Official Languages, National Identities and the Protection of Minorities: A Complex Legal Puzzle

Court of Justice (Grand Chamber) 7 September 2022, Case C-391/20, *Boriss Cilevičs et al.*, ECLI:EU:C:2022:638

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INTRODUCTION

What is the scope of application of Article 4(2) TEU? What is the relationship between the duty to respect national identity and the obligation to respect linguistic diversity, including speaking minorities within the Member States? In this case note, we will analyse the *Boriss Cilevičs* case, in which the Court of Justice gave a response to these questions that is in many ways both unclear and problematic. There are three aspects that, in our opinion, make this Court of Justice judgment particularly interesting.

First, it is a ruling that shows the progressive involvement of national constitutional courts in the mechanism of the preliminary ruling procedure governed by Article 267 TFEU. The second reason that makes the case interesting concerns the use of Article 4(2) TEU on the duty to respect national identity.[1]

[1]On this clause: F.X. Millet, *L'Union européenne et l'identité constitutionnelle des États membres* (LGDJ 2013) B. Guastaferro, 'Beyond the Exceptionalism of Constitutional Conflict: The Ordinary Functions of the Identity Clause', 31 *Yearbook of European Law* (2012) p. 263; A. von Bogdandy and S.W. Schill, 'Overcoming Absolute Primacy: Respect for National Identity under the Lisbon

European Constitutional Law Review, 19: 346–370, 2023

doi:10.1017/S157401962300010X

In our opinion, the judgment represents a missed opportunity to clarify, as suggested by Advocate General Emiliou, the nature and scope of the identity clause, which in this specific instance was used together with Article 3(3), sub-paragraph 4, TEU and Article 22 of the Charter of Fundamental Rights concerning the protection of linguistic diversity in the European Union. Once again, the Court of Justice uses Article 4(2) TEU as a boilerplate provision to reassure the member states that their specificities have been duly taken into account in cases involving potential exceptions to EU free movement law. Finally, the judgment is noteworthy because, 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. Moreover, the deferential stance taken by the Court of Justice ultimately ignores the negative implications of its judgment on the rights of the large Russian speaking minority in Latvia.

Factual and legal background

The case originated from a preliminary reference sent by the Constitutional Court of Latvia (*Latvijas Republikas Satversmes tiesa*) and had to do with the interpretation of Articles 49 and 56 TFEU and of Article 16 of the Charter. The Latvian Constitutional Court had raised the preliminary question under Article 267 TFEU in a case about the constitutionality of the Law on higher education institutions (*Augstskolu likums*), dated 2 November 1995. The case had been brought to the Latvian Constitutional Court by some members of the Latvian Parliament, including Mr Boriss Cilevičs, a politician who is member of the Social Democratic Party 'Harmony'.

The Latvian statute had been revised after the entry into force of another law dated 21 June 2018. As a result of these amendments, the legislation contained some problematic provisions. For instance, Article 56(3), which provided for the obligation to teach courses in the official languages in 'higher education institutions and institutions of higher technical and vocational education'. The provision subsequently added a series of exceptions which could justify the use of a foreign language.[2] The statute amending the Law on higher education

Treaty', 48 *Common Market Law Review* (2011) p. 1417; L.D. Spieker, 'Framing and Managing Constitutional Identity Conflicts: How to Stabilise the Modus Vivendi between the Court of Justice and National Constitutional Courts', 57(2) *Common Market Law Review* (2020) p. 361.

[2]According to this norm: 'In higher education institutions and institutions of higher technical and vocational training, courses of study shall be taught in the official language. Those courses of

https://doi.org/10.1017/S157401962300010X Published online by Cambridge University Press

institutions also provided for a transitional regime on higher education institutions.[3] Finally, one should take into account Article 5(1) of this law, according to which 'as part of their activities, [higher education institutions] shall promote and develop the sciences, the arts and the official language'. This complex legal patchwork was completed by some pieces of legislation governing two special status universities, namely the Law on the Stockholm School of Economics in Riga and the Law on the Riga Graduate School of Law, which provided for the use of English in teaching activities. This solution represented a derogation from what was established concerning the use of the official language of Latvia.

As anticipated, the dispute in the main proceedings was brought by 20 members of Parliament who questioned the validity of Article 5(1) and Article 56(3) of the Law on higher education institutions and point 49 of the transitional provisions of that law in light of Articles 1, 105 and 112 of the Latvian Constitution.

Before moving to the decision of the Latvian Constitutional Court, it is necessary to recall the relevant constitutional framework: Article 1 states that Latvia is an independent democratic republic; Article 105 acknowledges and guarantees the right to property; and Article 112 recognises and protects the right to education. Article 113 acknowledges the 'freedom of scientific, artistic and other forms of creation'. Finally, it is necessary to recall Article 4 of the Latvian Constitution, which states that 'The official language of the Republic of Latvia is Latvian'.

study may be provided in a foreign language only in the following circumstances: (1) Courses of study pursued by foreign students in Latvia and courses of study organised as part of the cooperation provided for by European Union programmes and international agreements may be taught in the official languages of the European Union. Where the course of study to be undertaken in Latvia lasts for more than six months or represents more than 20 credits, the number of compulsory class hours to be taken by foreign students must include the learning of the official language; (2) Classes taught in the official languages of the European Union may not account for more than one fifth of the credits for the course of study, which furthermore shall not include final exams, State exams, assessed coursework and dissertations for a bachelor's or master's degree; (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; ... (4) Joint courses of study may be taught in the official languages of the European Union'.

[3]Point 49 to the transitional provisions of the law: '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'.

On 11 June 2020, the Constitutional Court decided to divide the case into two: while the first case concerned the constitutionality of the contested provisions in light of Article 112 of the Latvian Constitution, the second case regarded the compatibility of these norms with Articles 1 and 105 of the Latvian Constitution. The Constitutional Court considered itself ready to judge on the first case and decided that the third sentence of Article 5(1) of the Law on higher education institutions was consistent with Article 112 of the Latvian Constitution, read in conjunction with Article 113. It declared the incompatibility of Article 56(3) of the Law on higher education institutions and point 49 of its transitional provisions with Article 112 of the Latvian Constitution, in conjunction with Article 113 since these provisions were applicable to private higher education institutions. At the same time, the Latvian Constitutional Court 'decided temporarily to maintain the contested provisions in force – namely, until 1 May 2021 – in order to give the national legislature a reasonable time to adopt new legislation'.[4]

Regarding its second case, instead, the Constitutional Court considered interpreting Article 105 of the Constitution in light of EU law, in particular looking at the relevant norms governing the freedom of establishment and the freedom to provide services. This explains why the Latvian Constitutional Court decided to stay the proceedings by using Article 267 TFEU. The Constitutional Court also recalled the duty of the EU to respect the national identity of the member states and Article 165 TFEU, according to which the content and organisation of higher education institutions falls within the competence of the member states. Finally, it mentioned that – according to the case law of the Court of Justice – freedom of establishment also applies in areas covered by member states' competence.[5]

On this basis the referring court raised the following preliminary questions to the Court of Justice:

> (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]?

[4]ECJ 9 September 2021, Opinion of AG Emiliou in Case C-391/20, *Boriss Cilevičs et al.*, ECLI:EU:C:2022:638, para. 17.

[5]ECJ (GC) 7 September 2022, Case C-391/20, *Boriss Cilevičs et al.*, ECLI:EU:C:2022:638, para. 27.

(2) What considerations should be taken into account when assessing whether the legislation in question is justified, suitable and proportionate with regard to its legitimate purpose of protecting the official language as a manifestation of national identity?

Having clarified the factual and legal background it is time to look at the Opinion of the Advocate General and the judgment of the Court of Justice in the next sections.

The Opinion of Advocate General Emiliou

In his Opinion, Advocate General Emiliou summed up the previous stages of the case and the substance of the reference[6] before framing the relevant legal issues and offering some solutions to the Court. Since many of his reflections were later followed by the Court of Justice, some of his insights will be commented on in the last part of the contribution. In this section, we will focus on only some aspects of the Opinion.

The Advocate General immediately clarified that the questions are to be considered as admissible in light of the traditional criteria followed by the Luxembourg Court. Reasoning *a contrario*, the decision to divide the proceedings in two separate cases cannot impinge on the presumption of relevance enjoyed by the questions referred to the Court of Justice under Article 267 TFEU: on the one hand, the interpretation of EU law might still be relevant for the finding of additional aspects of unconstitutionality with respect to those addressed in the first case;[7] on the other hand, the decision to maintain the contested provision in force until 1 May 2021 implies that follow-up judicial proceedings brought by the firms and individuals affected by the contested provisions cannot be ruled out.[8]

Having concluded in favour of admissibility, for the Advocate General there were essentially three questions to be resolved by the Court: (1) whether the provision of higher education courses constitutes an economic activity; (2) whether the consistency of the contested national measures with EU law is to be assessed in the light of the Treaty norms on the freedom of establishment and the freedom to provide services or in the light of the Services Directive; and (3) whether the Court should independently assess the consistency of the national measures with Article 16 of the Charter.[9] The answer to the first question is positive. As to the second and the third questions, in turn, Advocate General

[6]Opinion, *supra* n. 4, paras. 6-21.
[7]Ibid., para. 31.
[8]Ibid., para. 32. *See also* para. 35.
[9]Ibid., para. 40.

https://doi.org/10.1017/S157401962300010X Published online by Cambridge University Press

Emiliou suggested that the Court of Justice should focus on compatibility with Article 49 TFEU only, without paying autonomous attention to Article 16 of the Charter. In his view, 'it is hardly disputable that those provisions – and the legislation of which they form part – were adopted mainly to govern the activities of institutions established (or willing to establish themselves) in Latvia'.[10] Although the relevance of Article 56 TFEU cannot be ignored, the Advocate General reckons that this case is about freedom of establishment. In a nutshell, reasons of 'judicial economy'[11] led the Advocate General to consider Article 49 TFUE alone.

When dealing with the substantive part of the case, Advocate General Emiliou suggested that 'in so far as they render more difficult and less attractive the exercise of the freedom of establishment for higher education institutions based in other Member States, the contested provisions give rise to a restriction under Article 49 TFEU'.[12] The Advocate General went on to assess the existence of justification and the proportionality of the measure. As the Court of Justice clarified in *Runevič-Vardyn and Wardyn*,[13] the duty to protect national identity may include the official language of the member states, although 'that does not imply that – by virtue of Article 4(2) TEU – any national measure that forms part of a policy for the protection and promotion of a Member State's official language(s) is automatically and inherently compatible with EU law'.[14]

National identity and Article 4(2) TEU entered the scene in this part of the Opinion, in which the Advocate General recalled the case law of the Court of Justice on such a contested provision,[15] suggesting that it be taken into account for the solution of the case. For the Advocate General, the national measures at stake that serve the protection and promotion of a member state's official language 'are genuinely designed to protect and promote the use of the official language of the State: Latvian. That is [...] a legitimate interest which may justify a restriction to the right of establishment enshrined in Article 49 TFEU'.[16]

The Advocate General emphasised that in principle the national measures under consideration are suitable to serve the legitimate interest invoked, even if the Commission had doubts as to their ability to achieve their objectives in a coherent manner, in particular for what has to do with the special status recognised to the Stockholm School of Economics in Riga and the Riga Graduate

[10]Ibid., para. 59.
[11]Ibid., para. 66.
[12]Ibid., para. 76.
[13]ECJ 12 May 2011, Case C-391/09, *Malgožata Runevič-Vardyn and Łukasz Paweł Wardyn* v *Vilniaus miesto savivaldybės administracija and Others*, ECLI:EU:C:2011:291, para. 86.
[14]Opinion, *supra* n. 4, para. 80.
[15]Ibid., paras. 82-94.
[16]Ibid., para. 95.

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School of Law. On this point the Advocate General showed some concerns related to the scarcity of information coming from the referring judge.[17]

The doubts over the necessity of these measures reemerge in the final part of the Opinion, where the Advocate General concentrated on the balance struck by the domestic legislator between the benefits of the challenged provisions and the sacrifice imposed on firms and individuals. Besides the evident connection with Articles 13 (Freedom of the arts and sciences), 14 (Right to education), 16 (Freedom to conduct a business), Advocate General Emiliou pointed out that the national provisions under consideration can create a discrimination based on language prohibited by Article 21 of the Charter and significantly affect the language rights of minorities protected under Articles 2 and 3(3), sub-paragraph 4, TEU and under Article 22 of the Charter; something which is 'crucial in the present case, because of the existence of a large Russian-speaking minority in Latvia'.[18]

For the Advocate General, measures such as those at issue in the preliminary ruling procedure can be considered compatible with EU law provided they are suitable and necessary to achieve the objective pursued by the domestic legislator, *and* strike 'a fair balance between the interests at stake'.[19] Here, the Advocate General acknowledges how the national court is best placed to test the proportionality of national measures, but does not refrain from noting that monolingualism does not necessarily serve the noble objective of protecting linguistic heritage.[20]

The judgment of the Court of Justice

The Court of Justice first dealt with the issues of admissibility of the question and its jurisdiction. It concluded positively on both matters. Concerning the former, the Court of Justice relied on its previous case law, according to which the admissibility is excluded only insofar as the dispute in the main proceedings is confined in all respects within a single member state and/or the interpretation sought is unrelated to the facts or purposes of the relevant action and/or the problem raised is hypothetical.

The potential restrictive effects of the piece of legislation under review were deemed capable of bringing the situation within the reach of Articles 49 and 56 TFEU, and the decision of the Latvian Constitutional Court to split the case in two was considered to have no bearing on the usefulness of the reply, since:

[17]Ibid., para. 100.
[18]Ibid., paras. 109-112.
[19]Ibid., para. 117.
[20]Ibid., para. 113.

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> Even though the referring court has ruled that the third sentence of Article 5(1) of the Law on higher education institutions complies with Articles 112 and 113 of the Latvian Constitution, the fact remains that that court could, in the light of the Court's answers to the questions which it has submitted to it, reach the opposite conclusion as regards the compatibility of that provision with Articles 1 and 105 of that constitution, interpreted in the light of the provisions of the FEU Treaty on the freedom of establishment and the free movement of services and Article 16 of the Charter.[21]

In addition, taking into account that Article 56(3) of the Law on higher education institutions and point 49 of the transitional provisions of that law were declared unconstitutional, but the effects of such declaration had been postponed to 1 May 2021, the Court of Justice noted that in its reply to a request for clarification 'the referring court explained that it retained jurisdiction to assess the constitutionality of those provisions'[22] and concluded that:

> Since that court is required, inter alia, to determine whether the provisions at issue in the main proceedings should be removed from the Latvian legal order, even in respect of the period prior to their becoming invalid, it must be held that an answer from the Court to the questions referred is still of use for the resolution of the dispute in the main proceedings.[23]

Although it may appear to be a purely technical question, the issue of the admissibility of the question is linked, in a mirror-image fashion, to the effort made by the referring court to separate the questions related to the constitutionality of national measures from those relevant to EU law. After clarifying why the questions were admissible, the Court of Justice reshaped the questions raised by the referring court, focusing on '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'.[24]

The Court recalled that where a national measure relates to several of those freedoms at the same time it will, in principle, verify whether in the circumstances of the case one prevails.[25] Taking into account the purpose of the domestic

[21]Judgment, *supra* n. 5, para. 43.
[22]Ibid., para. 44.
[23]Ibid., para. 46.
[24]Ibid., para. 48.
[25]Ibid., para. 50.

https://doi.org/10.1017/S157401962300010X Published online by Cambridge University Press

legislation at stake (and in line with the Advocate General), the Court of Justice considered freedom of establishment as the 'predominant fundamental freedom'[26] and decided to concentrate exclusively on Article 49 TFEU, maintaining that a separate examination of the freedom to conduct a business enshrined in Article 16 of the Charter was not necessary.[27]

Despite the limited competences of the EU in the area of education, when intervening in this domain 'Member States must comply with EU law, in particular the provisions on freedom of establishment'.[28] For the Court of Justice, these national measures certainly represented a restriction of the freedom guaranteed by Article 49 TFEU. The Court then moved on to determine whether the Law on higher education institutions could be justified by virtue of an overriding reason in the public interest. It found it in the promotion and encouragement of the use of the official language of the state, a legitimate interest protected under Articles 3(3) and 4(2) TEU and Article 22 of the Charter.

Subsequently, the Court of Justice examined the ability of the contested piece of legislation to actually achieve that objective and considered that the limited exceptions concerning the Stockholm School of Economics in Riga and the Riga Graduate School of Law were not capable of compromising the attainment of such a goal. On the other hand, the possibility of derogating from the general rule on the basis of international agreements entered into between the Republic of Latvia and other states allowed the Court of Justice to overcome the concerns expressed by Advocate General Emiliou concerning the proportionality of the domestic regime.[29] On this basis the Court of Justice claimed that, independently of the wide discretion member states enjoy when implementing policies aimed at protecting and promoting their official language(s), as recognised in the *Runevič-Vardyn and Wardyn* and *Las* precedents, the Law on higher education institutions could be interpreted as being compatible with EU law,[30] providing some (as we will see, non-entirely clear) guidelines and leaving the final assessment to the national judge.

Without performing the delicate balancing act conducted by the Advocate General to ascertain the extent to which the Latvian legislator had adequately weighed up the different interests concerned, including the rights of the large Russian-speaking minority in Latvia, the Grand Chamber thus concluded that:

[26]Ibid., para. 51.
[27]Ibid., para. 56.
[28]Ibid., para. 59.
[29]Ibid., para. 84.
[30]Ibid., paras. 83-86.

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> 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.[31]

The existence of a genuine dispute and the questions raised by the Latvian Constitutional Court

The admissibility of the preliminary reference

The decision to admit the referral is not itself surprising. The European Court of Justice has been known to apply a rather relaxed standard when assessing the usefulness of its reply and the preliminary questions sent by the judge *a quo* 'enjoy a presumption of relevance'.[32] As well summarised by the Court in *Muladi*:

> The Court may refuse to rule on a question referred for a preliminary ruling by a national court only where it is quite obvious that the interpretation of EU law that is sought bears no relation to the actual facts of the main action or its purpose, where the problem is hypothetical, or where the Court does not have before it the factual or legal material necessary to give a useful answer to the questions submitted to it.[33]

In the present case, one of the main issues that had to be addressed was the decision of the referring court to split the case into two. In these circumstances, the Commission expressed doubts as to the usefulness of the reply since the Latvian Constitutional Court decided to declare unconstitutional some of the provisions brought to its attention. At the same time, the Constitutional Court decided to postpone the effects of the declaration of invalidity of these provisions. Finally, the Latvian Constitutional Court also clarified that, in order to judge on the constitutionality of Article 5(1) and Article 56(3) of the Law on higher education institutions, and of point 49 of the transitional provisions of that law in light of Articles 1 and 105 of the domestic Constitution, it needed first to have an authentic

[31]Ibid., para. 87.

[32]Among others, *see* ECJ 2 September 2021, Case C-350/20, *Childbirth and maternity allowances for holders of single permits*, ECLI:EU:C:2021:659, para. 38 (and the judgment annotated here at para. 42). On how the ECJ filters the preliminary questions *see* L. Pierdominici, *The Mimetic Evolution of the Court of Justice of the EU: A Comparative Law Perspective* (Palgrave Macmillan 2020) p. 262.

[33]ECJ 7 July 2016, Case C-447/15, *Ivo Muladi* v *Krajský úřad Moravskoslezského kraj*, ECLI:EU:C:2016:533, para. 33.

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interpretation of some EU law provisions. Indeed, the idea behind this reference was that an interpretation of Articles 49 and 56 TFEU and Article 16 of the Charter was necessary in order to rule on the compatibility of the relevant domestic measures with the right to property as codified in the Latvian Constitution.

The choice of the Lithuanian Constitutional Court to split the case in two and to open the constitutional parameter to the influence of European law, accepting to supplement it in the light of the case law of the Court of Justice, was courageous and could not be taken for granted. Indeed, at the current stage of the European integration process, there are many constitutional courts that, in similar situations, would have decided to resolve pending issues solely in the light of domestic law.[34]

Less consideration was given to the fact that the proceedings gave rise to 'a review *in abstracto*' of the domestic law provisions in question. In this regard, the status of the referring court, and the will to maintain its preliminary questions after the request for clarification from the Court of Justice, certainly played a paramount role, but it is suggested that the decision to admit the reference was also dictated by the principle of national procedural autonomy. Indeed, if the retention of jurisdiction over the matter by Latvian Constitutional Court does not in itself make the questions less hypothetical, one should also take into account that in this particular instance – where the case originated (pursuant to national law) from an action brought by a group of members of Parliament – a declaration of inadmissibility would have been tantamount to excluding the possibility of the domestic court to recur to Article 267 TFEU altogether.[35]

The decision to rephrase the questions put forward by the referring judge

What is more questionable is the choice to completely rephrase the questions and the decision not to adopt the Charter as a legal parameter in this case. Of course, it could be argued that this is only a formal rewording. Nonetheless, the fact remains that excluding a piece of the jigsaw from the balancing operation can always have an impact on the final outcome. And the way the Court of Justice reformulated the question undoubtedly favoured the decision to leave the Charter outside the relevant legal framework.

[34]G. Martinico and G. Repetto, 'Fundamental Rights and Constitutional Duels in Europe: An Italian Perspective on Case 269/2017 of the Italian Constitutional Court and its Aftermath', 15 *EuConst* (2019) p. 731.

[35]Interestingly, however, Art. 16 of the Charter does not concern the right to property (codified in Art. 17) as such, but the freedom to conduct a business. Indeed, the Court of Justice mentioned the issue of the relevance of Art. 17 (and Art. 15) of the Charter in para. 56 before following the Opinion of the Advocate General and focusing on Art. 49 TFEU only. The strategy followed by the referring court is laudable inasmuch as it made it possible for the Court of Justice to conclude that its reply was still useful to the referring judge.

The relationship between national constitutional courts and the Court of Justice has always been a complicated love affair, but there are certain trends that make this relationship perhaps even more intricate today, namely: the binding nature of the Charter, the justiciability of the identity clause under the Lisbon Treaty, the legacy of problematic cases like *Mangold*[36] (of which *Ajos* is a more recent example)[37] and the politicisation of constitutional courts 'captured' by the political power in Hungary and Poland.

In particular, the Charter has certainly triggered convergence between the constitutional courts and the Court of Justice, but it is also a bone of contention, especially in those systems characterised by centralised constitutionality review, where the application of the Simmenthal mandate to conflicts involving the Charter has been seen as problematic because it could pave the way for forms of diffuse judicial review of legislation in disguise.[38] In this respect, fundamental rights provisions must be understood as 'multi sourced equivalent norms',[39] i.e. norms that can belong at the same time to different sources, of different levels.

However, in this case, the Latvian Constitutional Court itself had invoked the Charter after surgically distinguishing constitutionality profiles from those relating to EU law so the decision to avoid making the Charter part of the yardstick appeared at least too abrupt, especially considering that the request came from its 'interpretative competitor'.[40] Beyond the symbolic dimension of this decision, it should be stressed that the freedom to conduct business is certainly broader than the freedom of establishment and to provide services; moreover, the Charter provision is more deferential towards the state, expressly referring to the 'national laws and practices'.

[36]ECJ 22 November 2005, Case C-144/04, *Werner Mangold* v *Rüdiger Helm*, ECLI:EU:C:2005:709. On this case *see* C. Tobler, 'Putting Mangold in Perspective: in Response to Editorial Comments, Horizontal Direct Effect – A Law of Diminishing Coherence?', 44 *Common Market Law Review* (2007) p. 1177. On general principles before and after Mangold *see* C. Amalfitano, *General Principles of EU Law and the Protection of Fundamental Rights* (Edward Elgar Publishing 2018).

[37]ECJ 19 April 2016, Case C-15/2014, *Dansk Industri (DI) acting for Ajos A/S* v *The estate left by A*, also analysed by M.R. Madsen et al., 'Legal Disintegration? The Ruling of the Danish Supreme Court in AJOS' (2017) https://verfassungsblog.de/legal-disintegration-the-ruling-of-the-danish-supreme-court-in-ajos/, visited 20 June 2023.

[38]Martinico and Repetto, *supra* n. 34 and D. Gallo, 'Challenging EU Constitutional Law. The Italian Constitutional Court's New Stance on Direct Effect and the Preliminary Reference Procedure', 25 *European Law Journal* (2019) p. 434.

[39]To borrow the title of an interesting book: T. Broude and Y. Shany (eds.), *Multi-Sourced Equivalent Norms in International Law* (Hart Publishing 2011).

[40]K. Alter, 'Explaining National Court Acceptance of European Court Jurisprudence: A Critical Evaluation of Theories of Legal Integration', in A.-M. Slaughter et al. (eds.), *The European Court and National Courts – Doctrine and Jurisprudence. Legal Change in its Social Context* (1998) p. 227.

The promotion and protection of the official language as a part of the national identity of member states: the need to clarify the scope of Article 4(2) TEU

The unsubstantiated justification based on the protection of national identity

Once the restrictive nature of the national measure had been determined, the question remained as to whether it could be justified, and if so on what legal basis. In accordance with settled case law, the Grand Chamber began by considering whether the measure in question pursues an overriding reason in the public interest. The answer was positive on account of the fact that the domestic legislator 'seeks to defend and promote the use of the official language of the Republic of Latvia'.[41]

The reasons for reaching this conclusion are packed in four short, rather assertive and tautological paragraphs where the Court recalls, on the one hand, that nothing in EU law prevents member states from implementing similar policies and, on the other hand, that the objective pursued is among those that can justify an exception to Article 49 TFEU pursuant to Article 4(2) TEU, Article 3(3), sub-paragraph 4, TEU and Article 22 of the Charter.

The precedents relied upon by the Court to justify the restriction to Article 49 TFEU offer little assistance in understanding the reasons for quoting all three provisions together: *Groener* dates back to 1989 when the protection of national identities and linguistic diversity were not in the treaties,[42] whilst *Runevič-Vardyn and Wardyn*, *Las* and *New Valmar* are relevant only to the extent that they postulate that the protection and promotion of official languages represents an overriding public interest that can in principle justify a restriction to the freedom of movement and residence provided for in Article 21 TFEU, to the free circulation of workers guaranteed under Article 45 TFUE, and to the free movement of goods pursuant to Article 35 TFEU.[43]

[41]Judgment, *supra* n. 5, para. 66.

[42]ECJ 28 November 1989, Case C-379/87, *Anita Groener* v *Minister for Education and the City of Dublin Vocational Educational Committee*, ECLI:EU:C:1989:599. The case notoriously concerned a Dutch national who had moved to Ireland and challenged the language requirement of knowledge of the Gaelic language imposed for access to a full-time teaching post in public vocational education institutions. Here the Court of Justice solved the case on the basis of Art. 3(1) of Regulation 1612/68 on freedom of movement for workers within the Community and simply took note of the fact that the use of Irish was considered by the legislator (for many years) 'as a means of expressing national identity'. The Court did nonetheless emphasise that the Gaelic language was recognised by Art. 8 of the Constitution of Ireland as the first official language and that the requirement is part of a well-established policy aimed at facilitating its use (paras. 17 and 18).

[43]The *New Valmar* precedent (ECJ 21 June 2016, Case C-15/15, *New Valmar BVBA* v *Global Pharmacies Partner Health Srl*, ECLI:EU:C:2016:464) was presumably cited only because it concerned the same piece of legislation discussed in *Las*, although this time for the purposes of

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The Court did not indicate precisely why the Law on higher education institutions falls within the scope of application of the identity clause and why it is necessary to cite Article 3(3) TEU and Article 22 of the Charter in this case and not in the 2011 *Commission* v *Luxembourg* precedent,[44] where the Grand Chamber – called upon to decide the compatibility with Article 49 TFEU of a nationality requirement foreseen for notary publics aimed at guaranteeing the use of Luxemburgish – (re)affirmed that the objective pursued by the national legislator was worthy of protection under Article 4(2) TEU,[45] and made no reference to the latter two provisions.[46] This raises doubts as to the exact legal notion of national identity under the Treaties.

If one can certainly agree that the promotion of official languages is a strong unifying tool for States, it can nonetheless be doubted that this case is actually about the duty to respect national identity under Article 4(2) TEU. Indeed, as will be argued more extensively below, the identity clause – in its current formulation – was not intended to protect the linguistic diversity of the member states, which is in turn covered by other primary law provisions.

The missed constitutional interlock between national identity and linguistic diversity

The decision of the Grand Chamber to quote Article 4(2) TEU, Article 3(3), sub-paragraph 4, TEU and Article 22 of the Charter together overlooks the constitutional interlocking of national identity and linguistic diversity. In this regard, it is useful to succinctly recall the origins of Article 4(2) TEU and subsequently retrace the progressive inclusion of linguistic diversity in primary law, and its relationship with the identity clause. The latter, as we know it today,

applying not Art. 45 TFEU but Art. 35 TFEU. Here the Court of Justice limited itself to declaring that 'the objective of promoting and encouraging the use of one of the official languages of a Member State constitutes a legitimate objective which, in principle, justifies a restriction on the obligations imposed by EU law'; most notably a restriction to the outflow of goods (judgment, para. 50). The case does not even mention the identity clause, nor Art. 3(3), sub-para. 4, TEU or Art. 22 of the Charter.

[44]ECJ 24 May 2011, Case 51/08, *European Commission* v *Grand Duchy of Luxemburg*, ECLI:EU:C:2011:336, para. 72.

[45]Ibid., para. 124.

[46]The judgment was about the compatibility with Art. 49 TFEU of a nationality requirement foreseen for notary publics aimed at guaranteeing the use of Luxemburgish and 'intended to ensure respect for the history, culture, tradition and national identity of Luxembourg'. The Court, however, dismissed the government's claim that the profession was connected to the exercise of official authority pursuant to Art. 45 TEC (now Art. 51 TFEU). This case actually started before the entry into force of the Reform Treaty and thus still refers to Art. 6(3) TEU, but also acknowledges that after 1 December 2009 national identities are recognised and protected under Art. 4(2) TEU.

builds on the work of the Giscard d'Estaing Convention. Although certainly more precise than Article 6(1) TEC, Article 4(2) TEU is far less articulate with respect to the original version drafted by the competent Working Group. Whilst Article 4(2) TEU includes the fundamental structures, political and constitutional, the essential functions of the state, including the regional and local autonomies, and national security, Article I-5 of the Treaty establishing a Constitution for Europe also mentioned citizenship, territory, the status of confessions and churches and religious associations, national defence and the armed forces, social security and social benefits, fiscality, education and health ... and the choices relating to language.

With the Lisbon Treaty, the duty to respect national identity became justiciable and Article 4(2) TEU has been invoked by national governments, Advocates General, referring courts and even by the Court of Justice *motu proprio*, and is increasingly used in the context of actions for annulment, preliminary rulings (of validity and interpretation) and infringement proceedings.[47] The provision has been deemed capable of covering a variety of national prerogatives such as the form of government of the member states,[48] and the internal allocation of competences at the regional or local level,[49] but also other aspects of constitutional relevance like the concept of family in the domestic legal order[50] and – independently of the final formulation of the identity clause – the national choices related to the use of

[47]For an in-depth review of the pertinent case law of the Court of the Justice, the reader is referred to G. Di Federico, 'Identifying National Identities in the Case Law of the Court of Justice of the European Union', 20 *Il Diritto dell'Unione europea* (2015) p. 765 and, more recently, *L'identità nazionale degli Stati membri nel diritto dell'Unione europea. Natura e portata dell'art. 4, par. 2, TUE* (Editoriale Scientifica 2018) p. 74-120.

[48]ECJ 22 December 2010, Case C-208/09, *Ilonka Sayn-Wittgenstein* v *Landeshauptmann von Wien*, ECLI:EU:C:2010:608 and *Nabiel Peter Bogendorff von Wolffersdorff* v *Standesamt der Stadt Karlsruhe and Zentraler Juristischer Dienst der Stadt Karlsruhef*, ECLI:EU:C:2016:401. On this decision *see* L. Besselink 'Case C-208/09, Ilonka Sayn-Wittgenstein v. Landeshauptmann von Wien', 49(2) *Common Market Law Review* (2012) p. 671.

[49]ECJ 24 October 2013, Case C-151/12, *European Commission* v *Spain*, ECLI:EU:C:2013:690; ECJ 12 June 2014, Case C-156/13, *Digibet Ltd and Gert Albers* v *Westdeutsche Lotterie GmbH & Co. OHG*, ECLI:EU:C:2014:1756; and ECJ 21 December 2016, Case C-51/15, *Remondis GmbH & Co. KG Region Nord* v *Region Hannover*, ECLI:EU:C:2016:985.

[50]ECJ 5 June 2018, Case C-673/16, *Relu Adrian Coman and Others* v *Inspectoratul General pentru Imigrări and Ministerul Afacerilor Interne*, ECLI:EU:C:2018:385 and ECJ 14 December 2021, Case C-490/20, *V.M.A.* v *Stolichna obshtina, rayon 'Pancharevo'*, ECLI:EU:C:2021:1008. On this case *see* D. Kochenov and U. Belavusau, 'Same-Sex Spouses: More Free Movement, But What About Marriage? Case C-673/16, Coman et al. v. Inspectoratul General pentru Imigrări', 57(1) *Common Market Law Review* (2020) p. 227.

the official language(s).[51] As argued in greater detail elsewhere, however, the Court of Justice follows a casuistic and somewhat opportunistic approach when quoting Article 4(2) TEU, alone or in combination with other primary and secondary law provisions.[52] In this sense, *Cilevičs* confirms this trend and is particularly disappointing taking into account the status of the referring court and the constitutional relevance of the second question referred.

The relation between respect for the national identity of the member states and their choices concerning the promotion and protection of the official language(s) is apparent since the Maastricht Treaty. Article F TEU (mainly for enlargement purposes) expressly linked the duty to respect the national identity of the member states to the principle of democracy inherent in their form of government, and Article 126 TEC connected the obligation to fully respect cultural and linguistic diversity to the domestic competence in determining the content of teaching and the organisation of the education system.[53] Article F TEU was subsequently amended by the Amsterdam Treaty, with Article 6 TEU effectively decoupling national identity (paragraph 1) and democracy (paragraph 3). For its part, Article 22 of the Charter, solemnly proclaimed in December 2000, affirmed that the Union 'shall respect cultural, religious and linguistic diversity'. According to the original Explanations by the Praesidium of 2000 this provision was based on Article 6 TEU and was thus (also) traceable to the need to respect the national identities of the member states.[54] However, it must be noted that the updated Explanation of 2007 adds a reference to Article 3(3) TEU, but not to Article 4(2) TEU. Consequently, the duty to respect linguistic diversity – namely, the choices operated at the domestic level concerning the protection and promotion of the official language(s) – has been severed from the duty to respect the national identity of the member states and the respective obligations are now set in two dedicated primary law provisions. Yet, only the identity clause is fully justiciable, which might contribute to explaining why the Court felt the need to quote Article 4(2) TEU together with other (more pertinent) primary law provisions. Indeed,

[51] *Runevič-Vardyn*, *supra* n. 13 and ECJ 23 April 2013, Case C-202/11, *Anton Las v PSA Antwerp NV*, ECLI:EU:C:2013:239.

[52] *See further* G. Di Federico, 'The Potential of Article 4(2) TEU in the Solution of Constitutional Clashes Based on Alleged Violations of National Identity and the Quest for Adequate (Judicial) Standards', 25(3) *European Law Review* (2019) p. 347 at p. 356 ff.

[53] *Cf* Art. 248 TEEC and Art. 55(2) TEU (but *see also* Declaration No. 16).

[54] Moreover, it can hardly be ignored that Art. 22 of the Charter can be found in the Title devoted to Equality, thereby effectively creating a conceptual bridge with Art. 4(2) TEU, which openly connects the respect for the equality of member states before the Treaties and for their national identities. That being said, respect for national languages, of course, does not only concern relations between the institutions and the member states, but also those between individuals and the institutions, which must operate with respect for linguistic diversity: ECJ 4 March 1964, Case 15/63, *Claude Lassalle* v *European Parliament*, ECLI:EU:C:1964:9.

Article 3(3), sub-paragraph 4, TEU sets out an objective of the Union and Article 22 of the Charter affirms a principle of EU law. Nevertheless, it should be stressed that the latter provision is not only about linguistic diversity but, as convincingly argued by Advocate General Emiliou, also implies respect for minority languages.[55]

The developments in primary law since the Maastricht Treaty and the hard negotiations which accompanied the elaboration and inclusion of this provision in the final version adopted by the Herzog Convention suggest that the linguistic diversity mentioned therein relates more to the right of (linguistic) minorities present in the member states than to multilingualism within the Union. And this is precisely why the Advocate General, as we shall see shortly, correctly uses Article 22 of the Charter when ascertaining the proportionality of the Law on higher education institutions in light of the adverse effects it creates for the large Russian-speaking minority in Latvia.

A possible alternative (and more correct) legal qualification of the justification based on the protection of the official language

According to the Opinion of Advocate General Jääskinen in *Las*, while '[T]he concept of "national identity" [...] concerns the choices made as to the languages used at national or regional level',[56] the principle of linguistic diversity resulting from Article 165 TFEU, the fourth subparagraph of Article 3(3) TEU and Article 22 of the Charter of Fundamental Rights of the European Union concerns the multilingualism present in the Union and 'is binding only on the institutions and bodies of the Union [and] cannot be relied on by a Member State against citizens of the Union in order to justify a restriction on their fundamental freedoms'.[57]

This passage of the Opinion is particularly noteworthy. In fact, it could be argued that in *Las* the Court of Justice made good use of Article 4(2) TEU insofar as the national measure in question was inextricably linked to the federal nature of the Belgian state and thus to one of the elements expressly included in Article 4(2) TEU. In turn, *Runevič-Vardyn and Wardyn* and *Cilevičs* – more trivially – concerned the choices operated at the domestic level to ensure and foster the use of the national languages. In this respect, although Article 3(3), sub-paragraph 4,

[55]Opinion, *supra* n. 4, para. 111.

[56]Opinion of AG of 12 July 2012, in Case C-202/11, *Anton Las* v *PSA Antwerp NV*, ECLI:EU:C:2012:456, para. 59.

[57]Ibid., paras. 56-57. More specifically, the Advocate General admits that the definition of the official language, or of the various official languages, of the state, and the territorial subdivisions of a constitutional source into linguistic communities may justify recourse to measures restricting the fundamental freedoms of movement.

TEU is not justiciable per se, it is submitted that it can nevertheless operate together with Article 4(3) TEU, which affirms the duty of reciprocal loyalty.[58] Read jointly, these two provisions bind the institutions to pursue the aim of respecting the Union's rich cultural and linguistic diversity in a spirit of sincere cooperation with national authorities.

A systematic, teleological and historical reading of Article 4(2) TEU suggests that when the promotion and protection of the official language(s) is invoked as part of the national identity to derogate from EU law, reference should be made exclusively to Article 3(3), sub-paragraph 4, TEU, in combination with Article 4(3) TEU. Article 22 of the Charter will possibly become relevant when the protection and promotion of the official language(s) of a member state negatively impacts on the individual rights connected to the use of a given language, not necessarily one of the 24 official languages of the Union.[59] The national identity clause, instead, could become relevant in exceptional cases (like *Las*) where the linguistic element is strictly connected to the constitutional structure of the state. Although it will be conceded that in any case the Court of Justice will have to show some deference vis-à-vis the solutions envisaged at the domestic level, and that the final outcome will most probably be the same, the proper use of the relevant primary law provisions is still considered – and this is our main argument here – to be an asset in the Court's hands to promote legal certainty.

The deference owed to the member states under the identity clause, the proportionality test and the quest for appropriate judicial standards

The (limited) margin of appreciation left to member states under Article 4(2) TEU

The Court of Justice highlighted that member states enjoy a broad discretion when implementing a policy designed to protect and promote the use of the official language(s), 'since such a policy constitutes a manifestation of national identity for the purposes of Article 4(2) TEU'.[60] In the absence of a common conception on how to pursue these objectives, the necessity of the (restrictive) national measures cannot be excluded by virtue of discrepancies in the legislation of the member state. However, 'the fact remains that that discretion cannot justify

[58]On the duty of sincere cooperation, *see* T. Roes, 'Limits to Loyalty: The Relevance of Art 4(3) TEU', *Cahiers de Droit Européen* (2016) p. 253 at p. 272 and M. Klamert, *The Principle of Loyalty in EU Law* (Oxford University Press 2014) p. 291 ff.

[59]But *see also* G. van der Schyff, 'Exploring Member States and European Union Constitutional Identity', 22 *European Public Law* (2016) p. 227 at p. 233.

[60]Judgment, *supra* n. 5, para. 83.

https://doi.org/10.1017/S157401962300010X Published online by Cambridge University Press

a *serious undermining* of the rights which individuals derive from the provisions of the Treaties enshrining their fundamental freedoms'.[61]

The passage is borrowed from *Runevič-Vardyn and Wardyn*, where the Luxembourg judges claimed that:

> in order to constitute a restriction on the freedoms recognised by Article 21 TFEU, the refusal to amend the joint surname of the applicants in the main proceedings under the national rules at issue must be liable to cause 'serious inconvenience' to those concerned at administrative, professional and private levels.[62]

What is troubling about this reference is that, on the one hand, it seems to overlook the fact that the case was about the compatibility of the Lithuanian spelling rules for entries in the civil registries with the rules on free movement of citizens, not about a restriction to the freedom of establishment; and, on the other hand, that the serious inconvenience test has been accepted since *Garcia Avello* as a legal threshold when considering breaches of Article 21 TFEU,[63] not as a standard to determine the margin of appreciation of member states when departing from EU law on the basis of a derogation foreseen in the treaties or a mandatory requirement recognised by the Court. Indeed, the reported passage of the *Runevič-Vardyn and Wardyn* judgment can be found in the part dedicated to the restrictive nature of the domestic measure. With this important caveat, the judgment in *Cilevičs* suggests that when the situation is considered to be caught by

[61]Ibid. (emphasis added).

[62]*Runevič-Vardyn and Wardyn*, *supra* n. 13, para. 76.

[63]ECJ 2 October 2003, Case C-148/02, *Carlos Garcia Avello* v *Belgian State*, ECLI:EU:C:2003:539, para. 36. *See also* ECJ 14 October 2008, Case C-353/06, *Stefan Grunkin and Dorothee Regina Paul*, ECLI:EU:C:2008:559, para. 23, and, with particular regard to national identity, *Sayn-Wittgenstein*, *supra* n. 48, para. 67. On the serious inconvenience test elaborated by the Court of Justice in these cases, *see* H. Van Eijken, 'Case C-391/09, Malgozata Runevicˇ-Vardyn and Lukasz Pawel Wardyn v. Vilniaus miesto savivaldybes administracija and Others, Judgment of the Court (Second Chamber) of 12 May 2011, nyr.', 49 *Common Market Law Review* (2012) p. 809 at p. 816 ff. On the relevance, existence and desirability of a *de minimis* rule in the internal market, which; obviously goes beyond the remit of this contribution, *see further* J. Hojnik, 'De Minimis Rule within the EU Internal Market Freedoms: Towards a More Mature and Legitimate Market?', 6 *European Journal of Legal Studies* (2013) p. 25 at p. 31; N Nic Shuibhne, *The Coherence of EU Free Movement Law: Constitutional Responsibility and the Court of Justice* (Oxford University Press 2013) p. 157 ff; M.S. Jansson and H. Kalimo, 'De Minimis Meets "Market Access": Transformations in the Substance – and the Syntax – of EU Free Movement Law?', 51 *Common Market Law Review* (2014) p. 523. As to the viability of a de minimis rule, *see* more recently 3 December 2020, Opinion of AG Hogan in Case C-311/19, *BONVER WIN, a. s.* v *Ministerstvo financí ČR*, ECLI:EU:C:2020:640 and L. Michaux, 'BONVER WIN: The Final Curtain Call for the De Minimis in Internal Market Law' (2021) KU Leuven CCM.

https://doi.org/10.1017/S157401962300010X Published online by Cambridge University Press

Article 4(2) TEU, the Court of Justice will only declare the incompatibility of the relevant domestic legislation, practice or case law with primary and secondary law if it significantly restricts free movement law. Still, how to measure the margin of appreciation left to the member states ultimately remains open to speculation.

The suitability and (doubtful) necessity of the Law on higher education institutions

In internal market law cases the Court in principle follows a three-step proportionality procedure which focuses on suitability, necessity and proportionality *stricto sensu*. In the words of Advocate General Emiliou:

> it must be possible to subject, by way of judicial review, the questions of whether (i) the national measures make a meaningful contribution to the achievement of the stated objective; (ii) there may be other measures that are equally capable of doing so, while being less restrictive of the internal market freedoms; and (iii) the national measures may have disproportionate repercussions on the other subjects affected.[64]

As to the first criterion (suitability), the Luxembourg judges recalled that there must be a genuine connection between the measure and its declared aim, and insist on the fact that the objective must be implemented in a 'consistent and systematic manner'.[65] On this point, the Advocate General openly questioned the reasons for granting a special status to the higher education institutions based in Riga and for excluding primary and secondary law institutions from the scope of the contested piece of legislation, but conceded that there was not enough information in the case file to deepen the analysis.[66] The Court of Justice, for its part, felt no need to make use of its power to request clarifications from the referring Court under Article 101 of the Rules of Procedure[67] and concluded that the Law on higher education institutions complies with the consistency requirement by reason of the limited exceptions to the general rule laid down therein.

[64]Opinion, *supra* n. 4, para. 90.

[65]Judgment, *supra* n. 5, para. 75.

[66]Most notably, according to AG Emiliou, the Latvian legislator does not seem to duly take into account the advantages connected to learning one or more additional languages at a young age (Opinion, *supra* n. 4, paras. 102-105).

[67]*See further* X. Arzoz, 'Op-ED: Judicial Minimialism in national identity claims: The Grand Chamber on higher education language policy in Latvia – Boriss Cilevičs and Others (C-391/20)' (*EU Live*, 21 September 2022).

https://doi.org/10.1017/S157401962300010X Published online by Cambridge University Press

Moreover, the fact that these exceptions can be extended on the basis of international agreements[68] is sufficient for the Luxembourg judges to conclude that the Law on higher education institutions respects the second criterion (necessity).[69] After all, in *Las* it was the absolute character of the obligation for businesses established in the Dutch-speaking region of Belgium to conclude cross-border employment contracts in Dutch, regardless of the effective knowledge of that language by the parties involved and under sanction of nullity, that ultimately forced the Court to directly declare that the measure went beyond what was strictly necessary to attain the objectives pursued by the domestic legislator. That being said, one cannot refrain from noticing that the reluctance of the Court to further investigate the necessity of the Law on higher education institutions is at odds with the rigorous stance adopted in *Runevič-Vardyn and Wardyn*, where the 'consistent and systematic implementation condition' was closely reviewed.[70]

Stopping short of a strict proportionality test: undesired consequences

Although the Court does not normally and necessarily go through all canonical steps of the proportionality test, in some instances it does call upon the referring court to carry out a *stricto sensu* assessment. This was the case, for instance, in *Runevič-Vardyn and Wardyn*, where the Grand Chamber gave the following indication:

> it will be for the national court to decide whether [the refusal to amend the joint surname of the couple in the main proceedings, who are citizens of the Union] reflects a *fair balance between the interests in issue*, that is to say, on the one hand, the right of the applicants in the main proceedings to respect for their private and family life and, on the other hand, the legitimate protection by the Member State concerned of its official national language and its traditions.[71]

As previously seen, the existence of exceptions in the national legal order was considered sufficient to deem the measure necessary and thus, in principle, admissible. The Court of Justice refused to venture into what it evidently considered slippery terrain. Advocate General Emiliou instead – perhaps because of his academic background and publications on the subject matter[72] – insisted on the advisability of weighing the benefits of the contested provisions against 'the

[68]Judgment, *supra* n. 5, paras. 78, 79.
[69]Ibid., paras. 84-86.
[70]*Runevič-Vardyn and Wardyn*, *supra* n. 13, paras. 92-93.
[71]Ibid., para. 78 (emphasis added).
[72]V. Emiliou, *The Principle of Proportionality in European Law. A Comparative Study* (Kluwer Law International 1996) p. 126 ff.

https://doi.org/10.1017/S157401962300010X Published online by Cambridge University Press

disadvantages accruing to the various categories of individuals and firms negatively affected by them'. And he is not sure that the 'scale tips in favor of the former'.[73]

From a strictly legal perspective, there are a number of prerogatives recognised in the Charter that could and should be considered, namely: Article 13, on the academic freedom of teachers, Article 14 on the right to education, which is capable of comprising both the right of choice considering pedagogical conviction, like studying a different language and the right to found educational establishments, Article 16 concerning the right of economic initiative, Article 21 on non-discrimination, which also covers (indirect) discriminations based on language, and Article 22 on cultural, linguistic and religious diversity. On closer inspection, the last of these provisions does something more than impose on the EU institutions (alone) the duty to respect linguistic specificities and, hence, their equality before the treaties.[74] According to the Explanations (of 2000 and 2007), Article 22 of the Charter is not based on (what is now) Article 165 TFEU, dedicated to education, but on Article 167 TFEU, relating to culture, reinforcing the idea supported by the Advocate General that the provision is (also and mostly) about linguistic minorities.[75]

Here attention can again be drawn to *Runevič-Vardyn and Wardyn*, where the Court of Justice acknowledged the origins of the applicant, but did not tackle the delicate question of the protection of the Polish minority in Lithuania. In *Cilevičs*, however, the question is pivotal insofar as the exceptions foreseen for the two institutions based in Riga only apply to EU languages significantly affecting the rights of the large Russian-speaking minority in Latvia.[76] This is particularly critical considering the principle of non-discrimination affirmed in Article 21 of the Charter and, more generally, the duty to observe and promote the values set in Article 2 TEU – i.e. human dignity, freedom, democracy, equality, the rule of law and respect for human rights, 'including the rights of persons belonging to minorities'. In this regard, we need not remind the reader that pursuant to the

[73]Opinion, *supra* n. 4, para. 106.

[74]For AG Emiliou this is the result of the combined effect of Art.3(3), sub-para. 4, TEU and Art. 22 of the Charter (para 111). However, for the reasons illustrated above, we believe that only Art. 22 is relevant to that effect.

[75]*See* P. Jeronimo, 'Article 22, Cultural, Religious and Linguistic Diversity', https://repositorium.sdum.uminho.pt/bitstream/1822/43941/1/Annotation%20Article%2022_Patr%C3%ADcia%20Jer%C3%B3nimo%20FINAL.pdf, visited 20 June 2023 and R. Craufurd Smith, 'Article 22' in S. Peers et al. (eds.), *The EU Charter of Fundamental Rights. A Commentary* (Hart Publishing 2014) p. 605 at paras. 22.45 ff.

[76]Opinion, *supra* n. 4, paras. 112-113. As reported by Arzoz, *supra* n. 67: 'in 2018, when the controversial legislation was approved, around 7 per cent of university students in Latvia were enrolled in Russian-medium programmes, all in private institutes'.

ERT doctrine member states must always comply with fundamental rights when they derogate from EU law and that the Court of Justice must uphold the rights enshrined in the Charter.[77] In this respect, one is thus left with the impression that the Court of Justice's decision not to embark on the assessment of the proportionality *stricto sensu* was dictated more by the difficult political context (i.e. the war in Russia and russification) than by purely legal considerations. However, at the end of the day, deference and conflict avoidance – which is (and should be) a typical feature of judicial dialogue with constitutional courts under Article 267 TFUE – left out of the picture a provision like Article 22 of the Charter, with potentially negative consequences on the Russian-speaking minority in Latvia.

Conclusion

The judgment in *Cilevičs* is a further indication that the constitutional courts of the member states are willing to engage in a dialogue with the Court of Justice on matters related to the interpretation and application of EU law. The decision to admit the reference can be said to be consistent with the doctrine of the presumption of relevance formulated over the years by the Court of Justice. Regardless of the finding of unconstitutionality in the first case decided by the Latvian Constitutional Court, the interpretation of EU law was still relevant for the outcome of the second pending case also considering the clarifications offered by the referring court upon request by the Court of Justice.

The choice to admit the case notwithstanding the possibly hypothetical nature of the questions referred testifies to the Court of Justice's willingness to show deference for national procedural autonomy and engage in a dialogue with the constitutional courts of the member states. This flexible stance, it is submitted, is welcome considering the post-Lisbon centripetal forces generated by the binding character of the Charter and the rewording of the identity clause.

However, once the case had been admitted, the rephrasing of the two questions formulated by the Latvian Constitutional Court deprived the latter of any viable answer as to how to solve the case in a way which is actually compatible with EU law. As to the first question, the Charter is (one of) the bridge(s) connecting the case pending before the referring court and the case brought before the Court of Justice. This seems to be in line with the case law of other constitutional courts who, even in cases characterised by a certain polemical spirit, have recognised 'the

[77]ECJ 18 June 1991, Case C-260/89, *Elliniki Radiophonia Tiléorassi AE and Others v Dimotiki Etairia Pliroforissis*, ECLI:EU:C:1991:254. *See* in particular D. Chalmers, 'Looking Back at ERT and its Contribution to an EU Fundamental Rights Agenda', in M. Poiares Maduro and L. Azoulai (eds.), *The Past and Future of EU Law. The Classics of EU Law Revisited on the 50th Anniversary of the Rome Treaty* (Hart Publishing 2010) p. 140-150.

https://doi.org/10.1017/S157401962300010X Published online by Cambridge University Press

typically constitutional stamp' of the Charter.[78] Yet, the latter played an absolutely secondary role in the Court's decision, which in turn focused on Article 49 TFEU. This choice of the Luxembourg Court is a bit of a missed opportunity, as it ends up, in part at least, emptying the issue of its constitutional impact. Precisely, the binding nature of the Charter is, together with the codification of respect for the national identity(s) of the member states, one of the reasons for the progressive involvement of the constitutional courts in the mechanism governed by Article 267 TFEU after the entry into force of the Lisbon Treaty. On the other hand, as suggested by Advocate General Emiliou,[79] the choice to leave Article 16 of the Charter out of the picture avoided the Court of Justice entering the constitutional quagmire of the referring judge.

As to the second question, *Cilevičs* is truly a missed opportunity considering that the progressive engagement of constitutional courts in a dialogue with the Court of Justice over issues pertaining to the core of the domestic constitutional order offers a unique chance to define the contours of national identity and the role of Article 4(2) TEU in the solution of constitutional clashes in the European Union.

Despite the considerable case law on the matter, the truth is that in practice the use of Article 4(2) TEU remains largely unsubstantiated. In *Cilevičs*, once again, the Luxembourg judges fail to elucidate the nature and intensity of the link between the relevant domestic measure and the identity element necessary to bring the situation within the realm of Article 4(2) TEU. Neither the Advocate General nor the Court of Justice explained why exactly the Latvian law on higher education institutions is caught by Article 4(2) TEU in combination with Article 3(3), sub-paragraph 4, TEU and Article 22 of the Charter, and what happens when national identity issues are raised before the Court of Justice to depart from EU law. This case, more than others, offered the Court of Justice the opportunity to clarify these important aspects. As we explained above, it is only when national identity and the protection of the official language(s) of a member state overlap, as in *Las*, that Article 4(2) TEU may apply. Besides this specific situation, when the claim is purely cultural the Court of Justice should rely solely on Article 3(3), sub-paragraph 4, TEU, read in conjunction with Article 4(3) TEU. In cases like *Cilevičs* and *Runevič-Vardyn and Wardyn*, Article 22 of the Charter should instead be used to adequately balance the policy elaborated by the national legislator with (fundamental) minority rights.

In situations (strictly) connected to identity claims on the part of national governments and national courts, and especially constitutional courts, the Court

[78]Italian Corte costituzionale, judgment 269/2017, https://www.cortecostituzionale.it/documenti/download/doc/recent_judgments/S_269_2017_EN.pdf, visited 20 June 2023.

[79]Opinion, *supra* n. 4, para. 71.

https://doi.org/10.1017/S157401962300010X Published online by Cambridge University Press

of Justice must seek an interpretation capable of admitting the national specificity unless the relevant domestic measure or rule is blatantly disproportionate and, save exceptional cases, leave the final choice concerning the proportionality of the measure to the domestic judge. However, the discretion enjoyed by the member states pursuant to the standard affirmed in *Cilevičs* appears excessively wide. First, the suitability of the Law on higher education institutions is not properly investigated. Second, the necessity is established on the basis of the fact that limited exceptions are foreseen and that they can in principle be expanded. Third, the serious inconvenience test introduced to stem the discretion acknowledged to member states in situations covered by Article 4(2) TEU is vague and somewhat confusing. Finally, the choice not to follow the Advocate General on the *stricto sensu* proportionality test to orient the decision of the referring judge leaves the rights of the Russian-speaking minority in Latvia unaddressed. And one cannot refrain from noticing that this is in stark contrast to the increasing attention towards the respect for EU values and fundamental rights, which also emerges in recent decisions of the Court of Justice related to the identity clause, most notably in the case concerning the action brought by Hungary against the conditionality regulation.[80]

Authorship declaration. This article is the result of the joint reflection of the authors. Giacomo Di Federico wrote the third, sixth and seventh sections while Giuseppe Martinico wrote the second, fourth and fifth sections. The Introduction and Conclusion were written by the authors together.

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[80]ECJ 16 February 2022, Case C-156/21, *Hungary* v *European Parliament and Council of the European Union*, ECLI:EU:C:2022:97, para. 233. *See also* M. Bonelli, 'Has the Court of Justice Embraced the Language of Constitutional Identity?', Diritti Comparati (2022) 26 April, https://www.diritticomparati.it/has-the-court-of-justice-embraced-the-language-of-constitutional-identity/, visited 20 June 2023.

https://doi.org/10.1017/S157401962300010X Published online by Cambridge University Press