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**PUBLIC POLICY, SECURITY AND INTEREST AS JUSTIFIABLE RESTRICTIONS  
ON THE FREE MOVEMENT OF SERVICES**

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*Anton Surenkin*

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Faculty of Law

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Supervised by Professor Juha Raitio

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<p>A market that operates without borders can be difficult to accept, because there are certain social expectations that are intertwined with national history and culture. This thesis examines how the concepts public policy, security and interest function as justifiable restrictions on the free movement of services in the European Union.</p> <p>This thesis is divided into five main chapters. In the first part, provisions governing the free movement of services are examined as the legal framework provides a foundation for understanding the judgments of the Court. After this, different justifications recognized by EU law are identified: Article 52 TFEU (public policy and public security) and the judge-made 'overriding reasons in the public interest' doctrine. Finally, the relationship between the express derogations and judge-made exceptions is examined in order to understand, if there are some inherent differences as to how the justifications operate.</p> <p>The emphasis is on the case law of the Court of Justice of the European Union, because the Treaty provisions are rather vague and open to interpretation. There is also no meaningful way to comprehensively explain what the concept of public policy, public security or public interest is <i>per se</i>, because every society has a different take. As a result, examining the case law is the only way to find out how these abstract institutions function, and how they can be invoked when Member States want to protect important national interests.</p> <p>The thesis ultimately suggests that there is some ambiguity in the case law; concerning the relationship between Article 52 TFEU and the doctrine of 'overriding reasons in the public interest'.</p>			
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#### IV LIST OF ACRONYMS

AG	Advocate General
CJEU	The Court of Justice of the European Union (also as “the Court”)
EU	European Union
Ibid.	”In the same place”
ORPI	Overriding Reasons in the Public Interest
Para.	Paragraph
TEU	Treaty on the European Union
TFEU	Treaty on the Functioning of the European Union (also as “the Treaty”)

# 1. INTRODUCTION

## 1.1 Purpose of Research

The freedom to provide cross-border services plays a significant role within the European internal market. The service sector represents about 70% of our GDP on average and will likely provide most job opportunities over the next decade.<sup>1</sup> Especially now, as Europe faces hard questions during the ongoing economic crisis, a vibrant service sector could provide answers to growth and help us avoid perpetual decline. This potential can only be exploited to its fullest extent if Europe can overcome fragmentation that blocks the flow of content and restricts consumer access.<sup>2</sup> However, a market that operates without borders can be difficult to accept as there are social expectations that are intertwined with national history and culture. Governments feel that in certain instances vital public interests must be prioritized, because laws are not effective unless they reflect the collective morality of society and provide a deterrent to domestic and foreign threats.

Restricting the free movement of services on the basis of these legitimate interests is what this thesis concentrates on. The main focus of this paper will be on three specific exceptions to the free movement of services; public policy, public security and public interest. To fully understand the scope of these three justifications, they will be examined from two different angles. Firstly, I will present the express powers given to the Member States by Union law to restrict or prevent the fundamental freedom to provide and receive services. Secondly, I will examine the ‘overriding reasons in the public interest’; a doctrine developed by the Court of Justice of the European Union.

The main focus of this paper will be on the activist approach of the Court as it has tried to define what the margin of discretion is when Member States enact barriers in order protect important national interests. It is unsurprising that this balancing act has caused friction. There is

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<sup>1</sup> ETLA (Research Institute of the Finnish Economy): New value from services 2012, p.10.

<sup>2</sup> Hatzopoulos 2012, p. VIII

often a perception that the Court tends to indulge in excessive activism<sup>3</sup> and goes beyond its judicial capacity while safeguarding the services market from restrictions. The task of trying to find a balanced approach is especially daunting in the case of public policy, public security or public interest. While the European Court of Justice is supposed to draw inspiration from our common constitutional tradition, the reality is that value systems tend to vary when borders are crossed and public policy/security/interest related questions are often entrenched in national history. The inviolability of human dignity might be a legitimate reason to restrict violence in entertainment in one country, but it can also be an unjustified barrier to fundamental economic freedoms in another.

As a result, the Court has tried to adopt a somewhat cautious approach while maintaining the goal of liberalization. For example, in the famous *Grogan* case the Court put aside moral arguments when it concluded that abortion procedures were medical services, even though outlawed in Ireland, while also ruling that the Irish prohibition fell outside the scope of Community law.<sup>4</sup> The judgment was criticized by both sides and raised questions whether the CJEU was dancing around the rules in order to avoid political backlash. My aim is to explore if the CJEU has, in fact, muddied the waters with its rulings.

The concept of public policy, or *ordre public*, is well known in international law so a lot of literature has been published on the issue from various perspectives. However, there is no meaningful way to comprehensively explain what the concept of public policy, public security or public interest is *per se*, because every society has a different take.<sup>5</sup> Therefore, my primary objective in this thesis is to find out if there is some specific formula that tells us how Member States have to act in order to satisfy the Court. What are the objective requirements when na-

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<sup>3</sup> The sentiment behind judicial activism is that decision-making is being transferred from legislature to the courts as judges make crucial policy decisions.

<sup>4</sup> Case C-159/90 *Grogan* [1991] ECR I-4685, para 21 and 24.

<sup>5</sup> For example, the Supreme Administrative Court in Finland (case 2007:47) referenced to government proposal 28/2003vp when examining the concept of public policy and security. It was stated that the concept of public policy and security are applied differently in every country. When applied broadly, they can include all things related to providing a secure and an enjoyable environment to citizens.

tional measures are adopted in order to restrict the free movement of services? Is there a clear test of justification or are Member States at the mercy of the whims of the Court?

## **1.2 Structure**

I will start this thesis, and the second chapter, by going through the provisions governing the free movement of services as they are laid out in the Treaty on the Functioning of the European Union (TFEU). Going through the legal framework is necessary as it provides a foundation for understanding the judgments of the Court. In the third and fourth chapter, I will identify and examine different justifications recognized by EU law: Article 52 TFEU (public policy and security) and the judge-made ‘overriding reasons in the public interest’ doctrine. The emphasis will be on the case law of the CJEU, because the Treaty provisions are rather vague and open to interpretation. The Court is often seen as a political animal, as a chameleon that adapts to its environment, and my aim is to analyze its judgments with a healthy dose of criticism. Even though the CJEU can be somewhat ambiguous at times, I will do my best at identifying the significance of those judgments so that we can better understand how the free movement of services can be restricted on the grounds of public policy, security or interest.

Towards the end of this paper, in the fifth chapter, I will investigate the relationship between the express derogations, such as public policy and security, and the judge-made exceptions (ORPI). The existence of a legitimate interest does not mean that the Court will customarily give its blessing to the national measure in question. My intention is to find out if there are some inherent differences concerning how the different justifications function - when Member States invoke them as they adopt restrictive measures.

This paper will conclude with a discussion in chapter six.

## 2. THE FREE MOVEMENT OF SERVICES

### 2.1 Single Market Persistently on the Horizon

Market integration is one of the main aims of the European project. Article 26 (2) of the TFEU states that the internal market shall comprise an area without internal frontiers, in which the free movement of services is ensured, in accordance with the provisions of the Treaties. While the Treaty of Rome originally set out the concept of a common market back in 1958, the post-war focus was undoubtedly on the recovery of the manufacturing sector. The services sector played a minor part even in the 1980s when the likes of Jacques Delors, president of the European Commission, and British Commissioner Lord Cockfield devised a route towards increased co-operation and removal of physical, technical and fiscal barriers to trade.<sup>6</sup>

Three decades later, the process of integration is still very much ongoing as Europe tries to find ways to abolish barriers and enhance competitiveness within the services market. The latest effort to promote smart and sustainable economic growth in Europe is called the Europe 2020 strategy which was launched in 2010.<sup>7</sup> Improving competitiveness is seen as a key component in responding to the current economic troubles that still haunt the continent after the onset of the 2008 financial crisis. While the Economic Recovery Plan and the Stabilization Mechanisms served to mitigate the immediate risk of contagion across the European Union, the 2020 strategy operates as a medium term plan for the Member States. Five years after its launch, the quality of structural reforms varies from one country to another, but there is an overwhelming support for a comprehensive strategy in favor of growth.<sup>8</sup>

As the trade in services has eventually grown, there have been an increasing amount of cases that the European Court of Justice has had to settle as well. The development of case law has expanded over the years, outlining how the general Treaty provisions should be applied in

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<sup>6</sup> Barnard 2013, p.10 and COM (85) 310 “*Completing the internal market*”.

<sup>7</sup> COM (2010) 2020. A strategy for smart, sustainable and inclusive growth.

<sup>8</sup> COM (2015) 100. Results of the public consultation on the Europe 2020 strategy for smart, sustainable and inclusive growth.



specific cross-border situations. Legislative action has also taken place during the past decade. The European Union and the Member States have worked with the implementation of the Services Directive.<sup>9</sup> The need for further integration is clearly recognized and, according to Commission estimates, a more thorough implementation of the Services Directive could provide additional economic gain to the tune of 2.6% GDP. Many Member States such as Spain, Portugal, Italy and the Czech Republic are carrying out reforms as they aim for economic growth.<sup>10</sup> Others are more reluctant to accept cross-border liberalization, often citing consumer protection and the environment as reasons for their careful approach.

This thesis will examine next how the EU law in the field of services is structured and what the free movement of services entails. The application of articles 56-62 TFEU (formerly 49-55 EC) has often been controversial. The Member States and the European Court have repeatedly been on a collision course while this freedom has developed, and later on I will demonstrate how governments have tried to justify their restrictions. This second chapter will conclude with the presentation of the Services Directive and other sectoral legislation. The Services Directive is an important instrument that covers a wide range of economic activity.

## **2.2 General Scope of the Free Movement of Services**

The freedom to provide services entails the pursuit of an economic activity for a temporary period in any Member State in which either the provider, the recipient or the service is not established.<sup>11</sup> Article 56 TFEU provides:

*“Within the framework of the provisions set out below, restrictions on freedom to provide services within the Union shall be prohibited in respect of nationals of Member States who are established in a Member State other than that of the person for whom the services are intended”*

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<sup>9</sup> COM (2012) 261 on the implementation of the Services Directive “*A partnership for new growth in services 2012-2015*”.

<sup>10</sup> Commission contribution to the European Council of 20-21.3.2014. ” *Services: Tapping the potential for growth and jobs*”, p.3.

<sup>11</sup> Paul 2011, p.788.

This rather complicated passage can be split into smaller pieces so that we can better understand what it encompasses. Firstly, we can see that this right applies only to nationals who are established in a Member State. In case of companies, legal persons, the General Programme on Services states that this requirement is satisfied when the company has a real and continuous link with the economy of the Member State.<sup>12</sup> This is relevant in situations where the company has a registered office inside the European Union while the management resides somewhere else.<sup>13</sup>

Secondly, we can see that Article 56 paints a picture where the service provider is established in one Member State while providing services on a temporary basis in another Member State. One example might be a Finnish company that provides household shifting services for wealthy individuals who decide to relocate to Cannes. Article 56 can be used to challenge rules enacted by both the home (in our example Finland) or the host state (France) if they restrict the freedom to provide or receive services.<sup>14</sup> The right to move freely is also not restricted to just service providers. The Court has stated that the freedom to receive services is the necessary corollary and it is only logical that the recipient should also be able to travel to the state of the provider in order to receive services. Not only that, the Court has also concluded that Article 56 applies in situations where neither the provider nor the recipient travel but only the service itself moves. The Court has concluded that situations where the provider is offering services via technical devices are covered by the Treaty.<sup>15</sup> Applying Union law to services themselves is important as it facilitates the implementation of modern technology in cross-border transactions. For example, the internet has expanded the market horizon to subscription based business models such as Facebook and Netflix.

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<sup>12</sup> General Programme for the abolition of restrictions on freedom to provide services. OJ 002, 15/01/1962 English special edition: Series II Volume IX.

<sup>13</sup> Wyatt 2011, p.554.

<sup>14</sup> In *Gourmet*, the European Court of Justice ruled that national measures obstructing cross-border advertisement can be challenged and are in violation of Article 56 TFEU but may be justified by public interest requirements (public health). Case C-405/98 *Gourmet* [2001] ECR I-1795, para 39 and 40.

<sup>15</sup> Barnard 2013, p.368; Case C-384/93 *Alpine Investments* [1995] ECR I-1141.

Finally, the Court has given some consideration to situations that could be considered mainly internal. In *Carpenter*, a national of the Philippines, challenged British immigration rules as her deportation would have been detrimental to her husband's ability to provide services.<sup>16</sup> As a result, the principle that Union law only covers cross-border situations in the field of services can be somewhat inconclusive at times.

### 2.2.1 The Temporary Nature of Services and Need for Remuneration

We have established that Article 56 TFEU is usually confined to three basic cross-border situations where the provider, recipient or service itself moves. Now it is time to find out what constitutes a service in EU law. Article 57 states the following:

*“Services shall be considered to be services...where they are normally provided for remuneration, in so far as they are not governed by provisions relating to freedom of movement for goods, capital and persons.”*

The text suggests that this provision is subordinate to other fundamental freedoms as services are services only when the other Treaty provisions related to goods, capital and persons do not apply.<sup>17</sup> While some examples are provided by the Treaty,<sup>18</sup> compiling a comprehensive and detailed list of all services is not feasible as the sector is rapidly changing and developing. However, we can see from the text that there is a need for an economic link. The Court has used this principle to exclude voluntary activities from the scope of the Treaty. This was the case in the highly contentious *Grogan* ruling, where the Court evaluated whether providing information about the availability of abortion services in another Member State was protected by Article 56 TFEU. Student unions in Ireland were responsible for distributing information about the availability of legal abortions in the UK and the argument was that restricting the activity would constitute an obstacle to the freedom to provide services. The Court ruled

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<sup>16</sup> Case C-60/00 *Carpenter* [2002] ECR I-6279.

<sup>17</sup> Case C-180/89 *Commission v Italy* [1991] ECR I-709, para 6; Davies 2003, p.75.

<sup>18</sup> Activities of industrial and commercial character are mentioned in Article 57 TFEU. Similarly, the activities of craftsmen and the professions are covered by the Treaty. However, in secondary legislation the approach can be somewhat opposite. For instance, the Services Directive states specifically what activities are excluded.

eventually that Union law did not apply, because the information was not given directly on behalf of the economic operator (abortion clinics) and thus no direct economic link existed.<sup>19</sup> The approach was careful but also much criticized. A full collision between fundamental economic rights and the Irish constitution<sup>20</sup> was avoided but it raised questions. Would the outcome have been different if the abortion clinics had given any compensation to the students' unions?

The absence of remuneration has caused some headache also in the case of public services, as the recipient might not pay anything directly for state funded programs. In *Humbel*, the Court concluded that state education was not covered by the Treaty provisions as the purpose of the state was not to gain profit but instead fulfill its cultural and social duties to its population.<sup>21</sup> However, the Court disagreed later when Member States relied on *Humbel* and argued that publicly funded healthcare did not constitute an economic activity. In *Watts* the Court concluded that Article 56 applies to healthcare systems even when patients are covered directly and the system is paid via general taxation.<sup>22</sup> It remains to be seen how the Court will apply its case law as some Member States lean towards a freer market approach when providing essential services to the public. At what point does state funded education cross the threshold where *Humbel* ends and *Watts* begins? Despite these slight inconsistencies, the need for remuneration operates as the baseline.

We now understand some aspects of EU law in the field of services, but it is important to distinguish services from the concept of establishment, which is governed by Articles 49-55. Here we arrive to the temporary nature of services: The provisions related to the freedom of establishment apply when a Polish plumber relocates to France and offers valve assemblies on a permanent basis. But should he travel to Sweden, for temporary repair work, he is most likely providing a service.<sup>23</sup> The line can be somewhat blurry at times but the Court stated in

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<sup>19</sup> Case C-159/90 *Grogan* [1991] ECR I-4685, para 24.

<sup>20</sup> Abortion is still illegal in Ireland. However, the new Protection of Life During Pregnancy Act 2013 provides that termination is allowed to protect the life of the mother.

<sup>21</sup> Case C-263/86 *Humbel* [1988] ECR 5365.

<sup>22</sup> Case C-374/04 *Watts v. Bedford Primary Care Trust* [2006] ECR I-4325; Barnard 2013, p.377.

<sup>23</sup> Wyatt 2011, p.556-557.

*Gebhard* that the question of time should not be simply based on the duration of the activity but also on its regularity, periodicity or continuity.<sup>24</sup> In *Schnitzer*, a Portuguese firm agreed to carry out large-scale plastering work in Germany between the years 1994 and 1997. The Court said that the Treaty does not provide any formula for determining the duration beyond which the activity should only be governed by provisions related to freedom of establishment.<sup>25</sup> Regarding the Portuguese firm, the Court felt that three years was not too long and the service provisions would apply.

In *Trojani*, the Court affirmed that activities carried out on a permanent basis, or at least without a foreseeable time limit, would not fall within the Community provisions concerning services.<sup>26</sup> That being said, the Court has held that despite the temporary nature of the activity, the person providing the service may equip himself with some form of infrastructure in the host Member State when necessary – such as offices or consulting rooms.<sup>27</sup> A place of business in another state, even when it exists for many years, does not necessarily mean that the activity is not protected by EU services law (long lasting construction work for example).

The freedom of services and establishment share many similarities and one should be careful before making quick distinctions. In the first instance, national courts are responsible for interpreting the difference, which is handled on a case-by-case basis. However, one difference between the two relates to the possible requirements that the host state may necessitate. Individuals or companies that are established in another Member State can be expected to observe national rules. On the other hand, it is not as easy to accept that service providers should be required to comply with every regulation that exists in the host state while they operate in a cross-border environment on a temporary basis. If that were the case, single market in the field of services would be practically unattainable. This is the approach Advocate General Jacobs took in *Säger*<sup>28</sup> and the Court has shared this sentiment in its subsequent case law.<sup>29</sup> The result

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<sup>24</sup> Case C-55/94 *Gebhard* [1995] ECR I-4165, para 27.

<sup>25</sup> Case C-215/01 *Schnitzer* [2003] ECR I-14847.

<sup>26</sup> Case C-456/02 *Trojani* [2004] ECR I-7573, para 28.

<sup>27</sup> *Ibid.*

<sup>28</sup> Case C-76/90 *Säger* [1991] ECR I-4221. Opinion of AG Jacobs, 21 February 1991, para 23.

<sup>29</sup> Case C-198/89 *Commission v. Greece* [1991] ECR I-727, para 16.

is somewhat similar to the principle of Mutual Recognition; a fundamental part of the free movement of goods. Mutual Recognition operates under the presumption that legally produced goods can be sold equally in all other member States without having to constantly comply with different regulations when crossing borders.<sup>30</sup>

### 2.2.2 Direct Effect

One of the fundamental characteristics of the European Union is that its law is usually enforced in a decentralized manner through domestic courts. Through the principle of direct effect, or immediate applicability, Union law is capable of producing independent effects within national judicial systems.<sup>31</sup> This means that individuals may invoke European provisions even if no national law exists as long as the provisions are clear and unconditional.<sup>32</sup> The direct effect of European law was established in 1963 when the Court of Justice gave its historic judgment in *Van Gend & Loos*.<sup>33</sup>

In the field of services, the Court affirmed in *Van Binsbergen* that Articles 56 and 57 TFEU entailed similar effects. A Dutch national Kortmann, who lived in Belgium, challenged a rule that required legal representatives to be established in the Netherlands before they could represent clients in local courts. The Court ruled that, in principle, the national rule breached Article 56 and individuals should be able to rely on the Treaty provisions before national courts, at least so far as they seek to abolish any discrimination based on the nationality or locality of the service provider.<sup>34</sup>

While it is unequivocally clear that Member States are not allowed to breach the Treaty provisions, the question of direct effect is more complicated when we analyze restrictive measures adopted by private parties. Articles 60 and 61 TFEU impose obligations solely on the Member States and the language in 56 TFEU does not provide clarity as to how horizontal relationships

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<sup>30</sup> Raitio 2013, p.36.

<sup>31</sup> Wyatt 2011, p.235 and Jacobs 2007, p.39–40.

<sup>32</sup> Hartley 2010, p.210.

<sup>33</sup> Case 26/62 *van Gend & Loos* [1963] ECR 1.

<sup>34</sup> Case 33/74 *van Binsbergen* [1974] ECR 1299, para 27; Broberg 2003, p.780.

are covered.<sup>35</sup> However, the Court has outlined certain situations in its case law where private parties may be caught by the free movement provisions. For example, this is the case if the private conduct hinders the free movement of services and the state fails to adopt adequate measures to fulfill its Community obligations and deal with the situation properly.<sup>36</sup> Private parties may also be subject to Treaty provisions when there is a national measure that is designed to regulate gainful employment and the provision of services in a collective manner.<sup>37</sup>

The Court has repeatedly stated that the notion of a Single Market would be compromised if obstacles resulting from private activity could neutralize the abolition of state barriers.<sup>38</sup> The argument is sound if we consider a situation, where a local service provider is acting aggressively towards his/her out of state counterpart, and the state is reluctant to intervene on behalf of the foreign service providers. One should not only consider the superficial appearance of national rules. Obstacles can take many forms when they prevent service providers from moving freely in the market place.

### **2.3 Prohibited Discriminatory Measures**

We have previously examined some of the central principles that govern cross-border activities in the field of services. Service providers enjoy protection under the Treaty provisions as they complete transactions in the host country. They can expect to receive similar treatment as their in-state equivalents. This non-discrimination on the grounds of nationality is the fundamental basis for all economic freedoms within the European Union's internal market.<sup>39</sup> It can be seen in Article 57(2) TFEU and Article 18 TFEU also states that any discrimination on the grounds of nationality shall be prohibited.

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<sup>35</sup> Horizontal direct effect is consequential in relations between private actors whereas vertical direct effect operates between private actors and the state. See Raitio 2013, p.262.

<sup>36</sup> Case C-112/00 *Schmidberger* [2003] ECR I-5659, para 22.

<sup>37</sup> Case C-191/97 *Deliège* [2000] ECR I-2549, para 47 “*The abolition as between Member States of obstacles to freedom to provide services would be compromised if the abolition of States barriers could be neutralized by obstacles resulting from the exercise, by associations or organizations not governed by public law, of their legal autonomy*”.

<sup>38</sup> Case C-309/99 *Wouters* [2002] ECR I-1577, para 120.

<sup>39</sup> Barnard 2013, p.17; Raitio 2013, p.591; Broberg 2003, p.778–779.

However, non-discrimination does not entail that Member States lose their regulatory autonomy. National measures can be used to regulate the service market on condition that rules apply equally to all economic operators. In essence, discriminatory elements should be abolished under Union law while genuinely non-discriminatory rules are mainly lawful.<sup>40</sup> For example, a Finnish rule that sets language requirements for all services originating in Sweden, while allowing domestic operators to continue uninhibited, would be discriminatory. In this instance Finland should decide whether it wants to impose language requirements on everyone or none at all. The Treaty does not establish any specific level at which standards should be set.<sup>41</sup>

Before examining restrictive measures in more detail, it is worth noting that in recent years the Court has developed a more comprehensive approach and has applied Article 56 TFEU when national measures, even though non-discriminatory, have been prone to impede the free movement of services.<sup>42</sup> In our example, excessive language requirements could therefore be in breach of the Treaty even when applied equally. There is no clear formula for understanding what the proportional approach is, because every national law that regulates the domestic market can serve as a hindrance in some manner. Ultimately, the responsibility lies with the CJEU and even then the judgments can be somewhat inconclusive.

### 2.3.1 Distinctly Applicable Measures

The principle of direct discrimination, or distinctly applicable measures, was laid out in *Gouda*. The Court declared that Article 56 TFEU prohibits restrictive regulations on the grounds of nationality and place of establishment.<sup>43</sup> Likewise, in *Commission v. Greece*, the Court held that requiring foreign tourist guides to possess specific qualifications issued out by the host state (Greece) would be incompatible with Article 56 unless such measures could be objectively justified.<sup>44</sup> Another example was the *FDC* case: Spanish law granted licenses to dub

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<sup>40</sup> Barnard 2013, p.17

<sup>41</sup> Ibid, p.18.

<sup>42</sup> Paul 2011, p.808.

<sup>43</sup> Case C-288/89 *Gouda* [1991] ECR I-4007 “Article [56 TFEU] entails, in the first place, the abolition of any discrimination against a person providing services on the ground of his nationality or the fact that he is established in a Member State other than the one in which the service is provided”.

<sup>44</sup> Case C-198/89 *Commission v. Greece* [1991] ECR I-727 para 18.



foreign films on condition that distributors would also put Spanish films into circulation simultaneously. The Court held that the national rule gave preferential treatment to local film producers and was therefore in breach of the Treaty.<sup>45</sup>

The CJEU has repeatedly stated that direct discrimination on grounds of nationality or place of establishment can only be allowed if the Member State successfully references to one of the express derogations such as public policy and public security in Article 52 TFEU.<sup>46</sup> The case law suggests that there is some ambiguity around this issue, but in *Commission v. Poland* the Court reaffirmed its position as far as direct discrimination is considered.<sup>47</sup> It is possible that the Court is not necessarily changing the narrative as time passes but instead carefully examines justifications on a case-by-case basis then applies the law appropriately.

### 2.3.2 Indistinctly Applicable Measures

The Court has established that indirect discrimination, or indistinctly applicable measures, are also prohibited under the Treaty provisions. This involves situations where national measures appear to be neutral on their face but in practice have the same result as outright preferential treatment. ‘Same burden in law while different burden in fact’ is often the expression used to describe such situations.<sup>48</sup> One such example was the insurance case *Commission v. Germany* in which the court stated that German rules were in breach of the Treaty, because requiring insurance companies to be established and authorized in Germany severely increased costs - especially in situations where the insurer only performed transactions occasionally.<sup>49</sup>

Indirect discrimination is often hard to spot, but distinctions made on the basis of language or licenses have been considered as indistinctly applicable by the Court.<sup>50</sup> In *Gullung* and *Vlas-*

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<sup>45</sup> Case C-17/92 *FDC* [1993] ECR I-2239, para 15.

<sup>46</sup> Case C-341/05 *Laval* [2007] ECR I-987, para 116-117; Case C-490/04 *Commission v. Germany* [2007] ECR I-6095, para 86; See also Barnard 2013, p.383.

<sup>47</sup> Case C-546/07 [2010] ECR I-439, para 47.

<sup>48</sup> Barnard 2013, p.247.

<sup>49</sup> Case 205/84 *Commission v. Germany* [1986] ECR 3755

<sup>50</sup> Wiberg 2014, p.111.

*sopolou* the Court stated that licensing requirements can be indirectly discriminatory when a dual burden is imposed on foreign individuals without objective justifications.<sup>51</sup>

Simply put, migrants suffer as they have to satisfy their home-state rules and later also the rules of the host-state.<sup>52</sup>

In *Commission v. UK*, the national rules required that non-residents could only constitute 25% of the crew on fishing vessels in British waters. The Court saw this as indirectly discriminatory and therefore Article 56 TFEU was violated.<sup>53</sup> These examples seem to suggest that, while discriminatory measures based on nationality or establishment are direct, different treatment on the basis of residence can sometimes be considered as indirectly discriminatory. However, regardless of the form that discrimination takes, the Court has established in its case law that Article 56 TFEU “*prohibits not overt discrimination by reason of nationality but also all covert forms of discrimination which, by the application of other criteria of differentiation, lead in fact to the same result*” (see fig.1).<sup>54</sup> We can therefore reiterate that the Court tends to emphasize consequences of the measure while formal questions are usually of secondary importance.

### 2.3.3 Non-discriminatory Measures and Market Access

The European Court of Justice used to view genuinely non-discriminatory measures as acceptable.<sup>55</sup> This approach has changed since and now national rules that impede or prevent the free movement of services can be in breach of the Treaty even when applied without distinction. It was in *Säger*, where the Court stated that Article 56 TFEU requires “*not only the elimination of all discrimination against a person providing services on the grounds of his nationality, but also the abolition of any restriction even if it applies without distinction to national*

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<sup>51</sup> Case 292/86 *Gullung* [1988] ECR 111; Case 340/89 *Vlassopoulou* [1991] ECR I-2357.

<sup>52</sup> Case C-288/89 *Gouda* [1991] ECR I-4007 para 12: “*restrictions...may arise...as a result of the application of national rules which affect any person established in the national territory to persons providing services established in the territory of another Member State who already have to satisfy the requirements of that State’s legislation*”.

<sup>53</sup> Wiberg 2014, p.111; Case 279/89 *Commission v UK* [1992] ECR I-5785.

<sup>54</sup> Case C-388/01 *Commission v Italy* [2001] ECR I-721.

providers of services”.<sup>56</sup> Also, in *Alpine Investments* the Court declared that measures hindering intra-union trade in services and impeding access to the markets would constitute a violation of the Treaty.<sup>57</sup> A wide variety of national rules have been under consideration. For example, in *Placanica*, the Court ruled that an Italian rule prohibiting activities in the gambling market without a license was within the scope of the Treaty.<sup>58</sup> Likewise, advertising restrictions have been considered to have a particular effect as was the case in *Gourmet*.<sup>59</sup>

The market access test provides a useful tool for removing excessive barriers, but there is also a danger that it can create confusion if applied broadly. After all, most regulations tend to be bothersome and incur costs. Striking down genuinely non-discriminatory rules adopted by democratically elected governments can have serious political ramifications.<sup>60</sup> While Member States can always use the Treaty exceptions and public interest requirements to justify their measures, the Court would do well to apply a cautious approach in this regard.

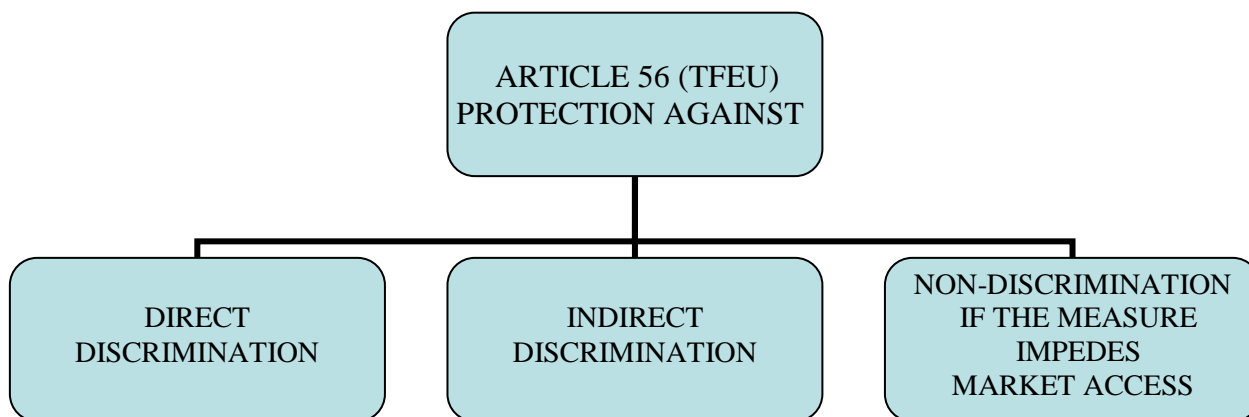


Fig.1

<sup>55</sup> Case 52/79 *Debaue* [1981] ECR 833:” If rules are applied without distinction as regards the origin, whether national or foreign, of those advertisements, the nationality of the person providing the services, or the place where he is established”; See also Barnard 2013, p.385.

<sup>56</sup> Case C-76/90 *Säger* [1991] ECR I-4221, para 12; See also Barnard 2013, p.386; Wyatt 2011, p.565.

<sup>57</sup> Case C-384/93 *Alpine Investments* [1995] ECR I-1141: Prohibition of cold-calling under Dutch law was therefore within the scope of Article 56 TFEU but the Court also accepted that the ban was justified on the basis of safeguarding the integrity of the market environment.

<sup>58</sup> Joined Cases C-338/04, C-359/04 and C-360/04 *Placanica* [2007] ECR I-1891, para 42 and 44.

<sup>59</sup> Case C-405/98 *Gourmet* [2001] ECR I-1795, para 39.

<sup>60</sup> Barnard 2013, p.17-20.

## 2.4 Secondary Legislation

### 2.4.1 The Services Directive

In order to promote economic growth in the field of services, the Lisbon Council invited the European Commission to propose a new plan for the purpose of removing national barriers from the internal market. This was accomplished in 2000 and eventually led to the enactment of Directive 2006/123/EC of the European Parliament and of the Council on services in the internal market.<sup>61</sup> It is the most significant piece of secondary legislation to date, in the field of services, and one of its main aims was to build on the solid foundation of previous case law. The Directive covers economic activities to the tune of 46% EU GDP and, according to Commission estimates, gains up to 1.6% of EU GDP (140 billion €) could be realized if Member States can agree on further liberalization. The potential is significant even though specific sectors were excluded from the final text as a compromise.<sup>62</sup> For example, broadcasting, legal and postal services and public transportation were a concern as Member States wanted to safeguard national markets from disturbances.<sup>63</sup> In addition, the final version of the Services Directive was founded on host-state control; meaning that national restrictions are lawful unless successfully challenged. Essentially, the country-of-origin principle was removed from the final draft.<sup>64</sup>

The Directive operates as a general legal framework and applies to a wide variety of services while also taking into account the distinctive features of different regulatory systems. The intent of this framework is to remove barriers by launching a process of evaluation of existing obstacles and from there make it possible to modernize national regulatory systems for service activities by means of harmonization and administrative simplification.<sup>65</sup> The Directive obligates Member States to establish a point of single contact (PSC). Providers and recipients of

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<sup>61</sup> COM (2000) 888 final, p.2 and Wiberg 2014, p.3. The process itself can be traced back to as early as 1997 when the Commission presented an Action Plan for the Single market.

<sup>62</sup> European Commission, EU Services Brochure (2014).

<sup>63</sup> Wiberg 2014, p.204.

<sup>64</sup> Wiberg 2014, p.24 and p.31. The country-of-origin principle would mean that service providers would only have to comply with the regulations of the state of establishment.

<sup>65</sup> Directive 2006/123/EC, recital 7.

services should be able to complete all formalities – such as authorizations - through these PSCs and simultaneously receive necessary information from them when needed.<sup>66</sup> Finally, the Directive includes provisions related to administrative cooperation. Chapter VI designates which state is responsible for mutual assistance in particular situations.<sup>67</sup>

The free movement of services is regulated by Chapter IV. Member States must ensure free access to their territory while also enabling the free exercise of service activities inside their borders. Discriminatory measures are strictly prohibited and service providers should not have to comply with non-justified requirements in order to gain access either. A real world example could be a Finnish architect who works in Helsinki but also wants to provide his services in Belgium on a temporary basis. The Belgian authorities cannot prevent him from working in Brussels on the basis of his nationality. The local authorities can demand that the architect is properly qualified but at the same the authorities should also be able to demonstrate that such qualifications are in fact necessary.

The issue of justified requirements and necessity has often been raised by various Member States. For example, the UK has lobbied for greater transparency over the criteria of proportionality.<sup>68</sup> The approach is reasonable if we consider the nature of Directives. They are binding legislative instruments, enacted by the institutions of the Union, but the choice and form of their implementation is the responsibility of national authorities.<sup>69</sup> As a result, interpretation and implementation varies from one Member State to another which can create confusion at times. Nevertheless, the concept of proportionality and necessity will be discussed in more detail when we examine the concept of ‘overriding reasons in the public interest’ in chapter 4.

It is worth keeping in mind that the Services Directive facilitates temporary cross-border activities. If the architect in our example decides to run a business in Brussels on a stable basis, his situation would probably fall under the scope of another Directive related to the Mutual

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<sup>66</sup> Barnard 2013 s.427

<sup>67</sup> Art. 29-35, Barnard 2013 p.428.

<sup>68</sup> Review of the Balance of Competences between the United Kingdom and the European Union, p.31.

<sup>69</sup> Article 288 TFEU.

Recognition of Professional Qualifications.<sup>70</sup> The recognition of qualifications by the host state means that a service provider from another state can pursue his profession, for which he is qualified, under the same condition as nationals. In essence, these directives regulate the same activity but function in different ways.

All Member States have officially transposed the Services Directive by the end of 2012, almost three years after the original deadline. The delays were mostly a result of some states experiencing difficulties while they were modifying existing national laws and procedural practices in order to properly implement the Directive.<sup>71</sup>

#### 2.4.2 Sectoral Legislation

While the Services Directive is the most important piece of secondary legislation, other legislative acts have been adopted over the years in order to cover a range of specific sectors.<sup>72</sup>

These include the E-commerce Directive (2000/31) which promotes the free movement of information services between Member States. Online newspapers are covered by the Directive.

Another example is the Audio Visual and Media Services Directive (2010/13) which regulates the freedom to provide television services. Member States are not allowed to restrict the reception of legitimately made broadcasts in another Member State, unless specific public policy conditions provide exceptions.<sup>73</sup>

We have established some ground rules as regards to the rights that service providers and receivers enjoy. It is now time to analyze the concepts of public policy and security, and then examine the express powers that Member States can use to restrict the aforementioned rights from being enjoyed in full.

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<sup>70</sup> Review of the Balance of Competences between the United Kingdom and the European Union, p.32.

<sup>71</sup> Klamert 2014, p.224.

<sup>72</sup> 'Financial services' is one sector which is comprehensively regulated.

<sup>73</sup> The United Kingdom used Article 27 when it banned the Red Hot Dutch channel in order to protect the physical and mental development of minors. (Balance of Competences report, p.33).

### 3. PUBLIC POLICY AND PUBLIC SECURITY

*“No nation can be justly required to yield up its own fundamental policy and institutions in favor of those of another nation. Much less can any nation be required to sacrifice its own interests in favor of another; or to enforce doctrines which, in a moral, or political view, are incompatible with its own safety or happiness, or conscientious regard to justice and duty”*  
Story (1846)<sup>74</sup>

#### 3.1 Introduction

##### 3.1.1 Public Policy

The concept of public order is well known in all modern legal systems. The French name *ordre public* most likely originated in the French Code Civil.<sup>75</sup> The term is the equivalent of *public policy*, which is used in Anglo-American legal terminology. The reason why English and U.S. law uses public policy as an expression instead of public order is to avoid confusion with the traditional concept of “*law and order*”.<sup>76</sup> Regardless, these two terms “*ordre public and public policy*” are often used interchangeably when speaking about the body of principles that underpin national legal systems. The terms are often used as synonyms in international contract drafting, because technically they tend to pursue the same objective even if their exact meaning can vary from one country to another.<sup>77</sup> In academic literature there is some disagreement regarding the possible differences between these terms but, for the purposes of this thesis, the terms *public policy* and *ordre public* will be used as equivalents.

In domestic private and public law these terms express the idea of state supremacy. For example, public policy indicates a situation in which a domestic mandatory rule and interest prevails over any conflicting agreements. There can be some important reason to prevent private

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<sup>74</sup> Story, J. 1846. Commentaries on the Conflict of Laws, Foreign and Domestic.

<sup>75</sup> Czech 2012, p.82. Article 6 of the French Code Civil stated that “*Private agreements must not contravene the laws which concern public order and good morals*”.

<sup>76</sup> Ibid, p.80.

<sup>77</sup> Ibid, p.119.

parties from setting aside national provisions when they sign contracts. For instance, minors are not allowed to participate in online gambling as it would be against public morality. In international relations *ordre public* often appears as an objection; when countries ratify treaties but want to maintain some remedies in order to avoid undesirable consequences.<sup>78</sup> One can make the distinction between domestic and international situations via using terms such as *ordre public interne* and *ordre public externe*.<sup>79</sup> The difference is relevant as many mandatory domestic rules have little cross-border relevance. In any case, *ordre public externe* operates as an exception to the general rule; ergo the High Contracting Parties should not invoke it on a regular basis. When states do invoke these derogations, phrases such as ‘the need to protect our basic constitutional principles’ are often cited by local figureheads as they aim to limit the effect of supranational norms.

Properly conceptualizing public policy is difficult, because it is an abstract institution. For example, when we speak of established principles of justice or good morals in any country, we must acknowledge that they are always dependent on the prevailing public opinion of that specific nation.<sup>80</sup>

### 3.1.2 Public Interest

The term public policy is intertwined with the concept of public interest; the well-being of society as a whole. This is a goal that goes beyond the aspirations and interests of an individual citizen. It is by definition the mirror image of individual interest, representing a loosely defined group of beneficiaries. The term public interest can be traced back to the old Roman Republic and the Law of the Twelve Tables (*Leges Duodecim Tabularum*).<sup>81</sup> It has taken many forms throughout human history. For example, after the Second World War the ruling elite in communist countries were the sole standard-bearer of the term public interest. Earlier, after the fall of absolutism in the nineteenth century, public interest was adopted by liberal

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<sup>78</sup> Czech 2012, p.80.

<sup>79</sup> Ibid, p.82.

<sup>80</sup> Judgement of the Permanent Court of International Justice 20/21/1929, p. 46.

<sup>81</sup> Czech 2012, p.123. The Law of the Twelve Tables was the foundation of Roman law (c. 439 BC).



ideology and subjected to various reforms.<sup>82</sup> In modern western society it can still - as is the case with public policy - mean anything until it is set side by side with a specific policy goal or some legal norm. In contemporary Europe it may refer to [a.] important environmental questions, [b.] local interests such as expanding the existing infrastructure or [c.] protecting specific groups like consumers from aggressive marketing.<sup>83</sup>

One should be careful not to directly equate public interest with public policy for two reasons. Firstly, it is possible that public policy, as it represents vital state interests, differs from public interests and in those situations the former must prevail in order to safeguard the fundamental principles of the constitutional order.<sup>84</sup> This is the position the Czech Constitutional Court took in 2009 when it stated that public interests can never completely remove specific fundamental rights from individuals.<sup>85</sup> Also, equating public policy with public interest can be seen as problematic from the perspective of international co-operation, because it would essentially expand the public policy exception to cover a wider spectrum of interests.<sup>86</sup>

For legal entities and natural persons, it can be problematic that there is no clear definition of the term; especially when local authorities decide to restrict private rights or enact barriers while citing that there is an imperative public interest at hand. The notion of generally beneficial goals – ‘this is good for society’ – also depends on the time and location of its usage.<sup>87</sup> There is also the question of balance between competing policy goals. One side might believe that building a new factory serves the public interest while others would prefer a cleaner living environment.

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<sup>82</sup> Czech 2012, p.124.

<sup>83</sup> Ibid, p.121.

<sup>84</sup> Ibid.

<sup>85</sup> Constitutional Court of the Czech Rep 557/09:” Nonetheless, *public interest.... may never completely prevail over the interest of the individual and strip them of their abovementioned fundamental rights*”.

<sup>86</sup> Czech 2012, p.117.

<sup>87</sup> Czech 2012. p. 126.

### 3.1.3 Public Security

It is often said that the most important task of human society is to safeguard its security. But the concept of security is constantly evolving; who should be protected and against what? In the fields of international relations security has often been defined exclusively in military terms. The reason for this is the rationalist approach towards world politics that was shaped largely by the Cold War. According to this vision, the world is anarchic by nature and States are in perpetual competition with one another. Their ultimate goal is to protect their own physical, political and cultural identity against any foreign intrusions. Every country is ultimately responsible for guaranteeing its own survival – its security.<sup>88</sup>

For rationalists, the nature of states is a given – they are existing entities in an environment in which they respond to objective threats. Following this view, the phenomenon of immigration can be seen as a threat to public security as it endangers the physical, political and cultural identity of the state. As a result, countries have to adopt strict border controls, increase surveillance and rethink their asylum systems.<sup>89</sup> The Hungarian response to the ongoing civil war in Syria and the European migrant crisis is a good example of traditional rationalist security thinking. Border transgressions are seen as a public security risk and human mobility is described by using various threat variables: crime, cultural differences, economic stability and health related issues.<sup>90</sup>

However, concentrating only on high politics and the existence of the State as the object of security is a narrow perspective. More and more the concept of security has been expanded to include everyday problems inside our society such as underdevelopment or even mundane traffic related issues. As the concept of security encompasses a wider spectrum, the range of solutions have to also increase from purely military ones.<sup>91</sup>

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<sup>88</sup> Brauch 2008, p.530.

<sup>89</sup> Ibid.

<sup>90</sup> Salter 2004, p.72; BBC 21.9.2015: “*Our borders are under threat. Hungary is under threat and so is the whole of Europe*” (Hungary PM Viktor Orban).

<sup>91</sup> Brauch 2008, p.531.

For the individual citizen, security can be seen as the freedom to perform something since there is no danger present. Human security has indeed received more attention in recent times. In some instances, individuals might require protection from the arbitrary power of the state; a situation in which the traditional concept of State security can be in conflict with the notion of human security.<sup>92</sup> The Final Report of the Commission on Human Security defines the term individual security as protecting the vital core of all human lives in ways that enhance freedoms and fulfilment. The goal is to create a political, social, environmental and a cultural system that provides the necessary building blocks for humans while also protecting individuals from critical and pervasive threats.<sup>93</sup> The report does not see state security and human security as two competing concepts, they fall under the umbrella of overall public security and complement one another. The approach is logical if we consider public security issues such as human trafficking.

It is quite evident that the concept of security is well established in our everyday language. However, the meaning of the term changes depending on the historical and political context and the strategic environment. It is a philosophical concept but also an ancient human ideal.<sup>94</sup> As our communities aspire towards greater security, it is easy to believe that there is an eventual goal where virtually all possible dangers have been removed and the citizenry can operate without external or internal threats. The American response to the September 11th attacks serves as an example of ambitious aspirations towards absolute security with little concern for personal liberties.<sup>95</sup> The problem with absolute security is that even if it was possible, would it be preferable? There is evidence to suggest that trying to maximize public security can have counter-productive or even self-destructive consequences. If we accept that absolute security is not achievable, what would be the suitable level societies should aim for? Who decides what level of security is satisfactory?<sup>96</sup>

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<sup>92</sup> The Final Report of the Commission on Human Security 2003, p.3.

<sup>93</sup> Ibid, p.4.

<sup>94</sup> Brauch 2008, p.289.

<sup>95</sup> Ibid, p.108.

<sup>96</sup> Burgess 2008, p.6.

The abstract nature of security is one of the reasons why it has been used so much in academic literature and public discourse. Arnold Wolfers stated after the Second World War that security is an ambiguous symbol; a concept that rarely remains stable.<sup>97</sup> The practical reality has hardly changed half a century later. The elasticity of security also makes it an effective tool when political leaders engage in so-called risk management. In other words, a wide variety of policies can be justified on grounds of public security.

### **3.2 On the Trail of European Public Policy**

Public policy is a stand-alone term in the context of Community *acquis* (EU law). It can be used to define the reach of all the fundamental freedoms. We have established that all modern nations, as is the case with all Member States of the European union, have a concept of public policy; both for their internal use and for protecting their constitutional principles against external norms.

At the same time, these very same Member States have limited some of their sovereign rights via European integration and upon forming the EU.<sup>98</sup> As a result, the European Member States are not in a position to autonomously define the spectrum of public policy, nor can it be defined on the basis of one or even several national legal systems.<sup>99</sup> The European Court of Justice has the authority to decide what the proper interpretation is in specific circumstances. In addition, since all Member States of the Union are a party to the European Convention on Human Rights, they must take into account the *European public order* as developed in the case law of the European Court of Human Rights (ECtHR).<sup>100</sup>

These realities do not mean that Member States are not able to independently invoke the public policy defence in order to safeguard their own constitutional principles. The most accurate description would probably be that there is a constant dialogue between national courts and the

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<sup>97</sup> Arnold Wolfers 1962, “*National Security as an ambiguous symbol*”.

<sup>98</sup> Case 26/62 *Van Gend & Loos* [1963] ECR 1.

<sup>99</sup> Czech 2012, p.128.

<sup>100</sup> Corthaut 2012, p.30.

CJEU.<sup>101</sup> While there is no federal court in the EU, national courts have the possibility to submit a reference for a preliminary ruling to the CJEU when there is a question regarding the validity or applicability of EU law. This procedure is established in Article 267 TFEU.

After the Court gives its decision, other courts will have to rule in accordance with the precedent established by the CJEU.<sup>102</sup> In principle, when one country invokes the public policy defence and the Court disagrees, others should abide by that decision. However, this is hardly self-evident since traditionally the Community has not possessed a strong mechanism to force insubordinate courts into compliance.<sup>103</sup> As a result, the European Court of Justice has had to find a way to reach agreeable compromises; to make certain that judgments are followed properly via paying careful attention to the acceptability and viability of the ruling. In other words, the CJEU has to pay proper respect to the constitutional traditions of all the 28 Member States. When interpreting EU law, one has to also keep in mind that Article 6(2) TEU states: “*The Union shall respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and....as they result from the constitutional traditions common to the Member States, as general principles of Community law*”. In essence, the Member States cannot fight the consequences of forming a supranational legal order, and dictate the meaning of *ordre public*, but simultaneously the Court would do well to exercise sensitivity when dealing with important national values.

Considering all of the above, there are several different ways to conceptualize how the dynamic between the EU and the Member States functions - as regards to *ordre public*. The first option is to assume that there is in fact a specific EU *ordre public* which is carefully shaped by the European Court of Justice by means of engaging in an indirect dialogue with national courts. The second option is that there is a mutual understanding between the EU and the Member States as to what the core of *ordre public* constitutes. In other words, in some respects it is shared. Finally, it is also possible to conceptualize *ordre public* as a national safety

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<sup>101</sup> Corthaut 2012, p.57; Jacobs 2007, p.11.

<sup>102</sup> Corthaut 2012, p.59.

<sup>103</sup> Ibid.

valve, something the EU is willing to tolerate and accommodate as a necessary evil when Member States protect their vital national interests from supranational intrusion.<sup>104</sup>

This complicated relationship between the European Union and its Member States inherently raises more questions than it provides answers. The task is made harder by the fact that the concepts of public interest, public policy (*ordre public*) and public security are difficult to analyze. The only way to properly understand their practical applications is to examine the express derogations laid down by the Treaty and then analyze how the European Court of Justice has applied said derogations in its case law. In the next part, we will do exactly that.

### **3.3 Restricting the Free Movement of Services**

In the second chapter we established the legal framework concerning the specific rights that service providers and receivers enjoy in the European Union. But a national measure that restricts the free movement of services does not automatically mean it is incompatible with said freedom. The concept of public policy (*ordre public*) and public security can be used to protect the sovereignty of the Member States; allowing EU countries to impose restrictive measures in order to protect the very existence of their state or the fundamental values of their constitutional order.<sup>105</sup>

It is important to emphasize that while the public policy and security exceptions do not really differ from similar exceptions in other international agreements, their intention can be somewhat different when compared to the classic conception of *ordre public* in international relations. In the European Union, the public policy or security exception does not render void the will of the parties but instead only excludes a specific part of national legislation from the equation. Simultaneously, this national exception is integrated into Community law as the European Union takes the national rule into account.<sup>106</sup> In essence, when the European Court of Justice rules in favor of one Member State and accepts its public policy defence, the norm

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<sup>104</sup> Corthaut, p.38.

<sup>105</sup> Wyatt 2011, p.572; Barnard 2013, p.496; Corthaut 2012, p.71.

<sup>106</sup> Poillot-Peruzzetto, S. "Ordre Public et Droit Communautaire", p.178-179; Corthaut 2012, p.72.

becomes part of the existing European legal framework. The phrase ‘unity in diversity’ describes this dynamic quite adeptly.

### 3.3.1 The Treaty Derogations

The express derogations, that can be relied upon in order to justify obstacles to the free movement of services, are laid down in Articles 52 and 62 TFEU. Article 52 concerns the right of establishment but Article 62 expands the same provision to include the freedom to provide services.

*“The provisions of this Chapter and measures taken in pursuance thereof shall not prejudice the applicability of provisions laid down by law, regulation or administrative action providing for special treatment of foreign nationals on grounds of public policy, public security....”*  
*TFEU Article 52(1)*<sup>107</sup>

As we can see, Member States have the possibility to use these express derogations in order to preserve their sovereign rights. The burden of proof lies on the defendant state; it has to provide evidence that the national measure can be justified on the basis of public policy or security.<sup>108</sup> We have established earlier that Member States cannot unilaterally dictate the scope of public policy or security; the CJEU specifically stated in *Commission v. Austria* that utilizing the express derogations is not possible without putting forward concrete proof capable of establishing that the national measure is required in order to avoid some threat to a fundamental interest of society.<sup>109</sup> The Court also concluded in *Orfanopoulos* that a particularly restrictive interpretation is necessary in the case of citizens of the Union.<sup>110</sup> In addition, using these derogations is not possible when Union directives have comprehensively harmonized the field.<sup>111</sup>

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<sup>107</sup> Public health is also included in Article 52 TFEU, but it will not be examined in this paper.

<sup>108</sup> Barnard 2013, p.497.

<sup>109</sup> Case C-161/07 *Commission v Austria* [2008] ECR-I-10671, para. 37; Case C-54/99 *Scientologie* [2000] ECR I-1335, para 17.

<sup>110</sup> Joined Cases C-482/01 and C-493/01 *Orfanopoulos* [2004] ECR I-5257, para. 65.

<sup>111</sup> Case C-421/98 *Commission v. Spain* [2000] ECR I-10375, para 42.

The CJEU reiterated in *Attanasio* that the public policy and public security provisions cannot be used when the national restriction is serving purely an economic goal of some sort.<sup>112</sup> Therefore, for example, Spanish authorities cannot use the express derogations in order to exclude Finnish video game developer from the local market even if the unemployment figures among young Spanish software specialists are high and giving beneficiary treatment to nationals would serve political purposes. That being said, it is possible to contemplate that in some instances the Court might allow protective measures to be taken in order to safeguard the economic interests of specific individuals. As an example, refusing to recognize and enforce out-of-state court decisions that are seen as excessive could be justified on the basis of public policy.<sup>113</sup>

Even though public policy and public security are separate derogations in Article 52(1), and we have approached these terms as separate concepts in this thesis, there is evidence to suggest that the Court can sometimes incorporate public security under the umbrella of public policy.<sup>114</sup> The boundary between these two concepts was a matter of careful consideration in *Tsakouridis*. In the case, the Court concluded that matters concerning both the internal and external security of a Member State, the functioning of the institutions and essential public services, as well as the survival of the population, were within the concept of public security.<sup>115</sup> On the other hand, the Court concluded that the issue could also be considered as a matter of public policy.<sup>116</sup>

Regarding Article 52 TFEU, it is difficult to pinpoint what the extent of the public security concept is. It can cover all forms of security, both external and internal.<sup>117</sup> It has been said that public security can be defined as “*the entire field of rules.....adopted in the interest of the*

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<sup>112</sup> Case C-384/08 *Attanasio* [2010] ECR I-2055, para 55; Case 352/85 *Bond* [1988] ECR I-02085, para 34.

<sup>113</sup> Hoško 2014, p.210.

<sup>114</sup> Barnard 2013, p.498.

<sup>115</sup> Case C-145/09 *Tsakouridis* [2010] ECR I-11979, para 44.

<sup>116</sup> Operative part of Case C-145/09 *Tsakouridis* [2010] ECR I-11979, para 2.

<sup>117</sup> Case C-83/94 *Leifer* [1995] ECR I-3231, para 26; Trybus 2014, p.72.



*political and social integrity of society*”.<sup>118</sup> However, despite such a broad definition, there have only been a handful of cases in which the public security defence has been invoked successfully.<sup>119</sup> And this is not a surprise, because the CJEU has been adamant that national authorities should only invoke the public security defence in rare circumstances. In *Johnston*, a case in which the exclusion of women from a considerable part of police activities was challenged, the Court stated that the public security exception does not “*lend [itself] to a wide interpretation and it is not possible to infer from [it] that there is inherent in the Treaty a general provision covering all measures taken for reasons of public safety*”.<sup>120</sup> This ‘Johnston principle’ was later reiterated in *Bond*, when the Court concluded that a narrow interpretation of the entire Article 52 TFEU is necessary.<sup>121</sup>

It is undeniable that there can be considerable ambiguity when we examine concepts such as public policy, security or interest. For instance, the Court itself has acknowledged the elusive nature of public policy; stating in *Van Duyn* that it may vary from one country to another and from one period to another.<sup>122</sup> As a result, it would be logical to assume that the margin of discretion, bestowed upon national authorities, can also evolve over time.

In order to better understand how the express derogations function, we will examine them from two different perspectives. We will first try to determine how Article 52 TFEU is applied when individuals are under the magnifying glass, and then we will examine how these exceptions function when the behavior of legal entities is under scrutiny.

### 3.3.2 Public Policy (and Security): Natural Persons

When services move, so do people. Individuals who are service providers can rely on Article 56 TFEU; in conjunction with the Citizens’ Rights Directive Article 6 (CDR). People who spend less than three months in another Member State while providing services are covered by

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<sup>118</sup> Schwarze 1992, p.778.

<sup>119</sup> Hatzopoulos, p.147.

<sup>120</sup> Case 222/84 *Johnston* [1986] ECR 1651, para 26; Trybus 2014, p.73–74.

<sup>121</sup> Case 352/85 *Bond* [1988] ECR 2082, para 36

<sup>122</sup> Case 41/74 *van Duyn* [1974] ECR 1337, para 18.

the CDR provisions just like any other migrant.<sup>123</sup> However, there is some ambiguity regarding the relationship between the CDR and Article 56 TFEU. In principle, the Treaty provisions will always prevail over the directive but on the other hand it is possible that in some instances the CDR functions as a gap filler of sorts. At the very least, the Citizens' Rights Directive strengthens the concept of Union citizenship even when the Court primarily applies the Treaty provisions in its rulings.<sup>124</sup>

As far as individuals are considered, the main focus of the public policy and security exceptions to the four freedoms – in our case the free movement of services – lies on the personal characteristics and conduct of the individual. For instance, the host Member State may want to rely on the express derogations in case a foreign citizen of a very questionable character seeks access.<sup>125</sup> For instance, national authorities might want to rely on the public security exception if there is reason to believe that the service provider is involved in terrorist activities. After the deadly attacks in Paris, that left 130 people dead, the question of border security and personal conduct of visitors and migrants is once again a hot topic in Europe.

#### 3.3.2.1 Personal Conduct

The matter of personal conduct was under careful examination in *Van Duyn*. Mrs Van Duyn was not allowed to enter into the United Kingdom to work as a secretary for the Church of Scientology. The British authorities saw the church's activities as harmful to society, even though being a member of the church was not illegal in the United Kingdom. In 1968 the Minister of Health stated in the House of Commons that: "*Scientology is a pseudo-philosophical cult. Scientology is socially harmful. It alienates members of families from each other... There is evidence that children are now being indoctrinated*".<sup>126</sup>

The minister stated that, while there was no existing law to prohibit the practice of Scientology, restricting the overall influence of Scientology was necessary. There was no ambiguity in

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<sup>123</sup> Barnard 2013, p.378.

<sup>124</sup> Ibid, p.473–474.

<sup>125</sup> Corthaut 2012, p.96.

<sup>126</sup> Hurri 2014, p.21.

the UK law as any foreigner could be refused entry in the case that such action would be ‘conducive to the public good’.

The European Court of Justice ruled eventually that it was not necessary for the personal conduct to be criminalized, before a Member State could invoke the express derogations and the public policy exception.<sup>127</sup> As a result, the British authorities were allowed to classify the activity as “socially harmful” and therefore take the necessary administrative steps to rectify the situation.<sup>128</sup> The second question in *Van Duyn* was related to the nature of personal conduct. The Court concluded that, in principle, past associations should not be used to restrict free movement within the Community but a present association with an organization could constitute personal conduct. This is so, because ongoing association reflects voluntary participation in the activities of the organization as well as identification with its aims and designs.<sup>129</sup>

It is relevant to point out that, despite the eventual ruling, there was some friction between the UK government and the Court regarding the extent of *ordre public*. The position of United Kingdom was clear: Scientology was undesirable and Community law was of little significance to the national definition of public policy. The Commission disagreed, it stated that public policy should be interpreted in the context of Community law and any national criteria only offer support during its application.<sup>130</sup> Ultimately, the Court concluded that discretion should be given to the competent national authorities but that in the future the Community institutions would have the final word over the application of the *ordre public* limitation.<sup>131</sup>

In *Van Duyn* the Court essentially implied that the host state, in this case the United Kingdom, could refuse a foreign national to enter the country on public policy grounds even if similar restrictions do not apply to its own citizens. In essence, this would mean that a British national would always have the option of working for the Church of Scientology while citizens of other Member States would not be afforded the same courtesy. The Court used principles of interna-

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<sup>127</sup> Hurri 2014, p.21; Case 41/74 *van Duyn* [1974] ECR 1337, para 19.

<sup>128</sup> Barnard 2013, p.499.

<sup>129</sup> Case 41/74 *van Duyn* [1974] ECR 1337, para 17.

<sup>130</sup> Hurri 2014, p.22–23.

<sup>131</sup> Case 41/74 *van Duyn* [1974] ECR 1337, para 18; Hurri 2014, p.23.

tional law to justify its approach; concluding that direct discrimination can take place in such situations, because the Member States can never refuse the right of entry or residence from their own nationals.<sup>132</sup>

However, in its subsequent case law the CJEU has made it clear that the general principle of non-discrimination should be respected. In *Adoui*, a French national had moved into the city of Liège in Belgium and had applied for a residence permit. The Belgian authorities refused and invoked the public policy defence, because her personal conduct was undesirable. Ms Rezguia Adoui worked in a local establishment where waitresses displayed themselves in the window and then offered services to clients for monetary compensation.<sup>133</sup> The authorities intervened despite the reality that prostitution was not criminalized by Belgian legislation.<sup>134</sup> In its ruling, the Court stated that Member States should not apply the public policy or security defence in a way that would have the effect of ‘applying an arbitrary distinction to the detriment of nationals of other Member States’.<sup>135</sup> In essence, Member States should always be consistent in their approach and give equal treatment to migrants when a specific activity is allowed in the country.<sup>136</sup>

The European Court of Justice has repeatedly underlined that the Treaty exceptions should only be invoked in case of a ‘genuine, present and a sufficiently serious threat to one of the fundamental interests of society’.<sup>137</sup> The Court has also used the criteria of ‘fundamental importance for a country’s existence’ as regards to public security.<sup>138</sup> However, there seems to be

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<sup>132</sup> Case 41/74 *van Duyn* [1974] ECR 1337, para 22.

<sup>133</sup> Hurri 2014, p.175 and Joined Cases 115-116/81 *Adoui & Cornuaille* [1982] ECR 1665, para 8.

<sup>134</sup> Joined Cases 115-116/81 *Adoui & Cornuaille* [1982] ECR 1665, para 6: Only exploitation of prostitution by third parties and various forms of incitement to debauchery were outlawed.

<sup>135</sup> Para 7.

<sup>136</sup> Barnard 2013, p.500; Case C-268/99 *Jany* [2001] ECR I-8615, para 61.

<sup>137</sup> The Court established this principle in *Boucherau*. British authorities launched expulsion proceedings after a French national was found guilty twice of possessing unlawful substances (Case 30/77 *Bouchereau* [1977] ECR 1999); In addition, the Court has stated that there is a distinction between imperative grounds of public security and serious grounds of public policy/security. The former presupposes that the threat is of a particularly high degree of seriousness and therefore national authorities have a higher margin of discretion. Case C-145/09 *Tsakouridis* [2010] ECR I-11979, para 41; Kaczorowska 2013, p.739 and p.753.

<sup>138</sup> Case 72/83 *Campus Oil* [1984] ECR 2727, para 34.

no clear distinction in the CJEU's subsequent case law<sup>139</sup> and, for the purposes of this paper, the above mentioned criteria (genuine, present and a sufficiently serious threat) applies to both exceptions equally.

As an example, in *Jipa* the Court ruled that a mere previous deportation from another Member State, on the basis of illegal residence, would not be enough to invoke Article 52 TFEU and restrict the right to free movement.<sup>140</sup> The CJEU also considered the relevance of 'present and genuine threat' in *Calfa*. In this case, the authorities in Greece had permanently expelled Calfa on the basis of possessing illegal substances. According to Greek law, foreign nationals, who were convicted for drug related crimes, were automatically be expelled for life.<sup>141</sup> The Court ruled that an automatic expulsion without sufficiently taking into account the personal conduct of the offender was in breach of the Treaty.<sup>142</sup> Furthermore, the Court said in *Cetinkaya* that national authorities should also take into consideration all the relevant factors after the initial decision. It is possible that the threat evaluation – and the risk to public security - changes if there is a shift in the personal conduct of the offender.<sup>143</sup> In other words, sometimes individuals should be afforded a second chance.

If we examine the Citizens' Rights Directive, we can see that the previously mentioned case law can also be found in Article 27(2). It explicitly states that any action taken on the grounds of public policy or security has to be based on the personal conduct of the individual and previous convictions in themselves should not be used as the sole yardstick.

### 3.3.2.1 Available Measures and Fundamental Human Rights

In situations, where a Member State decides to take action against any individual on public policy or security grounds, the host state has to pay close attention to fundamental human rights. The Court emphasized this in *Carpenter* in which Mrs Carpenter, a Philippine national married to an English citizen, had been denied the right to reside in the United Kingdom. Mrs

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<sup>139</sup> Case C-54/99 *Scientologie* [2000] ECR I-1335, para 17.

<sup>140</sup> Case C-33/07 *Jipa* [2008] ECR I-5157, para 25.

<sup>141</sup> Case C-348/96 *Calfa* [1999] ECR I-11, para 25.

<sup>142</sup> Para 29.

<sup>143</sup> Case C-467/02 *Cetinkaya* [2004] ECR I-10895, para 47.

Carpenter claimed that the national measure adopted against her would restrict her husband's capability to provide and receive services. Her argument was simple; since she looked after his children, her eventual deportation would either separate the family or force Mr Carpenter to leave Europe.<sup>144</sup> The Court eventually concluded that, while Member States could invoke the express derogations and the concept of public policy and public security to justify restrictive national measures, such measures would have to be compatible with the fundamental rights as they are laid out in Article 8 of the European Convention on Human Rights and Fundamental Freedoms; namely 'the right to respect for private and family life'.<sup>145</sup> The Court was unequivocal in its ruling: The decision to deport Mrs Carpenter did not strike a fair balance and was declared void.<sup>146</sup> This result can be seen as a sound victory for human rights. On the other hand, some have raised concerns that using the European Convention on Human Rights and Fundamental Freedoms (and the case law of the European Court of Human Rights) in conjunction with market freedoms, in this manner, leaves virtually no margin of discretion for national authorities.<sup>147</sup>

In any case, after *Carpenter*, the Court has reiterated several times that fundamental human rights should be taken into account when deporting a migrant.<sup>148</sup> However, applying this principle in real life can be difficult, because the Treaty does not specify the kind of measures that can be taken by national authorities on grounds of public policy or security.<sup>149</sup> At least we can be quite certain that permanent deportation, as was the case in *Calfa*, does not necessarily sit well with the idea of proportionality and fundamental human rights.

Such a drastic measure should only be used when absolutely necessary. For instance, the Court ruled in *PI* that any expulsion measure is conditional on the requirement that a genuine threat affecting one of the fundamental interests of society is at hand. The Member State should also consider other factors such as the age and the economic situation of the individual and his/her

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<sup>144</sup> Case C-60/00 *Carpenter* [2002] ECR I-6279, para 21.

<sup>145</sup> Para 40–41; Barnard 2013, p.507.

<sup>146</sup> Para 43.

<sup>147</sup> Sionaidh 2011, p.26.

<sup>148</sup> Case C-493/01 *Orfanopoulos* [2004] ECR I-5257.

<sup>149</sup> Barnard 2013, p.502.

state of health.<sup>150</sup> We can see a similar approach in the Citizens' Rights Directive Article 28(1) which states that the host country should consider the age, health and economic situation among other things before enacting an expulsion decision on the grounds of public policy or security.

National authorities should be able to impose less severe sanctions for unlawful activities in most situations. One example would be to restrict movement within the country as was the case in *Olazabal*. In this case, a Spanish national, who was a member of the separatist ETA organization, was banned from residing in the vicinity of the Spanish border in France. This happened after the person in question was sentenced to 18 years' imprisonment for kidnapping an industrialist in Bilbao.<sup>151</sup> The case caused some uncertainty, because similar measures were not available for French citizens. Regardless of the principle of non-discrimination, the Court ruled that since Union law allowed deportation in extreme situations, less severe measures (restrictions on residence) should also be available.<sup>152</sup> In essence, the Court favoured proportionality over the concept of non-discrimination.

It is evident that modern technology and creative thinking can enable a wide variety of national measures that can be taken on grounds of public policy and security. Instead of draconian measures such as deportation, or banning individuals from living in certain parts of the country, it might be better to simply monitor the behaviour and activities of service providers or receivers who might pose a risk to public safety. Besides, Article 32(1) CDR states that Member States cannot permanently exclude individuals from their territory. The 'right to reapply' is enshrined in EU law and individuals can request for their expulsion decision to be lifted. This can take place after a reasonable amount of time or three years after a material change in their circumstances has taken place.<sup>153</sup>

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<sup>150</sup> Case C-348/09 *PI* [2012] ECR 0000.

<sup>151</sup> Case C-100/01 *Olazabal* [2002] ECR I-10981, para 35; Corthaut 2012, p.88.

<sup>152</sup> Case C-100/01 *Olazabal* [2002] ECR I-10981, para 41.

<sup>153</sup> Article 32(2). In addition, the CDR contains many other procedural rules that need to be taken into account when national authorities adopt measures on grounds of public policy or security. See Corthaut 2012, p.89.

### 3.3.3 Public Policy (and Security): Legal Persons

We have now established that Member States can invoke the public policy or security provisions in order to restrict the activities of natural persons. However, there was little case law concerning the behavior or activities of corporate bodies at the dawn of the new millennium. In *Segers* the Court concluded that express derogations could be used to combat fraud<sup>154</sup> and in *Open Skies* the court assessed if a national measure such as the refusal to grant an operating license to an airline could be justified on the basis that it constituted a genuine threat to public policy or security.<sup>155</sup>

But only in *Omega* did the Court really provide a striking example as to how the express derogations could be used to restrict corporate conduct – namely on the basis of public policy. In *Omega*, the German authorities took action against a company that was responsible for organizing a game played in a laser dome.<sup>156</sup> The game revolves around simulated killing of participants; individuals use laser pistols in confined spaces while trying to score points by means of hitting one another with a laser beam or other such device (infrared is usually the technical tool that is used in these activities).

The municipal authorities in Bonn, namely the mayor, determined that they could not accept the existence of a ‘murder game’ as it constituted an affront to human dignity. Human dignity is inviolable and protected by Article 1 of the German constitution (*Grundgesetz* or basic law).<sup>157</sup> Eventually the local police authority intervened and issued an order against Omega. The company was forbidden from facilitating the game and also threatened with a DEM 10 000 fine for each game played in breach of the order.<sup>158</sup> The order was issued in accordance with the law governing the North Rhine-Westphalia Police Authorities (*Ordnungs-*

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<sup>154</sup> Case 79/85 *Segers* [1986] ECR 2375, para 17; Barnard 2013, p.509; Also in *Centros* the Court recognized public policy as a viable defense but ruled that the Danish government failed to justify its approach properly (Case C-212/97 *Centros* [1999] ECR I-1459, para 34).

<sup>155</sup> Case C-466/98 *Commission v. UK* [2002] ECR I-9427, para 57; Steiner 2012, p.542.

<sup>156</sup> The game is popular in various European countries. For instance, ‘Megazone’ centers can be found in twelve different Finnish cities. [www.megazone.fi](http://www.megazone.fi).

<sup>157</sup> Eeckhout 2011, p.1507–1508.

<sup>158</sup> Case C-36/02 *Omega* [2004] ECR I-9609, para 5.



*behördengesetz Nordrhein-Westfalen*) which states that the authority may take necessary action in case there is a risk to public order or safety.

The company, which was supplied by a U.K partner under a franchising contract, objected and eventually appealed to the Federal Administrative Court of Germany (*Bundesverwaltungsgericht*). Omega argued that these national measures infringed the free movement of services and were in breach of Article 56 TFEU (formerly known as Article 49 EC), because the game organizer imported parts from the British company Pulsar.<sup>159</sup> As a result, the German court opted to use the preliminary reference procedure to find out if the national law was in fact compatible with Community rules.

The problem for the European Court of Justice was that, while the notion of human dignity can be found in Article 1 of the Charter of Fundamental Rights, the concept is somewhat ambiguous under EU law and not as well developed as its German counterpart.<sup>160</sup> Nevertheless, the Court had to decide whether it was possible to use ‘human dignity’ as a public policy justification when restricting intra-Community trade. The Court had to tread carefully. It had previously established in *Schmidberger* that restricting free movement could be justified on the basis of protecting fundamental rights.<sup>161</sup> But, on the other hand, Advocate General Jacobs had also warned in that very same case that Member States might pursue illegitimate objectives while simultaneously proclaiming that such measures are necessary to protect a fundamental right recognized by national law.<sup>162</sup>

The Court was in quite the predicament and had to strike a careful balance since fully recognizing the German interpretation of ‘human dignity’ would have been essentially a value judgment against all those Member States that allowed similar laser games in their territories.<sup>163</sup> In essence, the *Omega* case demonstrated that there was a conflict between two legal systems. Pulsar’s actions were completely legal in the United Kingdom while at the same time

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<sup>159</sup> Case C-36/02 *Omega* [2004] ECR I-9609, para 9.

<sup>160</sup> Corthaut 2012, p.44.

<sup>161</sup> Case C-112/00 *Schmidberger* [2003] ECR I-5659.

<sup>162</sup> Case C-112/00 *Schmidberger* [2003] ECR I-5659. Opinion of AG Jacobs, 11 July 2002, para.98.

<sup>163</sup> Corthaut 2012, p.44.

the German Constitution and the concept of ‘human dignity’ apparently required interference.<sup>164</sup>

The Court eventually ruled that protecting fundamental human rights, human dignity included, was a valid justification when invoking the public policy defence.<sup>165</sup> The Court ruled that German authorities were able to exercise a margin of discretion when interpreting the concept of ‘human dignity’.<sup>166</sup> Furthermore, the Court stated that it was not indispensable for the measure to correspond to a conception shared by all the Member States – thus evading any controversial value judgments.<sup>167</sup> The conclusion was that the German prohibition was not excessive as it only prohibited one aspect of the game; firing laser beams on human targets.<sup>168</sup>

The *Omega* ruling has been a much discussed subject in academic literature. In many ways it was a landmark case and showed how the Court was able to exercise flexibility while assessing the public policy defence in an environment of value pluralism absent of settled case-law.<sup>169</sup>

After *Omega*, it is possible that a wide variety of measures can be taken to restrict electronic entertainment on the basis of public policy and morality. For instance, some groups in Germany have raised the idea of prohibiting violent and explicit computer games altogether.<sup>170</sup> On the other hand, the ruling should not be seen as a ‘carte blanche’ by any means. Even in situation where the constitutional norm – in this case the concept of ‘human dignity’ – is compatible with the EU legal order, the national measure has to be proportionate as well. In *Omega*, the outcome might have been different had the national authorities issued a blanket ban against all laser pistol games. The European Court of Justice concluded in *Omega* that the need for proportionality is not excluded merely, because one Member State has chosen a system of

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<sup>164</sup> There is an argument that the German censorship of games is inconsistent at best. As an example: “*Killing games: A look at German videogame legislation*” [www.gamasutra.com](http://www.gamasutra.com).

<sup>165</sup> Case C-36/02 *Omega* [2004] ECR I-9609, para 35.

<sup>166</sup> Para 31.

<sup>167</sup> Para 37.

<sup>168</sup> Para 31.

<sup>169</sup> Beck 2012, p.364–365.

<sup>170</sup> Corthaut 2012, p.46.

protection different from that adopted by another state.<sup>171</sup> We will leave the matter of proportionality and necessity aside for now as they will be examined comprehensively in the following chapter.

#### 3.3.4 Public Policy (and Security) and Secondary Legislation: Lost in Translation?

We established previously that the Citizens' Rights Directive also contains certain public policy and security provisions. For instance, Article 27 states that the freedom of movement and residence can be restricted on the grounds of public policy and security as long as the measure taken does not serve economic ends. Similarly, public policy appears in the E-commerce Directive and in the Audio Visual and Media Services Directive.<sup>172</sup> Both these Directives state that Member States may take necessary measures in order to protect, among other things, human dignity and national security. The concept of proportionality can also be found from these legislative acts so there is little ambiguity in relation to the case law of the Court. However, the lines begin to blur when we examine the concept of public policy and public security in the Services Directive.

Article 14 in the Services Directive dictates that discriminatory national measures are strictly forbidden. This includes natural persons on the basis of their nationality or, in the case of legal persons, the location of their registered office. However, Article 16 states that certain non-discriminatory measures may be accepted on the basis of public policy or security if they are necessary and proportionate. The Directive defines the concepts of public policy and security as 'overriding reasons relating to the public interest recognized as such in the case law of the Court of Justice' in Article 4.<sup>173</sup> A somewhat similar approach was adopted in *Commission v. Luxembourg*, in which the AG Trstenjak stated that the concept of public policy covers "rules...that meet the imperative requirements of public interest".<sup>174</sup>

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<sup>171</sup> Case C-36/02 *Omega* [2004] ECR I-9609, para 38; Corthaut 2012, p.48.

<sup>172</sup> Article 3(4) E-Commerce Directive (2000/31); Article 3(4) Audio Visual and Media Services Directive (2010/13).

<sup>173</sup> Article 4(8).

<sup>174</sup> Case C-319/06 *Commission v Luxembourg* [2008] ECR I-4323. Opinion of AG Trstenjak, 13 September 2007, para 44.

Using public policy (or security) as a component of - or in conjunction - with public interest is problematic considering that we have previously established that there can be inherent differences between the terms public policy and public interest. The two concepts are not always identical; it is possible to conceptualize public interest as an intrinsic part of public policy but by no means is public interest indispensable to the legal order. However, we have defined the concept of public policy as something more profound – it protects the fundamental values of legal and political order of any nation - and it should only be invoked as a defence when a sufficiently serious threat to some fundamental interest of society is at hand.<sup>175</sup>

It might be possible to disregard this obscurity; claiming that it is a result of inadequate translation. For instance, some language versions of the *Commission v. Luxembourg* ruling use the definition public policy while others have opted to use the term public interest.<sup>176</sup> It is obviously true that interpreters are not expected to produce texts that are completely identical. Translations are always approximations; they are rarely equivalent. But legal certainty demands that different language versions should produce similar legal effects.<sup>177</sup> And the important question remains: If the use of public policy and public interest in *Commission v. Luxembourg* was simply a result of linguistic diversity then why is the same approach adopted in the Services Directive?

It is possible that we will find a better explanation to this question when we examine the case law of the European Court of Justice more thoroughly. In the following chapter we will approach the subject of objective justifications, or overriding reasons in the public interest (OR-PI), that can also be used to restrict the free movement of services. Perhaps then we can begin to understand why these abstract institutions - public interest, public policy and public security - seem to appear side-by-side, not only in academic literature, but also in EU law.

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<sup>175</sup> Hobér 2010, p.26.

<sup>176</sup> Ibid.

<sup>177</sup> Paunio 2013, p.7.

### 3.4 Conclusion

The spectrum of the public policy and security exceptions are in first instance determined by national authorities and laws.<sup>178</sup> The interpretation of public policy may differ from one Member State to another, as was the case in *Omega*, and in these circumstances the Court has to tread carefully. But as we have examined, the European Court of Justice ultimately controls the limits of *ordre public* and is responsible for setting the material terms regarding its invocation.<sup>179</sup> The CJEU has to assess the necessity of the measure, avoid any unnecessary value judgments and simultaneously uphold the fundamental principles of EU law. The *Carpenter* case demonstrated that the Court can, in theory, investigate almost any legislative or administrative act if there is a chance that the measure has negative ramifications to the free movement provisions laid down in the Treaty. We saw that Mary Carpenter's right to residency could be derived from the fact that she provided support to her husband; a service provider who enjoyed free movement rights by working throughout Europe.<sup>180</sup> This can be seen as excessive judicial activism or constructive balancing as the likes of Robert Alexy have stated.<sup>181</sup> Alexy's 'Law of Balancing' assumes that the Court should always be active when conflicting interests are competing against one another. According to this theory the Court should assess every situation thoroughly when determining the underlying general interest. In other words, the Court has to define how far one principle can be infringed for the benefit of another.<sup>182</sup> It is the "*wisdom of knowing how to distinguish the nature of trouble when choosing the lesser evil*" as Niccolò Machiavelli stated in *Il Principe*.

When we consider the idea of balancing opposing interests, we have witnessed that special circumstances and the sensitive natures of the protected interests allow competent national authorities some margin of discretion.<sup>183</sup> If the restrictiveness of the national measure is mi-

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<sup>178</sup> Corthaut 2012, p.72; Poillot-Peruzzetto, S. "*Ordre Public et Droit Communautaire*", p.178.

<sup>179</sup> Corthaut 2012, p.72.

<sup>180</sup> Maduro 2010, p.35; Case C-60/00 *Carpenter* [2002] ECR I-6279.

<sup>181</sup> Vries 2013, p.170.

<sup>182</sup> Vries 2013, p.170; Robert Alexy:" *Constitutional Rights, Balancing, and Rationality*" Ratio Juris. Vol 16 2003.

<sup>183</sup> Hobér 2010, p.27.

nor, while the overall importance of the public policy or public security justification for this interference is high, then it is likely that the Court concludes that the national measure fulfills the principle of proportionality. Obviously this is a rather vague description, but in the following chapter the concept of proportionality will be examined in more detail.

## 4. THE JUSTIFICATION TEST: EXPANDING THE SCOPE OF THE TREATY

### 4.1 Introduction

In the previous section we witnessed that Member States may enact restrictions if they are proven to be reasonable and based on valid reasons. As discussed before, Article 56 TFEU prohibits discriminatory national measures unless they can be justified on the basis of Article 52 TFEU - public policy or public security.<sup>184</sup> But these exceptions should be interpreted narrowly.<sup>185</sup> We examined previously that only a genuine threat to a fundamental interest of society enables the invocation of public policy or security. Regardless of these requirements, Member States across the old continent have felt the need to apply and uphold a wide variety of restrictions to the free movement of services in order to protect the general public interest.<sup>186</sup>

#### 4.1.1 The CJEU: Building Bridges or Conjuring Confusion?

As a result of the ensuing friction – between the narrow interpretation of the express derogations and the need to protect national interests - the European Court of justice has developed another legal framework in its case law. In academic literature terms such as ‘judicially created exceptions’, or ‘objective justifications’ are used to describe the new legal reality.<sup>187</sup> To be more precise, the Court has used the term ‘overriding reasons in the general interest’ in the field of services.<sup>188</sup> In the field of goods, the Court has adopted a similar approach after the famous *Cassis de Dijon* decision – though the terminology can be slightly different.<sup>189</sup>

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<sup>184</sup> Article 52 also provides exceptions for public health related issues.

<sup>185</sup> Case 352/85 *Bond* [1988] ECR 2082, para 36; Raitio 2010, p.93.

<sup>186</sup> Kaila 2003, p.303.

<sup>187</sup> Barnard 2013, p.528, Wiberg 2014, p.115 and Raitio 2013, p.593.

<sup>188</sup> Case 55/94 *Gebhard* [1995] ECR I-4165, para 39.

<sup>189</sup> The Court has used the term ‘mandatory requirements’ in its ‘rule of reason’ test. See Case C-120/78 *Cassis de Dijon* [1979] ECR 649, para 8; Craig 2011, p.95.

It is quite evident that the Court of Justice has played a vital role in the development of the European Union. Many of the concepts that are fundamental to the way in which the Union functions cannot be ascertained from the Treaties themselves but instead from the case law of the CJEU.<sup>190</sup> But the development of these objective justifications, outside the express powers given to Member States, can also conjure confusion and criticism. The CJEU's extensive influence over the legal order of the European Union has repeatedly resulted in allegations of excessive judicial activism.<sup>191</sup>

Various authors have implied that, in principle, directly discriminatory national measures can only be applied on the basis of Article 52 TFEU (public policy and public security) while indirectly discriminatory measures can be justified, not only on the basis of Article 52, but also on reasons related to public interest.<sup>192</sup> But it can be difficult to decisively determine the restrictiveness of the national measure; is it directly or indirectly discriminatory?<sup>193</sup> Also, the rulings of the Court tend to be somewhat ambiguous quite often. As the Member States and national authorities proclaim that specific measures are required to protect the general public interest, or on the grounds of public policy or public security, the Court has a habit of concentrating primarily on assessing the proportionality of the measure in question. For instance, in *SIA*, the Court stated that while it is important to understand the nature of the restriction – can it be allowed as a derogation on the grounds of public policy and security or in accordance with the case law and the doctrine of ‘overriding reasons in the public interest’ – the measure must always satisfy the principle of proportionality.<sup>194</sup> Similarly, in *Pfleger* the Court concluded that the concept of ‘overriding reasons in the public interest’ can be used in conjunction with Article 52 TFEU but such restrictions should also comply with the relevant conditions of proportionality as they are laid down in the case law.<sup>195</sup>

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<sup>190</sup> Barnard 2013, p.61.

<sup>191</sup> Ibid.

<sup>192</sup> Wiberg 2014, p.115; Raitio 2013, p.593; Barnard 2013, p.528.

<sup>193</sup> Wiberg 2014, p.116.

<sup>194</sup> Case C-470/11 *SIA* [2012] ECR 0000, para 35–37.

<sup>195</sup> Case C-390/12 *Pfleger* [2014] ECR 0000, para 40 and 43.



This makes systemization rather burdensome, but it is also the reason why we must thoroughly analyze the ‘overriding reasons in the public interest’ (or ORPI) concept thoroughly. It will become evident that sometimes there is only a thin line between the express Treaty derogations (Article 52 TFEU) and the objective justifications developed by the Court (ORPI).

## 4.2 Overriding Reasons in the Public Interest (ORPI)

### 4.2.1 The Origins

We can trace the present-day ‘objective justification test’ back to *van Binsbergen*; a case that is over four decades old. It was in *van Binsbergen* in which the Court considered the extent of public policy and public security as exceptions to the free movement of services. The CJEU established that indistinctly applicable national measures could be justified, provided they have an objective justification and are also proportional all things considered.<sup>196</sup> To be more precise, the Court originally used the expression “*measures which are less restrictive*”. This concept was developed further in cases such as *Gouda*, *Säger* and *Commission v Netherlands*.

The Court concluded in *Säger* that the freedom to provide services may be restricted in situations in which there is an imperative reason relating to the public interest; provided that the measure applies to all persons equally (the principle of non-discrimination). The Court also stated that these measures should always be objectively necessary and must not exceed as to what is required to attain the stated objective.<sup>197</sup> This was also the case in the two other decisions; the Court was adamant that only a restriction pursuing a legitimate public interest could be accepted.<sup>198</sup>

*Gouda* demonstrates how the television market in Europe had begun to transform at the sunset of the Cold War era. Various public broadcasting monopolies were experiencing difficulties as new satellite based delivery services appeared. Simultaneously, Member States wanted to protect non-commercial radio and television broadcasting systems as part of a cultural policy. In

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<sup>196</sup> Littler 2006, p.22; Case 33/74 *van Binsbergen* [1974] ECR 1299, para 14 and 16.

<sup>197</sup> Case C-76/90 *Säger* [1991] ECR I-4421, para 15.

<sup>198</sup> Case C-353/89 *Commission v Netherlands* [1991] ECR I-4069, para 17; Case C-288/89 *Gouda* [1991] ECR I-4007, para 13.

*Gouda*, the Dutch Media Control authority imposed a fine on cable network operators for airing advertisements that did not comply with national requirements.<sup>199</sup> For the CJEU it was simply a question of striking a careful balance as deliberately protectionist measures would have had negative economic consequences, but the Court also had to recognize that there were some legitimate public policy related reasons for restricting the inward flow of television services.<sup>200</sup> A test of some sort was necessary for delicate situations such as these; and a test is exactly what the Court eventually constructed.

#### 4.2.2 The Test of Justification

Even though this thesis mainly concentrates on the freedom to provide services, it was a case concerning establishment in which the European Court of Justice refined the necessary requirements for the national measure to satisfy ‘the test of justification’.<sup>201</sup> In *Gebhard*, a German citizen Mr Reinhard Gebhard had moved to Italy to live with his family of four. He had been authorised to work as a lawyer in Germany (*rechtsanwalt*) and Gebhard, as he wanted to pursue his career in Italy, eventually opened a chamber in Milan while using the title “*avvocato*”. However, after several complaints, the Milan Bar Council decided that Gebhard did not possess the necessary qualifications required in Italy and prohibited him from using the title “*avvocato*” and also denied him the right to open a branch office in Milan.<sup>202</sup> Furthermore, the Council penalized Gebhard and suspended his right to pursue his professional activity for the duration of six months (*sospensione dell’ esercizio dell’ attività professionale*).<sup>203</sup>

The Milan Bar Council argued that the case should have been handled under the rules for the provision of services, because according to Italian regulations Gebhard was not ‘established’ there. The European Court of Justice ruled otherwise and concluded that prohibiting Mr Rein-

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<sup>199</sup> Case C-288/89 *Gouda* [1991] ECR I-4007, para 5.

<sup>200</sup> Keller 2011, p.119–120.

<sup>201</sup> See also Barnard 2013, p.528.

<sup>202</sup> Case C-55/94 *Gebhard* [1995] ECR I-4165, para 3–9.

<sup>203</sup> Para 11.

hard Gebhard from using the title “*avvocato*” was an infringement of his rights and restricted the freedom of establishment.<sup>204</sup>

The Court formulated the test of justification when it concluded that “*national measures liable to hinder or make less attractive the exercise of fundamental freedoms...must fulfil four conditions: they must be applied in a non-discriminatory manner; they must be justified by imperative requirements in the general interest; they must be suitable for securing the attainment of the objective which they pursue; they must not go beyond what is necessary in order to attain it*”<sup>205</sup>

We can distinguish four conditions that the national measure has to fulfil in order satisfy the test.

- (A) The measure must be applied in a non-discriminatory fashion
- (B) The measure must be justified by imperative requirements in the general interest
- (C) The measure must be suitable for securing the stated objective
- (D) The measure must not go beyond what is necessary to secure the stated objective

The Court also clarified in its judgment that this test of justification applies also to other freedoms such as the freedom to provide services.<sup>206</sup>

If we examine the *Gebhard-formula* step-by-step, we can witness that it is to be used in situations in which a national measure ‘hinders free movement or makes it less attractive’. This is a particularly broad approach since, in principle, any regulation can restrict access to markets (see section 2.3.3). In any event, if the answer to this first step is ‘yes’, then the Court has to assess whether the measure is applied in a discriminatory fashion. We have previously analysed the differences between distinctly and indistinctly applicable measures;

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<sup>204</sup> Case C-55/94 *Gebhard* [1995] ECR I-4165, para 29 and 34.

<sup>205</sup> Para 37.

<sup>206</sup> Para 6 (operative part).

non-discrimination in this context means that the action is administered equally but its effects are unequal.<sup>207</sup>

The second requirement, meaning that the measure has to pursue a valid aim, is yet another obscure condition. We will later examine the different justifications recognized by the Court but it suffices to say that in most instances Member States claim that they are pursuing a legitimate objective. In the next chapter we will also try to find out whether there is any distinct difference between ‘objectives in the general interest’ and the express Treaty derogations such as public policy and public safety. The last two components of the *Gebhard-formula* refer to the overall proportionality of the national measure.<sup>208</sup> We will now examine the concept of proportionality in more detail.

#### 4.2.3 The Principle of Proportionality

Originally, there were no explicit set of principles laying out how to test the legality of state action in the context of Community rules. Since the Treaty on the European Community did not contain these elements, the European Court of Justice had to establish a legal framework for the purposes of administrative legality.<sup>209</sup> It used the existing national legal systems as a springboard; the concept of proportionality was well shaped in countries such as Germany. In Germany the concept of proportionality was used to challenge excessive policing measures.<sup>210</sup>

Today, after the ratification of the Lisbon Treaty, the principle of proportionality is enshrined in Article 5 of the Treaty on European Union. In the context of the four freedoms, proportionality is used as a tool when contesting the legality of Member State action.<sup>211</sup> However, we can see this approach already in *Internationale Handelsgesellschaft*, a case that is over four decades old, in which the proportionality principle was used as a ground of judicial review.<sup>212</sup>

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<sup>207</sup> Barnard 2013, p.247.

<sup>208</sup> Dubravka 2011, p.100–103.

<sup>209</sup> Paul Craig: Proportionality, Rationality and Review, p.267

<sup>210</sup> Ibid; Craig 2012, p.591.

<sup>211</sup> Craig 2012, p.591.

<sup>212</sup> Paul Craig: Proportionality, Rationality and Review, p.268 and Case 11/70 *Handelsgesellschaft* [1970] ECR 1125.

While the EU courts are primarily responsible for determining the scope and extent of proportionality,<sup>213</sup> the burden of proof is on the defending state to show that the national measure is appropriate.<sup>214</sup> Proportionality *stricto sensu* means that the Member State has to show that there is a balance between the resulting restriction and the aim sought by or the result brought by the national rule.<sup>215</sup> As we saw earlier in the *Gebhard-formula*, this means that the measure has to be suitable for attaining the stated objective and must not go beyond what is necessary to attain this goal. The question of suitability of the national measure often requires only marginal control whereas the Court has to carefully determine whether the pursued aim could be satisfied by less restrictive instruments.<sup>216</sup> It should be emphasized that the burden of proof cannot, however, be so extensive that the Member State should exhaustively demonstrate that no other conceivable measure exists for the attainment of the objective under the same conditions.<sup>217</sup>

#### 4.2.3.1 Proportionality: Finding the Equilibrium

We can witness the application of the justification test in *De Coster*. In this case, Belgian authorities adopted a municipal tax on satellite dishes which had the effect of imposing a charge on the reception of television programmes by satellite; a measure which did not apply to the reception of programmes by cable.<sup>218</sup> The municipality of Watermael-Boitsfort argued that the tax on satellite dishes was introduced in order to prevent the ‘uncontrolled proliferation in the municipality and thereby preserving the quality of the environment’.<sup>219</sup>

The Court ruled that the tax was interfering with the free movement of services, because broadcasters from other states were not allowed the same access as Belgian cable broadcasters.<sup>220</sup> It was then a question of proportionality; was the measure suitable for the purpose of protecting the environment and did it not go beyond what was necessary? The Court ruled that

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<sup>213</sup> Paul Craig: Proportionality, Rationality and Review, p.268.

<sup>214</sup> Case C-465/05 *Commission v Italy* [2007] ECR I-11091, para 76.

<sup>215</sup> Vries 2013, p.172–173.

<sup>216</sup> Barnard 2013, p.534.

<sup>217</sup> Case C-110/05 *Commission v Italy* [2009] ECR I-519, para 66.

<sup>218</sup> Case C-17/00 *De Coster* [2001] ECR I-9445, para 2 and 34; Barnard 2013, p.534.

<sup>219</sup> Para 7.

this was not the case; the tax was not the least restrictive method of achieving the stated objective. The Court concluded that less restrictive mechanisms were available such as regulating the size of the satellite dishes, their positions and attachment or the general use of communal dishes.<sup>221</sup>

Correspondingly, the CJEU used the proportionality test in *Josemans*, in which the Court ruled that limiting access to coffee shops, and therefore the sale of cannabis, could be justified on the basis of public policy related arguments. In this case the Municipal Council of Maastricht banned any coffee-shop owner from allowing to his establishment people who did not have their actual place of residence in the Netherlands.<sup>222</sup> Mr Josemans was penalized for circumventing this regulation and the Mayor of Maastricht ordered his shop closed down.<sup>223</sup> The Court eventually ruled that excluding foreign residents from the market place in order to maintain public order and combat drug tourism was appropriate. The CJEU explicitly rejected the possibility of allowing non-residents to enter the coffee shops without having the permission to purchase cannabis as this might have encouraged illegal trade.<sup>224</sup> In addition, the Court stated that other less restrictive measures had proven to be inefficient such as restricting opening hours.<sup>225</sup>

*Josemans* demonstrates that the Court is willing to consider distinctly applicable measures (outright preferential treatment given to some group) in situations concerning public order or public policy. The approach can be seen as pragmatic and pro-state<sup>226</sup> but it also raises some questions regarding the relationship of ‘overriding reasons in the public interest’ and public policy and security as they exist in the Treaty provisions. We remember that only a genuine and a sufficiently serious threat to a fundamental interest of society should, in principle, enable the invocation of Article 52 TFEU (public policy and security). However, in *Josemans* the

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<sup>220</sup> Case C-17/00 *De Coster* [2001] ECR I-9445, para 33–34.

<sup>221</sup> Para 38.

<sup>222</sup> Case C-137/09 *Josemans* [2010] ECR I-13109, para 20.

<sup>223</sup> Para 2.

<sup>224</sup> Para 81.

<sup>225</sup> Para 80–82.

<sup>226</sup> Barnard 2013, p.535.

main objective was to end a nuisance of sort. The local authorities in Maastricht were dissatisfied with the fact that a large number of tourists purchased and consumed cannabis in the municipality. The government of Netherlands argued that the prevention of drug tourism should be seen as a ‘public interest objective’ while the Court remained inconclusive.<sup>227</sup> In any event, the CJEU ruled that the restriction itself justified.<sup>228</sup>

The nature of proportionality was also assessed in *Jyske*. Jyske, a branch of the Danish NS Jyske Bank, offered financial services in Gibraltar without being established there.<sup>229</sup> The Spanish FIU (financial intelligence unit) suspected that Jyske was used for money laundering purposes and demanded information regarding its customers. Jyske refused; citing the banking secrecy rules of Gibraltar.<sup>230</sup> Following the investigation and refusal to provide information, the local authorities imposed financial penalties to the tune of €1 700 000.<sup>231</sup> The Court eventually concluded that, in principle, requiring credit institutions to provide information directly to the FIU does constitute a restriction on the freedom to provide services as it gives rise to additional costs and administrative burdens.<sup>232</sup> But the Court concluded that the measure was justified; the prevention of money laundering meets the criteria of ‘overriding reasons in the public interest’ and the information itself was necessary to effectively supervise and suspend suspicious financial transactions.<sup>233</sup> *Jyske* can be seen as a pragmatic decision, especially so in the age of terrorist financing. Legitimate security risks should be taken into account when assessing the extent regulations concerning banking secrecy.

In addition, the Court has emphasized that national measures restricting the free movement of services should be clear, precise and predictable as regards their legal effects. This is particularly important when there are unfavourable consequences for individuals. The CJEU specifi-

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<sup>227</sup> Case C-137/09 *Josemans* [2010] ECR I-13109, para 61 and 66.

<sup>228</sup> Operative part of Case C-137/09 *Josemans* [2010] ECR I-13109, para 2.

<sup>229</sup> Case C-212/11 *Jyske* [2013] ECR 0000, para 23.

<sup>230</sup> Case C-212/11 *Jyske* [2013] ECR 0000, para 23–25.

<sup>231</sup> Para 2.

<sup>232</sup> Para 80.

<sup>233</sup> Para 85.

cally stated in *SIAT* that if the measure does not fulfil these requirements then it cannot be considered proportionate.<sup>234</sup>

#### 4.2.3.1 Proportionality: Strict Scrutiny or Sensitivity to National Values?

So far we have established that proportionality, in the context of the four freedoms, functions as a tool in situations where a *prima facie* restriction has been found and the Member State tries to defend its action on the basis of public order, security or some other abstract public interest. The Court then has to find a balance between a rights provision (such as Article 56 TFEU) and a state or public interest.<sup>235</sup>

However, there is no definitive way to explain how this principle functions. We could simply state that the Court uses a rationalist approach; it assesses whether the administrative measure is suitable and necessary in order to reach a stated objective. This is the conventional understanding of proportionality as we saw in *Gebhard*.<sup>236</sup> But the problem with this approach is that there are no predetermined structures, that is to say something substantive we could use as a reference point when the Court presents its argument in hard cases. This is the most common criticism of the proportionality approach. If we take it to the extreme, then proportionality can be applicable in any situation as all interests are relative and can be weighed against one another; even a relatively light expectation can be measured against the existing the legal framework.<sup>237</sup> Adopting such a generally applicable criteria for judicial review would no doubt provide flexibility but it would also increase uncertainty in public law.<sup>238</sup> And it is true that at times it can feel that the CJEU treats the Treaty provisions as if they are relative principles that can be weighed against other interests such as policies laid down in legislative measures.<sup>239</sup> If this is the case, the Court may stretch the concept of proportionality at will and use it differently in apparently similar cases. On the other hand, it is also possible to argue that these different manifestations of the principle are intrinsically related to the nature of the na-

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<sup>234</sup> Case 318/10 *SIAT* [2012] ECR 0000, para 58–59.

<sup>235</sup> Harbo 2010, p.164; Paul Craig: Proportionality, Rationality and Review, p.269.

<sup>236</sup> *Ibid*, p.165 and Case C-55/94 *Gebhard* [1995] ECR I-4165, para 37.

<sup>237</sup> Hickman 2010, p.307.

<sup>238</sup> *Ibid*, p.316.

<sup>239</sup> Harbo 2010, p.166.



tional measure; meaning that proportionality is different if the case concerns public policy or public security instead of something less relevant as ensuring the balance of sports clubs for example.<sup>240</sup>

There is also an argument that the Court has adopted two distinct approaches to the principle of proportionality. It is said that when it assesses whether Community regulations are in accordance with the four freedoms (horizontal dimension), it adopts a modest approach. But when it assesses national regulations (vertical dimension), it is more willing to quash the regulatory measure if the Member State has not chosen the least restrictive option available. Proportionality is therefore applied when the Court finds it suitable – when there is a window of opportunity to promote a desired outcome.<sup>241</sup> In essence, the Court is not functioning as a neutral mediator between various differing interests but as a biased institution with political aims, more precisely that of promoting the common European project.<sup>242</sup>

If we examine the argument of strict proportionality scrutiny within the vertical dimension, we can use *Viking* to demonstrate that the Court is willing to adopt an activist approach in order to strengthen the principles of Community law. Viking, a Finnish Company, wished to reflag its vessel Rosella under the Estonian flag in order to decrease wage costs via manning the ship with an Estonian crew.<sup>243</sup> The Finnish union of seamen (Suomen Merimies-Unioni) demanded that, regardless of this change, Viking would have to respect its earlier commitments and follow the Finnish law; that being the collective bargaining agreement. In addition, the union demanded that a possible change of flag would not lead to any laying-off of employees on any Finnish flag vessels belonging to Viking.<sup>244</sup> The union was aware that these expectations would essentially render the reflagging pointless but it justified its position on the basis of protecting Finnish jobs.<sup>245</sup> As a response to an immediate strike threat, Viking sought an in-

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<sup>240</sup> Harbo 2010, p.172.

<sup>241</sup> Ibid.

<sup>242</sup> Ibid.

<sup>243</sup> Hendrickx 2011, p.1058; Case C-438/05 *Viking* [2007] ECR I-10779, para 2.

<sup>244</sup> Case C-438/05 *Viking* [2007] ECR I-10779, para 15.

<sup>245</sup> Para 18.

junction restraining the union from breaching the free movement of services and establishment provisions.<sup>246</sup>

First, the CJEU stated that even though the right to collective action must be recognized as a fundamental right, it may also be subject to certain restrictions.<sup>247</sup> In essence, the Court first established that a restriction existed and then it assessed whether collective action pursued a legitimate aim compatible with the Treaty (could the restriction be justified by overriding reasons in the public interest). After this, the CJEU applied the principle of proportionality at its own discretion.<sup>248</sup> The eventual ruling itself was much criticised. The Court declared that, while the protection of workers is a legitimate interest, the policy of preventing ship-owners from registering their vessels in another state could not be objectively justified.<sup>249</sup>

Essentially, the European Court of Justice implied that these measures were socially legitimate but the amount of protectionism involved, and the possibility of fragmentation, jeopardized the integrity of Community law. The Court went even further in *Laval*, in which the Court declared that trade unions, that are not bodies governed by public law, could not rely on the public policy provision in order to protect their interests.<sup>250</sup> Questions have been raised after *Laval* whether hybrid bodies such as trade unions should be afforded the right for a ‘private policy exception’ of sort – so that they can defend their expressive rights.<sup>251</sup>

However, even though the *Viking* and *Laval* decisions were controversial and raised suspicions, local interests and organizations are not always on the losing side. The claim that CJEU prominently serves supranational interests is not waterproof; because even in this thesis we have examined several cases in which the CJEU exercised sensitivity to national values and ruled in favour of the Member States. For instance, in *Omega* the court specifically concluded

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<sup>246</sup> Action was taken against both the Finnish Seaman’s Union and the International Transport Workers’ Federation. The latter had ordered its affiliates to boycott Rosella. Vries 2013, p.181.

<sup>247</sup> Case C-438/05 *Viking* [2007] ECR I-10779, para 44.

<sup>248</sup> Para 75.

<sup>249</sup> Para 88.

<sup>250</sup> Case C-341/05 *Laval* [2007] I-11767, para 84.

<sup>251</sup> Corthaut 2012, p.101–102; Lasser 2014, p.251: “the unions gain all of the burdens – but none of the advantages – of being treated as if they were a public entity”.

that national authorities must be allowed some margin of discretion.<sup>252</sup> We remember that the national measure was deemed proportionate. Another similar example can be seen in *Schmidberger*, in the field of goods, in which the Court ruled that environmental groups were allowed to demonstrate on the Brenner motorway, for the duration of 30 hours, despite the negative consequences to cross-border trade.<sup>253</sup>

It must also be recognized that the Court is operating in a diverse environment – surrounded by differing and changing social values. For example, the concept of proportionality, and finding the correct balance between the Treaty provisions and interests of the Member States, has proven to be exceedingly difficult in the world of gambling. The gambling industry is known for its controversial elements. On one side there are private operators seeking new opportunities in the internal market, while others believe that publicly-owned monopolies are the best way to balance the overall benefits and costs of gambling services.<sup>254</sup> For the purposes of this thesis, it is not practical to examine the regulatory framework and the case law concerning online gambling, but it suffices to say that the Court has had to carefully assess how the concept of proportionality can be applied in a field of services that is sensitive to moral evaluations. Even though the overall public perception towards gambling was already changing prior to *Schindler*, the Court itself was still cautious. Two decades ago national authorities possessed a wide margin of discretion in gambling related activities. In *Schindler*, the Court stated that it is not possible to disregard the moral aspects of gambling and that the general tendency of the Member States has been to restrict or even prohibit the practice of gambling.<sup>255</sup>

Over time the CJEU has adjusted its approach together with the changing public perceptions. In *Placanica* the Court already concluded that while Member States are free to set the objectives of their policy on betting and gambling, restrictive measures must satisfy the principle of proportionality and must not go beyond what is necessary in order to achieve those objec-

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<sup>252</sup> Case C-36/02 *Omega* [2004] ECR I-9609, para 31.

<sup>253</sup> Case C-112/00 *Schmidberger* [2003] ECR I-5659.

<sup>254</sup> Littler 2011, p.221–222.

<sup>255</sup> Caligiuri 2012, p.583; Case C-275/92 *Schindler* [1994] ECR I-1039, para 60.

tives.<sup>256</sup> Likewise, if we examine current trends, then it is quite evident that the principle of proportionality is in full use and Member States have less room for manoeuvring.<sup>257</sup>

In essence, the proportionality principle appears to be another abstraction that can shapeshift when time passes and society's perceptions change. At times it can be somewhat similar to the *Wednesbury reasonableness*; a test which has been developed by the English courts in administrative law. According to *Wednesbury reasonableness* any decision can be challenged if it is clearly unreasonable or irrational. Essentially, the authority behind the decision has acted *ultra vires*, outside its competences, because the legislator could not have intended its powers to be exercised in such manner.<sup>258</sup> On the other hand, the burden of proof in the *Wednesbury* test, according to its definition, lies mainly on the claimant so there is still a stark difference between these two approaches.

In any event, it is hard to pinpoint the extent of proportionality or make any definitive normative assessments regarding its use; meaning that the application of proportionality is either a positive or a negative in its current form. The principle of proportionality can be seen as a tool that the Court uses to legitimise its decision as it seeks to rationalise its reasoning. But, on the other hand, if the CJEU's interpretation deviates from the conventional understanding of the principle, or the interpretation evolves rapidly, then proportionality can cause confusion and even be dangerous to legal certainty.<sup>259</sup>

Perhaps the best we can do is observe the facts in every specific case and therefore examine the principle from an empirical and practical point of view instead of engaging in comprehensive theoretical analysis.<sup>260</sup> What this means is that we can observe various justifications accepted by the Court in order to better comprehend the structure behind its case law. That is what we will do next.

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<sup>256</sup> Joined Cases C-338/04, 359/04 and 360/04 [2007] ECR I-1891, para 48–49.

<sup>257</sup> Case C-336/14 *Sebat Ince* [pending]. Opinion of AG Szpunar, 22 October 2015.

<sup>258</sup> Harbo 2010, p.161.

<sup>259</sup> Harbo 2010, p.184–185.

<sup>260</sup> Harbo 2010, p.183.

#### 4.2.4 Justifications Recognized by the Court.

The Court recognized numerous justifications in *Gouda*, such as the protection of intellectual property, rules intended to protect the recipients of a service, cultural policy in general and protecting the archaeological, historical and artistic heritage of a country.<sup>261</sup> This is by no means a comprehensive list, the CJEU has recognized a number of arguments during the last two decades either implicitly or explicitly. The exceptions are numerous, but they can be categorized into different groups.<sup>262</sup>

The first one involves market externalities; this means that the activity or transaction does not take into account important outside interests. These include the protection of the environment which the Court recognized (again) in *Yellow Cab*<sup>263</sup>, port safety<sup>264</sup>, road safety<sup>265</sup> or the need to safeguard the reputation of the financial markets.<sup>266</sup>

The second group concerns civil liberties; the objective here is that economic activities and freedoms should not jeopardize fundamental political values such as human dignity and freedom of expression (or assembly). We observed this approach in *Omega*<sup>267</sup> - in the context of Article 52 TFEU - but also witnessed in *Viking*<sup>268</sup> that the equilibrium between economic freedoms and civil liberties can be delicate to say the least. Regardless, the Court has also recognized equal treatment between citizens as an argument. In *Sayn-Wittgenstein* the CJEU concluded that this principle is compatible with the EU law as it is also enshrined in Article 20 of the Charter of Fundamental Rights.<sup>269</sup>

The next category concerns the protection of certain socio-cultural practises; this basically means safeguarding important institutions that enable the proper functioning of local markets.

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<sup>261</sup> Case 288/89 *Gouda* [1991] ECR I-4007, para 14.

<sup>262</sup> Chalmers 2006, p.833–834; Barnard 2013, p.530; Kaila 2003, p.306; Raitio 2010, p.94.

<sup>263</sup> Case C-338/09 *Yellow Cab* [2010] ECR I-1392, para 50.

<sup>264</sup> Joined Cases C-128/10 and C-129/10 *Thasou AE* [2012] ECR 0000, para 45.

<sup>265</sup> Case C-55/93 *Schaik* [1994] ECR I-4837, para 19.

<sup>266</sup> Case C-384/93 *Alpine Investments* [1995] ECR I-1141, para 44.

<sup>267</sup> Case C-36/02 *Omega* [2004] ECR I-9609.

<sup>268</sup> Case C-438/05 *Viking* [2007] ECR I-10779; Also in C-112/00 *Schmidberger* [2003] CR I-5659 the CJEU ruled in favor of fundamental rights (section 4.2.3.1).

The Court has ruled that the desire to avoid disturbances on the labour market<sup>270</sup> and preventing social security fraud or bogus self-employment<sup>271</sup> can be considered as valid justifications. In addition, the general prevention of abuse of the free movement of services is also seen as a valid defence – even if somewhat ambiguous.<sup>272</sup> In essence, the Court has concluded that restricting Article 56 TFEU on the basis of safeguarding the reliability and credibility of the national market can be legitimate. We should always remember that even though protecting the national markets from disturbances can be seen as a legitimate aim, depending on the situation, the Court has repeatedly rejected the notion that national measures could be adopted for purely economic purposes. For instance, in *SETTG* the CJEU ruled that a Greek law, which effectively excluded all tourist guides from other Member States, was a restriction on the free movement of services that could not be justified. The Greek government tried to argue that the national measure was necessary to ensure the proper functioning of the national economy – more specifically it was used to maintain industrial peace and to settle a collective labour dispute.<sup>273</sup> The Court, however, was adamant and stated “[it] must be regarded as an economic aim which cannot constitute a reason relating to the general interest”.<sup>274</sup>

In difficult situations the Court is willing to grant guidance as to what kind of national regulations are proportionate and what kind of expectations are required, ensuring the authorities are in compliance with the Treaty. This was demonstrated, for example, in *De Coster* when the Court provided alternative methods to reach the stated objective.<sup>275</sup>

The fourth category is related to the preservation of public order. It is inconclusive if this is somewhat similar to the concept of public policy and security as they appear in Article 52. The CJEU stated in *Läärä* that the maintenance of order in society is regarded as an ORPI.<sup>276</sup> In

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<sup>269</sup> Case C-208/09 *Sayn-Wittgenstein* [2010] ECR I-13693, para 89.

<sup>270</sup> Case C-445/03 *Commission v Luxembourg* [2004] ECR I-10191, para 38.

<sup>271</sup> Case C-577/10 *Commission v Belgium* [2012] ECR 0000, para 45.

<sup>272</sup> Case C-244/04 *Commission v Germany* [2006] ECR I-885, para 38. “on grounds relating to the prevention of abuse of the freedom to provide services, the protection of workers and legal certainty”.

<sup>273</sup> Case C-398/95 *SETTG* [1997] ECR I-3091, para 22–23.

<sup>274</sup> Para 23.

<sup>275</sup> Case C-17/00 *De Coster* [2001] I-9445, para 38; Barnard 2013, p.535.

<sup>276</sup> Case C-124/97 *Läärä* [1999] ECR I-6067, para 33.

any event, the effective supervision of the financial sector and the prevention of money laundering are valid justifications in this regard - as we saw in *Jyske*.<sup>277</sup>

It is interesting that the Court specifically stated in *Commission v. Italy* that the ‘preservation of public order and security’ can be used as a general justification despite ruling that the measure itself was not proportionate.<sup>278</sup> In this case the Italian government wanted to safeguard the integrity of private security activities via limiting the amount of licenses given to security guards. The measure was adopted as a mechanism to combat against local criminal organizations. The government tried to justify its action; stating that there was a risk of infiltration from these groups and restricted territorial licenses were necessary in order to maintain public order and security.<sup>279</sup>

Once again, the Court was somewhat ambiguous regarding the relationship between the express derogations found in the Treaty and its own case law concerning public interests and the general test of justification. It seemed once again as if this question was insignificant next to the principle of proportionality.

Finally, the Court ruled in *ASM Brescia SpA* that the need for legal certainty can be a valid justification<sup>280</sup> – another ambiguous statement that can mean many things depending on its interpretation.

#### **4.4 Conclusion**

In this chapter we have established that the Court has to delicately balance national interests against the general economic interests of the Union; or in other words the progression and cohesion of the European internal market. At times the Court has concluded that national authorities have not been able to justify their objectives. Sometimes the CJEU rules that the pre-

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<sup>277</sup> Case C-212/11 *Jyske* [2013] ECR 0000

<sup>278</sup> Case C-465/05 *Commission v Italy* [2007] ECR I-11091, para 74.

<sup>279</sup> Para 74.

<sup>280</sup> Case C-347/06 *ASM Brescia SpA* [2008] ECR I-10451, para 64.

sented aim itself is justifiable but the steps taken towards that goal are not proportionate.<sup>281</sup> When the Court assesses the national measure and applies the principle of proportionality it is willing to take into account the nature of the restriction but also the sensitivity of the sector in which the measure was enacted in.<sup>282</sup> This was clearly demonstrated in *Josemans* and in *Omega*.<sup>283</sup>

However, the CJEU's proportionality approach can also cause inconsistencies and significant ambiguity; the worst case scenario is that the principle of legal certainty itself is jeopardized.<sup>284</sup> This is the point of view that many people have adopted, who are critical of the European Court of Justice. For instance, Hickman writes that the proportionality as a general criterion is "*neither justified nor desirable*".<sup>285</sup> He states that there are inherent problems with the proportionality test as decoding the applied intensity and degree is burdensome for lawyers and public officials. There is a counter-argument that understanding this review would become easier over time, because the ever expanding case law would ultimately provide guidance. However, Hickman is unwilling to accept this argument. He states that this would still make the principle of proportionality too far-reaching.<sup>286</sup>

Hickman also argues that the proportionality evaluation is an intrusive test that imposes the burden on the public authority to provide satisfactory proof that their conduct is justified.<sup>287</sup> This is obviously in contrast with the traditional concept of judicial review in which the burden lies on the claimant to demonstrate that some wrongdoing has taken place or some decision is unreasonable.

I can certainly understand these arguments. It is true that the concept of proportionality, as it exists today in CJEU's case law, seems to have an elastic nature. Even the likes of Paul Craig

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<sup>281</sup> A statistical analysis, beginning from 25 July 1991 and finishing on 30 April 1998, shows that the CJEU held the measure to be permissible in 20 judgments (30%) and not permissible in 30 judgments (45%). This study was conducted by Jukka Snell: *Goods and Services in EC Law*, p.216.

<sup>282</sup> Wiberg 2014, p.121.

<sup>283</sup> Case C-36/02 *Omega* [2004] ECR I-9609; Case C-137/09 *Josemans* [2010] ECR I-13109.

<sup>284</sup> *Ibid*, p.123.

<sup>285</sup> Hickman 2010, p.308.

<sup>286</sup> *Ibid*, p.317.



have commented that it has “*been left to commentators to divine the legal test from the courts’ reasoning*”<sup>288</sup> Also there are some questions as to how suitable the test is in various circumstances. The *Viking* decision<sup>289</sup> caused significant controversy. It seemed as if the Court was expanding its doctrine and imposing its proportionality test on unions when it gave its ruling – completely overriding the public and private divide. Lasser raises this issue, stating “*the [Court] places a tremendous burden on unions, who must now treat the exercise of their fundamental rights as secondary to the firm’s fundamental market freedoms*”.<sup>290</sup>

The debate concerning the merits of proportionality as a test for judicial review will most likely continue for the foreseeable future. However, it is time for us to move on and examine what the relationship is between the express derogations and the general test of justification as it exists in the Court’s case law. We have witnessed that the Court has a habit of applying the test - the principle of proportionality - despite what national authorities use as an argument. They might invoke Article 52 TFEU directly or explain that overriding reasons relating to the public interest are the reason why some restriction or measure has to be adopted. The question then arises: What is the difference between the two or is there any difference at all?

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<sup>287</sup> Hickman 2010, p.314.

<sup>288</sup> Paul Craig: *EU Administrative Law* (Oxford University Press, 2006), p.650.

<sup>289</sup> Case C-438/05 *Viking* [2007] ECR I-10779.

<sup>290</sup> Lasser 2014, p.251.

## **5. ARTICLE 52 TFEU AND ORPI: THE THIN RED LINE?**

### **5.1 Introduction**

We have established one principal thing in the previous chapters. The free movement of services is not absolute; the Court has ruled in favour of various categories of national restrictions. It has concluded that these can be justified by different sets of standards, when it has delicately tried to strike a balance between the protected national interest and cohesion of the internal market. But simultaneously the Court is constantly evolving; it defines and changes the reasons for which national restrictions may be justified.<sup>291</sup> Systemising this inconsistent and ambiguous case law can be somewhat burdensome to say the least.

In this paper we have examined various national measures affecting economic activities. In essence, the justifications provided in Article 52 TFEU, public policy and public safety, are not the only reasons that may justify restrictions to trade in services. We have also examined that national measures can be justified on the basis of ‘overriding reasons in the public interest’; a doctrine the Court itself has introduced to the EU legal framework. That being said, the difference between Article 52 TFEU and the ‘public interest’ doctrine is unclear. Further complicating the matter; we have examined previously that in the Services Directive (2006/123/EC) there seems to be no distinction at all. Article 4 of the Services Directive specifically states that public policy and public security are part of the ‘overriding reasons relating to the public interest’ (ORPI) doctrine.

It does not help either that these three different abstract institutions – public policy, public security and public interest – can often be used as synonyms in everyday language. Also, in Black’s Law Dictionary the term public policy is defined as something that the government

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<sup>291</sup> Wiberg 2014, p.94.

can use to stop any action that is against the overall public interest.<sup>292</sup> Naturally public security can also be placed under the umbrella of public interest in formulations such as these.

Regardless, in this chapter we will finally try to reach some kind of conclusion concerning the relationship between Article 52 TFEU and the CJEU's public interest doctrine. I will provide three propositions as to how one can conceptualize the divide or lack thereof. This is by no means an exhaustive list as legal scholars are constantly analysing the case law and finding new ways to describe the overall structure behind the Court's decisions.

However, let us remind ourselves of what we have learned previously before going through the different hypotheses. As we have examined before, the free movement of services entails that any direct discrimination on the basis of nationality or place of establishment is prohibited. Discrimination is also strictly forbidden in Article 21 of the Charter of Fundamental Rights of the European Union. In chapter two we established that the Court has interpreted Article 56 TFEU comprehensively. Member States are to eliminate restrictions that are directly discriminatory, but also all regulations or measures that are non-discriminatory if they impend the access or exercise of the free movement (market access).<sup>293</sup>

The Treaty formulates that distinctly applicable measures can only be adopted if their existence can be justified on the basis of one of the reasons laid out in Article 52. The Court has repeatedly stated that the public policy or security derogations can only be invoked in specific circumstances.<sup>294</sup>

In chapter four we identified the general public interest justifications developed by the Court. In *Gebhard*, the European Court of Justice clearly stated that the justification test contains four specific conditions. The measure has to be non-discriminatory, it has to be suitable for secur-

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<sup>292</sup> Black's Law Dictionary is the most widely used law dictionary in the United States, founded by Henry Campbell Black. [thelawdictionary.org](http://thelawdictionary.org).

<sup>293</sup> Wiberg 2014, p.100; See also Barnard 2013, p.102–108: The Market Access Approach.

<sup>294</sup> Case C-249/11 *Byankov* [2012] ECR 0000, para 40.

ing the stated objective and must not go beyond what is necessary to achieve this goal.<sup>295</sup> We will witness that it is in fact the issue of discrimination that lies at the centre of the ambiguity.

## 5.2 The Relationship between Article 52 and the Justification Test

### 5.2.1 Article 52 TFEU and ORPI: Separate Entities?

At the moment, the conventional understanding is that the Treaty derogations and the CJEU's case law are separate entities not to be confused with one another. The argument here is as follows: Since the express derogations were left untouched when the Treaty of Lisbon was ratified, we should not assume that the legal reality has shifted either. Because public policy and security are specifically mentioned in Article 52 TFEU, they are more eminent as derogations than the public interest justifications developed by the Court.<sup>296</sup>

There is no doubt that the overall consensus is that Article 52 TFEU is available in respect of any breach of Union law. In essence, this means that the Member States can adopt non-discriminatory measures, but also distinctly applicable restrictions, when there is a sufficiently serious threat affecting one of the fundamental interests of society.<sup>297</sup> This is not the presumption when we examine the 'overriding reasons in the public interest'. The argument is that, even if there is considerable overlap with the terms public interest, public policy and public security, the test is only applicable when national authorities have adopted non-discriminatory or indistinctly applicable restrictions. The European Court of Justice emphasized this in *Gebhard*<sup>298</sup>, and has underlined it several times in its subsequent case law. For instance, in *Digibet* the Court concluded that such national measures must be in compliance with the standard of non-discrimination and proportionality as they are laid down in the case law.<sup>299</sup> Similarly in *Pfleger* the Court concluded that Member States must satisfy the relevant conditions of non-discrimination (while reiterating also the other parts of the

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<sup>295</sup> Case C-55/94 *Gebhard* [1995] ECR I-4165, para 37.

<sup>296</sup> Raitio 2013, p.598; Davies 2003, p.101–102.

<sup>297</sup> Barnard 2013, p.528.

<sup>298</sup> Case C-55/94 *Gebhard* [1995] ECR I-4165, para 37.

<sup>299</sup> Case C-156/13 *Digibet* [2014] ECR 0000, para 26.

*Gebhard-formula*; suitability, necessity and the concept of proportionality).<sup>300</sup> Likewise, in *Blanco* the CJEU unequivocally stated that ‘a discriminatory restriction is compatible with EU law only if it falls under an express derogation, such as Article 52 TFEU’.<sup>301</sup>

If we are to take these statements at face value, then the following theory is plausible: The Treaty provisions for the free movement of services prohibit some national measures; these can only be justified on the basis of Article 52 TFEU. However, other national measures are classified as restrictions *per se* only if the public authority fails to provide satisfactory justification for their existence – consistent with the principle of proportionality and the *Gebhard-formula*.<sup>302</sup> In other words, ORPI functions as a qualification tool that the CJEU can use to determine whether the label ‘restriction’ should be given to a specific national measure.<sup>303</sup>

On the other hand, both Article 52 TFEU and ORPI are subject to the principle of proportionality, and the Court seems to treat them somewhat similarly as exceptions, so it might be more appropriate to categorize both of them as exception criteria.

In any event, according to this approach, there is no overlap between Article 52 and ORPI. We are to understand that the express derogations are used only in rare circumstances, while the justification test offers a broader tool for analysing restrictive national measures.

### 5.2.2 Article 52 TFEU and ORPI: Symbiosis?

The problem with the previous construction becomes evident if we examine the Court’s case law in detail. The Court has been willing to apply its justification test (ORPI) in situations where distinctly applicable measures have been adopted by public authorities, or the Court has not properly defined the restrictive nature of the measure. In essence, the Court has blurred the

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<sup>300</sup> Case C-390/12 *Pfleger* [2014] ECR 0000, para 43.

<sup>301</sup> Joined Cases C-344/14 and C-367/13 *Blanco* [2014] ECR 0000, para 38.

<sup>302</sup> Also Wyatt 2011, p.573.

<sup>303</sup> Hatzopoulos 2012, p.151.

line between the two sets of justifications.<sup>304</sup> The situation is somewhat similar if we examine the argument that ‘purely economic considerations cannot qualify as valid justifications’. At times the Court has simply ignored the economic nature of the objective behind the national measure.<sup>305</sup>

Therefore, the existence of ambiguity in the case law cannot be denied. In addition, it seems that there is some inconsistency concerning the use of the terms distinct, indistinct and non-discriminatory. When the Court uses the term ‘non-discriminatory’ in its case law (*Gebhard-formula*), this seems to refer to national measures that, while not directly discriminatory, make it more difficult for foreign service providers to properly exercise their rights in the territory of a Member State.<sup>306</sup> But if the Court is willing to consider distinctly applicable measures when it applies its justification test, while also emphasising that this is only possible when express derogations are invoked<sup>307</sup>, then how are we to systematize Article 52 and OR-PI? Should we view them as [a.] separate institutions, [b.] just accept that there is some ambiguity in the case law or [c.] perhaps there is in fact a symbiosis of some sort between the two?

Considering the above, the following thought experiment is possible: [a.] There is a sliding scale within the concept of ‘distinctly applicable measures’ or [b.] the principle of proportionality is applicable to all national measures and no clear borderline exists between Article 52 and ORPI.

The first possibility means that the Court is willing to consider discriminatory measures outside the express derogations in specific circumstances. This is how Hatzopoulos describes the current reality.<sup>308</sup> The problem is that the Court has not acknowledged the existence of this possibility in its case law. It has never explicitly embraced the idea that there is a wide defini-

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<sup>304</sup> Hatzopoulos 2012, p.156–157; Case C-250/95 *Futura Participations* [1997] ECR I-2471, Case C-158/96 *Kohll* [1998] ECR I-1931.

<sup>305</sup> Hatzopoulos 2012, p.157; Jukka Snell: ‘Economic aims as justifications for restrictions to free movement’ 2005, p.35-56.

<sup>306</sup> Wiberg 2014, p.114.

<sup>307</sup> Joined Cases C-344/14 and C-367/13 *Blanco* [2014] ECR 0000, para 38; Case C-262/02 *Commission v France* [2004] ECR I-6569; Hatzopoulos 2012, p.157.

<sup>308</sup> Hatzopoulos 2012, p.119–120.

tion of indirect discrimination or some overlap between the terms distinct and indistinct. And there are too many unanswered questions if we accept this premise. How do we define the scope of distinctly applicable measures that *can be* justified without invoking the express derogations? On the basis of residence, as the case law suggests, depending on other unknown variables?

There is also the option that we, in fact, make no outright distinction between the concept of public policy and security, as they exist in Article 52, and the general public interest criteria developed by the Court. In essence, this would go against the argument that the express derogations are becoming ever narrower, while the justifications recognized by the Court are becoming ever broader.<sup>309</sup> Instead, there is now a symbiosis between the justification test and the express derogations – all the exception criteria form one totality and the Court applies the principle of proportionality without any clear distinction. If we accept this rationale, then Article 4 of the Services Directive makes sense.

It is undeniable that the Court applies the principle of proportionality in some manner to all restrictions – regardless if the Member States use Article 52 TFEU as a justification or ORPI. If we consider that these two exception criteria form one totality, it is then possible to assume that there is a sliding scale when the Court applies its two-stage proportionality approach (suitability and necessity). In essence, the national authorities are left with a considerable margin of discretion, regarding the discriminatory nature of the national measure, when the measure protects some fundamental value - as was the case with human dignity in *Omega*.<sup>310</sup> On the other hand, the burden of proof on the public authority is much higher in other instances. One such example might be the protection of cultural policy interests as we saw in *Gouda*.<sup>311</sup>

Essentially, the assumption behind this hypothesis is that the relationship between Article 52 TFEU and ORPI is of secondary importance; instead the focus lies on finding the correct balance between the stated objective and adopted regulation on a case-by-case basis. Therefore,

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<sup>309</sup> Barnard 2013, p.536.

<sup>310</sup> Case C-36/02 *Omega* [2004] ECR I-9609.

<sup>311</sup> Case C-288/89 *Gouda* [1991] ECR I-4007.

the means must be suitable and necessary in order to reach a given end, but it is also important to analyse if there are less restrictive alternatives available. This approach is extremely flexible as, at the end of the day, everything depends on the Court's discretion. No doubt, it provides much needed elasticity in a continent where the service market is expanding rapidly while the regulatory framework struggles to keep pace. On the other hand, this outcome is not practical unless we want to completely dismantle the principle of legal certainty.

### 5.2.3 The CJEU: Political Ambitions?

The third option is somewhat controversial. The assumption here is that the current teleological approach<sup>312</sup> to the principle of proportionality – and the existing legal framework concerning various exceptions – is not primarily about how suitable or necessary the national measure itself is; nor is it about preserving individual freedoms from overzealous government regulations or about protecting some important public policy such as human dignity.<sup>313</sup> In reality, the relationship between Article 52 TFEU and ORPI is irrelevant, because the Court interprets the Treaty provisions and establishes new legal doctrines in order to achieve political goals. Those critical of the Court tend to argue that safeguarding its own authority, while promoting overall European integration is the true objective of the CJEU.

Essentially, the idea here is that the principle of proportionality and the justification test function together as a tool that the Court can use to legitimise its decisions. But, simultaneously, the Court also takes certain political realities and ambitions into account when trying to strike a balance between various national interests and the Treaty provisions. And it is indeed possible that the Court does not want to risk a repeat of the famous *Sheep Meat* decision that jeopardized its own authority.<sup>314</sup> In this case the French government claimed that it would maintain its mutton market organization as banning imports was necessary to protect domestic producers. The government was adamant that especially the poor regions in France were largely de-

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<sup>312</sup> It can be described as 'purpose driven interpretation' or, more broadly, as a method that the Court uses to interpret legislative provisions in light of their true purpose, values and goals. The CJEU has concluded that "*Every provision of Community law must be placed in its context and interpreted in the light of the provisions of EC law as a whole*". Case C-283/81 *CILFIT* [1982] ECR 3415, para 20.

<sup>313</sup> Harbo 2010, p.180–181.



pendent on sheep rearing and opening up the market would result in serious socioeconomic consequences.<sup>315</sup> When the Court eventually ruled against France, it started the ‘sheep meat war’. France simply refused to comply with the ruling and defied the Court.<sup>316</sup> Might this be the reason why the CJEU ruled in *Grogan* that no sufficient economic link existed between the students and the abortion service providers? The Court was able to avoid a head-on collision with the Irish constitution and ‘the right to life of the unborn’.<sup>317</sup>

But if we accept this premise, then we also have to re-examine the nature of the European Court of Justice. Is it purely a legal institution or perhaps also a political one? Is the ambiguity that we’ve witnessed in its case law a result of some perpetual balancing act that is political by nature? This sentiment – that the CJEU is a political animal trying to find a balance, while being surrounded by value pluralism (28 Member States with different beliefs and values) - is gaining more steam after various controversial decisions that have been intertwined with long-lasting social and economic models.<sup>318</sup> Especially after *Viking* and *Laval*<sup>319</sup>, there was a feeling that the Court failed to balance fundamental rights and economic freedoms properly. And there is some validity to this argument; the Court failed to take into account important institutional and jurisdictional distinctions within the Member States.<sup>320</sup> It is not unconceivable to think that this was a result of the Court trying too hard to avoid the risk of re-fragmentation of the internal market.

The persistent ambiguity in the Court’s case law concerning discriminatory measures, and the inconclusive divide between Article 52 TFEU and ORPI, is not a surprising result if we assume that some decisions are completely political by their nature. As the political landscape changes and the Court has to adjust accordingly, on a case-by-case basis, staying consistent is nearly impossible.

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<sup>314</sup> Case 232/78 *Commission v France* [1979] ECR 2729.

<sup>315</sup> Garrett 1998, p.164.

<sup>316</sup> *Ibid.*

<sup>317</sup> Case C-159/90 *Grogan* [1991] ECR I-4685.

<sup>318</sup> Shuibhne 2013, p.23.

<sup>319</sup> Case C-438/05 *Viking* [2007] ECR I-10779; Case C-341/05 *Laval* [2007] ECR I-987.

### 5.3 Conclusion

In this fifth chapter, three rudimentary hypotheses were presented in order to explain the relationship between public policy and security, as they exist in Article 52 TFEU, and the doctrine of ‘overriding reasons in the public interest’. Finding the guiding thread is difficult since it is ultimately the Court that is responsible for defining abstractions such as public policy and public interest. And since there is some inconsistency with the use of some words, namely distinct and indistinct discrimination, it can be quite burdensome to conclude which exception is accepted as justifying a particular restriction.<sup>321</sup>

However, there are ways to remove ambiguity from the legal framework. Some have suggested that higher transparency and clarity could be achieved with the permissibility of dissenting opinions. This might open the Court to some healthy self-criticism and also force it to resolve its contradictory judgments. It is said, after all, that a working democracy is characterized by an open discourse between the Courts and the society.<sup>322</sup> In addition, the Court can also help by being more specific. For instance, the proportionality test is somewhat abstract but defining its substance is not so burdensome when the Court offers guidance as was the case in *De Coster*.<sup>323</sup> Similar approach should apply to distinctly and indistinctly applicable measures and the concept of non-discrimination. Simply using these terms is not enough; the Court should define them thoroughly. At the moment, scholars have to make educated guesses as to what the legal reality is.<sup>324</sup>

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<sup>320</sup> Lasser 2014, p.229; The Guardian 10.8.2010: “*Is the European Court of Justice a legal or a political institution now?*”

<sup>321</sup> Also Wiberg 2014, p.114–115.

<sup>322</sup> Julia Laffranque, ‘Dissenting Opinion in the European Court of Justice – Estonia’s Possible Contribution to the Democratisation of the European Union Judicial System’. *Juridica International* 1/2004, p.21.

<sup>323</sup> Case C-17/00 *De Coster* [2001] ECR I-9445.

<sup>324</sup> One attempt to define the extent of discriminatory measures can be seen in Hatzopoulos 2012, p.119.

## 6. DISCUSSION

The economic importance of services is now fully recognized. On 7 February 2013, the Parliament adopted a resolution in which it emphasized the importance of the services sector as a key area for growth.<sup>325</sup> At the moment the Parliament is involved in legislating on innovative services like lifesaving in-vehicle emergency *eCal*.<sup>326</sup> However, the multi-faceted nature of services makes them exceedingly difficult to regulate. Even though there are now more studies of the way services are produced and traded, the market is constantly evolving and keeping pace is difficult.<sup>327</sup>

Usually, it is the legislature that sets some basic principles and ground rules that are later interpreted by the courts. But in the field of services, in the face of regulatory inertia and market pressures, it is the CJEU that has mainly been responsible for implementing the Treaty rules on the free provision of services. In the last two decades, a rich case law has been developed by the Court. In the five-year period between 1995–1999 the CJEU gave 40 rulings; that is less than the 50 cases given during 2010 alone.<sup>328</sup> But this activist approach has also provoked hostile reactions and cries of excessive judicial activism.

In this thesis we have examined the extent of the free movement of services; namely its ceiling. National authorities across Europe have persistently tried to argue that in some instances there are legitimate reasons to restrict market freedoms. But sometimes the line between vital public interests and unjustified protectionist measures can be thin; especially so when restrictions are enacted in order to safeguard national markets from excessive disturbances.<sup>329</sup>

The main principles behind Article 52 TFEU and the legal doctrine of ‘overriding reasons in the public interest’ have been explained in order to help better understand how the free

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<sup>325</sup> European Parliament Resolution of 7 February 2013: Governance of the Single Market with recommendations. (7172/13).

<sup>326</sup> On 28 April 2015 the Parliament voted to make *eCall* mandatory after April 2018. See “*Fact Sheets on the European Union: Freedom to provide services*” [www.europarl.europa.eu](http://www.europarl.europa.eu)

<sup>327</sup> Hatzopoulos 2012, p.179.

<sup>328</sup> *Ibid.*

<sup>329</sup> Case C-398/95 *SETTG* [1997] ECR I-3091.

movement of services can be restricted. We've also established that there is some ambiguity in the CJEU's case law and that abstractions such as public policy, security, interest and the principle of proportionality can be quite burdensome to define. Furthermore, it has been argued that some inconsistencies, if not outright contradictions, can be found from the legal doctrine developed by the European Court of Justice. We cannot be certain if there is considerable overlap between Article 52 TFEU and ORPI or if, in fact, public policy and public security can be categorized as overriding reasons in the public interest like the Services Directive (2010/13) suggests.

The overall consensus still is that the express derogations – public policy and public security - are only available when there is a 'genuine, present and a sufficiently serious threat to one of the fundamental interests of society'. Simultaneously, the doctrine of 'overriding reasons in the public interest' cannot be used to justify discriminatory measures.

Despite some of the ambiguity in the case law, we can be quite certain that the Court follows a two-prong test when it establishes whether a national measure can be justified. The Court first defines the pursued interest and then examines whether the measure is suitable for its purpose and fulfils the expectation of proportionality. It does not matter if the restriction is in place to protect the inviolability of human dignity or local port safety. The principle of proportionality applies in all instances and the ultimate discretion – as to what is proportionate - lies with the CJEU. This can be problematic as far as the issue of legal certainty is considered. Even though the Court tends to exercise caution when sensitive national values are at stake, like the inviolability of human dignity, it can also provide much criticized surprises as was the case in *Viking* and *Laval*.

But we should also remember that the single market was conceived before the arrival of the internet age. Today, information and communication technologies are the main drivers of growth as new services are constantly emerging and providing opportunities.<sup>330</sup> It is the very nature of the services market that makes it difficult for the legislature to respond properly. Perhaps abstract institutions, such as the principle of proportionality, are needed so that the

CJEU can be flexible in its approach. That is not to say that ambiguity or outright contradictions in the case law should be ignored. The Court should be specific as to what the relevance between distinctly and indistinctly applicable measures is, and it should always try to provide viable alternatives when national measures are ruled to be in breach of the Treaty. An all-encompassing written legal structure is an impossibility in the field of services - or in any other area of law for that matter. But there is a fine line between flexibility and excessive arbitrariness on the part of the judges.

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<sup>330</sup> COM (2010) 2020. A strategy for smart, sustainable and inclusive growth.