higher education institutions and institutions of higher technical and vocational education, courses of study shall be taught in the official language. Those courses of study may be provided in a foreign language only in the following circumstances: ... 3) Courses of study that must be taught in a foreign language in order to achieve their objectives ... in the following categories: linguistic and cultural studies and language courses; ...'.

⁹ 'The amendments to Article 56(3) of this law concerning the language in which courses of study are to be taught shall come into force on 1 January 2019. Higher education institutions and institutions of higher technical and vocational education at which courses of study are taught in a language that does not comply with Article 56(3) of this law may continue to teach such courses in the language concerned until 31 December 2022. From 1 January 2019, students may not be admitted to courses of study taught in a language that does not comply with Article 56(3) of this law'.

¹⁰ Case C-391/20, *Cilevičs* (EU:C:2022:638), para. 15.

¹¹ *Ibid.* para. 18.

legitimate purpose of protecting the official language as a manifestation of national identity?¹²

The referring court clearly appreciated the balancing act that had to be undertaken in this case: it acknowledged that Article 4(2) TEU requires the Union ‘to respect the national identity of the Member States, of which the official language is one of the manifestations thereof’ and recognized, ‘from Article 165 TFEU, that the content and organisation of higher education falls within the competence of the Member States’;¹³ while recalling, at the same time, that ‘freedom of establishment also applies in the areas for which competence lies with those Member States’.¹⁴ Thus, it ‘expresse[d] doubts as to whether legislation of a Member State that makes obligatory the use of the official language of that Member State in the field of higher education, including in private higher education institutions, while providing for certain limits on that obligation, constitutes a restriction on the freedom of establishment enshrined in Article 49 TFEU’.¹⁵

The Court of Justice recast the preliminary reference into one question: ‘whether Articles 49 and 56 TFEU and Article 16 of the Charter must be interpreted as precluding legislation of a Member State which, in principle, obliges higher education institutions to provide teaching solely in the official language of that Member State’.¹⁶ In this part of the chapter, we stick, for now, with how the Court of Justice presented its response to that question.

First, the Court confined the scope of the proceedings further by determining that the only question it needed to consider was whether the Law on higher education institutions constituted a restriction of freedom of establishment within the meaning of Article 49 TFEU. It did this for two reasons: first, following established case law that draws out determination of the

¹² Ibid. para. 30.

¹³ Article 6 TFEU delimits ‘culture’ as one of the areas for which the competence of the Union is confined to ‘actions to support, coordinate or supplement the actions of the Member States’. Article 167 TFEU then provides that ‘[t]he Union shall contribute to the flowering of the cultures of the Member States, while respecting their national and regional diversity and at the same time bringing the common cultural heritage to the fore’. In a similar vein, Article 165(1) TFEU provides that ‘[t]he Union shall contribute to the development of quality education by encouraging cooperation between Member States and, if necessary, by supporting and supplementing their action, while fully respecting the responsibility of the Member States for the content of teaching and the organisation of education systems and their cultural and linguistic diversity’.

¹⁴ *Cilevičs* (n. 10) para. 27.

¹⁵ Ibid. para. 29.

¹⁶ Ibid. para. 48.

‘predominant fundamental freedom’ in a given case;¹⁷ and second, because ‘examination of the restriction brought about by national legislation from the point of view of Article 49 TFEU *also covers* possible limitations of the exercise of the rights and freedoms laid down in Articles 15 to 17 of the Charter, with the result that a separate examination of the freedom to conduct a business enshrined in Article 16 of the Charter is not necessary’.¹⁸

Second, the Court found that a national law obliging the provision of higher education courses solely in the official language of a Member State rendered establishment in that State less attractive to the nationals of other Member States since ‘such nationals will not be able, when they have an institution in another Member State, to use a large part of the administrative and teaching staff employed in that institution, thus entailing considerable costs’.¹⁹ An important reminder in this context is the statement that ‘[w]hile EU law does not detract from the power of those Member States as regards, first, the content of education and the organisation of education systems and their cultural and linguistic diversity and, secondly, the content and organisation of vocational training, as is apparent from Article 165(1) and Article 166(1) TFEU, the fact remains that, when exercising that power, Member States must comply with EU law, in particular the provisions on freedom of establishment’.²⁰

Third, the Court affirmed that ‘the objective of promoting and encouraging the use of one of the official languages of a Member State must be regarded as being a legitimate objective which, in principle, justifies a restriction on the obligations imposed by the freedom of establishment enshrined in Article 49 TFEU’.²¹ At one level, the Court drew from its much earlier findings in the *Groener* case to reinforce ‘[t]he importance of education for the implementation of such a policy for the protection and promotion of the use of the official language of a Member State’.²² However, it also (rightly) invoked the more complex

¹⁷ Ibid. para. 51, emphasis added, referring to Case C-323/18, *Tesco-Global Áruházak* (EU:C:2020:140), para. 51. In paras 52-53, the Court distinguished the economic activity in question (providing higher education courses for remuneration on a stable and continuous basis) from the legal qualities of services under EU law.

¹⁸ *Cilevičs* (n. 10) para. 56 (emphasis added), referring to Case C-322/16, *Global Starnet* (EU:C:2017:985), para. 50.

¹⁹ *Cilevičs* (n. 10) para. 63. In para. 64, the Court also pointed out that ‘such a restriction also exists in respect of nationals of other Member States who exercised that freedom, before the adoption of the Law on higher education institutions, by opening institutions in Latvia that offer a curriculum in a language other than Latvian. After the end of the transitional period, those nationals will have to adapt their curriculum to the requirements of that law, which may involve considerable costs, in particular as regards a large part of their administrative and teaching staff’.

²⁰ Ibid. para. 59.

²¹ Ibid. para. 70, referring to Case C-202/11, *Las* (EU:C:2013:239), para. 27 and Case C-15/15, *New Valmar* (EU:C:2016:464), para. 50.

²² *Cilevičs* (n. 10) para. 69, referring to Case 379/87 *Groener* (EU:C:1989:599), para. 20.

constitutional landscape cultivated since that time, pointing to Article 3(3) TEU, which provides that the Union ‘shall respect its rich cultural and linguistic diversity, and shall ensure that Europe's cultural heritage is safeguarded and enhanced’; Article 22 CFR, which provides, similarly, that ‘[t]he Union shall respect cultural, religious and linguistic diversity’; and the fact that ‘[i]n accordance with Article 4(2) TEU, the European Union must also respect the national identity of its Member States, which includes protection of the official language of the Member State concerned’.²³

Finally, as would be expected in any case assessing a restriction of free movement, the Court then examined the proportionality of the Latvian Law. The Court went into some detail in this part of its ruling, separating out its analysis of the *suitability* and the *necessity* of the national rules. Affirming the suitability of the Latvian legislation for the objective of defending and promoting Latvian as the official language of the State, the Court pointed to the threshold of ‘genuinely reflect[ing] a concern to attain [the objective] and ... implement[ing it] in a consistent and systematic manner’²⁴ and appeared satisfied that it was reached in this case, in part because ‘the Latvian legislation provides that the compulsory use of Latvian does not relate to two private higher education institutions, whose operation is governed by special laws, thus allowing those two institutions to continue to offer courses of study in English or, in some circumstances, in another official language of the European Union’.²⁵ Recognizing the ‘special status’ that these institutions enjoy under national law, the Court underlined that ‘there is nothing ... to prevent other institutions from being able to provide education in an official EU language other than Latvian, provided that their operation comes under an international agreement entered into between the Republic of Latvia and other States’.²⁶

Assessing the necessity of the rules provided for in the Latvian legislation, the Court emphasized that ‘Member States may introduce, in principle, an obligation to use their official language in [higher education] courses, provided that such an obligation is accompanied by

²³ *Cilevičs* (n. 10) para. 70. However, Article 167(4) TFEU, which requires that the Union ‘shall take cultural aspects into account in its actions under other provisions of the Treaties, in particular in order to respect and to promote the diversity of its cultures’, was not mentioned.

²⁴ *Ibid.* para. 75, referring to Case C-377/17, *Commission v Germany* (EU:C:2019:562), para. 89.

²⁵ *Cilevičs* (n. 10) para. 77. Thus, ‘[a]s is apparent from the Latvian Government’s written reply to questions from the Court, those two institutions were established by international agreements entered into between the Republic of Latvia and the Kingdom of Sweden ... Article 56(3)(1) of the Law on higher education institutions specifically provides that a course taking place in Latvia may be provided in an official EU language other than Latvian where that course is organised in the framework of international agreements’ (para. 78).

²⁶ *Ibid.* para. 79.

exceptions that ensure that a language other than the official language may be used in the context of university education'.²⁷ Reflecting similar themes to those noted above, the Court advised that 'such exceptions should, in order not to exceed what is necessary for that purpose, allow the use of a language other than Latvian, *at least as regards education provided in the context of European or international cooperation*, and education relating to culture and languages other than Latvian'.²⁸ It therefore concluded that 'Article 49 TFEU must be interpreted as not precluding legislation of a Member State which, in principle, obliges higher education institutions to provide teaching solely in the official language of that Member State, *in so far as such legislation is justified on grounds related to the protection of its national identity*, that is to say, that it is necessary and proportionate to the protection of the legitimate aim pursued'.²⁹

B. The *Cilevičs* Ruling: a Preliminary Appraisal

Even without yet taking the *Cilevičs* case beyond what the ruling *did* address,³⁰ points of criticism can be raised with respect to the Court's reasoning on the points summarized above. In his Opinion, Advocate General Emiliou had highlighted the link between language policy, on the one hand, and 'national sovereignty and identity', on the other, pointing out that, mindful of the social and political sensitivity at stake, 'both the EU legislature and the EU Courts have consistently adopted a rather cautious, diplomatic and pragmatic approach to language regimes, especially when that meant imposing obligations in that regard upon Member States'.³¹ However, as Bruno has established in his work, 'the Court of Justice does recognize, in principle, the importance of the value of cultural diversity in the post-Lisbon EU, *but ...* when balancing that value against the conflicting requirements of free movement rights law under its proportionality review, the outcome varies and is quite unpredictable'.³²

In *Cilevičs*, it might have been expected that the intensity of the requirement to provide higher education courses in Latvian would have been defeated by freedom of establishment's market-opening impetus: compare the degree of latitude accorded to Latvia with, for example, the

²⁷ Ibid. para. 85.

²⁸ Ibid. para. 86 (emphasis added).

²⁹ Ibid. para. 87 (emphasis added).

³⁰ We return to what it did not address—notably the wider context and complexities of the case and their intersection with several provisions of the Charter of Fundamental Rights—in Section 4 below.

³¹ AG Emiliou in *Cilevičs*, point 1 of the Opinion (EU:C:2022:166).

³² De Witte (n. 1) 200 (emphasis added).

rejection of Belgian legislation requiring employers to draft cross-border employment contracts exclusively in the official language of the region in which their place of business was established as a restriction of the free movement of workers under Article 45 TFEU in the field of language diversity.³³ In contrast, the proportionality assessment in *Cilevičs* extends significantly more discretion to Latvia to determine the shape of its language policy and it is therefore far more resonant with the lighter touch proportionality analysis seen classically in *Groener*³⁴ and, more recently, in *UTECA*.³⁵ The problem that results is that there are no discernible indicators of when or why the proportionality test narrows or widens in this way: the promotion of an official language is clearly not the deciding factor *per se* since the cases highlighted here all relate to that objective. Moreover, in *Groener*, the Irish language was both the first official language of Ireland *and* a minority language.

The timing of the *Cilevičs* case is, of course, the elephant in the (court)room, since the Opinion and the ruling were delivered in March and September 2022 respectively, after Russia had invaded Ukraine. Though the Court did not mention it at all, as we return to in Section 3 below, the context of the case at national level was, as AG Emiliou acknowledged yet very briefly, ‘the existence of a large Russian-speaking minority in Latvia’.³⁶

Bruno has raised the question of ‘whether the European Court will strike *the right balance* if asked to do so’.³⁷ But how do we determine, through appropriately objective criteria, what the ‘right’ balance is? In the case law of the Court of Justice, the idea of a *fair* balance is usually invoked, and we use that here as a proxy for Bruno’s query in a narrow sense, since we know that what he might have meant by referring to the ‘right’ balance could bring more factors into play than determining the applicable legal method. As we indicated in Section 1 above, the fair balance method is spread widely across the case law of the Court of Justice: in essence,

³³ Case C-202/11, *Las* (EU:C:2013:239); or, more generally, with the controversial overriding of economic and social rights by the force of freedom of establishment and freedom to provide services in the highly criticized *Viking Line* and *Laval* cases respectively (Case C-438/05, *The International Transport Workers’ Federation and The Finnish Seamen’s Union* (EU:C:2007:772); Case C-341/05, *Laval un Partneri Ltd* (EU:C:2007:809)).

³⁴ Case C-379/87, *Groener* (EU:C:1989:599), paras 20-21.

³⁵ Case C-222/07, *UTECA* (EU:C:2009:124), esp. para. 36: ‘[t]he fact that [a linguistic] criterion may constitute an advantage for cinema production undertakings which work in the language covered by that criterion and which, accordingly, may in practice mostly comprise undertakings established in the Member State of which the language constitutes an official language appears inherent to the objective pursued. Such a situation cannot, of itself, constitute proof of the disproportionate nature of the measure at issue in the main proceedings without rendering nugatory the recognition, as an overriding reason in the public interest, of the objective pursued by a Member State of defending and promoting one or several of its official languages’.

³⁶ AG Emiliou in *Cilevičs* (n. 31) point 112 of the Opinion.

³⁷ De Witte (n. 1), at 198.

‘[w]here several rights and fundamental freedoms protected by the European Union legal order are at issue, the assessment of the possible disproportionate nature of a provision of European Union law must be carried out with a view to reconciling the requirements of the protection of those different rights and freedoms and a fair balance between them’.³⁸ Alongside the idea of reconciliation, however, we also consider whether there are, or should be, any formal or informal ‘hierarchies’ among the relevant rights and freedoms later in this chapter. For now, we note only that the relevant rights and fundamental freedoms in *Cilevičs* are all expressed in primary EU law.

Advocate General Emiliou reflected on the Court’s fair balance approach as follows in *Cilevičs*:

The desire to continue the process of ‘creating an ever closer union among the peoples of Europe’ appears in the preamble of both the EU Treaty and the FEU Treaty, as well as in Article 1 TEU. At the same time, the preamble to the FEU Treaty and Article 3(3) TEU also express the European Union’s will to ‘respect its rich cultural and linguistic diversity’ and to ‘ensure that Europe’s cultural heritage is safeguarded and enhanced’. There is no doubt, in my view, that *those objectives are not antithetic and, consequently, can and should be pursued at the same time*. However, it is equally true that, in some specific sets of circumstances, *they might pull the European Union in different directions*. For example, national measures designed to promote and protect the use of a national language may, in practice, give rise to obstacles to the exercise, by individuals and firms, of their freedom of movement. In those circumstances, it seems to me that *a fair balance between those two objectives must be struck, so that they both can effectively be pursued*.³⁹

The fair balance method enables ‘account to be taken *of the specific context of each Member State*’ where the relevant (EU) legislation ‘allows each Member State a margin of discretion in achieving the necessary reconciliation of the different rights and interests concerned, in order to ensure a fair balance between them’.⁴⁰ In that light, the Court’s emphasis in *Cilevičs* on the

³⁸ Case C-283/11, *Sky Österreich* (EU:C:2013:28), para. 60. In this case the fair balance test was applicable to the freedom to conduct a business on the one hand and the ‘fundamental freedom of citizens of the European Union to receive information and the freedom and pluralism of the media, on the other’ (para. 59).

³⁹ AG Emiliou in *Cilevičs* (n. 31), points 3-5 of the Opinion.

⁴⁰ Case C-344/20, *SCRL* (EU:C:2022:774), para. 50, addressing Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation, 2000 OJ L303/16. In this case a ‘fair balance’ had to be struck between non-discrimination on the ground of religion or belief on the one hand and, *inter alia*, the freedom to conduct a business on the other, and Directive 2000/78/EC did not preclude a national court from

fact that use of languages other than Latvian ‘as regards education provided in the context of European or international cooperation, and education relating to culture and languages other than Latvian’ should be allowed was especially interesting,⁴¹ since that point of emphasis was more about ensuring a ‘European language space’ within Latvia than the margin of discretion that Latvia enjoys on its own terms.⁴²

Differently, AG Emiliou determined the proportionality of the Latvian rules through the fair balance prism, which produced, in consequence, a different assessment and differently framed guidance for the national court from that of the Court. He first suggested that ‘the contested measure appears to be based on the premiss that, in order to promote the use of the official language of the State, the use of other languages in higher education must inevitably be ‘sacrificed’ (or at least significantly restricted)’—a view that he did not ‘share’.⁴³ He then pointed out that ‘the exceptions to the obligation to teach courses in the official language of the State are relatively few, and rather limited in scope’ and that ‘[t]he effect of the contested provisions is to impose *de facto* monolingualism in the field of higher education, including in the private sector. The national measure thus appears to be quite radical and *thus possibly over-reaching*’.⁴⁴ On that basis, he responded to the referring court—in a notably less definitive way when compared to the ruling of the Court—that ‘national legislation which, in order to develop and promote the State’s official language, requires, subject to some exceptions, institutions of higher education financed essentially by private funds, to offer courses only in that language, is compatible with EU law provided that it is suitable and necessary to achieve the stated objective, *and strikes a fair balance* between the interests at stake’.⁴⁵

Finally, another dimension of the fair balance mission stems from the significance in *Cilevičs* of promoting an official language not only as an element of cultural diversity but as an expression of a Member State’s national identity—a provision characterized in Bruno’s work

ascribing ‘in the context of balancing diverging interests, greater importance’ to one set of interests over the other (at para. 52).

⁴¹ *Cilevičs* (n. 10) para. 86.

⁴² Overlaps, and distinctions, between national and ‘European’ conceptions of the public interest raise deeply interesting questions, connecting in some ways to the wider idea of promoting the ‘European way of life’. See further, Azoulai, ‘The Law of European Society’, 59 *Common Market Law Review (CMLR)* (2022) 203; and Editorial Comments ‘EU law as a way of life’, 54 *Common Market Law Review (CMLR)* (2017) 357.

⁴³ AG Emiliou in *Cilevičs* (n. 31), point 102 of the Opinion.

⁴⁴ *Ibid.* point 104 of the Opinion (emphasis added).

⁴⁵ *Ibid.* point 115 of the Opinion (emphasis added).

as ‘the anchoring of a domestic concern in EU law’.⁴⁶ Indeed, in the Court’s ruling, while national identity was not discussed in any detail,⁴⁷ it was nevertheless, as indicated above, the concern that inspired the referring court’s second question and it was folded expressly into the final determination of the case by the Court of Justice.⁴⁸ Adopting the same wording as the question referred by the national court, the Court of Justice stated that a policy of ‘protecting’ a Member State’s official language ‘constitutes *a manifestation* of national identity for the purposes of Article 4(2) TEU’.⁴⁹

Advocate General Emiliou considered the nature and scope of Article 4(2) in more detail, confining its scope to ‘*core* constitutional elements of a Member State’ in light of the wording of the provision itself (‘*essential* State functions’, *fundamental* structures’).⁵⁰ Once again, he was firmly in the territory of fair balancing in his consideration of national identity, recalling both the ‘significant leeway’ that Member States enjoy, on the one hand, and the fact that their discretion ‘cannot be without limits’, on the other.⁵¹ As we saw above, he invoked the significance of judicial review for ensuring the compliance of relevant national measures with EU law, and especially the proportionality test that comes as part of that review to mediate the required balance in both procedural and substantive terms.

We return to the expectations placed on fair balance methodology in Section 4 below, i.e., to *how* balancing is done. However, we first illustrate that the multiplicity of interests at issue in *Cilevičs* was wider—and thus, even more complex and more sensitive—than the Court’s ruling alone would suggest, underlining the need for deeper probing of *what* should be balanced in the first place.

⁴⁶ Fromage and de Witte, ‘National Constitutional Identity Ten Years on: State of Play and Future Perspectives’, 27 *European Public Law (EPL)* (2021) 411, at 412-413.

⁴⁷ See only, paras. 68 and 83 of *Cilevičs* (n. 10).

⁴⁸ *Cilevičs* (n. 10) para. 87 (‘the answer to the questions referred is that Article 49 TFEU must be interpreted as not precluding legislation of a Member State which, in principle, obliges higher education institutions to provide teaching solely in the official language of that Member State, *in so far as such legislation is justified on grounds related to the protection of its national identity*, that is to say, that it is necessary and proportionate to the protection of the legitimate aim pursued’) (emphasis added).

⁴⁹ *Ibid.* para. 83 (emphasis added), referring to but amplifying the language of para. 26 of Case C-202/11, *Las* (EU:C:2013:239) (‘According to the fourth subparagraph of Article 3(3) TEU and Article 22 of the Charter of Fundamental Rights of the European Union, the Union must respect its rich cultural and linguistic diversity. In accordance with Article 4(2) TEU, the Union must also respect the national identity of its Member States, which includes protection of the official language or languages of those States’), a finding established earlier in Case C-391/09, *Runevič-Vardyn and Wardyn* (EU:C:2011:291), para. 86.

⁵⁰ AG Emiliou in *Cilevičs* (n. 31) point 85 of the Opinion (emphasis in original).

⁵¹ *Ibid.* point 86 of the Opinion.

3. Cultural Diversity, Free Movement, and National Identity: Bringing Fundamental Rights into the Equation

This part of the chapter brings a further element to our discussion on the relationship between the fundamental freedoms of the EU's internal market, cultural diversity, and national identity introduced in Section 2 above, namely that of fundamental rights. It considers the fact that respect for cultural and linguistic diversity is enshrined in Article 22 of the EU Charter of Fundamental Rights, but also that claims to national identity, including the protection of a national language, can conflict with (other) fundamental (cultural) rights enshrined in the Charter. The framing of the interests at stake in any given case—whether of a primary law and fundamental rights in nature or not—is reflective of their hierarchical status and therefore has a direct impact on their balancing in the case at hand.

Before entering into discussion of what the Court did *not* address in *Cilevičs* in terms of fundamental rights, it is useful first to recall the principal ways in which fundamental rights enter the equation in free movement law cases. They are three. First, when fundamental freedoms of the internal market are construed as overlapping with fundamental rights, and notably with the 'economic freedoms' contained in the Charter, as was the case, for example, in *Global Starnet* and *Pfleger*,⁵² which raised Article 15 CFR ('freedom to choose an occupation and the right to engage in work'), the second paragraph of which deals explicitly with the free movement of workers, freedom of establishment and freedom to provide services;⁵³ Article 16 CFR ('freedom to conduct a business'); and Article 17 CFR ('right to property'). Second, when the ground of derogation from the internal market freedoms is (framed as) a fundamental right. The classic case here is *Schmidberger*.⁵⁴ Third, when national measures derogating from the internal market freedom must comply with fundamental rights—the *ERT* scenario.⁵⁵

Cilevičs is a complicated case where all three fundamental rights avenues could have been involved. As we will see below, however, in *Cilevičs*, the third route, which involved some of

⁵² Case C-322/16, *Global Starnet* (EU:C:2017:442), para. 38 and Case C-390/12, *Pfleger and Others* (EU:C:2014:281), paras. 57-60.

⁵³ Next to the provision's wording, this is also noted in the Explanations relating to the Charter, OJ [2007] C 303/17.

⁵⁴ Case C-112/00, *Schmidberger* (EU:C:2003). And classic cases where this framing should but infamously did not occur: Case C-438/05, *Viking* (EU:C:2007:772) and Case C-341/05, *Laval* (EU:C:2007:809).

⁵⁵ Case C-260/89, *Elliniki Radiophonia Tiléorassi (ERT)* (EU:C:1991:254). And more recently, *Pfleger* (n. 52).

the thorniest issues in this case, was, surprisingly, even from a legal perspective alone, not taken by the Court (unlike the Advocate General). Fundamental rights featured in the Court's legal reasoning only via the first and second route. As regards the first route, as part of its preliminary observations the Court held rather swiftly that there was no need for a separate examination of Article 16 CFR as 'an examination of the restriction brought about by national legislation from the point of view of Article 49 TFEU also covers possible limitations of the exercise of the rights and freedoms laid down in Articles 15 to 17 of the Charter'.⁵⁶ The second route was, to some extent, also taken. The Court identified, in accordance with its previous ruling in *Las*,⁵⁷ 'the protection and promotion of one or more official languages of a Member State' as the overriding requirement in the public interest at stake here.⁵⁸ And just like in *Las* (and earlier in *Runevič-Vardyn*), the Court did note the post-Lisbon 'constitutional framework of cultural policy',⁵⁹ which now also includes Article 22 CFR:

According to the 4th subparagraph of Art. 3(3) TEU and Article 22 of the Charter, the European Union must respect its rich cultural and linguistic diversity. In accordance with Article 4(2) TEU, the European Union must also respect the national identity of its Member States, which includes protection of the official language of the Member State concerned (...).⁶⁰

In this framework, cultural policy is recognized at a constitutional level in the sense that the relevant provisions protecting it enjoy primary Treaty status and thus rank on the same level as the internal market freedoms. This is also reflected in the Court's formulation that promoting and encouraging the use of one of the official languages of a Member State is a legitimate interest, *which in principle justifies a restriction*.⁶¹ This formula was used in *Schmidberger* (the '*Schmidberger* formula') and serves to indicate an equal hierarchical relationship between the conflicting interests at stake. The overriding requirement in the public interest is not a conventionally narrow exception to the free movement rule, but rather one that is of equal weight (which is the reason why it justifies a restriction in principle) and therefore needs to be weighed in a 'fair balancing' exercise. The Court did not, however, follow the *Schmidberger*

⁵⁶ *Cilevičs* (n. 10) para. 56.

⁵⁷ Case C-202/11 *Las*, EU:C:2013:239.

⁵⁸ *Cilevičs* (n. 10) para. 67.

⁵⁹ de Witte, 'Cultural Policy Justifications', in P. Koutrakos, N. Nic Shuibhne, and P. Syrpis (eds) *Exceptions from EU Free Movement Law: Derogation, Justification and Proportionality* (2016) 131.

⁶⁰ *Cilevičs* (n. 10) para. 68. Case C-391/09, *Runevič-Vardyn and Wardyn* (EU:C:2011:291), para. 86 and Case C-202/11, *Las* (EU:C:2013:239), para. 26.

⁶¹ *Cilevičs* (n. 10) para. 70.

approach in *Cilevičs* when examining the proportionality of the contested Latvian measure. In other words, it did not invoke the fair balance method but limited itself to noting the broad discretion the Member States enjoy given that the overriding requirement in the public interest constitutes a manifestation of Article 4(2) TEU (with reference to *Las*). At the same time, it also noted the limits to this discretion when stating that such discretion ‘cannot justify a *serious* undermining of the right which individuals derive from the provisions of the Treaties enshrining their fundamental freedoms’ (with reference to *Runević-Vardyn*).⁶²

That the Court *should* take a more deferential approach towards cultural policy measures in free movement law could conceivably be argued on the basis of the post-Lisbon ‘constitutional framework on cultural policy’—even if the Court’s case law might not be consistently reflecting that.⁶³ However, next to this question (how much deference for Member States should follow from Article 4(2) TEU), there is another element in the Court’s reasoning that is striking: the Court noted the ‘full framework’, i.e., Article 3(3) TEU and Article 22 CFR next to Article 4(2) TEU at the level of identifying the overriding requirement in the public interest, but it did not acknowledge Article 22 CFR (or Article 3(3) TEU) at the level of assessing the proportionality of the national measure.

To recall the wording of Article 22 CFR, it provides that ‘[t]he Union shall respect cultural, religious and linguistic diversity’. Similarly, Article 3 TEU requires that the Union shall establish an internal market and also, according to paragraph 3, ‘respect [the Union’s] rich cultural and linguistic diversity’. In fact, the Explanations to the Charter on Article 22 CFR refer to Article 3(3) TEU. They also indicate further overlap between Treaty provisions and Article 22 CFR, stating that Article 22 CFR is based on Article 6 TEU, which used to refer in paragraph 3 to the national identities of the Member States which the Union shall respect,⁶⁴ but no longer does so. Article 22 CFR is also based on Articles 167(1) TFEU, which requires that ‘the Union shall contribute to the flowering of the cultures of the Member States, while respecting their national and regional diversity and at the same time bringing the common cultural heritage to the fore’, and 167(4) TFEU, which is a mainstreaming clause requiring that ‘[t]he Union shall take cultural aspects into account in its action under other provisions of the

⁶² *Cilevičs* (n. 10) para. 83 (emphasis added).

⁶³ De Witte (n. 59) 139.

⁶⁴ See discussion by Craufurd Smith, ‘Article 22’, in S. Peers *et al.*, (eds), *The EU Charter of Fundamental Rights* (2021) 640.

Treaties, in particular in order to respect and to promote the diversity of its culture’. Additionally, Article 167(4) is ‘inspired by Declaration No 11 to the Final Act of the Amsterdam Treaty on the status of churches and non-confessional organisations, now taken over in Article 17 [TFEU]’.

Article 22 CFR and the sources on which it is based reflect several legal ambiguities. One such ambiguity concerns the relationship between Article 22 CFR and Article 4(2) TEU. How one is to understand the scope of protection provided by Article 22 CFR and how that, in turn, relates to Article 4(2) is relevant not only at the stage of framing the overriding requirement in the public interest (as a particular fundamental right or not) but also at the stage of assessing the proportionality—and especially the necessity—of the contested national measure in an internal market case like *Cilevičs*.

There are three possible readings of this relationship. The first is that cultural diversity is subsumed under the protection of national identity. It is in fact quite likely that a Member State will invoke linguistic diversity and national identity vis-à-vis the *EU level* when adopting measures to protect its official language. Support for this position can be found in *Las* and in *Cilevičs* where, as noted above, Article 22 CFR was cited in recognition of ‘the protection and promotion of one or more official languages of a Member State’ as an overriding requirement in the public interest. This might perhaps then also explain why the Court did not invoke Article 22 CFR (or Article 3(3) TEU) again at the proportionality stage in *Cilevičs*—if one is subsumed in the other, there would be no need to mention Article 22 CFR separately. It is notable, though, that the legal authority cited in the relevant paragraph⁶⁵ is the passage from *Las* which does refer to Article 22 CFR (recognition of the overriding requirement in the public interest).

The second possible reading of the relationship between Article 22 CFR and Article 4(2) TEU is one that sees an inherent tension between diversity and national identity built into the provision.⁶⁶ On a *Member State level*, respect for linguistic diversity and respect for national identity can be antagonistic principles when one construes Article 22 CFR as a type of minority clause that protects diversity *within* Member States. This can come into tension with Article 4(2) TEU’s concern for protecting national identity. As we will see below, Advocate General

⁶⁵ *Cilevičs* (n. 10) para. 68.

⁶⁶ Craufurd Smith (n. 64) 641.

Emiliou considered this dimension to be crucial in *Cilevičs* ‘because of the existence of a large Russian-speaking minority in Latvia’ and he therefore addressed it in his proportionality assessment.⁶⁷ However, strikingly, the Court did not engage with this dimension at all. While, as noted by Toggenburg, the EU has no general powers in the field of minority rights,⁶⁸ this does not mean that the respect for the rights of persons belonging to minorities, expressed as a founding value of the Union in Article 2 TEU, has no legal meaning or that the EU is not bound by the obligations set out in the Charter when acting within its powers—including adjudication in the field of free movement law—to respect the rights, observe the principles, and promote the application thereof based on Article 51(1) CFR. The latter commitment would include the obligation resting on the Union to respect cultural, religious, and linguistic diversity per Article 22 CFR (if understood as a minority clause), and thus protect a minority against a Member State where it is situated and also uphold the prohibition of discrimination on the ground of (*inter alia*) membership of a national minority (per Article 21(1) CFR).

There is a third possible reading of the relationship between the two provisions, which hinges on a different interpretation of Article 4(2) TEU. Bruno rejects the idea that this provision ‘offers a kind of generic protection for national diversity and national constitutional values’.⁶⁹ Instead, based on a close literal reading of the text, he has argued that the ‘meaning of the national identity clause of Article 4(2) TEU should be limited to what its text actually states, namely to guarantee for the constitutional and political structures of the EU Member States’.⁷⁰ This includes regional and local self-government, as expressly referred to in Article 4(2) TEU. The term ‘fundamental structures’ can also be understood to include, furthermore, things like ‘the choice between parliamentary or semi-presidential political regimes, the existence or not of a mechanism for the constitutional review of legislation, the proportional or majoritarian nature of the electoral system etc’.⁷¹

⁶⁷ AG Emiliou in *Cilevičs* (n. 31) point 111 of the Opinion.

⁶⁸ Toggenburg, ‘The Protection of Minority Rights by the European Union: The European Citizens’ Initiative as a Test Case’, in R. Hofmann, T.H. Malloy, and D. Rein (eds.), *The Framework Convention for the Protection of National Minorities – A Commentary* (2018), 49 at 53. Toggenburg notes that the European Commission would typically state that the EU ‘has no competence over matters concerning the definition of what is a national minority, the recognition of the status of minorities or their self-determination and autonomy. Those matters fall under the responsibility of the Member States’ (ibid).

⁶⁹ De Witte, ‘Article 4(2) TEU as a Protection of the *Institutional Diversity* of the Member States’, 27 *European Public Law (EPL)* (2021) 559 at 559.

⁷⁰ Ibid. 559.

⁷¹ Ibid. 561.

In other words, according to Bruno, Article 4(2) should be understood as protecting the specific institutional infrastructure of each Member State only—its institutional autonomy and system of government—and not the protection of their culture or particular moral values. Such a broader meaning, he argues, is also not necessary given that primary EU law ‘contains many provisions that protect national diversity, all of which have a specific meaning and role in the EU legal order’.⁷² A broader reading of Article 4(2) TEU would ‘open ... the door to abusive and superficial uses of identity as a justification for non-compliance with EU law obligations from the side of the Member States’.⁷³ So, according to this account, Article 22 CFR protects cultural diversity while Article 4(2) TEU is limited to protecting the institutional diversity of the Member States. However, Bruno also states here that ‘the argument could be made that in some EU countries such as Belgium or the Baltic states, the regulation of official languages is indeed an essential political element in the state’s identity’.⁷⁴ At the same time, he acknowledges that ‘the reference to the national identity clause seems a bit redundant in these cases, since respect for the Member States’ linguistic policies is protected elsewhere in primary law, namely in the Articles 3(3) TEU and 22 of the Charter’.⁷⁵

As we have seen so far, the Court seems principally to have endorsed the first reading in *Cilevičs*—a relationship in which Article 22 CFR is subsumed into Article 4(2) TEU. However, this interpretative choice means not only that Article 22 CFR was not invoked for establishing the appropriate degree of discretion that should be left to Member States, but also that Article 22 CFR was not mentioned *as a fundamental right* with which a national measure derogating from the internal market freedoms needs to comply (according to *ERT* and, now, Article 51(1) CFR). In fact, the Court did not address this dimension of the case at all, in relation to any fundamental rights that were implicated, so not only as regards Article 22 CFR.

By contrast, the Advocate General examined not only the suitability and necessity of the contested national measure, but also, in a separate step of analysis, its proportionality *stricto sensu*, which admittedly does not occur often in the Court’s free movement case law. It is this stage that deepens the revealing and balancing of all the relevant interests at stake: on the one hand the ‘advantage’ of protecting and promoting the official language of a Member State and

⁷² Ibid. 560.

⁷³ Ibid.

⁷⁴ Ibid. 567.

⁷⁵ Ibid. 567.

on the other hand the ‘disadvantages’, i.e., the interference with or restrictions of four fundamental rights: Article 13 CFR and Article 14(3) CFR, Article 21(1) CFR and Article 22 CFR (which he considered in conjunction with Article 3(3) TEU). We shall discuss these rights in reverse order.

First, Article 22 CFR: Advocate General Emiliou clearly endorsed the view that this provision also includes a minority clause. He considered that Article 22 not only gives expression to the principle of the equality of Member States before the Treaties, as set out in Article 4(2) TEU, but also—as the other side of that concept—to respect for minority languages.⁷⁶ The large Russian-speaking minority in Latvia was noted in this regard, as well as the fact that ‘protection of minority languages is a value enshrined in several provisions of EU primary law (including Article 2 TEU and Article 21(1) of the Charter) and in numerous international instruments which the European Union and/or the Member States have signed’,⁷⁷ with reference being made, in particular, to Article 27 of the ICCPR. The Advocate General observed that the exceptions provided for in the contested national higher education law do not apply to Russian, as this is not one of the official languages of the European Union. The national measure therefore makes it impossible for privately funded higher education institutions to convene courses in that language and that affects the language rights of the minority significantly.⁷⁸ Notably, the European Commission for Democracy through Law (Venice Commission) found in its relevant opinion that:

[S]ome of the changes [made by the relevant amendments of the Latvian law] are ... open to criticism as they *do not strike a fair balance* between the protection of the rights of minorities and their languages and the promotion of the state language. In order to ensure such a balance, the Venice Commission recommends to ... consider enlarging the possibilities for persons belonging to national minorities to have access to higher education in their minority language, either in their own higher education institutions, or at least in state higher education institutions.⁷⁹

⁷⁶ AG Emiliou in *Cilevičs* (n. 31) point 111 of the Opinion.

⁷⁷ *Ibid.* point 112 of the Opinion.

⁷⁸ *Ibid.* point 113 of the Opinion.

⁷⁹ The European Commission for Democracy through Law (Venice Commission), ‘On the recent amendments to the legislation on education in minority languages in Latvia’, 18 June 2020, CDL-AD(2020)012, para. 120 (emphasis added).

As the Advocate General did apply Article 22 CFR here, it may be worth noting that there is a debate in the literature as to whether this Charter provision amounts to a principle, and is thus not justiciable, or whether it is a right. Craufurd Smith has discussed the arguments that may be put forward in support of both positions, which we briefly recall here.⁸⁰ On the one hand, a case for Article 22 CFR amounting to a principle could be made based on a textual argument, considering the wording ‘the Union shall respect’ and the absence of any reference to individual rights. It could also be made when looking at the drafting history and, more specifically, to the Member States’ concerns at the time that Article 22 CFR could ‘open ... the way for minority secessionist pressures’, which probably led to an agreement that this provision would not be justiciable.

On the other hand, there is also a textual argument in support of the position that Article 22 CFR enshrines a right: the Charter, in Article 51 CFR, speaks of rights that shall be ‘respected’ (while principles shall be ‘observed’), so the use of the word ‘respect’ may be indicative of justiciability. Furthermore, Craufurd Smith references arguments by other scholars that the intentions of the drafters of the Charter were to protect rights, not merely to proclaim values,⁸¹ and that Article 22 CFR has a close relationship with Article 27 ICCPR, which does establish rights for individuals.⁸² She also puts forward a third possibility: that Article 22 CFR enshrines both ‘a specific right to challenge the curtailment of distinctive expressions by the EU institutions or Member States, when acting in the field of EU law, but also a principle that the EU should support and foster cultural, religious and linguistic diversity through legislative and executive measures, where legally and factually possible’.⁸³

In further support of the position that Article 22 CFR may have an individual rights’ dimension, consider *Spain v European Parliament*,⁸⁴ where an EU act, rather than the legitimacy of a domestic rule, was contested. There, the Court held that Article 41(1) CFR (the right of every person to write to the institutions of the Union in one of the languages of the Treaties and the entitlement to have an answer in the same language) is ‘an essential component of respect for

⁸⁰ Craufurd Smith (n. 64) 654 et seq.

⁸¹ Arzo, ‘The Protection of Linguistic Diversity through Article 22 of the Charter of Fundamental Rights’, in X. Arzo (ed.), *Respecting Linguistic Diversity in the European Union* (2008) 160.

⁸² Krommendijk, ‘Principled Silence or Mere Silence on Principles? The Role of the EU Charter’s Principles in the Case Law of the Court of Justice’, *22 European Constitutional Law Review* (2015) 321, at 333.

⁸³ Craufurd Smith (n. 64) 655.

⁸⁴ Case C-366/16, *Spain v European Parliament* (EU:C:2019:249). See the discussion in Craufurd Smith (n. 64) 655.

the linguistic diversity of the Union, the importance of which is recalled in the fourth subparagraph of Article 3(3) TEU and Article 22 of the Charter'.⁸⁵ Nevertheless, given that Article 22 CFR scarcely features in the Court's case law or in wider institutional practice, it is difficult to resolve this question fully. At any rate, the Advocate General in *Cilevičs* did see obligations flowing from Article 22, obligations that, in his view, the Court should take into account in assessing the proportionality of the national measure.

Turning to the next fundamental right that Advocate General Emiliou assessed, namely Article 21(1) CFR, it can be said that this was dealt with rather swiftly. The Advocate General suggested that the language requirements provided for in the national measure created discrimination 'to the detriment of non-nationals employed (or employable) in the sector of higher education',⁸⁶ which 'often give rise to indirect discrimination based on nationality, since they are more easily fulfilled by local professionals than by foreign professionals'.⁸⁷

Finally, Advocate General Emiliou also considered that the Latvian measure restricted the academic freedom of teachers (Article 13 CFR) and the right of individuals to found education establishments (Article 14(3) CFR) as well as the rights of students to education (Article 14(1) CFR in conjunction with Article 14(3) CFR). It is worth noting that the point on the academic freedom of teachers constitutes a novel use⁸⁸ of Article 13 CFR relating to the individual dimension of academic freedom. It does raise a series of interesting questions, such as whether choice of language constitutes a form of teaching method and, if so, how far that is protected under Article 13 CFR; or whether teachers can enforce this claim against the state and against their own academic institution (and, by implication, whether there can be an institutional claim of academic freedom concerning the choice of that language). Advocate General Emiliou did not enter into these debates, however. On the rights of students to education, and more specifically 'the possibility for the students themselves to choose, when possible, and education that is in conformity with their "pedagogical convictions" (which may include a more intensive use of foreign languages in higher education courses)',⁸⁹ he did acknowledge that this right is

⁸⁵ Ibid. para. 36.

⁸⁶ AG Emiliou in *Cilevičs* (n. 31) point 110 of the Opinion.

⁸⁷ Ibid.

⁸⁸ The Court has so far only once applied Article 13 CFR (and Article 14(3) CFR) in Case C-66/18, *Commission v Hungary (Lex CEU)* (EU:C:2020:792), which involved the institutional dimension of academic freedom.

⁸⁹ AG Emiliou (n. 31) point 109 of the Opinion.

not as such expressly protected in the Charter but is rather derived from the provisions cited above.

Interestingly, the European Court of Human Rights, in the case of *Valiullina and Others v. Latvia*,⁹⁰ which was delivered after *Cilevičs*, considered that ‘Article 2 of Protocol No. 1 does not include the right to access education in a particular language; it guarantees the right to education in one of the national languages or, in other words, official languages of the country concerned’.⁹¹ That Court did ‘not find that there is sufficient international material to warrant the conclusion that the right to education as enshrined in Article 2 of Protocol No. 1 to the Convention includes the right to access educational institutions in a language of one’s choice’.⁹² It also noted the Latvian Constitutional Court’s findings that there was no European consensus with respect to minorities’ rights in the field of education⁹³ and that the national constitutional system needs to be taken into account.⁹⁴ There are two points to note here, though. First, the Charter does of course allow the EU to provide for a higher level of protection when a given fundamental right is also protected by the Convention system.⁹⁵ Secondly, *Valiullina and Others* involved school education, not higher education, and the question remains whether there is a relevant distinction to be drawn in that regard. Other open questions here are whether the right to access education in a particular language, as identified by the Advocate General in *Cilevičs*, could also be based on Article 13 CFR,⁹⁶ as well as how conflicts between teachers’ academic freedom under Article 13 CFR and students’ rights under Article 14 CFR could be resolved.

In *Cilevičs*, the Advocate General left the final outcome of the proportionality analysis to the referring court, entrusting it to ‘properly assess and, where appropriate, weigh against each other, the elements illustrated in the previous points’.⁹⁷ In doing so, he advised that the national court should not only assess the suitability and necessity of the measure to achieve the stated

⁹⁰ ECtHR, *Valiullina and Others v. Latvia*, Appl. nos. 56928/12 and 2 others, Judgment of 14 September 2023. All ECtHR decisions are available online at <http://hudoc.echr.coe.int/>

⁹¹ *Ibid.* para. 135.

⁹² *Ibid.* para. 134.

⁹³ *Ibid.*

⁹⁴ *Ibid.*

⁹⁵ See Article 52(3) CFR.

⁹⁶ The Rome Ministerial Communiqué defines academic freedom as ‘freedom of academic staff and students to engage in research, teaching, *learning* and communication in and with society without interference nor fear or reprisal’ (emphasis added).

⁹⁷ AG Emiliou in *Cilevičs* (n. 31) point 114 of the Opinion.

objective, but it should also ‘strike ... a fair balance between the interests at stake’,⁹⁸ which is arguably the most important part of the proportionality analysis when conflicts of interests (or rights) of a fundamental nature are at stake. To recap, the interests at stake here are an internal market freedom (Article 49 TFEU), which can be (and is) framed by the Court as overlapping with Articles 15 to 17 of the Charter; the protection of national identity, which enjoys primary Treaty status and is framed by the Court as being protected by Article 22 CFR; and, according to the Advocate General at least, a series of other fundamental rights, including cultural diversity as protected by Article 22 CFR.

We can see, then, in this overview of the Advocate General’s analysis, not only substantive differences in terms of how fair balance methodology was applied with respect to the interests that both the Opinion and the ruling of the Court discuss but, also, differences with respect to the interests articulated—the interests that had to be balanced—in the first place. In the next part of the chapter, we draw together the different threads of the *Cilevičs* case identified thus far and test the Court’s self-termed method of ‘fair’ balancing of interests, from which we then draw some wider reflections.

4. Cultural Diversity and National Identity: Towards a Better Balancing of Interests?

For this chapter, our initial guiding questions came from Bruno: ‘[d]oes [the European Union] accept that the EU Member States define their cultural policies in the way they wish? Does it consider that cultural goods or services should not be subject to the logic of the internal market, or at least not in the same way as other goods and services?’⁹⁹

In Section 1 above, we qualified the scope of the chapter in the sense that we have not investigated the ‘specialness’ of culture as a public interest concern at a general level. While we recognize the specialness of culture and language, and the importance of ensuring the legal protection of their diversity, it is not clear how legal *effect* could be given to treating cultural goods or services differently in terms of the logic and structure of the internal market. Bruno has emphasized that ‘[t]he answer to that question not only depends on the European Court’s views but also, and primarily, on the position of cultural policy within the EU’s written

⁹⁸ Ibid. point 115 of the Opinion.

⁹⁹ De Witte (n. 1) 193-194.

constitutional framework'.¹⁰⁰ He has highlighted the 'uneven' weight attributed to cultural policy in the case law of the Court and suggested that, post-Lisbon, '[n]ow that respect for cultural diversity has become a norm of primary EU law with a legal status equivalent to free movement itself, the Court's traditional rule/exception reasoning should be replaced by a more deferential attitude to national cultural policy measures, at least when those measures can be shown to contribute to the protection of cultural diversity within Europe'.¹⁰¹

The difficulty we struggle to overcome is that the post-Lisbon Treaties signal that *many* public interests are special.¹⁰² To sustain the non-protectionist aim of freedom of movement within the internal market, we must typically trust the admittedly imperfect system of proportionality review. At the same time, we acknowledge that this system is responsible in part for the case law inconsistency that Bruno and other scholars have identified and critiqued. We highlight here that the discussants assigned to our chapter at the authors' workshop *did* identify tools that the Court could use to defend the specialness of cultural and linguistic diversity in EU law—to deliver, in effect a margin of appreciation for the Member States in this policy field; to strengthen the shield that would protect more of their policy choices from the inroads produced by free movement rights. Thus, developing better rationalization for that shield than we have seen in the case law to date, Clara Muller highlighted the underused legal power of subsidiarity¹⁰³ and Yamam Al-Zubaidi drew from the idea of 'cultural diplomacy' that is practised by the EU in its international cultural relations.¹⁰⁴

The more specific challenge with which our chapter is concerned arises from positioning questions about the specialness of culture as a public interest against the concern Bruno himself later raised about corrosion of the EU legal order when an overstretched understanding of

¹⁰⁰ De Witte (n. 59) 131.

¹⁰¹ *Ibid.* 141.

¹⁰² Thus, Tridimas characterizes the 'political bargain established by the Treaties' as one that is 'incomplete, vigorously dynamic, and unstable' ((n. 5) 186).

¹⁰³ In particular, Clara argued during the author's workshop that the ruling and Opinion in *Cilevičs* can be explained by reframing the ruling as subsidiarity-based reasoning. See generally, e.g., Fabbrini, 'The Principle of Subsidiarity', in R. Schütze and T. Tridimas (eds), *Oxford Principles of European Law. Volume I: The European Legal Order* (2018) 221; Horsley, 'Subsidiarity and the European Court of Justice: Missing Pieces in the Subsidiarity Jigsaw?', 50 *Journal of Common Market Studies (JCMS)* (2012) 267. See also the elaboration by Velyvyte on the argument that the Court's interpretation of EU free movement law needs to comply with the principle of subsidiarity: V. Velyvyte, *Judicial Authority in EU Internal Market Law – Implications for the Balance of Competences and Powers* (2024) 106-117 and 171.

¹⁰⁴ For Yamam, an extension of cultural diplomacy by the Court of Justice could provide a way to make better sense of the apparent randomness of proportionality review in cultural diversity case law. This point was made during the author's workshop. See generally, e.g., C. Carta and R. Higgott (eds), *Cultural Diplomacy in Europe: Between the Domestic and the International* (2020).

national identity is added to the balancing of relevant interests in market/culture confrontations. We conceived the chapter to illustrate and reflect on precisely these wider *layers* of interests that can be relevant when a national rule in the field of cultural policy intersects with EU freedoms.

In our analysis of *Cilevičs*, we therefore considered Articles 4(2) TEU and 3(3) TEU alongside the freedom of establishment protected by the TFEU, as well as several provisions of the Charter of Fundamental Rights (even though the majority of these were not addressed by the Court). How can these different rights and freedoms be balanced? How is cultural diversity ‘accommodated’ within the EU’s internal market, and to what extent should it be? Who decides? What is the degree of discretion that is left to Member States to define cultural diversity or their national identity, or the relationship between the two, on their own terms? How do those decisions affect the balancing of relevant, sometimes conflicting, interests at EU level? And, fundamentally, when, and why, is the overall balance achieved going to be ‘fair’ in consequence? Here, we draw out in more detail both possible approaches to the questions raised by and the lessons learned from the *Cilevičs* case.

For a balancing exercise when national identity is in play, as it almost certainly now will be in language policy cases specifically and cultural policy cases more generally, it might be argued that the part played by national identity is either reduced (e.g. *Las*) or expanded (e.g. *Cilevičs*) to reflect the outcome of the proportionality analysis undertaken under the auspices of fair balancing. How, though, is the Court differentiating—and thus, how can we know when and how to differentiate—these situations?

Two initial considerations come from the Opinion of Advocate General Emiliou in *Cilevičs*. First, in his view, ‘Article 4(2) TEU lays down the key principles governing the relationship between the European Union and the Member States, and cannot be construed as re-defining what the European Union *is* and what it *stands for*’—in other words, it ‘cannot be considered to derogate from Articles 2 and 3 TEU’.¹⁰⁵ This perspective aligns very well with the growing emphasis on the values on which the Union is founded that is evident in both EU law and EU policymaking, especially in light of the Court’s assertion that the values provided for in Article

¹⁰⁵ AG Emiliou in *Cilevičs* (n. 31) point 87 of the Opinion (emphasis in original), referring to the Opinion of AG Kokott in Case C-490/20, *VMA v Stolichna obshtina, rayon ‘Pancharevo’* (EU:C:2021:296), point 73.

2 TEU ‘define the very identity of the European Union as a common legal order’.¹⁰⁶ However, as a result, it also brings to the table difficult questions about possible hierarchies *within* EU primary law, which we return to below.

Second, Advocate General Emiliou emphasized the importance of allowing appropriate decision-making space for national courts in areas linked with national identity within the meaning of Article 4(2). That is, of course, how preliminary rulings should work anyway. But we know that it is not how they work in reality, with greater and lesser degrees of ‘guidance’ from the Court of Justice. In *Cilevičs*, the Advocate General reasoned this point as follows:

National identity is normally the result of the history, culture, and sociopolitical characteristics of a specific country. It may not be an easy task, for a supranational court, to grasp fully the importance of a given element of national identity, identify the level of protection desired by the national authorities, and evaluate whether there is a reasonable relationship between the objective pursued and the means used to pursue it to that end.

Thus, when a *genuine* claim based on a national identity is put forward, unless the issues are rather straightforward, and provided that the national interest protected is broadly compatible with the EU constitutional framework, it should be mainly for the competent national courts to carry out the proportionality assessment. That does not mean, obviously, that the Court cannot provide the competent national courts with all the elements of interpretation that may be useful for them to carry out that analysis.¹⁰⁷

This plea for greater distance on the part of the Court of Justice may be more symbolic than substantive, since it is only the Court of Justice that could first determine whether the nationality identity claim is *genuine* and therefore ‘broadly compatible with the EU constitutional framework’. In other words, one of the first points to address would necessarily be whether a given claim would be appropriately categorized as falling under Article 4(2) TEU

¹⁰⁶ Case C-156/21, *Hungary v Parliament and Council* (EU:C:2022:97), para. 127. Examining the implications of this for EU constitutional hierarchy, see L.D. Spieker, *EU Values Before the Court of Justice. Foundations, Potential, Risks* (2023). Alongside increasing ‘reliance’ on Article 2 TEU values, Tridimas also highlights both the ‘proliferation of EU rights’ and the ‘enhanced prominence of EU structural principles’ as significant constitutional developments in the EU context ((n. 5) 187-188, referring, for the latter point, to M. Cremona (ed.), *Structural Principles in EU External Relations Law* (2018)).

¹⁰⁷ AG Emiliou in *Cilevičs* (n. 31) points 92-93 of the Opinion (emphasis added).

or not—which, additionally, as we noted in Section 2 above, may legitimately vary from Member State to Member State.

We would therefore underline that the ideas put forward by the Advocate General in *Cilevičs*—that the national identity claim must be genuine and broadly compatible with the EU constitutional framework—produce a slightly circular argument in the end. Nevertheless, his wider message of caution around centralized understandings of or presumptions about what national identity means to a Member State is well taken. Bruno has argued for Article 4(2) TEU to be applicable only to *institutional* diversity claims: as noted in Section 3 above, he did acknowledge that the regulation of the official language could qualify as an essential political element of the State’s identity for *some* countries, such as Belgium or the Baltic States,¹⁰⁸ so that such claims could, in theory, be brought under Article 4(2) TEU even under a narrow, institutional reading of Article 4(2) TEU. At the same time, he has suggested the redundancy of such an approach given the existence of Articles 3(3) TEU and 22 of the Charter.¹⁰⁹ In our reading, the Court’s approach to national identity in *Cilevičs* simply does not fully explain why the contested Latvian legislation fits with an institutional understanding of Article 4(2). The Court did not explain whether a particular institutional understanding of Article 4(2) was in play or how, if it was, that understanding passed a fundamental rights compliance check.

We also take a third point about national identity and fair balancing from Bruno: as discussed in more detail in Section 3 above, Article 4(2) TEU ‘should not be used in a more general way to refuse the primacy of EU law, nor to carve out certain specific policy fields which would be within Member States’ exclusive competence and be shielded from the influence of EU law’.¹¹⁰ On that basis, perhaps Bruno answers his own question: cultural goods or services *should* be subject to the logic and structure of the internal market in the same way as other goods and services—with, as we explained above, a narrowly drawn exception for the regulation of a Member State’s official language(s) when that can be read into an institutional perspective. As also noted above, however, we are not wholly convinced by the relevance of that exception in the circumstances of *Cilevičs*,¹¹¹ preferring to attribute more power to applicable Charter rights in the relevant balancing act.

¹⁰⁸ De Witte (n. 69) 567.

¹⁰⁹ Ibid.

¹¹⁰ De Witte (n. 69) 422.

¹¹¹ See similarly, di Federico and Martinico, ‘Official languages, national identities and the protection of minorities: a complex legal puzzle’, 19 *European Constitutional Law Review (ECLR)* (2023) 346, at 359-365.

Finally, from our shared review of *Cilevičs* and of Bruno's work more broadly (and moving beyond how we might balance national identity considerations specifically), we suggest two further and more general points to consider. First, if we accept the framing of all interests at stake in *Cilevičs* as being of *equal* primary law status, and thus of equal or at least equivalent constitutional rank, each capable of limiting the other, the principle of 'practical concordance' (*praktische Konkordanz*) or 'practical conciliation' from German constitutional thought¹¹² and practice¹¹³ might provide useful insights on how to achieve a fair balance between conflicting claims. As the German Constitutional Court has held, 'it is necessary to assess conflicting fundamental rights positions in terms of how they interact, and to strike a balance in accordance with the principle of practical concordance (*praktische Konkordanz*), which requires that the fundamental rights of all persons concerned be given effect to the broadest possible extent'.¹¹⁴

The same is true for conflicts between a fundamental right and another constitutionally protected value or asset that is capable of limiting fundamental rights. According to the German Constitutional Court, 'this conflict between different holders of an unconditionally guaranteed fundamental right and between that fundamental right and other constitutionally protected assets must be resolved on the basis of the principle of practical concordance, which requires that not one of the conflicting legal positions is favoured and asserted to a maximum, but that all legal positions are balanced as far as possible in a careful and considerate manner'.¹¹⁵ This means that there must be an 'optimal relationship' between the conflicting rights or interests that enjoy constitutional rank. Practical concordance is thus said to be different from the principle of proportionality, even though it is applied within 'the proportionality analysis' (according to Hesse) and, more specifically, within proportionality *strictu sensu*, in the following sense: proportionality identifies the tolerable limits to a fundamental right whereas

¹¹² Ascribed to K. Hesse, *Grundzüge des Verfassungsrechts der Bundesrepublik Deutschland*, (20th ed., 1999), but Schadelbach explains that the term can be traced earlier to Richard Bäuml, see the discussion in Schadelbach, 'Praktische Konkordanz als Verfassungsrechtliches Kollisionsprinzip: Eine Verteidigung', 53 *Der Staat* (2014) 263, at 267 et seq.

¹¹³ It is an established practice of the German Constitutional Court to apply practical concordance in its case law, see e.g. BVerfGE 28, 243 (261).

¹¹⁴ BVerfG, Order of the First Senate of 11 April 2018 – 1 BvR 3080/09, para. 32 (official translation).

¹¹⁵ BVerfGE 93, 1 – 37; 28, 243, at. 260 et seq.; 41, 29, at 50; 52, 223, at 247, 251. Our own translation from the original: 'Dieser Konflikt zwischen verschiedenen Trägern eines vorbehaltlos gewährleisteten Grundrechts sowie zwischen diesem Grundrecht und anderen verfassungsrechtlich geschützten Gütern ist nach dem Grundsatz praktischer Konkordanz zu lösen, der fordert, dass nicht eine der widerstreitenden Rechtspositionen bevorzugt und maximal behauptet wird, sondern alle einen möglichst schonenden Ausgleich erfahren'.

practical concordance identifies the optimal relationship between two colliding fundamental rights.¹¹⁶

That optimal relationship can only be established in each concrete case and given all facts and circumstances. Given this, it can be difficult to establish more general guidelines in the abstract. If that is true, it might not be surprising, then, that while practical concordance has received some criticism from within the German literature—as Schladebach has explained,¹¹⁷ as being vague or nothing more than a catchphrase—it is overall well-established. This is not to say that it is impossible to improve the test further and attempts have been made in that respect.¹¹⁸

In EU law, we can detect that the fair balance formula of the Court of Justice of the EU is reminiscent of practical concordance, at least as it has been applied in cases like *Schmidberger*. The European Court of Human Rights has also applied the fair balance formula in cases of conflicts between fundamental rights, which, it has noted ‘merit, in principle, *equal respect*’¹¹⁹—a framing that we presume here but challenge in some respects below. The ECtHR has also shown in *Von Hannover (No. 2)*¹²⁰ that it is possible to establish broader criteria that are relevant for the balancing exercise, at least as regards conflicts of two specific fundamental rights (here, the right to privacy and freedom of expression) in certain types of cases.¹²¹ Furthermore, both the *Von Hannover* judgment of the ECtHR and the *Schmidberger* ruling of the Court of Justice show that it does not, and should not, matter in principle in terms of outcome which of the conflicting rights is invoked by the applicant in a given case given the equal weight of both.

Considering all of this, it might not be surprising that the Venice Commission also applied a ‘fair balancing’ test in its opinion on the Latvian reforms concerning language in education, including the level of higher education at stake in *Cilevičs*. Comparisons between the Court of

¹¹⁶ Schladebach (n. 112) 272: ‘Verhältnismäßigkeit kennzeichnet eine Erträglichkeitsgrenze, praktische Konkordanz dagegen einen Optimierungspunkt’.

¹¹⁷ Ibid. with reference to, *inter alia*, Böckenforde, ‘Zum Ende des Schulgebetsstreits’, *Die Öffentliche Verwaltung (DÖV)* (1980) 232, at 325; Jürgen Schwabe, *Probleme der Grundrechtsdogmatik* (1977) 322; Sebastian Graf Kielmansegg, *Grundrechte im Näheverhältnis* (2012) 479.

¹¹⁸ See Schladebach’s own account (n. 112) 279 et seq.), based and building on Robert Alexy’s theory of balancing and more specifically his ‘Gewichtsformel’—a formula incorporating the weight of the interference with a ‘principle’ (which is how Alexy’s conceptualizes fundamental rights) with the importance of the reason justifying such interference. The greater the interference with the former, the greater must be the importance of the latter.

¹¹⁹ E.g., in the ECtHR case of *Mosley v. United Kingdom*, Appl. no. 48009/08, Judgment of 10 May 2011, para. 111 (emphasis added), and further case law cited therein.

¹²⁰ *Von Hannover v Germany* (No. 2), Appl. nos. 40660/08 and 60641/08, Judgment of 7 February 2012.

¹²¹ Ibid. paras. 108-113.

Justice and other international (including judicial) actors are necessarily limited, since the Court of Justice must always be mindful of the fact that its rulings bind all EU Member States, not just the one Member State involved in a case before it. Even allowing for that, however, what is extremely surprising, as already noted above, is that the Court of Justice did not engage fair balance language in *Cilevičs*. Thus, the Court appears to have skewed its own ‘fair’ balancing exercise.

However, as we emphasized in Section 3 above, before a balance can be applied in a manner that is ‘fair’ (which is what our discussion on practical concordance above is concerned with), it presupposes something else first: that all relevant ‘constitutional’ interests at stake, which are *of equal rank* and capable of limiting each other, are *identified* and thus duly weighed in the balancing exercise. The fact that this did not occur in *Cilevičs* is, in the end, our strongest criticism of the ruling and the main contribution that we make to work interrogating the fair balance method: in essence, we consider identification and inclusion of all relevant elements a precondition for the fairness of the balance yet not something to which sufficient attention is necessarily drawn. In that sense, our criticism is stronger than that of di Federico and Martinico, who find that, ‘by refusing to carry out a strict proportionality test, the Court of Justice makes it difficult to understand exactly what elements are relevant when appraising the admissibility of a derogation to EU law grounded on the respect for national specificities traceable to Article 4(2) TEU, which was the essence of the second question referred by the Latvian Constitutional Court’.¹²² When EU fundamental rights are relevant in assessing the justification of exception from the free movement provisions, those (relevant) interests should be considered.¹²³

For this reason, we disagree with Arzoz that the Opinion of Advocate General Emiliou ‘failed to provide a correct framing for the restriction analysis, not only because all the arguments put forward were not equally persuasive, but also because they moved the focus of analysis to fundamental rights and values other than the constitutional right invoked by the applicants in the constitutional proceedings and the freedoms object of the reference for a preliminary ruling’.¹²⁴ It is true that the referring court sought guidance from the Court of Justice on Articles

¹²² di Federico and Martinico (n. 111) 347.

¹²³ Based on Case C-260/89, *Elliniki Radiophonia Tileorasi (ERT)* (EU:C:1991:254).

¹²⁴ Arzoz, ‘Judicial minimalism in national identity claims: The Grand Chamber on higher education language policy in Latvia – *Boriss Cilevičs and Others* (C- 391/20)’, 21 September 2022, <https://eulawlive.com/op-ed-judicial-minimalism-in-national-identity-claims-the-grand-chamber-on-higher-education-language-policy-in-latvia-boriss-cilevics-and-others-c-391-20-by-xabier-arzoz/> (last visited 13 February 2026).

49 and 46 TFEU so as to adjudicate in national proceedings on the right to property as enshrined in the Latvian Constitution, after it had found already Article 5(3) of the Latvian Law on higher education institutions compatible with Article 112 of the Latvian Constitution (setting out the right to education), in conjunction with Article 113 thereof (recognizing freedom of scientific research, artistic, and other creative activity, and protecting copyright and patent rights), and after it found Article 56(3) of the Latvian Law on higher education incompatible with the same provisions in so far as the contested measure applied to private higher education institutions.

However, as noted above, when the Court of Justice is called upon to give guidance on the internal market freedoms, it also needs to assess relevant derogations and justifications in light of fundamental rights—and importantly, according to the applicable *EU standard* of fundamental rights. Advocate General Emiliou did not couch his analysis in these terms, and did not cite the classic *ERT* line of case law. It is true that he only invoked fundamental rights at the proportionality *stricto sensu* stage (the third step of the proportionality analysis, which admittedly is not typically applied by the Court in free movement cases¹²⁵). Nevertheless, in pointing there to all the fundamental rights protected by the Charter, that the national measure was restricting, he was, in essence, applying the *ERT* line of reasoning.¹²⁶ We would commend rather than criticize him for taking that step.

Our second point is the following: we have noted at several points in this chapter that Articles 4(2) TEU, 3(3) TEU and 22 CFR are, formally, in a non-hierarchical relationship given that Article 6(1) TEU underlines that the Charter of Fundamental Rights ‘shall have the same legal value as the Treaties’. We have also noted the unclear relationship between these provisions and especially between Article 4(2) TEU and Article 22 CFR. There is one provision in the Charter, also already noted above, which does tell us something about the relationship between rights that are found in both the Charter and the Treaties, namely Article 52(2) CFR. It reads: ‘[r]ights recognised by this Charter for which provision is made in the Treaties shall be

¹²⁵ See Kosta, ‘The Principle of Proportionality in EU Law – An Interest-Based Taxonomy’, in J Mendes (ed.), *EU Executive Discretion and the Limits of Law* (2019) 198-199. See also van Gerven’s discussion of older CJEU case law and how the Court sometimes applies the three steps of the proportionality analysis (suitability, necessity, and proportionality *stricto sensu*) whereas in many instances it applies only the first two steps: van Gerven, ‘The Effect of Proportionality on the Actions of Member States of the European Community: National Viewpoints from Continental Europe’, in E. Evelyn (ed.), *The Principle of Proportionality in the Laws of Europe* (1999) 37.

¹²⁶ We believe that the assessment of a derogation in light of fundamental rights is in any case best conducted at the justification stage, even though we acknowledge that the Court’s case law is not consistent on this: see further on this point, the discussion in Kosta and Piqani, ‘Where trade and academic freedom meet: *Commission v. Hungary* (Lex CEU)’, 59 *Common Market Law Review* (2022) 813, at 836-837.

exercised under the conditions and within the limits defined by those Treaties'. One might think, therefore, that there is no added value in invoking Article 22 CFR next to Article 3(3) TEU if both provide for the same obligation, which seems already to be the case for the internal market freedoms in the Court's analysis. This might be so as a matter of the substantive scope of the provisions but there remains, of course, the possibility of added value from Article 22 CFR since it provides for a *right*. Can a similar argument be made based on Article 52(2) CFR with reference to Article 4(2) TEU and Article 22 CFR? That of course depends on whether one reads as Article 22 CFR as not providing more than what Article 4(2) TEU provides, but we have seen in Section 3 above that there are very good arguments for thinking otherwise.

Here, though, we must also bring back Article 49 TFEU and freedom of establishment. Article 52(2) CFR ensures not only that the Charter shall not change the rights (already) provided for in the Treaties but also that when restrictions of these rights are being assessed, it is the free movement model of proportionality that applies rather than Article 52(1) CFR.¹²⁷ We have highlighted, for that reason, the merits of Advocate General Emiliou's approach to proportionality, which overtly incorporates the fair balancing exercise and thus ensures deeper engagement with Charter rights under the free movement framework of analysis.

But we also raise for further reflection and debate questions about hierarchical relationships *within* primary law that are not signposted so directly as the one addressed by Article 52(2) CFR. This question has normative dimensions: for example, should the Charter be privileged in fair balancing exercises notwithstanding the equality formally signalled by Article 6(1) TEU?¹²⁸ Giving effect to that objective would probably require Treaty change. But the question also has empirical dimensions already: in *legal* terms, are some primary law provisions of a higher rank than others? Because, if they are, then the fairness of any balancing exercise must already reflect their heavier constitutional weight. For example, we already referred to arguments that advocate constitutional privilege for Article 2 TEU. Similar claims could be raised for a hierarchy of fundamental rights *within* the Charter. The obvious provision pointing to such hierarchy is Article 1 CFR, which states that 'human dignity is inviolable', expressing the absolute nature of this right. According to the Explanations to the Charter, 'none of the

¹²⁷ See generally, Nic Shuibhne 'Primary laws: Justifying free movement restrictions after Lisbon' in P. Koutrakos, N. Nic Shuibhne, and P. Syrpis (eds) (n. 59) 293.

¹²⁸ E.g., Schiek 'Towards More Resilience for a Social EU - The Constitutionally Conditioned Internal Market', 13 *European Constitutional Law Review (ECLR)* (2017) 611.

rights laid down in this Charter may be used to harm the dignity of another person, and ... the dignity of the human person is part of the substance of the rights laid down in this Charter. It must therefore be respected, even where a right is restricted'. This results from the fact that human dignity is, according to the Explanations, 'not only a fundamental right itself but constitutes the real basis of fundamental rights'.¹²⁹

Furthermore, a combined reading of the Charter and several primary Treaty provisions could lead to elevating a ground of derogation in the Treaties to a higher hierarchical level than a 'regular' public interest requirement that is conventionally construed as a narrow exception to the free movement momentum of the internal market. As we have shown above, cultural policy is one example but there are others. Consider, for example, Advocate General Kokott's summary of the long-established position of the Court on public health in her Opinion in *Pillbox 38 (UK) Limited*, where she stated that,

in the present case ... a fair balance must be found between purely economic interests, as expressed in the freedom to conduct a business, and the protected interest of public health, *which has particularly high importance in the value system under EU law*. As is clear from Articles 9 TFEU, 114(3) TFEU and 168(1) TFEU, but also from the second sentence of Article 35 of the Charter, a high level of health protection must always be ensured in defining and implementing Union policies and activities in all areas'.¹³⁰

Thus, even without Treaty change, there seem to be seeds and signs of hierarchies *within* EU primary law scattered across various provisions. More open constructing of gradated primary law is not necessarily something that we advocate: not, at least, without significantly more space to consider the implications of it. For now, then, we make three points to open that debate. First, hierarchical gradation of EU primary law could, at one level, better explain case law that otherwise seems inconsistent. However, second, it does not, in fact, explain the case law we have considered in this chapter, which points, more variably, to protection of cultural diversity, or of national identity, or of freedom of movement, or of fundamental rights, as the more strongly weighted primary law norm. And therefore, third, what we underline here, above all, is that the importance an interest assumes in the EU's value system appears to be determinative

¹²⁹ Making a case for judicial protection but based on 'judicial ranking' rather than a textual reading, for example, see Tridimas (n. 5) 195-197.

¹³⁰ Advocate General Kokott in Case C-477/14, *Pillbox 38 (UK) Limited v The Secretary of State for Health* (EU:C:2015:854), point 190 of the Opinion, emphasis added.

not only of *how* but, in the first place, even of *whether* a ‘fair balance’ test is applied, since that presupposes equal respect of the two rights or interests to be balanced. To the extent that there is a hierarchy among primary law provisions, their *formal* rank will not be fully revealing of the applicable balancing exercise. But neither will any subtly supposed hierarchies: for those seem to change from case to case too.

5. Conclusion

In discussing how cultural diversity interacts with national identity in market/culture confrontations, we chose to analyse the *Cilevičs* case concerning national language policy. We found the following complex situation, which results from both the Treaty framework and how the Court of Justice interprets it: internal market freedoms, which are located at primary law level and carry, since the early days, the epithet ‘fundamental’¹³¹—and overlap with some of the Charter articles—can clash with national cultural policy measures: in our case, national language policy for higher education. These language policy measures can be framed in national identity terms and the Court accepts that. This constellation already triggers questions as regards their reconciliation given the ambiguities relevant to the relationship between Article 22 CFR protecting cultural diversity and Article 4(2) TEU protecting national identity. Open questions result both from the hitherto uncertain content of Article 22 CFR and Bruno’s critique of applying an overstretched understanding of national identity in such situations. Moreover, the constellation is one involving the reconciliation of interests all of which are located at primary EU law level. It therefore requires a different kind of proportionality analysis than when a narrow derogation to the internal market freedoms is invoked. It requires a proportionality test that acknowledges the equal rank of the colliding rights.

It is of course in the very essence of proportionality and ‘balancing’ that outcomes will differ depending on the circumstances of the specific case. Case law can only ever produce general guidelines, and the quality of the reasoning that distinguishes cases from each other becomes therefore even more important. When it comes to the Court’s case law, where Member State’s cultural language policies clash with market integration, as noted by Bruno, that can be criticized as being unpredictable and incoherent. We do not need to spend time here on the

¹³¹ See for example Weatherill: ‘the Court has been rather promiscuous and indiscriminate in attaching the label ‘fundamental’ to the provision of free movement and Competition’, in S. Weatherill, *The Internal Market as a Legal Concept* (2017) 136.

disadvantages of an erratic jurisprudence: we appreciate that different cases can entail a different outcome, but we struggle, nevertheless, to understand the underlying legal coordinates that construct the framework within which these outcomes are reached.

Cilevičs involved the complex constellation outlined above and with one additional layer: according to the Advocate General, the contested national language policy measure interfered with a series of fundamental rights, including respect for cultural diversity understood as a minority protection clause. So, additional colliding interests were at stake, which are also protected at primary law level and therefore need to be balanced fairly. We have criticized the Court for ignoring these.

Thus, our main plea in this work is, in essence, that for ‘fair balancing’ to be conducted, it requires, at the very least attention to a prior concern: that (all) the relevant primary law interests at stake are acknowledged. The subsequent balancing must be then also accompanied by a clear line of argumentation as to how and why it is conducted in the way it is. Both identifying and engaging with these interests when they take the form of fundamental rights is moreover a duty, which has been recognized by the Court’s own established case law.¹³²

We also add that the reflections on the ‘fair balancing’ method that this chapter required opened for us bigger questions about balancing within EU primary law. We have noted that ‘fair balancing’ involves colliding interests of equal (primary law) rank. However, there can be hierarchies within primary law that might need to be taken into account in the balancing exercise. The case law does not produce satisfactory, consistent impressions of formal hierarchy within the Treaties. The text of the Treaties arguably does so to a certain extent. The primary law hierarchy question deserves further work and attention since its implications—and the fundamentals of EU law that formal hierarchy would revisit—go much further than cultural exceptions to free movement law.

Bruno commented (during the authors’ workshop) as to why the Court might have decided *Cilevičs* in the way it did: it might have been driven by what the German legal scholar Josef

¹³² See above *ERT* (n. 55), and Case C-617/10, *Åklagaren v Åkerberg Fransson* (EU:C:2013:105), para. 21: ‘[t]he applicability of European Union Law entails applicability of the fundamental rights guaranteed by the Charter’.

Esser has famously coined ‘Vorverständnis’.¹³³ This can be translated in English as ‘preconception’ or ‘pre-understanding’. The Court’s deliberations in *Cilevičs* must have been coloured by the Russia-Ukraine war. Nevertheless, while the Court in *Cilevičs* could not ignore the wider context in which the case was being decided, it must, at the same time, be doctrinally sound and transparent, in fact applying a ‘fair balance’. Airing all interests does not determine the final outcome of the balancing exercise nor who conducts it or how much leeway is given to the national court. But it does make the exercise *fairer*.

It is also notable that some of the specific fundamental rights arguments made by the Advocate General would have amounted to a novel use of those rights (regarding the academic freedom of teachers or the students’ right to education) with no obvious outcome, and the delicate issue of respect for minority languages in higher education is also one that should have been reasoned through. As we noted above, the ECtHR found that there is insufficient international material to establish that the right to education as enshrined in Article 2 of Protocol No. 1 to the Convention includes the right to access educational institutions in a language of one’s choice.¹³⁴ Although the Union could of course provide more extensive protection under the right to education in Article 14 of the Charter (per Article 52(3) CFR).

In short, we believe the Court could have been doctrinally better. This is even more important in cases such as the one under consideration, involving highly sensitive questions.

¹³³ J. Esser, *Vorverständnis und Methodenwahl in der Rechtsfindung. Rationalitätsgarantien der richterlichen Entscheidungspraxis*, vol. 7 (1970) 197.

¹³⁴ (n. 91).