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Internal market meets geopolitics: recent case law on freedom of establishment

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SUMMARY: 1. Introduction. – 2. The jurisdiction of the Court to intervene in substantive themes of governance. – 3. The substantive areas engaged in recent decisions are language/higher education (*Cilevičs*) and supply of raw material (*Xella*). – 4. What these cases reveal about the dynamics of the internal market. – 4.1. The settled case law is still valid. – 4.2. It is necessary to balance free movement with national identity. – 4.3. Does the geopolitical context matter? – 5. Conclusion.

1. *Introduction*

Internal market litigation appears to be entering a new phase. The traditional paradigm – where the freedom of establishment served primarily as a vehicle for economic integration and the removal of protectionist barriers – is acquiring a new dimension because, while in the past the interests invoked by Member States as justification for their measures[1] were largely domestic (economic or social),[2] it is now more common that they have a clear 'geopolitical' element.[3] As the EU acquired new competences, the substantive areas of governance where Member States are required to comply with EU law have increased in

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[1] That is, for the measures «liable to hinder or make less attractive the exercise of fundamental freedoms guaranteed by the Treaty», under the formulation of ECJ 30 November 1995, Case C–55/94, *Gebhard*, point 37.

[2] Articles 36, 45, para. 3, 65, para. 1 and 52, para. 1 TFEU and the so-called 'mandatory requirements' constitute the 'acceptable' public interests that may be worthy of protection even in derogation of the rules of the internal market. See generally C. BARNARD, *The Substantive Law of the European Union. The Four Freedoms*, Oxford, 2025, pp. 7 and 33.

[3] By 'geopolitical', this Article means that they relate directly to the foreign policy of the Member State.

number.[4] From a foreign policy and from an EU constitutional law perspective, this is especially significant, as it entails that the protection of national security (and to a lesser extent even of national identity), meant to be the exclusive domain of Member States, is being 'negotiated' also through internal market litigation. Recent cases before the Court of Justice illustrate this.

In *Cilevičs*,[5] the Latvian Constitutional Court asked the European Court of Justice ("the Court") if Latvian legislation requiring private higher education institutions to promote and develop the Latvian language (subject to exceptions allowing the provisions of education in other EU official languages),[6] thereby limiting the opportunities for those institutions to offer courses of study in foreign languages, was compatible with the freedom of establishment (Art. 49 TFEU), the freedom to provide services (Art. 54 TFEU), and the freedom to conduct a business (Art. 16 Charter). In *Xella*,[7] the referring Hungarian court questioned the compatibility with EU law of a ministerial decision prohibiting the acquisition of a Hungarian company (operating in the construction material) by an EU operator on the ground that the transaction was contrary to Hungary's national interest.

Both are (treated by the Court as) internal market cases but they are caused by, or anyways acquire heightened importance in, the EU's international context. In Latvia, one quarter of the population is Russian-speaking, and, after the Russian annexation of Crimea in 2014, several Member States in Central and Eastern Europe intensified measures aimed at limiting Russian cultural and linguistic influence. The case therefore had an implicit geopolitical dimension: a national language policy framed as the promotion of Latvian was also part of a broader strategy of political distancing from Russia. While the Court of Justice treated the issue as one of freedom of establishment and national identity, its context was shaped by the EU's security environment and the efforts of Member States at the Union's eastern border to consolidate their (cultural) identity as distinct from the Russian one. The international context was equally relevant in *Xella*. The Hungarian government prohibited the acquisition of a domestic company by a non-Hungarian EU operator on the ground that it was contrary to Hungary's national interests. This occurred in a period of growing

[4] Since the Single European Act (1986) and even more so the Lisbon Treaty (2009). As the discussion contained in Part 4 of this Article shows, the geopolitical element appears rather in recent than in older case law.

[5] ECJ 7 September 2022, Case C-391/20, *Cilevičs.*

[6] Art. 56(3) Latvian Law on higher education institutions dated 2 November 1995 as modified by the law of 21 June 2018.

[7] ECJ 13 July 2023, Case C-106/22, *Xella.*

concern across the EU about foreign (especially non-EU) investment in strategic sectors, leading to the adoption of the FDI Screening Regulation. Although the Court ultimately found that *Xella* involved intra-EU investment, the Hungarian government's invocation of 'public security' reflected the global context of economic security, strategic autonomy, and the politicisation of investment flows – issues sharpened by tensions between the EU, China, and the United States. The case thus raised questions about how far Member States can rely on an invocation of their security interests to derogate from internal market freedoms, and therefore about the Court's role in policing the boundary between legitimate security interests and forbidden economic policy. A similar issue arose later in *Commission/Hungary* (Matériaux de construction pour infrastructures critiques), which related to free movement of goods – at issue was the justification of a restriction on exports of construction material for critical infrastructure – rather than relating to freedom of establishment.[8]

In Section 2, this Article presents the reasoning of the Court (and of the Advocates General) in the two judgments as far as they are relevant for the purposes of the present analysis, highlighting in particular why EU law was applicable and why the cases had to be analysed under freedom of establishment.[9]

The cases show how the Court is presented with an opportunity to intervene in important themes of governance: language policy and economic security. The role of the Court in these matters, that is, the way the Court applied the proportionality principle, is discussed in Section 3.

Section 4 conceptualises what these cases tell us about the dynamics of the internal market, broadening the analysis to other recent judgments involving national identity or state security interests. The Court's case law confirms the continuing constitutional salience of the internal market as a forum for

[8] ECJ 13 November 2025, Case C-499/23, *Commission/Hungary* (Matériaux de construction pour infrastructures critiques), on which see again Section 4 of this Article.

[9] For other profiles on the judgments under analysis, in addition to those cited throughout the Article, readers may consult S. VAN DER JEUGHT, *Academic Freedom of Language*, in *VBlog*, 16 October 2025; H. VAN EIJKEN, E. MEYERMANS SPELMANS, *Words Travel Worlds: Language in the EU Internal Market, Linguistic Diversity and the National Identity of the Member States*', in *Comparative Law and Language*, vol. 2, n. 2, 2022, p. 87; F. PICOD, *Cour de justice, gde ch., 7 septembre 2022,* Boris Cilevičs e.a.*, aff. C-391/20, ECLI:EU:C:2022:638*, in *Jurisprudence de la CJUE 2022. Décisions et commentaires*, Brussels, 2024, pp. 425-435; X. ARZOZ, *When Protecting the National Language Is Broadly Compatible with EU Law (but the National Court Is Kindly Invited to Reach the Opposite Conclusion): AG Emiliou on Higher Education Language Policy in Latvia - Case* Boriss Cilevičs and Others *(C-391/20)*, in *ELL*, 21 March 2022; ID., *Judicial Minimalism in National Identity Claims: The Grand Chamber on Higher Education Language Policy in Latvia* - Boriss Cilevičs and Others *(C-391/20)*, in *ELL*, 21 September 2022.

negotiating the balance between economic integration and public interests. It follows that the classic case law is still good law. But Member States' interests are now also, to a greater extent than they were in the past, geopolitical interests. The classic 'form' of internal market cases, pitching a private company v a Member State for the removal of some barrier or obstacle or hindrance persists. It has been said that «*Schmidberger* and *Omega* mark the transition to a new stage of the internal market. EU inter-state movement rights have to be balanced with fundamental rights and economic integration must respect overarching constitutional standards».[10] *Cilevičs* reflected the 'securitisation' of language and identity in the shadow of what Latvia perceived as an aggressive Russian foreign policy; *Xella* reflected the securitisation of investment amid a changing global economic order.[11] One could therefore say that *Cilevičs* and *Xella* mark the transition to a stage of the internal market in which freedom of establishment has to be balanced with geopolitical interests and national identity (and not with another fundamental rights[12]). This article contributes to the literature on such balancing by the Court by exploring precisely whether and to what extent the geopolitical context is a factor affecting the validity of national measures. While the case law on national identity is still developing and the concept has uncertain and contested boundaries, the Court's case law on public security interests is squarely in line with its settled jurisprudence on internal market derogations.[13]

2. *The jurisdiction of the Court to intervene in substantive themes of governance*

The litigation shows lingering uncertainty on the scope of application of (certain instruments of) EU law. In *Xella*, this turned on the question of the scope of the FDI Screening Regulation. It was the case about the applicability of the FDI, and the Court found that it was not, in fact, applicable to the facts

[10] T. HARTLEY, T. TRIDIMAS, *Foundations of European Union Law*, Oxford, 2025, p. 248.
[11] On which see generally S. MEUNIER, K. NICOLAIDIS, *The Geopoliticization of European Trade and Investment Policy*, in *JCMS*, vol. 57, 2019, pp. 103-113.
[12] G. DI FEDERICO, G. MARTINICO, *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*, in *EuConst*, n. 19, 2023, p. 346 ss., spec. p. 356. consider questionable «the choice to completely rephrase the questions and the decision not to adopt the Charter as a legal parameter» in *Cilevičs*.
[13] Starting from ECJ 10 July 1984, Case 72/83, *Campus Oil*, defining the scope of 'public security' as derogation from free movement of goods. See also the cases cited in Section 4.3 of this Article.

of the case. Its scope was interpreted narrowly, as Art. 1(1) requires a «foreign» investor for the applicability of the Regulation, a notion which the Court (correctly) interpreted as «undertakings constituted or otherwise organised under the laws of a third country».[14] The FDI Screening Regulation defines foreign investor as an «undertaking of a third country», and it is based on this literal interpretation that a Hungarian company (such as the applicant in the main proceeding) could not meet this definition.

This is by no means an obvious finding. The AG, in her Opinion, had argued otherwise, that is, for the applicability of the FDI Screening Regulation. The argument was also based on a literal interpretation (of Art. 2(1) FDI Screening Regulation), defining «foreign investment» as «an investment *of any kind*».[15] The argument of the AG was therefore that the FDI covers «any type of investment through which the foreign investor gains effective participation in or control over an EU undertaking»,[16] regardless of the structure of the company (or companies) through which the foreign investor ultimately exercises control over the EU undertaking. This substantive view of the AG bears some resemblance to the finding of the International Court of Justice in *Barcelona Traction*,[17] as both reason in terms of effective control and economic reality. The AG also excludes possible abuses, whereby a foreign company might set up a subsidiary in a Member State view a view to conduct an operation there which would be subtracted from the application of the FDI screening regulation only by virtue of the fact that the subsidiary is not 'foreign'. This would amount, to borrow the terminology of *Cadbury Schweppes*, to «a wholly artificial arrangement».[18] An anti-circumvention clause is contained in fact in Art. 3(6) FDI Screening Regulation, but it does not define what «circumvention» entails, so the case law on freedom of establishment may provide guidance.

The Court was more formalistic. It followed the letter of the FDI. Granted, the ownership structure of the foreign investor may be taken into account in determining whether there is a threat, (Art. 4, para. 2(a) FDI Screening Regulation), but that is the ownership structure of the *foreign* investor indeed (and not of the group incorporated under the law of the Member State).[19] The Court also addressed the argument of a potential abuse, noting that there was

[14] *Xella*, cit., point 32.
[15] Opinion of AG Capeta of 30 March 2023, Case C-106/22, *Xella*, para. 41, emphasis in the original.
[16] *Ivi*, para. 42.
[17] ICJ 5 February 1970, *Barcelona Traction.*
[18] ECJ 20 December 2017, Case C-196/04, *Cadbury Schweppes,* point 51.
[19] *Xella*, cit., point 37.

nothing in the file of the case that indicated that the decision by the Minister was taken in order to counter an attempt to circumvent the screening mechanism.[20] Art. 3(6) FDI screening Regulation was therefore not engaged. It may be added that the Court's reading is probably in line with the condition of Art. 54 TFEU first sentence, which «seems to exclude third-country letterbox companies that have no genuine connection with the Union economy».[21]

In *Cilevičs* as well there could be doubts as to the applicability of EU law, but the Court dispelled them immediately. This was not a purely internal situation: foreign entities may establish higher education institutions in Latvia, and that potential or, indeed, hypothetical effect of the law on cross-border transactions is sufficient to trigger the application of EU law.[22] This is broad interpretation of the scope of EU law is standard, but it can be compared and contrasted with another recent internal market decision, in *FA.R.O*,[23] involving Italian legislation setting limits to the amount of tobacco retailers. In a dispute between an Italian retailer and an Italian municipalities, an Italian court referred a question relating to free movement of services and of establishment. The Court declared it inadmissible, because the order for reference contained «nothing to suggest that, despite its purely domestic character, the subject matter of that dispute has a connecting factor with Articles 49 and 56 TFEU that would make the interpretation thereof necessary».[24] It bears recalling briefly how the Court's reasoning proceeded in *Cilevičs* instead: in accordance with Art. 6 TFEU, the European Union is to have competence to carry out actions to support, coordinate or supplement the actions of the Member States, including in the area of education. But it is settled case law that when exercising that power, Member States must comply with EU law, in particular the provisions on freedom of establishment[25] (freedom of establishment was engaged because the provision of higher education courses for remuneration in question was provided on a stable and continuous basis[26]).

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[20] *Ivi,* point 38.
[21] R. SCHÜTZE, *European Union Law*, Oxford, 2025, p. 655.
[22] *Cilevičs*, cit., point 33. See, more recently, for the same rationale also ECJ 11 July 2024, Case C-598/22, *Società Italiana Imprese Balneari*.
[23] ECJ 17 October 2024, Case C-16/23, *FA.R.O.*
[24] *FA.R.O*, cit. point 41. *V. DELHOMME, Op-Ed: "Purely Internal Situations and Proportionality in Free Movement Cases" (C-16/23, FA.R.O. Di YK & C.)"*, in *ELL*, 18 November 2024.
[25] *Cilevičs*, cit., point 59.
[26] *Cilevičs*, cit., point 52.

3. *The substantive areas engaged in recent decisions are language/higher education* (Cilevičs) *and supply of raw material* (Xella)

In both cases, the fact that EU law was applicable and gave the Court the opportunity to enter into substantive themes of governance (economic security in *Xella*, education/language policy in *Cilevičs*). Are these *new* areas of governance or were they already regulated by EU law? In a sense, the question on the scope of application of the FDI Regulation in Xella was precisely about this: is the regulation of investment coming from the internal market (and, with the FDI Screening Regulation, the EU is merely 'delegating back' competence to Member States, as the AG says), or are is the EU 'attracting' competences (i.e., *in casu*, about national security) from a domain that was traditionally the Member States'? The Court replies by couching firmly the answer in the internal market rationale. In *Xella*, in addition to the question of the applicability of the FDI Screening Regulation, there was a classic internal market 'doubt' as to the freedom under which to analyse the relevant facts. There was little doubt for the Court that the matters fell within the scope of EU law.[27] The Court clarified that the case had to be examined under Article 54 TFEU, freedom of establishment, and not Article 65, free movement of capital, because the acquisition of shares enabled a «to exert a definite influence on a company's decisions and to determine its activities».[28] This is a settled test in the case law, dating back to the judgment in Baars,[29] and can be read as stemming from Art. 49, para. 2, TFEU.[30]

One way to understand the cases is to ask whether the geopolitical interest of Latvia or Hungary was protected by EU law. This, however, is not how *Cilevičs* was phrased (where free movement, it shall be recalled, was pitched against national identity).

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[27] Would the factual circumstances at issue in the main proceeding in *Xella* have been attracted under the scope of EU law regardless of the existence of, say, the FDI screening regulation? Or is the fact that the EU now 'enters' the process of FDI already enough to attract the Court's jurisdiction? The former is correct: as the AG noted, «direct investment, that is to say, shareholding in an undertaking that enables an investor to participate effectively in that undertaking's management and control, is governed by the rules on freedom of establishment. On the other hand, short-term or minority investments – that is to say, the acquisition of shares solely with the intention of making a financial investment without any intention to influence the management and control of the undertaking in question – must be examined exclusively in the light of the free movement of capital». Opinion of AG Capeta, *Xella*, cit., para. 27.

[28] *Xella*, cit., point 42.

[29] ECJ 13 April 2000, Case C-251/98, *Baars*, point 22.

[30] See also C. BARNARD, *EU Substantive Law,* cit., Chapter 11.

In *Cilevičs*, the Court recognised more discretion to the national authority to carry out the balancing between these two competing interests. This follows from settled case law: in internal market cases, the public interests that may justify a derogation from a freedom protected by the TFEU is identified by the Member State. In *Cilevičs*, the public interest was the protection and promotion of Latvian, an official language of the EU. That this is a valid interest is settled case law, at least since the classic authority in *Groener*, where the Court held that Ireland could lawfully require lecturers in vocational schools to be Irish speakers, as part of a policy for the promotion of the national language.[31] In *Cilevičs*, the Court carefully explained that the protection of an official language as overriding reason available to a Member State to derogate from the internal market (provided that it is proportionate) is grounded in the fourth subparagraph of Art. 3, para. 3, TEU[32] and Art. 22 of the Charter;[33] as well as in Art. 4, para. 2, TEU, under which 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.

Provided that the national measure protects a worthy interest, the next step is to proceed to a proportionality test. While it is ultimately for the national Court to determine this, in *Cilevičs* the Court considered that Latvian legislation could be suitable to achieve to objective of promoting the national language in education at university level «only if it genuinely reflects a concern to attain it and is implemented in a consistent and systematic manner».[34] There is here perhaps a hint that the geopolitical context might play a bigger role than the legislation would otherwise suggest: the purpose of the law is to exclude Russian, rather than (simply) to promote Latvian. This is this author's speculation, as there is nothing in the judgment to that effect – the Court simply notes instead that universities established under an international agreement in Latvia may offer classes *in other languages of the EU*.[35] As it is settled case law, the Court respects the balancing between the protection of fundamental rights (here, freedom of establishment) and national identity carried out by the Latvian authority. The Court merely notes that «the legislation of a Member State which would require, with no exceptions, that higher education courses of study be provided in the official language of that Member State would exceed

[31] ECJ 28 November 1989, Case C-379/87, *Groener*, point 19.
[32] «It shall respect its rich cultural and linguistic diversity, and shall ensure that Europe's cultural heritage is safeguarded and enhanced».
[33] «The Union shall respect cultural, religious and linguistic diversity».
[34] *Cilevičs*, cit., point 75.
[35] *Cilevičs*, cit., point 79.

what is necessary and proportionate for attaining the objective pursued by that legislation»,[36] but this is not the case for the legislation at issue in the main proceedings. It is nonetheless interesting to note that, following the preliminary ruling, the Latvian Constitutional Court decide to strike down only the measure of national law insofar as they apply to the implementation of study programs in private higher education institutions *in the official languages of the European Union*.[37] Whereas those same provisions, when they apply to study programmes in languages other than EU official language, are compatible with the Latvian Constitution. In other words, it is permissible to prohibit teaching in Russian, but not in Swedish.

What are exactly the terms of the balancing? While the Court does not go in the same level of detail, AG Emiliou in his opinion in *Cilevičs* discusses at greater lengths the competing interests that are being curtailed by the policy of (quasi) mono-linguism imposed by the Latvian legislation. As the Advocate General correctly identifies, the legislation restricts academic freedom, the freedom of students to choose education in line with their pedagogical convictions (implicit in the right to education); the legislation also creates discrimination on the basis of language, and indirect discrimination on the basis of nationality.[38] Crucially, the AG – but not the Court – discuss what in my view is the elephant in the room, namely the protection of minority languages (here, Russian). As the AG recalls, «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».[39] The Latvian legislation, in his opinion, significantly affected the language rights of that minority.

By contrast, in *Xella*, the Court was more interventionist in the identification of the public interest capable, in principle, to justify a restriction to free movement of capital. The Court reaffirmed its settled case law: the protection of economic interests by a Member State is not sufficient to justify reliance on a derogation from the internal market.[40] «Reasons of an economic nature in the pursuit of an objective in the public interest»[41] may be relevant – but derogations on the ground of public security, such as those invoked by the

[36] *Cilevičs*, cit., point 84.
[37] Latvian Constitutional Court, Judgment of 9 February 2023, no 2020-33-01.
[38] Opinion of AG Emiliou of 8 March 2022, Case C-391/20, *Cilevičs*, paras 109-110.
[39] *Ivi*, para. 112.
[40] *Xella*, cit., point 64. AG Szpunar was more dismissive in his Opinion of 6 February 2025, Case C-499/23, *Commission/Hungary*.
[41] *Xella*, cit., point 65.

Hungarian Minister, «may be relied on only if there is a genuine and sufficiently serious threat to a fundamental interest of society».[42] The protection of gravel (in particular at the local level[43]), the Court says, is not such a fundamental interest. This is not merely a question of proportionality: the Court excludes that Hungary may rely on the derogation on the ground of public security in the first place. This is a harsh finding, that essentially determines what is a fundamental interest of (the Hungarian) society. The Court justifies the reasoning on two grounds: first, we are talking about gravel at local level (not about the import of material in Hungary as a whole); second, from the file it does not appear that there is a genuine and sufficiently serious threat (this suggests that the proportionality test would not have been met anyways). It may be noted *en passant* that economic security does not play by different rules than traditional security exceptions. This is borne also by the precedent of *Commission/Greece*, where a national measure requiring a prior authorisation and ex post control for the purchase of shares in companies owning, operating or managing national infrastructure networks was found to be in violation of EU law.[44]

4. *What these cases reveal about the dynamics of the internal market*

4.1. *The settled case law is still valid*

The first lesson to be drawn is that the Court's settled case law on the four freedom is still good law and is applicable regardless of the derogation of justification invoked by the Member State (whether it be economic interests, fundamental rights, or, as in the new generation of cases under consideration, national identity). The case law can be summed up in the following formula.

a. Where a national measure relates to several of those freedoms at the same time,

the Court will in principle examine the measure in relation to only one of those freedoms if it appears, in the circumstances of the case, that the other freedoms are entirely secondary in relation to the first and may be considered together with it.[45]

[42] *Xella*, cit., point 66.
[43] *Xella*, cit., point 69.
[44] ECJ 8 November 2012, Case C-244/11, *Commission/Greece*.
[45] *Cilevičs*, cit., point 50.

b. In order to determine the predominant fundamental freedom, the purpose of the legislation concerned must be taken into consideration.[46]
c. The distinction between establishment and services is that establishment is stable and continuous, while services are not.[47] The distinction between establishment and capital is that the former applies to «those shareholdings which enable the holder to exert a definite influence on a company's decisions and to determine its activities».[48]
d. All measures which prohibit, impede or render less attractive the exercise of the freedom guaranteed by Art. 49 TFEU must be regarded as restrictions on the freedom of establishment.[49] It goes without saying that a measure authorising the prohibition of acquisition of a new company, such as that at issue in Xella, is a «particularly serious»[50] restriction. Similarly, an obligation to provide courses solely in Latvian «render[s] less attractive»[51] the establishment of foreign nationals in Latvia.
e. Finally, a restriction on a fundamental freedom guaranteed by the TFEU may be permitted only if the national measure in question meets an overriding reason relating to the public interest, that it is appropriate to ensure that the objective it pursues is achieved and that it does not go beyond what is necessary to achieve it.
f. In particular, measures which restrict a fundamental freedom may be justified only if the objective pursued cannot be attained by less restrictive measures, it is not indispensable for the restrictive measure issued by the authorities of a Member State to correspond to a conception shared by all Member States as regards the precise way in which the fundamental right or legitimate interest in question is to be protected.

These are all rules contained in settled case law, but their application is far from straightforward (see AG Capeta in *Xella*), and it is useful for the Court to spell it out, possibly also for the benefit national courts in which it may be the case that, for demographic reasons, the judges are not be intimately familiar with the law of EU internal market.

[46] *Cilevičs*, cit., point 51.
[47] *Cilevičs*, cit., point 53.
[48] *Xella*, cit., point 42.
[49] *Xella*, cit., point 59.
[50] *Xella*, cit., point 59.
[51] *Cilevičs*, cit., point 63.

4.2. *It is necessary to balance free movement with national identity*

As a general rule, 'The balance to be struck between fundamental rights and the public interest or between competing fundamental rights in a specific case is a matter for the Court, since the protection of human rights must be secured «within the framework of the structure and the objectives of the Community».[52] Arguably, this derives from *Internationale Handelsgesellschaft*.[53]

The balancing takes into account the nature of the public objective pursued by national legislation, the competing interest or fundamental right affected, and how much the competing interests are affected (the proportionality test *stricto sensu*). This is inherent in the malleable nature of proportionality.[54] It is the way in which the Court protects the discretion of Member States while ensuring the correct application and the effectiveness of EU law.

The protection of national identity was invoked as ground for justification in *Cilevičs*, in circumstances where, it shall be recalled, this internal market case originates from Latvian legislation with a strong foreign policy rationale – namely, to preserve the Latvian language against Russian influence, and perhaps to mark Latvian identity as neatly separate from Russian. As expected, we observe variance among Member States in the protection of their own national identity,[55] but there is differentiated deference by the Court as well. More concretely: the Court in *Cilevičs* appeared more deferential to the balancing struck by the Latvian legislator, and in particular to the decision by the Member States' to protect its national identity even in circumstances where this curtails a fundamental right, than it had been in other case. In *Coman*, the Court was invested with the question whether Romania was obliged to recognise a marriage between persons of the same sex that was lawfully recognised in Belgium between an EU citizen and his non-EU partner. It was argued, in defence of Romania's refusal to recognise such marriage, that the restriction to citizens' free movement (Art. 21 TFEU) was justified on the grounds of public policy and national identity: marriage as a union between a man and a woman is protected in some Member States by laws having constitutional status. In *Coman* the Court held that «the obligation for a Member State to recognise a

[52] T. HARTLEY, T. TRIDIMAS, *op. cit.*, p. 240.
[53] ECJ 17 December 1970, Case 11/70, *Internationale Handelsgesellschaft*, point 3.
[54] T. TRIDIMAS, *The General Principles of Law: Who Needs Them?*, in *Les Cahiers de Droit*, n. 52, 2015, p. 432.
[55] G. VAN DER SCHYFF, *Exploring Member States and European Union Constitutional Identity*, in *EPL*, vol. 22, 2016 p. 227.

marriage between persons of the same sex concluded in another Member State in accordance with the law of that state, for the sole purpose of granting a derived right of residence to a third-country national, does not undermine the institution of marriage in the first Member State».[56] The ECJ did not leave the matter to the national court to determine. The significance of this finding is that the Court interpreted in a very narrow way the scope of the national identity derogation, essentially substituting itself to the national legislator of Romania in drawing the balance between the right (to free movement) and the competing interest (to recognise only marriage between a man and a woman).

By contrast, in *Cilevičs* the Court conducted a much more lenient proportionality scrutiny, as if national identity could be interpreted broadly here, whereas in *Coman* it was interpreted strictly. To begin with, it found that the protection of national language is a matter of national identity – a finding that is borne by precedent (in *Runevič-Vardyn*, a case that has both «sensitive and historical geopolitical aspects»[57] as AG Jääskinen put it, the Court stated that respect for national identity «includes protection of a State's official national language»[58]). The fact that the Court chose to follow those precedents has nonetheless been criticised by some authors because Art. 4, para. 2, TEU does not explicitly mention language[59] («it can nonetheless be doubted that this case is actually about the duty to respect national identity under Article 4(2) TEU»[60]). It then recognised «broad discretion» to Member States «in their choice of the measures capable of achieving the objectives of their policy of protecting the official language, since such a policy constitutes a manifestation of national identity for the purposes of Article 4(2) TEU».[61] The Court went on to find that the exceptions to the Latvian legislation entailed that the measure was proportionate. The decision on this point has been criticised 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».[62] Indeed, the Court found that «discretion cannot justify a serious undermining of the rights which individuals

[56] ECJ 5 June 2018, Case C-673/16, *Coman*, point 45.
[57] Opinion of AG Jääskinen of 16 December 2010, Case C-391/09, *Runevič-Vardyn*, para. 5.
[58] ECJ 12 May 2011, Case C-391/09, *Runevič-Vardyn*, point 86.
[59] 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*, in *ELR*, vol. 25, 2019, p. 356.
[60] G. DI FEDERICO, G. MARTINICO, *op. cit.*, p. 359.
[61] *Cilevičs*, cit., point 83.
[62] G. DI FEDERICO, G. MARTINICO, *op. cit.*, p. 347.

derive from the provisions of the Treaties enshrining their fundamental freedoms».[63] What constitutes a «serious undermining of the rights»? The Court does not provide guidance.[64] It shall be recalled that the AG gave more detailed guidance on what are the terms of the balancing, that is, the concrete elements that the national legislator should take into account in carrying out the balancing between the competing (national) interest and the EU interests or fundamental rights (and which the Court can then monitor if it is asked to do so).[65]

4.3. *Does the geopolitical context matter?*

The balancing exercise carried out by the ECJ is notoriously complex, and a variety of factors are to be taken into account.[66] This section investigates whether the geopolitical context of national measures may be a relevant factor. This will also enable to conceptualise the link between the nature and scope of the national identity clause of Art. 4, para. 2, TEU and internal market derogations. Is the difference in deference identified in the previous section, for example, due to the external context, that is, the geopolitical interests pursued by the Member States?

Formally, the answer is no: geopolitical considerations do not enter explicitly in the reasoning of the Court on internal market cases. Doctrinally, there are two possible candidates in the Treaty suggesting that geopolitics may affect the internal market: the derogations on the grounds of public security and Art. 347 TFEU. Let us consider each in turn.

The case law of the Court on public security operates in the same way since *Campus Oil*, decided in 1984: a derogation on the ground of public security codified in the Treaties[67] (or in secondary legislation) is not a "self-executing clause", meaning that a Member State may not unilaterally declare what its security interests are and *eo ipso* escape judicial control. Derogations cannot be «construed as conferring on Member States the power to derogate from the

[63] *Cilevičs*, cit., point 83.
[64] See, for a discussion, G. DI FEDERICO, G. MARTINICO, *op. cit.*, p. 364.
[65] AG Opinion Emiliou of 8 March 2022, *Cilevičs*, cit., paras 108-112.
[66] T. TRIDIMAS, *Wreaking the Wrongs: Balancing Rights and the Public Interest, the EU Way*, in *CJEL*, vol. 29, 2023, p. 185 ss., spec. p. 194.
[67] See the list already in ECJ 15 May 1986, Case 222/84, *Johnston*, point 26. It is settled case law that «the only articles in which the Treaty expressly provides for derogations applicable in situations which may affect law and order or public security are Articles 36, 45, 52, 65, 72, 346 and 347 TFEU, which deal with exceptional and clearly defined cases», ECJ 2 April 2020, Joined Cases C-715/17, C-718/17 and C-719/17, *Commission/Poland, Hungary and Czech Republic*, point 143.

provisions of the FEU Treaty simply by invoking those interests».[68] Granted, Member States are, in principle, free to determine the requirements of public policy and public security in the light of their national needs. Perhaps, this is when geopolitical considerations come into play (i.e., each Member State is free to determine what is a threat to its national security, provided that it shows 'a genuine and sufficiently serious threat to a fundamental interest of society'), as discussed below and in the next paragraph. However, the Court will monitor the suitability and necessity of the State measure pursuing the security interest: it did so in *Xella*, finding the measure unsuitable, and in *Commission/Hungary*, finding that the restriction at issue applied to a broad category of companies, in an unsystematic manner, and was therefore not «necessary» for the protection of public security.[69]

The instances where the proportionality of the measure was determined in some way by "geopolitics" are few and far between. In *Campus Oil*, Ireland required importers of petroleum to purchase a certain proportion of their import from a company owned by the Irish state, with a view of guaranteeing security of supply in Ireland. The Court refused the Irish government's submission that «it is for the Member States to determine, for the purposes of Article 36, and in particular with regard to the concept of public security, their interests that are to be protected and the measures to be taken to that end».[70] The Court instead stated that the purpose of derogations «is not to reserve certain matters to the exclusive jurisdiction of the Member States; it merely allows national legislation to derogate from the principle of the free movement […] *to the extent to which this is and remains justified in order to achieve the objectives set out in the article*».[71] The Court went to on to find that supply of petroleum is a public security issue, because it enables the state to function.[72] Only implicitly did this depend on Ireland's geopolitical situation – namely the fact that it is a country exclusively dependent on oil import and, as it was submitted in the case «[i]n any crisis of a military nature, Ireland, being a non-aligned country and not a member of NATO, would have to fend for itself».[73] Since Ireland does not refine oil of its own, the Court concluded, [74] a measure

[68] ECJ 7 September 2023, Case C-601/21 *Commission/Poland*, point 82. Similarly, ECJ 15 December 2009, Case C-387/05, *Commission/Italy* (military material), point 47.
[69] *Commission/Hungary*, cit., point 83.
[70] *Campus Oil*, cit., point 22.
[71] *Ivi*, point 32, emphasis added.
[72] *Ivi*, point 34.
[73] *Ivi*, p. 2738.
[74] *Ivi*, point 39.

to ensure security of supply will be more necessary than for a country that does not rely exclusively on import.

Much more recently, in a case on free movement of workers, *Ministrstvo za obrambo*, the Court recognised that the organisation of armed forces by a Member State may be due to specific features deriving from geopolitical considerations.[75] In the context of public procurement, where Member States may protect their essential security interests by not applying certain procedures for public service contracts,[76] the Court recognised the discretion afforded by EU law (here, the EU Procurement Directive) to national authorities is subject to the usual proportionality test, with no mention of how the geopolitical context may affect the identification of such interests.[77] In the same case, AG Emiliou argued, similarly to what Poland did, that the identification of «essential security interests» of a Member State «depends on historical, political and geopolitical considerations which may vary from one State to the other». [78] Similarly, AG Saumgandsgaard Øe was keen on stressing the geopolitical background of a Lithuanian measure restricting free movement of services in *Baltic Media Alliance*, pointing to the proportionality of such measure, because it was «adopted in order to protect the Lithuanian information area and to provide a swift response to Russian propaganda in the context of the information war to which the Baltic States are subject in view of their geopolitical situation».[79] The Hungarian minister, in *Xella*, considered that the acquisition of the company would be contrary to Hungary's interests, but the Court did not, as it considered that blocking the acquisition of a company in the local gravel industry was unsuitable for the protection of Hungary's security.

Art. 347 TFEU distinguishes three cases in which Member States should consult to prevent an impact on the internal market of measures which a

[75] ECJ 15 July 2021, Case C-742/19, *Ministrstvo za obrambo*, point 44: «It follows that the specific features which each Member State imposes on the functioning of its armed forces must be duly taken into consideration by EU law, whether those specific features result, inter alia, from the particular international responsibilities assumed by that Member State, from the conflicts or threats with which it is confronted, or from the geopolitical context in which that State evolves».

[76] Articles 15(2) and (3) Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC ("the Public Procurement Directive").

[77] ECJ 7 September 2023, Case C-601/21, *Commission/Poland* (Public Procurement Contracts.

[78] Opinion of AG Emiliou of 2 March 2023, Case C-601/21, *Commission/Poland* (Public Procurement Contracts), para. 46.

[79] Opinion of AG Saumgandsgaard Øe of 28 February 2019, Case C-622/17, *Baltic Media Alliance*, para. 76.

Member State may be called upon to take: these are in «the event of serious internal disturbances affecting the maintenance of law and order, in the event of war, serious international tension constituting a threat of war, or in order to carry out obligations it has accepted for the purpose of maintaining peace and international security». They relate to foreign policy concerns, but, as AG Jacobs stated already in the 90s, contrary to the general public security derogations «the situations covered by Article [347 TFEU] are, as the Court recognised in paragraph 27 of the *Johnston* judgment, *wholly* exceptional. That is confirmed by the fact that Article [347] has so rarely been invoked, while recourse to Article 36 is relatively common [and while] Article 36 permits derogations from one aspect of the common market (admittedly a fundamental one); Article [347], on the other hand, permits derogations from the rules of the common market in general».[80] The exceptionality of Art. 347 TFEU is confirmed by how little it is applied in practice. Recent case law mentioning it relates to the Area of Freedom Security and Justice rather than to the four freedoms.[81]

In practice, as we saw, the deference shown to the national legislator varies, even though this is not formally due to "geopolitical" considerations but to the nature of the public objective pursued by national legislation, to the competing interest or fundamental right affected, and to how much the competing interest is affected (the proportionality test). The national identity clause operates in a similar way as to the public security derogations discussed so far: even though its *scope* is object of litigation, its *nature* appears to be that of a derogation (in addition to imposing an obligation on the legislator not to adopt legislation conflicting with national identity[82]). This nature of derogation of that provision may be problematic in decisions that run the risk of substituting the value judgment of the Court for that of the national legislator. The risk is heightened when something sensitive such as "national identity" is invoked – whereas the case law on public security is more settled. More specifically, one could doubt whether the Court, in *Coman* respected its rule that «it is not indispensable for the restrictive measure issued by the authorities of a Member State to correspond to a conception shared by all Member States as regards the precise way in which the fundamental right or legitimate interest in question is to be protected». In *D and Sweden/Council*,[83] decided in 2001, the ECJ refused to

[80] Opinion of AG Jacobs of 6 April 1995, Case C-120/94, *Commission/Greece*, para. 46. The case was never decided on the merits by the Court.
[81] E.g. *Commission/Poland, Hungary and Czech Republic*, cit., on the relocation decisions adopted during the so-called migration crisis.
[82] Opinion of AG Emiliou in *Cilevičs*, cit., para. 83.
[83] ECJ 31 May 2001, Case C-122/99 P, *D and Sweden/Council.*

recognize that a registered same sex partnership should be treated in the same way as marriage for the purposes of granting a household allowance. It stated that the situation existing in the Member States at that time reflected «a great diversity of laws and the absence of any general assimilation of marriage and other forms of statutory union» and, as a result, the two statuses could not be equated. *Cilevičs* is closer to the approach of D and Sweden than that of Coman. We know from *ERT*[84] that a derogation from an internal market freedom must itself comply with fundamental rights. Why does the Court not consider in greater detail the fundamental rights of linguistic minorities in Latvia?

There is at present no single case in which a Member State sought to rely on the protection of its public security *as* an aspect of national identity. Given the blurred boundaries of Art. 4, para. 2, TEU, it is not inconceivable that geopolitical interests of a State may be a matter of national identity – as the facts of *Cilevičs* (and the decision of the Latvian Constitutional Court after the preliminary ruling) show, we are not far from taking that step. Recent case law in fact suggests a gradual evolution from a model in which derogations predominantly protected domestic socio-economic interests to one in which national identity, itself shaped by geopolitical dynamics, structure the hierarchy of public interests capable of justifying restrictions on free movement. The national identity clause contained in Art. 4, para. 2, TEU might then operate as the hinge through which geopolitical concerns are channelled into the legal vocabulary of internal market derogations: measures adopted in response to external pressures may reframed, and articulated, as expressions of constitutional identity and therefore tested with a (laxer) proportionality scrutiny (compared to that attracted by other derogations from the free movement provisions).

5. *Conclusion*

Recent case law reveals an internal market jurisprudence that continues to rest on orthodox foundations established decades ago, while operating in a new geopolitical context. The Court has not abandoned its doctrinal anchors: a familiar taxonomy of freedoms, a structured proportionality review, and the insistence that Member States may invoke public interests only within limits set by EU law, under the jurisdiction of the Court. But under this stability, the

[84] ECJ 18 June 1991, Case C-260/89, *ERT*.

litigation is shifting, pitching the four freedoms against invocation of security interests or national identity inextricably linked to those interests.

Cilevičs and *Xella* exemplify this evolution. Both disputes were decided as quintessentially internal market cases, but both originated in contexts marked by language "securitisation" or preservation of economic security in the face of geopolitical competition. Hardly ever does the Court explicitly refer to a changed international environment in its case law on the internal market. Still, its reasoning operates against the backdrop of such pressures, as it transpires from the Opinion of its Advocates General. In a classic work on the internal market, Poiares Maduro's *We, the Court*, the author wrote that «the free movement rules will also promote the development of and criteria for solidarity among the Member States, while building upon the concept of European citizenship».[85] But, contrary to a supranational *citizenship*,[86] there is no supranational *identity* nor *security*. The internal market – and litigation – is therefore still the *locus* of contestation of (centrifugal?) state measures, such as those protecting national identity and economic security.

This raises a constitutional question that reaches beyond the doctrinal confines of either judgment: how far can the internal market serve as the forum through which the boundaries of national identity and economic security are negotiated? The Court's case law shows two parallel movements. On the one hand, the Court retains authority over the ultimate balance between free movement and national interests, reaffirming that neither invocation of national identity nor of security exclude judicial control. On the other hand, its approach in recent case law displays differentiated deference: when public interests are framed in identity terms, national discretion expands.

[85] M. POIARES MADURO, *We, The Court*, Oxford, 1998, p. 168.
[86] See Art. 20 TEU and ECJ 29 April 2025, Case C-181/23, *Commission/Malta* (Citizenship by investment), point 96 as defended here: L.D. SPIEKER, *It's solidarity, stupid!: In defence of Commission v Malta,* in *VBlog,* 7 May 2025; and already J.H.H. WEILER, *Does Europe Need a Constitution? Demos, Telos and the German Maastricht Decision,* in *ELJ*, n. 1, 1995, p. 219.

ABSTRACT (ita)

L'articolo analizza come il mercato interno stia diventando sempre più permeato dalle priorità geopolitiche degli Stati membri. Misure adottate in nome della sicurezza economica, della resilienza delle *supply chain*, dell'identità nazionale vengono contestate davanti alla Corte di giustizia e rilette attraverso la grammatica ben nota delle libertà fondamentali. Esaminando un insieme di controversie recenti, soprattutto in materia di libertà di stabilimento, l'articolo mostra come il diritto del mercato interno risponde al perseguimento, da parte degli Stati membri, di obiettivi di politica estera. Casi come *Xella* (sicurezza economica) e *Cilevičs* (politica linguistica) sono discussi come esempi, tra molti, di questo incontro fra "geopolitico" e libertà fondamentali.

ABSTRACT (eng)

The article examines how EU internal market has become a key site for the articulation and contestation of geopolitical priorities of Member States. National measures adopted in the name of economic security, supply-chain resilience, or national identity are challenged before the Court of Justice and are framed through the well-known grammar of free movement. On the basis of a set of recent disputes, especially on freedom of establishment, the article analyses how internal market law responds to the pursuit of foreign policy goals by Member States. Judgments such as *Xella* (economic security) and *Cilevičs* (language policy) are discussed as illustrations, among many others, of this encounter between geopolitics and the fundamental freedoms.