J U R I D I C U M

Free Movement of Goods

Article 36 TFEU and Mandatory Requirements Justification under Public Policy and Public Security

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Abstract

Article 36 TFEU (express derogation) creates a possibility for the Member States to derogate from the principle of free movement of goods in order to protect certain objectives. According to the Court of Justice, derogations from the free movement of goods must be interpreted strictly in such a way that its scope is not extended any further than is necessary for the protection of the interests (legitimate objectives) which are intended to be protected by the rule that hinders free circulation of goods between the Member States. In other words, Article 36 TFEU can only provide for successful justification if the restriction aims to protect an interest which Article 36 TFEU lists and if the restriction satisfies the principle of proportionality. The other ground for justification is mandatory requirements, introduced by the ECJ, which is an open-ended list that may involve any legitimate objective not listed in Article 36 TFEU. The restriction must satisfy the principle of proportionality to be justified under mandatory requirements.

This thesis aims to examine two objectives listed under Article 36 TFEU, namely public policy and public security. Which "arguments" may fall within the scope of the two derogations is unclear and subject to interpretation. What has been clarified is that the public policy derogation relates to genuine and sufficiently serious threats to one of the fundamental interests in society. In line with this, the Court's case law suggests that where conducts of private bodies hinder free movement of goods and the Member State concerned does not intervene, the threats to public order due to civil unrest can fall under public policy if there is a clearly proven risk and if the Member State concerned has been unable to handle the risk by using the means at its disposal. Consequently, the non-intervention of the Member State concerned can be justified. This also indicates that where the Member State has invoked the public policy derogation in matters of civil unrest posing a potential threat to public order, the Member States have an obligation not only to abstain from applying national rules that are contrary to the Treaty objectives as regards free movement of goods, but also to prevent such actions of private bodies that hinder intra-Union trade, which is far-reaching. Moreover, the scope of the obligation to ensure the free movement of goods is uncertain. As this issue poses problems, it is examined in this thesis. Furthermore, the protection of fundamental (human) rights can fall under public policy and thus justify an infringement of free movement of goods, which may create a conflict of interests between the assurance of free movement of goods and protection of human rights. This issue of conflict is analysed in this thesis as it is crucial. In addition, the Member States have an obligation to protect fundamental rights and to prevent actions among individuals that can be contrary to the Treaty objectives as regards fundamental rights, including human dignity. Moreover, the Member States are given a wide margin of discretion under public policy which "broadens" the Member States legislative autonomy, but the scope of discretion is uncertain, and this issue is analysed in this thesis. As regards public security, what may fall within the scope of public security has been given more indication by the ECJ. The public security derogation includes protection of both internal and external security and regulating the management of strategically sensitive goods or exceptionally important products, such as petroleum products, with the aim to guarantee at least at a minimum level of supply in the event of a crisis. Lastly, the margin of discretion of the Member States is more limited under public security, compared to public policy, and this aspect is presented and discussed in this thesis.

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Abbreviations

AG	Advocate General
CD	Customs Duties
CHEE	Charges Having Equivalent Effect
CMLR	Common Market Law Review
Commission	European Commission
CSA	Certain Selling Arrangement
EEC	European Economic Community
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
ECSC	European Coal and Steel Community
IPR	Intellectual property rights
MHEE	Measures Having Equivalent Effect to Quantitative Restrictions
QR	Quantitative Restrictions
TEU	Treaty of the European Union
TFEU	Treaty for the Functioning of the European Union
The Charter	Charter of Fundamental Rights of the European Union
The ECJ or the Court	Court of Justice (previously known as the European Court of Justice.)
The Member States	The Member States of the European Union
The Union or the EU	The European Union
Treaty	The Lisbon Treaty or Treaty of Lisbon
SEA	Single European Act

1. Introduction

1.1 Background

An economic aim within the European Union (EU) is to create an internal market without frontiers which enables the free circulation of goods, services, capital, and persons between the Member States.[1] Free movement of persons entail freedom of establishment and free movement of workers. All these free movements are economic freedoms, as they aim to guarantee conduct of an economic activity in any Member State, such as import or export of goods between the Member States, by aiming to liberalise barriers to cross-border free circulation between the Member States. Therefore, such a liberalisation requires the removal of internal frontiers/ barriers within the national legal order of the Member States, in order to further a single market within the Union.[2] Such national barriers are mainly the national rules of the Member States. Therefore, the provisions, such as Article 34 of the Treaty on the Functioning of the European Union[3] (TFEU) in the Treaty of Lisbon[4] (Treaty) are directed at/address the Member States and require them to abolish their national rules that hinder free movement. Such national rules that hinder free circulation are generally called "measure", "restriction" or "obstacle". Moreover, the EU facilitates free circulation through EU legislation (harmonisation). Needless to say, the ground-breaking case law of the Court of Justice (ECJ[5]) in the area of free movements, which started with the free movement of goods, has helped to achieve the internal market to a great extent.

However, even though the Member States are required not to have restrictive national rules, it is not always the case. Thus, the obligation not to have restrictions is not *absolute* because a Member State whose national rule constitutes restriction can *justify* its national rule under certain conditions. As regards as free movement of goods, which is the main focus of this thesis, a Member State can justify its restriction based on legitimate objectives (interests) listed in Article 36 TFEU and/or mandatory requirements introduced by the ECJ. Furthermore, in order to be justified, the measure needs to be *proportionate,* which means that it must satisfy the principle of proportionality. The burden of proof under justification lies on the Member State imposing the rule.[6] The assessment of proportionality of a measure can be difficult due to the different tests of proportionality assessment[7] and includes the weighing of different interests,

[1] Article 26(2) of the Treaty on the Functioning of the European Union.
[2] Tryfonidou, Alina, *The Outer Limits of Article 28 EC: Purely Internal Situations and the Development of the Court's Approach through the Years,* in Barnard & Odudu (Eds.), *The Outer Limits of European Union Law,* Hart Publishing, Oxford, 2009, p. 197–224 [Tryfonidou] p. 197.
[3] Consolidated Version of the Treaty on the Functioning of the European Union (TFEU) [2016] OJ C202/47.
[4] The Treaty of Lisbon [2007] C306/01.
[5] With the entry into force of the Lisbon Treaty, the European Courts renamed as "Court of Justice of the European Union" which involves Court of Justice, the General Court and specialised courts. In the doctrine, the abbreviation CJEU is mostly used also when referring to the Court of Justice. However, as this abbreviation does not make a distinction between the Court of Justice and the General Court and that it is the Court of Justice's case law that has developed free movements, the previous abbreviation "ECJ" or "the Court" will be used to specifically indicate the Court of Justice.
[6] Case 251/78 *Denkavit Futtermittel v. Minister of Agriculture [*1979] ECR 3369 [Denkavit]; Case 227/82 *Criminal Proceedings against Leendert van Bennekom* [1983] ECR 3883 [Bennekom].
[7] The principle of proportionality is examined in the further chapters.

specifically the interests of free movement of goods and the legitimate objective aimed for by the Member State imposing the rule.[8] This issue highlights the fact that there is a conflict between the objective of assuring intra-Union trade *and* the Member States' national autonomy and the legislative competence on the other. The Member States' national autonomy and legislative competence are restricted as, in most cases, it is the ECJ that decides whether a national rule is restriction or not[9] and if the said measure can be justified or not.[10]

Another problem is related to the fact that some objectives under which justification can be made require interpretation, which indicates unclarity. The clarification of which arguments can serve as basis for *justification* is of crucial importance for the Member States when they are legislating in order to prevent unintentional breaches of EU-law and to avoid unpredictability. Linked to this, the problem also particular to the aim of this thesis is that the boundaries between some objectives listed in Article 36 TFEU as well as the boundaries between Article 36 TFEU and mandatory requirements is not clear. For example, when public policy and/or public security can be invoked by a Member State is not clear. Moreover, another conflict that arises is related to "competing objectives". For example, a restriction on free movement of goods may aim to protect human rights. In such a case, whether the objective of assuring free movement of goods or protection of human rights will prevail is uncertain.

Lastly, the ECJ has ruled that the Member States can be held liable for breach of free movements if they do not act where the conduct of private parties or private bodies[11] hinder free movements. Needless to say, this "rule" introduced by the ECJ has created tension on the Member States.

1.2 Aim and Research Questions

The aim of this thesis is to critically analyse justification of restrictions falling within the scope of Article 34 TFEU which prohibits quantitative restrictions (QR) and measures having equivalent effect to quantitative restrictions (MHEE) on imports. More precisely, the thesis examines Article 36 TFEU which is the express derogation for free movement of goods and, in particular, the public policy and public security derogations. With this aim, this thesis analyses how the Court establishes that a national measure restricting free movement of goods can be justified on the grounds of the public policy and public security derogations. This assessment naturally involves presenting how a national rule is considered as *restriction* by the ECJ. On this point, it should be stated that the terms "measure", "restriction" and "obstacle" will be used interchangeably throughout the text. Moreover, linked to justification, the principle of proportionality is examined.

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[8] Barnard, Catherine, *Derogations, Justifications and the four freedoms: Is State interest really protected?* in Barnard & Odudu (Eds.), *The Outer Limits of European Union Law*, Hart Publishing, Oxford, 2009, p. 273–305 [Barnard, in Barnard & Odudu], p. 282.

[9] The cases reach the ECJ either through the preliminary reference procedure regulated under Article 267 TFEU or the Commission bring a case before the ECJ against a Member State whose national rule is contrary to EU law as a result of the infringement procedures regulated under Article 258 TFEU.

[10] Barnard, in Barnard & Odudu, p. 274.

[11] The term "private parties" involve individuals (natural persons) and private legal persons. The terms "private parties" and "private bodies" will be used ***interchangeably*** throughout the text.

The main research topic is divided into the following research questions: (i) When can a Member State successfully invoke public policy and/or public security as grounds for justification? (ii) Which arguments may fall within the scope of the public policy and/or public security derogations? Linked to this, can any conflict arise, in terms of the delineating of the boundaries between public policy and public security, as well as between the aforementioned two derogations and another objective, such as the protection of human (fundamental) rights? (iii) To what extent do the Member States enjoy a margin of discretion in a case concerning justification under the public policy and public security derogations? Linked to this, is there any difference between the degree of the margin of discretion of the Member States under the public policy and public security derogations?

1.3 Delimitations

This study focuses on justification of restrictions on free movement of goods based on public policy and public security. Consequently, other derogations and mandatory requirements will not be subject of this study and thus they are presented only to the extent that the research topic requires. Moreover, whether a national rule constitutes restriction on free movement of goods, and if that national rule can be justified (permissible) are separate issues which need to be separately assessed in a systematic and methodological manner. Furthermore, this study focuses on justification of MHEE on imports. Therefore, neither justification of restrictions on export nor justification of other categories of restriction such as customs duties (CD) and charges having equivalent effect to customs duties (CHEE) will be subject of the study. They will only be briefly presented in chapter 2 for a better understanding. Connected to this, the parts in the judgments of the Court that are related to the existence of the restrictions that are relevant to the aim of this thesis will briefly be presented. Moreover, as this thesis focuses on justification of restrictions on free movement of goods, justification of restrictions on other free movements will not be examined in this study unless required, for example, where a case ruled by the ECJ in the area of other free movements possibly provides for answer(s) to the research questions. In addition, the free movement of goods and the connected concepts that are presented in chapter 2 are provided only to the extent the research questions require. Furthermore, the internal market also involves competitions rules and monopolies which will not be subject to this study. Finally, the cases used in this thesis reached the ECJ either through the preliminary reference procedure regulated under Article 267 TFEU or the Commission brought a case before the ECJ against a Member State whose national rule is contrary to EU law as a result of the infringement procedures regulated under Article 258 TFEU. Neither the preliminary reference procedure nor the infringement procedures will be examined in this thesis. Finally, this thesis does not examine harmonisation and does not analyse any EU legislation as these do not fall within the purpose of the aim of this thesis.

1.4 Methodology and Material

In this thesis, the legal dogmatic method is used, and the current law is presented and analysed.[12] The sources of EU law are categorised as primary sources and secondary law (secondary legislation). Thus, the hierarchy of norms within EU law differs from the legal acts of national legal systems. The primary sources of EU law consist of the Treaty, the Charter of Fundamental Rights (the Charter) and general principles of EU law. The secondary sources are acts that are adopted by the EU institutions based directly on the Treaty, such as Union legislation.[13] Secondary sources are only valid if they are in compliance with the primary sources, as the secondary sources aim to fulfil the Treaty objectives.[14]

In this thesis, the provisions in the Treaty on European Union[15] (TEU) and the TFEU that are relevant to the research topic are analysed as the Treaty is the primary source within EU law which sets the main rules.[16] Furthermore, as it is the Court, according to Article 19(1) TEU, that is to carry out the task of interpreting the provisions in the Treaty, the ground-breaking relevant case law deriving from the Court is examined and analysed. Significantly, it is the Court that has defined the scope of at least some derogations (objectives), such as those listed in Article 36 TFEU as this article does not provide such a definition. Moreover, as the tests of the principle of proportionality have been clarified by the Court to some extent, the relevant cases of the ECJ is of importance and are used. Furthermore, in order to critically analyse the provisions in the Treaty and the Court's case law, books and articles relating to the research topic are used. Furthermore, as in many cases referred to the Court, an Advocate Generals' (AG) opinion is submitted to the Court before the Court decides on a case, the AG opinions are examined and analysed as they provide a valuable insight and knowledge by analysing issue(s) in depth.[17] Even though the AG opinions are not binding upon the ECJ, the Court, in some cases, explicitly refers to the AG opinion in its subsequent ruling and rules as suggested by the AG opinion.

1.5 Disposition

In chapter 2, the internal market, free movement of goods, concept of restriction (fiscal and non-fiscal restrictions) and justification including the structure and Article 36 TFEU and mandatory requirements are briefly explained. The reason is that these concepts are important for a better understanding of the aim and the research questions of this thesis, and also because of the fact that the aim of this thesis and the research issues within the scope of this thesis are complicated.

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[12] Sandgren, Claes, *Rättsvetenskap för uppsatsförfattare – Ämne, material, metod och argumentation*, 3 u., Norstedts Juridik, Stockholm, 2015, p. 43–44.

[13] Barnard, Catherine & Peers, Steve, *European Union Law*, 2 ed., Oxford University Press, Oxford, 2017 [Barnard & Peers] p. 103–104.

[14] Bernitz, Ulf & Kjellgren Anders, *Europarättens grunder*, 5 u., Norstedts Juridik, Stockholm, 2014 [Bernitz & Kjellgren] p. 47, 54.

[15] Consolidated Version of the Treaty on European Union [2016] OJ C202/13.

[16] Hettne, Jörgen & Otken Eriksson, Ida (red.) *EU-rättslig metod – teori och genomslag i svensk rättstillämpning*, 2 u., Norstedts Juridik, Stockholm, 2011 [Hettne & Otken Eriksson] p. 41.

[17] Moreover, in some cases, the ECJ leaves to the national court to ascertain if a rule can be justified or not. In such a case, the AG opinion can influence the national court's assessment (Hettne & Otken Eriksson, p. 117). Hence, the AG opinion cannot be disregarded within the field of EU-law.

Chapter 3 is dedicated to the public policy and public security derogations. In this chapter, these two derogations are aimed to be explained by presenting and analysing the relevant case law of the ECJ. Moreover, in this chapter, some problems related to the reliance on public policy and public security, as well as a conflict between these two grounds and the perception of human (fundamental) rights are presented.

Subsequently, in chapter 4, assessments of the issues related to the aim of this thesis, justification under public policy and public security and the related complicated problems, are analysed. Namely, the scope of public policy under which the duty of cooperation, non-intervention of a Member State with conducts of private bodies and public policy, fundamental rights v. fundamental freedoms are analysed and the scope of public security under which public security and other treaty exceptions relating to security, the notion of essential public service and measures of a non-economic nature are analysed. Lastly the Member States' margin of discretion is analysed in relation to public policy and public security.

Finally, in chapter 5, conclusions are presented.

The answers to the research questions are aimed to be given throughout the text, mostly in chapter 3, chapter 4 and finally in chapter 5 which presents conclusions.

2. The Internal Market, Free Movement of Goods, and Justification in General

Free movement of goods is one of the freedoms of the internal market aimed at economic integration which requires the abolition of national restrictive rules that can have a negative effect on the free circulation of goods within the Union.[18] If a Member State is found to have a restrictive rule affecting trade negatively, which is generally called *restriction* or *obstacle*, the Member State can try to defend its restrictive national rule, referring to the provisions on justification.[19] As the main focus of this thesis is justification of restrictions on free movement of goods, the internal market, free movement of goods, the concept of restriction, and justification are briefly presented in this chapter with an aim for a better understanding.

2.1 The Internal Market

The start of the "internal market" dates back to the establishment of the EU. The very founding treaty, the Paris Treaty[20], which established the European Coal and Steel Community (ECSC) was aimed at economic integration by creating a "common market" for coal and steel between the founding six Member States. Thus, coal and steel industry were aimed to be integrated and coal and steel products were the first "goods" that was subject to the free circulation between the founding Member States. In order words, a unified market for the Member States coal and steel products was to be established by eliminating restrictions on imports and exports of such products between the Member States. Thus, free movement of goods (free circulation of coal and steel products) was started to be regulated in the Union legal order.[21]

The Treaty of Rome[22] established the European Economic Community (EEC) in 1957 and focused on a broader economic integration, in addition to free movement of goods, as to cover free movement of services, capital, and persons between the Member States. Consequently, the goal of creating a common market also involved free movement of capital, services, and persons.[23] The aim for a broader economic integration with the EEC is also reflected in the name "Economic Community" which is not limited to a "Community" on coal and steel. The goal of broader integration was tried to be achieved by prohibiting a large amount of trade barriers, such as customs duties, in the national legal orders of the Member States. Even though other free movements were at aim, most of the prohibited barriers such as customs duties focused on guaranteeing free movement of goods between the Member States.[24]

However, the achievement of a common market was not fully successful because the Member States were not very willing to abolish national rules that constituted barriers (restrictions) to free circulation between themselves and a strong decision-making process at the Union (then

[18] Craig, Paul & De Burca, Gráinne, *EU LAW – Text, Cases, and Materials*, 6 ed., Oxford University Press, Oxford, 2015 [Craig & De Burca] p. 608.
[19] Oliver, Peter, *Free Movement of Goods in the European Community*, 4 ed., Sweet & Maxwell, London, 2003 [Oliver] p. 215.
[20] Treaty of Paris, 11951K/TXT.
[21] Bernitz & Kjellgren p. 25; Oliver, p. 4.
[22] Treaty of Rome, 11957E/TXT.
[23] Bernitz & Kjellgren, p. 26.
[24] Oliver, p. 5–6.

Community) level that would abolish or harmonise restrictive national rules was lacking. With these difficulties at hand, an amendment came with the Single European Act (SEA)[25] in 1987 which required the creation of a "single market". In order to complete the single market, many measures were introduced by the EU (then Community) which prohibited the Member States' discriminatory rules.[26]

In 1993 the Treaty of Maastricht[27], which was a big step towards a fully integrated market, entered into force. The Maastricht Treaty, also called the Treaty of the European Union, used the term "European Community" which indicates that the "Community" was more than an economic integration by aiming at social objectives[28] and required the achievement of an "internal market" where national barriers to free circulation of goods, services, establishment, workers, and capital between the Member States were to be abolished. In line with this goal, many measures by the EU were introduced.[29] The Treaty of Amsterdam[30] came into force in 1999 which included the repeal of obsolete articles. In addition, the Treaty of Amsterdam introduced the renumbering of all the provisions of the Treaty. Furthermore, the Treaty of Nice[31] which was signed in 2001, primarily concerned the institutional provisions of the Treaty.[32] Finally, in 2009 the Treaty of Lisbon (Treaty) entered into force. At the time of the Treaty, which also uses the term "internal market", the internal market is fully achieved.[33]

Consequently, despite of the fact that different terms, such as "common market", "single market", and "internal market", were used, the different terms are the same: a market between the Member States in which free circulation is guaranteed.[34] As presented above, what the concept of "internal market" entails dates back to the founding Treaty which focused on free movement of goods. Each Treaty amendment was a further step towards the completion of the internal market. On this issue, it must be stated that the ground-breaking judgments of the ECJ, such as *Dassonville*[35] and *Cassis de Dijon*[36] which were ruled in the area of free movement of goods, were crucial for the completion of the internal market because it is such judgments of the ECJ that interpreted the rules on free movements in the Treaties[37] and precluded national rules that restricted free circulation between the Member States.

[25] Single European Act [1987] OJ L169.
[26] Oliver, p. 95–96; Bernitz & Kjellgren, p. 30.
[27] Treaty of Maastrict [1992] OJ C191.
[28] The Treaty of Maastricht established EU citizenship, which was given to citizens of the Member States.
[29] Oliver, p. 8–9.
[30] Treaty of Amsterdam [1997] C340/01.
[31] Treaty of Nice [2001] C80/01.
[32] Oliver, p. 9–10.
[33] Bernitz & Kjellgren, p. 30–31.
[34] In the doctrine, it is claimed that "common market", "single market", and "internal market" are different. As the topic of this thesis is not an assessment of the internal market in general, such discussions will not be examined.
[35] Case C-8/74 *Procureur du Roi v. Benoîtet Gustave Dassonville* [1974] ECR 837 [Dassonville].
[36] Case C-120/78 *Rewe-Zentrale v. Bundesmonopolverwaltung für Branntwein* [1979] ECR 649 [Cassis de Dijon].
[37] Interpretation of the rules by the ECJ has been a "necessity" because the rules on free movements in the Treaty are either drafted in a vague manner or lack definition.

Today, Article 3(3) TEU states that an internal market shall be established. Article 26(2) TFEU states that the internal market

> "/…/ shall comprise an area without internal frontiers in which the free movement of goods, persons, services, and capital is ensured in accordance with the provisions of the Treaties."[38]

Free movement of persons involves freedom of establishment and free movement of workers. This requires guaranteed free circulation between the Member States, namely free movement of goods, freedom of establishment, freedom to provide services, free movement of workers, and free movement of capital. In line with this, Article 26(1) TFEU allows the EU to adopt measures (EU acts) that will maintain proper functioning of the internal market, in accordance with the relevant provisions in the Treaty. Thus, in order to guarantee the free circulation of goods within the EU, between the Member States, measures are taken at EU level in line with the provisions in the Treaty, whose main purpose is to eliminate trade barriers.[39] As regards as the relevant provisions on free movements of goods in the Treaty, the main provisions regulating and prohibiting restrictions are Articles 28-33 TFEU that prohibit (target) fiscal restrictions and Articles 34, 35 and 37 TFEU that target non-fiscal restrictions. In the following sub-chapter, free movement of goods, fiscal restrictions, and non-fiscal restrictions are briefly explained.

2.2 Free Movement of Goods

As previously stated, free movement of goods is one of the freedoms of the internal market, and it aims at ensuring the free circulation of goods such as import and export between the Member States within the Union. It is the first freedom that has been introduced with the ECSC. Thus, free movement of goods is the starting point of the internal market. As being at the core, the case law of the ECJ on free movement of goods is ground-breaking, which means that the leading principles of the free movements, such as mutual recognition, have firstly been introduced in cases that dealt with free movement of goods. Later, the ECJ has transferred most of these to other free movements. Consequently, free movement of goods is one of the core-stones of the internal market.

As there are different free movements in the internal market, the question of when free movement of goods will apply must be answered, as this question is the related to the choice of the correct free movement, which is the first step to decide on in a case before the Court. For a case to fall within the scope of free movement of goods, some conditions must be satisfied. In other words, for the provisions (rules) on free movement of goods to be applicable, some conditions must be met. Firstly, there must be a product which is considered as *good*. For a product to qualify as good, that product must have physical characteristics, must be valued in money and must hence form part of commercial transactions.[40] Secondly, a *cross border element* must exist. This condition is fulfilled when trade of a good takes place between two or

[38] Free movement of persons involves freedom of established and free movement of workers.
[39] Barnard, Catherine, *The substantive law of the EU – The four freedoms*, 5 ed., Oxford University Press, Oxford, 2016, [Barnard, *The substantive law*, 5 ed.] p. 4.
[40] Case 7/68 *Commission v. Italy* [1968] ECR 423. Also *see* Oliver, p. 16 ff.

more Member States.[41] In order for trade to take place, a good needs to be exported, imported or in transit between the Member States. This applies both to goods produced within the EU and also to goods that are produced outside the Union but have entered into the territory of a Member State and thus are in free circulation within the Union.[42] Finally, the last requirement is the existence of a *restriction* that hinders free circulation of a good between Member States.[43] A restriction is a national measure which creates obstacles to/hinders free movement of goods between the Member States.[44]

2.2.1 The Concept of "Measure"

The provisions on free movement of goods, in principle, only apply to *State measures*. "State" is defined extensively and involves all organs of the State.[45] More precisely, the concept of "measure" involves rules, laws, and administrative practices (all instruments) adopted by a public authority and even non-binding policies and conducts of a public authority.[46] For example, in case *Buy Irish*[47], the Irish Government supported a campaign organised by a private body promoting Irish goods and the ECJ ruled that the conduct(s) including non-binding policies of an authority/State could constitute "measure". Moreover, the concept of "measure" also involves administrative actions which show a certain degree of consistency and generality. In case *Commission v. France*[48], an administrative practice which involved the approval of postal franking machines, consistently delayed and rejected the applications of approval made by a British company. In this case, the ECJ ruled that in order for an administrative practice to constitute "measure" the practice must show a certain degree of consistency and generability which was the case in *Commission v. France* due to the consistent delays and rejections.[49] However, it is important to underline that not all non-binding measures emanating from the authorities automatically constitute "measure". It is likely that more ephemeral acts/statements by representatives of the State are excluded from the scope of what constitutes "measure".[50]

As regards as "measures" such as rules adopted by private bodies, the ECJ has ruled that rules adopted by some private bodies are to be considered as "measure" where such rules undermine the free circulation of goods.[51] For example, rules of a professional body for pharmacies where all pharmacists must be registered in order to carry on their business, which lays down rules of ethics applicable to the members of the profession, and which has a committee upon which national legislation has conferred disciplinary powers that could involve the removal from said register[52] were considered as measure by the ECJ. It seems as the rationale behind catching rules of such bodies is that the State cannot regulate "everything" and these are private bodies

[41] Barnard, *The substantive law*, 5 ed., p. 35.
[42] Jarvis, Malcolm in Oliver (ed.) *Free movement of goods in the European Union*, 5 ed, Hart Publishing Ltd, 2010, p. 14–43 [Jarvis in Oliver] p. 28; Oliver, p. 23 ff.
[43] Bernitz & Kjellgren, p. 298.
[44] The notion of restriction will be presented in the following sub-chapter.
[45] Barnard, *The substantive law*, 5 ed., p. 35; Oliver p. 58.
[46] Directive 70/50/EEC of 22 December 1969, p. 87.
[47] Case C-249/81 *Commission v. Ireland* [1982] ECR 4005 [Buy Irish].
[48] Case 21/84 *Commission v. France* (postal franking machines) [1985] ECR 1355 [Commission v. France].
[49] Commission v. France, para. 13.
[50] Oliver, p. 97.
[51] For another example see Case C-470/03 *AGM-COS.MET v. Finnish State and Lehtinen* [2007] ECR I-2749 (GC).
[52] Joined cases 266 and 267/87 *Royal Pharmaceutical Society* [1989] ECR 01295.

that are regulating as "State". Hence, a Member State will be held responsible for any action that can be attributable to that Member State, regardless of the fact that the actions/measures do not derive from the State but rather from a private body.[53] Finally, failure to act of the State to facilitate free movement of goods where a hindrance on free circulation of goods is created by private bodies, such as destruction of foreign goods by farmers[54] or a demonstration on a motorway that blocks transport of goods between two Member States[55] will also be caught by the rules on free movement of goods, which will be presented in chapter 3.

2.2.2 The Concept of "Restriction"

As previously mentioned, free movement of goods aims at ensuring the free circulation of goods within the EU by eliminating trade barriers between the Member States. With this objective, restrictions (barriers) to free movement of goods between the Member States are to be abolished. A restriction is a "measure"[56] which creates obstacles to/hinders free movement of goods within the Union. In line with the wording and structure of the Treaty, restrictions can be categorised as fiscal restrictions or non-fiscal restrictions.[57]

As regards fiscal restrictions, Article 28 TFEU states that the Union is a customs Union and prohibits customs duties (CD) and all charges having equivalent effect to CD (CHEE) within the EU.[58] Furthermore, in line with Article 28 TFEU, Article 30 TFEU prohibits CD and CHEE on imports and exports between the Member States.[59] CD and CHEE are charges which are imposed on goods that have crossed a border. More specifically, a CD is tariff or tax charged on the importation or exportation of goods. As regards as CHEE, CHEE is not defined in the Treaty and therefore the definition has been provided by the ECJ. CHEE are:

> "/…/ any pecuniary charge, which is imposed unilaterally on goods by reason of the fact that they cross a frontier, and which is not a customs duty in the strict sense.".[60]

As CD and CHEE deal with charges imposed on goods, they are called fiscal restrictions.

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[53] Oliver, p. 84.
[54] Case C-265/95 *Commission v. France* [1997] ECR I-6959 [Spanish Strawberries].
[55] Case C-112/00 *Eugen Schmidberger, Internationale Transporte und Planzüge v. Republic of Austria* [2003] ECR I-5659 [Schmidberger].
[56] *See* sub-chapter 2.2.1 for the concept of "measure".
[57] Barnard, Catherine, *The Substantive Law of the EU – The Four Freedoms,* 4 ed., Oxford University, Oxford, 2013 [Barnard, *The Substantive Law,* 4 ed.] p. 36–37.
[58] As regards the products originating from a third country, a common customs tariff applies, which will not be examined in this thesis.
[59] Article 30 TFEU: Customs duties on imports and exports and charges having equivalent effect shall be prohibited between Member States. This prohibition shall also apply to customs duties of a fiscal nature.
[60] Barnard, *The substantive law,* 5 ed., p. 45; Case C-90/94 *Haahr Petroleum Ltd* [1997] ECR I-4085, para. 20.

Articles 34 TFEU and 35 TFEU target non-fiscal restrictions[61] and require the Member States to abolish quantitative restrictions (QR) such as quotas on imports and measures having equivalent effect to QR (MHEE). The two articles are as follows:

> "Quantitative restrictions on imports and all measures having equivalent effect shall be prohibited between Member States." (Article 34 TFEU)

> "Quantitative restrictions on exports and all measures having equivalent effect shall be prohibited between Member States." (Article 35 TFEU)

As seen from the text of the article, Article 34 TFEU prohibits QR and MHEE on imported products.[62] A definition of QR is not given in the Treaty and therefore the definition has been provided by the ECJ. According to the definition, QR are

> "/…/ measures which amount to a total or partial restraint of, according to the circumstances, imports, exports or goods in transit."[63]

Thus, QR on imports are national rules restricting (partial ban) or prohibiting (total ban) import of products, which does not only concern total prohibitions but also involves rules restricting quantity.[64] One example of a total prohibition on import was examined by the ECJ in case *Conegate*[65] where a British national rule prohibited import of certain pornographic material into the UK. The ECJ ruled that such a rule constituted QR and breached Article 34 TFEU as it hindered free circulation of goods (certain pornographic material) by prohibiting their import into the UK.

2.2.2.1 Measures Having Equivalent Effect to Quantitative Restrictions: Case Dassonville and Case Cassis de Dijon

Regarding MHEE, MHEE are measures which do not prohibit or restrict import of products *per se* but have similar effects as QR would have, i.e. the effect of hindering trade between the Member States[66], for example, a rule of a Member State whose effect is reducing sales volumes of a (foreign) product and consequently its import into that Member State. MHEE are prohibited by Article 34 TFEU. However, like CHEE and QR, what MHEE are is not defined in the Treaty. It has, once again, been the ECJ that has defined which measures constitute MHEE in the ground-breaking case *Dassonville*. In the case at hand, the Belgian law required Scotch whiskey to have a certificate of origin in order to be sold in Belgium. The French whiskey seller, Dassonville, did not have such certificate as it was not required in France. This left Dassonville unable to sell the whiskey in Belgium due to lack of certificate of origin. Consequently, Dassonville challenged this rule as being a MHEE.

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[61] The other type of non-fiscal restriction is monopolies, which is regulated in Article 37 TFEU. However, this issue will not be mentioned as it is not relevant to the research topic.
[62] Article 35 TFEU prohibits QR and MHEE on exported products. Restrictions on export is not subject to this study.
[63] Case 2/73 *Geddo v. Ente, Nazionale Rici* [1973] ECR 865, para. 7.
[64] Oliver, p. 89.
[65] Case C-121/85 *Conegate v. Customs & Excise Commissioners* [1986] ECR I-1007 [Conegate].
[66] Maduro, Miguel Poiares, *We the Court – The European Court of Justice and the European Economic Constitution - A Critical Reading of Article 30 of the EC Treaty,* Hart Publishing, Oxford, 1998 [Maduro] p. 51.

In its ruling, the ECJ provided the definition of MHEE and has thereby introduced the famous so-called *Dassonville-formula* stated below:

> "All trading rules enacted by Member States, which are capable of hindering, directly or indirectly, actually or potentially, intra-Community trade are to be considered as measures having equivalent effect."[67]

Consequently, the Belgian rule requiring a certificate of origin was found to be a MHEE and in breach of Article 34 TFEU because it made sale, and thereby importation of whiskey into Belgium, quite difficult and it thus hindered intra-Union trade of this product.

The ruling of the ECJ in case *Dassonville* has also led to a category called *product requirements*, which constitute MHEE. Product requirements are national rules that interfere with (regulate) the product itself, for example rules relating to the designation, form, size, weight, composition, presentation, labelling, and packaging of a product.[68]

Following *Dassonville*, another ground-breaking case, case *Cassis de Dijon*, was ruled by the ECJ. The case concerns a German rule requiring a minimum alcohol content of 25 % in fruit liqueur in order for the product to be sold as "fruit liqueur" in Germany. A German importer, Rewe, of French fruit liqueur called crème de cassis (known as Cassis de Dijon) was unable to sell the product under the name "liqueur" as the alcohol content in the French liqueur was lower than the minimum content required by the German rule. Consequently, Rewe challenged this rule as being a MHEE. Remarkably, in this case, the ECJ introduced the principle of *mutual recognition*. According to the mutual recognition principle, a product which is lawfully produced and marketed in one Member State must be mutually recognised in other Member States and consequently such a product must freely be sold and marketed in other Member States.[69] Consequently, the minimum alcohol requirement was MHEE as it imposed an extra burden on imported products by requiring them additionally to comply with the rules of the country of import (double burden), as foreign products must comply with the rules of the Member State of origin. Finally, such a minimum alcohol requirement, which is a product requirement that regulates content of such products, is MHEE because it makes sale, and thereby importation of such foreign products into the Member State where such a requirement exists, difficult by creating a double (extra) burden on them and it thus hinders intra-Union trade of such products.

Finally, case *Cassis de Dijon* is remarkable for another reason - by introducing *mandatory requirements*, which is an issue related to justification and is examined in chapter 2.3.

[67] Dassonville, para. 5.
[68] Joined cases C-267/91 and C-268/91 *Keck and Mithouard* [1993] ECR I-6097 [Keck], para. 15.
[69] Cassis de Dijon, paras. 14–15.

2.2.2.2 Discriminatory Rules and Non-Discriminatory Rules

MHEE are categorised as discriminatory (directly discriminatory and indirectly discriminatory) and non-discriminatory but hindering intra-Union trade.[70] Directly discriminatory measures[71] are rules which treat foreign products and domestic products differently both in law and in fact.[72] In other words, these are rules that treat foreign products less favorably in their wording. One example of such a rule is case *Weinvertriebs*[73], in which the German law requiring a minimum alcohol content for imported vermouth, but not for German vermouth, was in breach of Article 34 TFEU.[74] The wording of the German law was discriminating against products originating in other Member States.

Indirectly discriminatory measures[75] do not treat foreign products and domestic products differently in law (in wording) but, treat foreign products less favourably than domestic products in fact.[76] An example of an indirectly (indistinctly) discriminatory measure can be found in case *Commission v Italy*.[77] This case involved an Italian rule which limited the use of the name "chocolate" to products made without vegetable fats and chocolates made with vegetable fats had to be named "chocolate substitute". Accordingly, an Irish chocolate producer could not sell its chocolate under the name "chocolate" in Italy since the Irish chocolates were made of only vegetable fats. The national rule, which is a product requirement, is indirectly discriminatory because even though the national rule treats foreign and national products equally, it creates an additional (extra) burden on foreign products since foreign producers need to adjust packaging of their products. This creates an additional burden (cost) for them since they also need to satisfy their home state standards in order to be able to lawfully produce their products there.

As regards as non-discriminatory measures, these are (national) rules which do not discriminate between foreign and national products, but which hinder trade of a product between the Member States or hinder or impede access of a product to a market.[78] This approach has been confirmed in case *Cassis de Dijon*. One example of a non-discriminatory rule is case *Alfa Vita*[79] which concerned a rule that required sellers of bread to have a fully equipped bakery, even when the bread was half-baked on delivery and only needed to be baked-off by the seller. This requirement was considered to have negative effects on imports and thus constituted MHEE.

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[70] Barnard, *The Substantive Law*, 4 ed., p. 73.
[71] Also referred to as distinctly discriminatory measures - Barnard, *The Substantive Law*, 4 ed., 81.
[72] Barnard, *The Substantive Law*, 4 ed., 81.
[73] Case 59/82 *Schutzverband gegen Unwesen in der Wirtschaft v. Weinvertriebs GmbH* [1983] ECR 1217 [Weinvertriebs].
[74] Weinvertriebs, paras. 7–8.
[75] Also referred to as indistinctly discriminatory measures (Barnard, *The Substantive Law*, 4 ed., p. 90).
[76] Bernitz & Kjellgren, p. 209, 305-306.
[77] Case C-14/00 *Commission v. Italy* [2003] ECR I-00513. For another example, see case *Commission v. France* which concerns French legislation that regulates the categorisation of alcoholic beverages in relation to how they could be advertised. In fact, the French legislation categorised domestic products more favourably than foreign products, although treated domestic and foreign products equally in law (wording of the legislation). (Case C-152/78 Commission v. France [1980] ECR I-2299).
[78] Craig & de Burca, p. 689.
[79] Joined cases C-158/04 and C-159/04 *Alfa Vita* [2006] ECR I-8135 ; Case C-82/85 *Commission v. Greece* [2006] ECR I-93.

Consequently, apart from directly and indirectly discriminatory measures, non-discriminatory rules that hinder or inhibit market access can also constitute MHEE and thus restriction on free movement of goods.[80] Even though Article 34 TFEU does not give a definition of MHEE, the rationale behind Article 34 TFEU should be considered to abolish discriminatory rules (protective national rules favouring domestic products). Therefore, it is undisputable that the Court has interpreted Article 34 TFEU broadly and thus has given a broad meaning to the concept of MHEE by catching non-discriminatory rules. However, if a national rule is found to be MHEE, it does not automatically mean that the rule is impermissible. The Member State concerned has an opportunity to defend (justify) its rule. This is called *justification* and is examined in sub-chapter 2.3.

2.2.2.3 Measures Having Equivalent Effect to Quantitative Restrictions and Case Keck

The other category of MHEE is certain selling arrangements that do not satisfy some conditions. In order to clarify this category, firstly the concept of certain selling arrangements must be presented.

The concept of *certain selling arrangements* (CSAs) was introduced by the Court in case *Keck*. Case *Keck* concerns a French rule which prohibited sale of a product at a loss. The ECJ ruled that this rule was a certain selling arrangement[81] as it regulated how a product could be sold, rather than regulating the product itself (product requirement). Moreover, the Court ruled that CSAs are permissible as long as they satisfy certain conditions, the so-called *Keck conditions.*

Before briefly presenting the conditions, which rules will be considered as CSA must be stated. CSAs are national rules that interfere with the marketing - a method of sales promotion of a product, for example rules regulating *when/where/by whom* goods can be sold, how (certain) goods can be advertised restrictions and price controls over goods.[82] One example of a CSA is case *De Agostini*[83], in which a Swedish national rule banned TV advertising directed at children below the age of 12. The efficacy of the different types of promotion was left to the national court to ascertain, however the ECJ acknowledged that television advertising was an effective form of promotion in order to penetrate a national market and that an outright ban of a type of promotion for a product which is lawfully sold there, might have a greater impact on imported products than domestic products. Such a rule falls under Article 34 TFEU if it is shown that the ban does not affect in the same way, in fact and in law, the marketing of national products and of products from other Member States.[84]

[80] This structure has later been transferred to all other free movements by the ECJ.
[81] Keck, para. 16.
[82] Oliver, p. 125.
[83] Joined cases C-34/95, C-35/95 and C-36/95 *De Agostini* [1997] ECR I-3843 [De Agostini].
[84] De Agostini, paras. 42–44.

As regards as the conditions that must be satisfied, one "set" of these conditions are stated in para. 16 of the *Keck* judgment:

> "/…/ apply to all relevant traders operating within the national territory and so long as they affect in the same manner, in law and in fact, the marketing of domestic products and of those from other Member States." [85]

This means that the rule that is a CSA must apply to all relevant traders operating within the national territory *and* must affect the marketing (sale) of domestic products and foreign products in the same manner in law and in fact. A CSA that does not satisfy these two conditions stated in para. 16 will be considered as discriminatory CSAs[86] and will be treated as MHEE and breach of Article 34 TFEU.

The other condition is provided in para. 17 of the *Keck* judgment and it relates to market access. According to para. 17:

> "The application of such rules to the sale of products from another Member State meeting the requirements laid down by that State is not by nature such as to prevent their access to the market or to impede access any more than it impedes the access of domestic products."[87]

The condition stated in para. 17 should be interpreted in the way that a national rule which is a CSA must not hinder access of foreign products to the market of a Member State.[88]

Consequently, if a CSA satisfies the *Keck conditions*, such a CSA will be permissible and will thus fall outside the scope of Article 34 TFEU.[89] For example, in case *DocMorris*[90] where a German national rule prohibited the online sales of medicine, the ECJ ruled that the prohibition on online sales of medicine affected sales of foreign products more, as the online sales was found to be the most effective way of enabling foreign products to enter a market by not requiring foreign producers being physically established there. Consequently, the rule breached

[85] Keck, para. 16.
[86] Barnard, *The substantive law*, 5 ed., p. 129–130.
[87] Keck, para. 17.
[88] In the doctrine, there is no consensus on how to interpret the conditions stated in para. 16 and the condition stated in para. 17. Especially in its previous case-law, the ECJ did not examine compliance of the national rule in question with the condition provided in para. 17 so that the assessment was made only by assessing the conditions stated in para. 16. Later, in some cases, the ECJ examined the condition stated in para. 17. But, in some of those cases, the ECJ found breach of the second condition stated in para. 16 because the national rule in question breached the condition stated in para. 17 (market access). In other words, the national rule concerned did not satisfy the second condition in para. 16 because it did not satisfy the condition in para. 17. This line of case law has created a question of whether the second condition stated in para. 17 is a means of assessment of the second condition provided in of para. 16 of Keck or whether the condition stated in para. 17 is not an independent condition that must be examined separately. For an example, *see* case C-322/01 *Deutscher Apothekerverband eV v. 0800 DocMorris NV and Jacques Waterval* [2003] ECR I14887. As this issue is not related to the research question, it will not be examined.
[89] Keck, para. 16.
[90] Case C-322/01 *Deutscher Apothekerverband eV v. 0800 DocMorris NV and Jacques Waterval* [2003] ECR I14887 [DocMorris].

the condition stated in para. 17 and the second condition provided in para. 16 of the *Keck* judgment and therefore breached Article 34 TFEU.[91]

2.2.2.4 Measures Having Equivalent Effect to Quantitative Restrictions: Ban and Restriction on Use of a Product

The last category of MHEE is rules that *ban or restrict use of a* product. This category was introduced by the Court in cases *Italian Trailers*[92] and *Mickelsson*[93] in 2009. As previously stated, this category involves national rules which prohibit (total ban) or restrict (partial ban) the use of a product. The Court considered ban on use of a product as MHEE based on the reasoning that a rule that prohibits use of a product will negatively influence consumers' behaviour in purchasing such a product whose use is prohibited. In other words, the idea is that a consumer will be unwilling to buy a product if the use thereof is not unlimited, which will, in turn, adversely affect importation of that product.[94] In case *Italian Trailers*, which concerned a national rule that prohibited the use of trailers being pulled by motorcycles, the Court stated that ban on use of a product in the territory of a Member State has a considerable influence on consumer behaviour, which, in its turn, affects access to the market of that Member State.[95]

As regards restriction on use of a product, the Court stated that such a restriction can, depending on its scope, adversely affect consumers' willingness to buy the product, which presents the same reasoning, and this will thus impede market access of the product in question.[96] In case *Mickelsson*, the ECJ ruled that a Swedish national rule that restricted the use of watercraft only on designated waterways may, depending on its scope, have the effect of hindering access to the domestic market due to the fact that consumers would have only a limited interest in buying a product, knowing that the use thereof is very limited.[97]

Consequently, the well-established categorisation is that MHEE are product requirements[98], certain selling arrangements that do not satisfy the *Keck* criteria[99] and national rules that ban[100] or restrict[101] use of a product. However, as stated above, if a national rule is found to be MHEE, it does not automatically mean that the rule is impermissible. The Member State concerned has an opportunity to defend (justify) its rule, which is called *justification.* The concept of justification is presented and examined in the below sub-chapter 2.3.

[91] DocMorris, para. 74.
[92] Case C-110/05 *Commission v. Italy* [2009] ECR I-519 [Italian Trailers].
[93] Case C-142/05 *Åklagaren v. Mickelsson, Roos* [2009] ECR I-4273 [Mickelsson].
[94] Italian Trailers, paras. 56–58.
[95] Italian Trailers, para. 56.
[96] Mickelsson, paras. 26–27.
[97] Mickelsson, paras. 26–28.
[98] Dassonville, Cassis de Dijon and Keck.
[99] Keck.
[100] Mickelsson.
[101] Italian Trailers.

2.3 Justification

Justification is an opportunity for the Member States to justify their national rules that restrict free movement of goods.[102] In other words, the Member States are allowed to keep their restrictive national rules in their national legal order if such restrictive rules (restriction) are justified. However, for a national rule that constitutes restriction on free movement of goods to be justified, a structure must be followed/some conditions must be met (satisfied). Firstly, there must be a legitimate objective to be protected by the rule that constitutes restriction.[103] To illustrate the existence of a legitimate objective/interest, for example, encouraging corruption would not be accepted by the Court as this is not a *legitimate* objective. A list of legitimate objectives is provided in the Treaty, and also an open-ended list is accepted by the case-law of the ECJ. Secondly and finally, the national rule must satisfy the principle of proportionality.[104]

In the below sub-chapter, legitimate objectives and the assessment of the proportionality principle will briefly be presented.

2.3.1 Legitimate Objectives: *Grounds* for Justification

Some legitimate objectives are already listed in Article 36 TFEU, which are called "express derogations".[105] The list of derogations in Article 36 TFEU is exhaustive. Moreover, the ECJ expanded the list by introducing *mandatory requirements* in case *Cassis de Dijon* in the area of free movement of goods.[106] The mandatory requirements are "unwritten grounds" that the Court finds general interests worth protecting.[107] In this decisive case, *Cassis de Dijon*, the Court not only introduced the notion of mandatory requirements, but also ruled that non-discriminatory national rules can also constitute restriction if they hinder free movement of goods. The Court thereby broadened the scope of restriction, and at the same time introduced further/additional grounds for justification. This may be interpreted as an attempt of the ECJ to create a balance between EU law and the Member States legislative autonomy by creating an additional opportunity for the Member States to justify their national rules.[108] The concept of mandatory requirements is an open-ended list meaning that any "legitimate" objective which is not stated in Article 36 TFEU, such as consumer protection, can be accepted by the ECJ. This shows that it is up to the ECJ to accept an objective or not.

At this point it is important to keep in mind that the derogations listed in Article 36 TFEU and the mandatory requirements are only to be applied in the absence of harmonisation. In other words, the EU can inflict rules which are aimed at protecting the interests at Union level instead of national level. [109] Furthermore, according to the Court's case law, Article 36 TFEU refers only to matters of a non-economic nature which means that restrictions cannot be justified based

[102] Justification applies to all free movements. However, as this thesis is about free movement of goods, the reference will be to free movement of goods.
[103] Barnard, *The Substantive Law*, 4 ed., p. 154.
[104] Barnard, *The Substantive Law*, 4 ed., p. 177.
[105] Each free movement has its own express derogation, which will not be examined.
[106] Cassis de Dijon, para. 8.
[107] Burrows, F, *Free Movement in European Community Law*, Clarendon Press, Oxford, 1987 [Burrows] p. 60.
[108] Barnard, *The substantive law*, 5 ed., p. 172.
[109] Barnard, *The Substantive Law*, 5 ed., p. 150.

on purely economic considerations[110], such as maintaining economic stability in the Member State concerned. Moreover, as justification is, in fact, a derogation from the free circulation rule, the provision must be is interpreted strictly according to the ECJ.[111] This means that the free movement of goods is the main rule and the derogations are exceptions. For example, in the case *Buy Irish*, the Court stated that the derogations listed in Article 36 TFEU are exhaustive and that exceptions to free movement of goods must be interpreted strictly.[112] The same approach of the Court is also expressed in case *Campus Oil*[113]:

> "Article [36 TFEU], as an exception to a fundamental principle of the Treaty, must be interpreted in such a way that its scope is not extended any further than is necessary for the protection of the interests which it is intended to secure, and the measures taken pursuant to that article must not create obstacles to imports which are disproportionate to those objectives. Measures adopted on the basis of Article 36 can therefore be justified only if they are such as to serve the interest which that article protects and if they do not restrict intra-Community trade more than is absolutely necessary."[114]

Furthermore, directly discriminatory rules can be justified only under Article 36 TFEU (express derogation), while indirectly and non-discriminatory measures can be justified under both express derogation and mandatory requirements. Having said that, the recent case law of the Court has been moving in a different direction, as explained under sub-chapter 2.5.[115] Moreover, a Member State can invoke more than one ground.[116]

Lastly, at this point it needs to be acknowledged that each Member State is free to decide, to a certain extent, which level of protection will suffice in the territory of that Member State. The Court has ruled that the Member States enjoy a margin of discretion in determining the measures which are likely to achieve concrete results, with regard to particular social circumstances and to the importance attached by those States to a legitimate objective under Community law.[117] The notion of margin of appreciation will be presented in sub-chapter 2.6.

2.3.2 Justification and Proportionality in General

As stated above, the national rule must satisfy the principle of proportionality in order to be justified.[118] The proportionality assessment is made by examining some tests. These tests are suitability, necessity, and stricto sensu. This applies to both justification under the express derogations and mandatory requirements.[119] More specifically, for a restriction to be justified it needs to be proportionate, *suitable and necessary*, in order to protect the interest in

[110] *See* for example Case 7/61 *Commission v. Italy* [1961] ECR 317.
[111] As oppose to Article 34 TFEU which is given a broad interpretation, and thereby the concept of restriction has been broadened.
[112] Buy Irish, para 7.
[113] Case 72/83 *Campus Oil Limited and Others v. Minister for Industry and Energy and Others* [1984] ECR 2727 [Campus Oil].
[114] Campus Oil, para. 37.
[115] Barnard, *The Substantive Law*, 4 ed., p. 154.
[116] *See* for example case *Mickelsson* where both protection of environment and protection of health was invoked.
[117] Case C-394/97 *Heinonen* [1999] ECR I-3599, para. 43; Case C-434/04 *Ahokainen and Leppik* [2006] ECR I-9171, para. 32; Case C-141/07 *Commission v. Germany (hospital pharmacies)* [2008] ECR I-6935, para 51.
[118] Burrows, p. 62; Maduro, p. 51.
[119] Oliver, p. 217.

question.[120] According to the first test, the *test of suitability*, the national rule must be suitable and thus appropriate to attain the objective in question.[121] For example, in case *Italian Trailers*, the Court stated that there must be a reasonable connection between the ban on motorcycles from pulling trailers (restriction) and the protection of road safety (legitimate objective).[122] The second test, the *test of necessity*, requires that the restriction must be the least restrictive/intrusive way to protect the objective in question. In for example case *Rosengren*[123], the Court stated that the measures are to be:

> /…/ necessary in order to achieve the declared objective, and that that objective could not be achieved by less extensive prohibitions or restrictions, or by prohibitions or restrictions having less effect on intra-[Union] trade."[124]

Finally, the *stricto sensu test*, which is proportionality in narrow sense, involves the balancing of interests, i.e. guaranteeing free movement of goods and the objective which is protected by the measure in question.[125] In case *Schmidberger*, the Court applied the stricto sensu-test and thus balanced the free movement of goods and the fundamental right to expression and assembly by stating that:

> "/…/ whilst the free movement of goods constitutes one of the fundamental principles in the scheme of the Treaty, it may, in certain circumstances, be subject to restrictions for the reasons laid down in Article 36 of that Treaty or for overriding requirements relating to the public interest."[126]

> "/…/ the interests involved must be weighed having regard to all the circumstances of the case in order to determine whether a fair balance was struck between those interests."[127]

> "The competent authorities enjoy a wide margin of discretion in that regard. Nevertheless, it is necessary to determine whether the restrictions placed upon intra-Community trade are proportionate in the light of the legitimate objectives pursued, namely /…/ the protection of fundamental rights."[128]

It should be stated that the stricto sensu assessment is generally skipped by the ECJ except where protection of human rights is invoked as a ground.[129]

The burden of proof lies on the Member State imposing the restriction.[130] More specifically, as Article 36 TFEU is a derogation from the main rule/principle of EU law, free movement of goods, the Member State invoking a ground listed under Article 36 TFEU and/or a mandatory

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[120] Maduro, p. 51.
[121] Barnard, *The Substantive Law*, 4 ed., p. 177.
[122] Italian Trailers, paras. 59-60. Also *see* Case 132/80 *NV United Foods and PVBA Aug. Van den Abeele v. Belgium* [1981] ECR 995 [United Foods], para. 28.
[123] Case C-170/04 *Rosengren v. Riksåklagaren* [2007] ECR I-4071 [Rosengren].
[124] Rosengren, para. 50.
[125] Barnard, *The Substantive Law*, 4 ed., p. 179.
[126] Schmidberger, para. 78.
[127] Schmidberger, para. 81.
[128] Schmidberger, para. 82.
[129] Schmidberger; Case C-36/02 *Omega Spielhallen- und Automatenaufstellungs GmbH v. Oberbürgermeisterin des Bundesstadt Bonn* [2004] ECR I-9609 [Omega Spielhallen]; Case C-244/06 *Dynamic Medien* [2008] ECR I-505, para. 44.
[130] Denkavit; Bennekom.

requirement must put forward arguments to prove that the rule in question is proportionate. Thus, the Member State needs to prove that the rule in question is *suitable* and *necessary* in order to protect the legitimate interest in question. The Member State, in principle, also needs to show that the measure does not constitute arbitrary discrimination or a disguised restriction on trade between Member States.[131] However, the assessment of this condition rarely appears in the case law. Moreover, the ECJ will not look for a ground for justification if one is not presented by the Member State.[132] In that context, the Court has stated that:

> /…/ the reasons which may be invoked by a Member State by way of justification must be accompanied by appropriate evidence or by an analysis of the appropriateness and proportionality of the restrictive measure adopted by that State, and precise evidence enabling its arguments to be substantiated."[133]

As presented, the principle is that it is the Member State has the burden of proof and when the Member State fulfils its burden of proof, the burden of proof shifts to the other party.[134] However, an exception to this principle has occurred. For example, in case *Italian Trailers*, the Court ruled that the restrictive rule could be justified without evidence presented by the Member State.[135]

2.4 Justification under Article 36 TFEU: Some Examples

For a better understanding, in this sub-chapter, some examples related to express derogation and proportionality will briefly be presented. In chapters 3 and 4 the *public policy* and *public security* grounds for justification will be thoroughly presented and analysed, which is why these grounds are omitted from the presentation in this sub-chapter. Moreover, as no cases have been ruled under *protection of national treasures possessing artistic, historic or archaeological value*, this ground is also omitted from the following presentation.[136]

2.4.1 Public Morality

What is to be protected under public morality is determined by each Member State. In other words, the Member States' autonomy is mostly respected as the Court leaves it to the Member States to decide on what is protected under public morality within that Member State. Thus, the Member States have discretion, but their discretion is not limitless. This is only allowed to a certain extent.[137] Two cases draw the line between the Member States' autonomy in terms of recourse to public morality and the restriction on free movement of goods. These two cases are cases *Henn and Darby*[138] and *Conegate.* In *Henn and Darby*, the Court accepted a UK ban on

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[131] Enchelmaier, Stefan in Oliver (ed.) *Free movement of goods in the European Union,* 5 ed., Hart Publishing Ltd, 2010, p. 215–312 [Enchelmaier in Oliver] p. 216.
[132] Enchelmaier in Oliver, p. 221.
[133] Case C-254/05 *Commission v. Belgium* [2007] ECR I-4269, para. 36.
[134] *See* Case 178/84 *Commission v. Germany* [1987] ECR 1227 [Beer Purity]; Case C-55/99 *Commission v. France* [2000] ECR 11499.
[135] According to Enchelmaier, the Court's case law subsequent to case Italian Trailers is entirely consistent with the case law prior to Italian Trailers, suggesting that the principle of burden of proof has not been reversed (Enchelmaier in Oliver, p. 222).
[136] Barnard, *The substantive law,* 5 ed., p. 163.
[137] Barnard, *The substantive law,* 5 ed., p. 151; Enchelmaier in Oliver, p. 249.
[138] Case 34/79 [1979] ECR 3795 [Henn and Darby].

import of pornographic films and magazines into the UK[139] based on protection of public morality, as there was no lawful trade in such goods in the UK territory. The ban was *suitable* to protect public morality as represents the moral value in the UK and it was the only way of protection public morality. Consequently, as the ban did not aim to discriminate between such foreign and national products as there was no national market for such products, the rule was justified based on public morality. However, in *case Conegate*, the UK ban on import of certain pornographic material (sexual aids) was not justified on the ground of public morality. The reason is that while the UK rule prohibited import of such certain pornographic material (sexual aids), the UK allowed production and sale of the same type of material within the UK. This means that the rule discriminated against foreign products, and therefore justification of it was not accepted by the Court.[140] Apparently, *moral arguments* which fall within the scope of public morality are accepted where the Member State in question considers certain products "immoral" such as pornographic material and where the Member State in question prohibits a national market (production and sale in its territory) for such products.[141]

2.4.2 Protection of Health and Life of Humans, Animals or Plants

The protection of health and life of humans, animals or plants is an objective which the Court has found being an important objective to protect under Article 36 TFEU.[142] This ground involves the protection of health which may overlap with the protection of public health.[143] Protection of health, plants, and/or animals may overlap with protection of environment.[144] As regards the protection of health, in the absence of harmonisation, the Court has ruled that each Member State is entitled to decide on the level of health protection.[145] Furthermore, the Court has ruled that, in line with the *precautionary principle*, the Member States have the prerogative to decide which level of public health protection will suffice when the health risk of a specific product is uncertain.[146] For a better understanding, some examples are presented.

In the *Beer Purity* case, which involved a German ban of marketing beer containing additives due to the fact that Germans consumed a lot of beer and the long-term effects of additives were unknown, the Court stated that the rule in question could not be justified based on protection of health and precautionary principle due to the rule being contrary to the principle of proportionality.[147] The ECJ came to this conclusion after examining scientific research on the topic, which indicated that the additives posed no risk to public health. Interestingly, Germany

[139] Such a ban is a restriction on free movement of goods as being QR.
[140] Conegate, para 15.
[141] Doukas, Dimitrios, *Morality, Free Movement and Judicial Restraint at the European Court of Justice*, in Koutrakos, Nic Shuibhne & Syrpis (Eds.), *Exceptions from EU Free Movement Law: Derogation, Justification and Proportionality*, Hart Publishing, Oxford, 2016, p. 143–169 [Doukas] p. 167.
[142] Case C-333/14 *Scotch Whiskey Association* EU:C:2015:845, para 35; Case C-320/93 *Lucien Ortscheit GmbH v. Eurim-Pharm Arzneimittel GmbH* [1994] ECR I-5243, para. 16; Rosengren, para. 39.
[143] Case C-405/98 *Konsumentombudsmannen (KO) v. Gourmet International Products AB (GIP)* [2001] ECR I-1795 [Gourmet] paras. 27, 34.
[144] Mickelsson, para. 33.
[145] Case 97/83 *Criminal Proceedings against Melkunie* [1984] ECR 2367, para. 18.
[146] Case 174/82 *Officier van Justitie v. Sandoz* [1982] ECR 2445, para. 16; Case 53/80 *Officier van Justitie v. Koninklijke Kaasfabriek Eyssen BV* [1981] ECR 409; Case C-121/00 *Criminal Proceedings against Walter Hahn* [2002] ECR I-9193, para. 45; Case C-192/01 *Commission v. Denmark* [2003] ECR I-9693, para. 47.
[147] Beer Purity, para. 53.

allowed the same additives in other drinks which the Court found inconsistent.[148] This means that the rule is not *suitable* to protect public health because there is no causal link between the measure and the protection of public health as the prohibited additives are not harmful to human health. In the author's opinion, apart from lack of scientific research about the possible harmful effects of the prohibited additives, allowing the additives in other products alone would render justification impossible, as it indicates a clear inconsistency.

Moreover, in case *DocMorris*, where Germany had banned the online-sales of medicine whose sale was limited to pharmacies, invoked the protection of health argument as grounds for justification. The Court found the rule to be justified when it came to medicine subject to prescription, but not medicine which is not subject to prescription. The Court based its ruling on the argument that, as regards medicine subject to prescription, there was a need for pharmacies to be able to check the authenticity of the prescription and to ensure that the medicine was handed over to the right person, due to the health risks connected to use of such medicine.[149] Thus, the rule was found to be proportional, as the rule was suitable to protect health and it was necessary as a less possible restrictive way would not protect health sufficiently. For medicine which is not subject to prescription, the ECJ stated the rule was not *necessary* as less restrictive measures would provide sufficient protection for public health, and thus the rule was contrary to the principle of proportionality.[150]

As previously stated, animal health is also protected by Article 36 TFEU. In case Bluhme[151], which concerns a ban on the keeping of bees, rather than indigenous brown bee which was to extinct, on a particular Danish island and their importation to that island, Denmark invoked animal protection as grounds to justify its ban, as the indigenous brown bee was to extinct and the rule aimed to increase brown bee population . The Court ruled that the ban on import was justified due to the fact that the ban of imports protected the survival of the native bee.[152] Thus, the rule was found to be proportional, as it as suitable to protect survival of brown bee and it was necessary as it was only way to protect existence of the brown bee.

2.4.3 Protection of Industrial and Commercial Property

The derogation of industrial and commercial property protects various design rights, such as patents, trademarks, and copyright.[153] This derogation targets private interests rather than public interests. Intellectual property rights (IPR) have historically been protected by national laws and can thereby hinder trade as well as counteract the internal market.[154] The Court has, through case law, made a distinction between the *existence* of an intellectual property right and the *exercise* of an intellectual property right – the former being the subject of national law and the latter the subject of EU-law.[155] As regards Article 36 TFEU and IPR, the general rule is that the

[148] Beer Purity, para. 49.
[149] DocMorris, para. 119.
[150] DocMorris, paras. 112–116.
[151] Case C-67/97 *Criminal Proceedings against Ditlev Bluhme,* [1998] ECR I-8033 [Bluhme].
[152] Bluhme, para. 33.
[153] Barnard, *The Substantive Law,* 5 ed., p. 164.
[154] Case 24/67 *Parke Davis v. Probel* [1968] ECR 55.
[155] Case 78/70 *Deutsche Grammophon v. Metro* [1971] ECR 487.

Member States are free to legislate in the area of IPR in the absence of harmonisation. However, the following exceptions apply to the general rule. Firstly, the Member States cannot discriminate on grounds of nationality or place of manufacture in the national legislation. Secondly, the Member States cannot prevent goods from passing through their territory. The second exception applies only to goods in transit, not when the IPR is used in the territory of that Member State. Lastly, the Member States cannot allow the owner of an IPR to prevent the import or sale of goods which have been lawfully distributed on the market of another Member State by the owner of that IPR, or with that owner's consent.[156] In other words, the Member States are free to legislate in a way that restricts the free movement of goods provided that the abovementioned exceptions are not at hand. The ECJ has not objected to such national rules.[157]

One example which illustrates the general rule presented above is case *Keurkoop v. Nancy Kean Gifts*[158]. In this case Nancy Kean Gifts had, under the Uniform Benelux Law on Designs, registered the design of a handbag made in Taiwan. Nancy Kean Gifts was neither the author of the design nor acting with the consent of the author. This was in line with the Uniform law which also stated that subsequent to the registration no one, except the author of the design, could challenge such a registration. Keurkoup imported the design into the Netherlands despite of Nancy Kean Gifts being the holder if the IPR and Nancy Kean Gifts brought an action against Keurkoup. The national Court referred to the ECJ the question if such provisions were justified under Article 36 TFEU and the protection of IPR. The ECJ stated in the case that, in the absence of harmonisation, the question of which protection is granted is a matter for national rules and not EU-law.[159] Furthermore, the ECJ stated that such a provision as the one at issue in the case, falls within Article 36 TFEU and the protection of industrial and commercial property.[160] This means that the Member States are given a wide margin of appreciation as regards IPR.

2.4.4 Arbitrary Discrimination or a Disguised Restriction on Trade

According to the second sentence in Article 36 TFEU, no measure can be justified if that measure constitutes a means of arbitrary discrimination or a disguised restriction on trade between the Member States. The issue has arisen in several cases, particularly in cases where the public health derogation has been invoked, as for example the *Turkeys* case.[161] In the *Turkeys* case, the UK banned import of poultry meat and eggs from all other Member States, except Denmark and Ireland, due to animal health protection. A previous vaccination policy had been cancelled which, according to the UK, exposed the animals to risk of infection by imports. However, at the same time, there had been an increase in imports of turkeys into the UK from other Member States and the British producers urged the British Government to protect the domestic industry.[162] The ECJ ruled that the UK ban did not form part of a seriously considered health policy, due to the lack of consultation with the EU institutions prior to the

[156] Stothers, Christopher, in Oliver (ed.) *Free movement of goods in the European Union*, 5 ed, Hart Publishing Ltd, 2010, p. 313-369 [Stothers in Oliver], p 324.
[157] Stothers in Oliver, p. 325.
[158] Case 144/81 *Keurkoup v. Nancy Kean Gifts* [1982] ECR 2853 [Keurkoop v. Nancy Kean Gifts].
[159] Keurkoop v. Nancy Kean Gifts, para. 18.
[160] Keurkoop v. Nancy Kean Gifts, para. 20.
[161] Case 40/82 *Commission v. UK* [1984] ECR 2793 [Turkeys].
[162] Turkeys, paras. 22–23.

change of policy and the lack of detailed scientific research, but constituted a disguised restriction on imports.[163]

A case where the Court accepted justification under Article 36 TFEU *not* to be misused and thus *not* in breach of Article 36(2) TFEU is the previously mentioned case *Henn and Darby*, in which the ECJ found the ban on import of pornographic material justified due to the protection of public morality.[164] The purpose of Article 36(2) TFEU is to prevent restrictions which misuse the derogations listed in Article 36 TFEU in order to prevent imports. This was not the case in *Henn and Darby*, according to the Court, as the British rule as a whole was aimed at prohibiting products which could be regarded as obscene, which did not allow a national market for such products.

2.5 Justification under Mandatory Requirements: Some Examples

As previously mentioned, the mandatory requirements are objectives (grounds) which are not listed in Article 36 TFEU but have been deemed as worth protecting by the Court. Some examples of the accepted objectives by the ECJ are consumer protection[165], road safety[166], protection of environment[167]. The following categories can be identified in the Court's case law; *protection of public goods and values*, *protection of individuals*, *and protection of public order*.[168] These categories of protected interests are not exhaustive. On the contrary, the Court seems to recognise the Member States autonomy as regards national aims of a non-economic nature, which provides a means for justification by the Member States.[169] Below some examples are given.

In case *Familiapress*[170], the ECJ stated that an Austrian rule against unfair competition which restricted a magazine's including prize competitions, fell under Article 34 TFEU as it was a MHEE, but could be justified on the grounds of press diversity due to the protection of smaller publishers who could only offer small prizes as oppose to large publisher that could offer large prices. The Court left it to the national court to ascertain if the measure was proportionate, thus suitable and necessary, in order to attain the objective which the Member State was aiming at.[171] As regards the balancing of interests the Court gave the national court a detailed framework to follow when conducting the proportionality assessment. As to *suitability* the national courts should carry out a study in order to determine whether newspapers which offered the chance of winning a prize in a competition were in fact in competition with the small publishers that were considered to be unable to offer comparable prices, whether the potential prize was an incentive for potential customers to buy magazines, and whether this

[163] Turkeys, paras. 38, 40.
[164] Henn and Darby, para. 21.
[165] Case 286/81 *Oosthoek's Uitgeversmaatschappij* [1982] ECR 4575 [Oosthoek].
[166] Italian Trailers.
[167] Mickelsson.
[168] Barnard, *The substantive law*, 5 ed., p. 173.
[169] Barnard, *The substantive law*, 5 ed., p. 174.
[170] Case C-368/95 *Familiapress* [1997] ECR I-3689 [Familiapress].
[171] Familiapress, para. 27.

could influence the demand for such magazines.[172] Moreover, the national court should assess the extent to which such magazines could be replaced by magazines which did not offer prizes, from a consumer's perspective. In doing so, the national court had to take into account all the circumstances which could influence a consumer's willingness to buy such a product, such as the presence of the advertising on the front cover referring to the chance of winning a prize, the likelihood of winning, the value of the prize, or the extent to which winning depended on a test calling for a measure of ingenuity, skill, or knowledge.[173] As regards necessity, the ECJ ruled that the national court had to consider if it would have been sufficient/enough for the national law to require the removal of the page on which the prize competition was presented in the copies intended for the Austrian market or adding the statement that the Austrian readers were not subject to the competition and thus could not win the prize.[174] As seen, case *Familiapress* is an example of a strict approach to the proportionality assessment.

Furthermore, in case *Oosthoek*, Oosthoek had offered a dictionary, a universal atlas, or a small encyclopedia as a free gift to subscribers to an encyclopedia and a Dutch rule prohibiting the offering or giving of free gifts within a commercial activity was scrutinized by the Court. The Court stated that a rule which restricts or prohibits certain form of advertising and certain means of sales promotion may negatively affect marketing opportunities for imported products which, in turn, affects imports negatively.[175] Moreover, the Court stated that:

> "/…/ the offering of free gifts as a means of sales promotion may mislead customers as to the real prices of certain products and distort the conditions on which genuine competition is based. Legislation which restricts or even prohibits such commercial practices for that reason is therefore capable of contributing to consumer protection and fair trading."[176]

The Court thereby acknowledged the possibility for a Member State to invoke consumer protection as a legitimate objective, i.e. mandatory requirement. The Court found the rule in case *Oosthoek* to be proportionate, thus suitable and necessary to attain the objectives in question. More specifically, there is a link between the rule and the objective, the rule is thus *suitable*, and does not exceed what is *necessary* for the attainment of the objectives in question.[177]

In earlier case law, directly discriminatory measures (distinctly discriminatory measures) were considered only to be justified by the derogations listed in Article 36 TFEU which could be seen as a punishment as direct discrimination is the "worst" form of restriction, and not the mandatory requirements.[178] However, recent case law from the ECJ indicates that this view has

[172] Familiapress, paras. 28–29.
[173] Familiapress, para. 31.
[174] Familiapress, para. 32.
[175] Oosthoek, para. 15.
[176] Oosthoek para. 18
[177] Oosthoek, para. 20.
[178] *See* for example Joined cases C-1 and 176/90 *Aragonesa* [1991] ECR I-4151, para. 13; Case C-2/90 *Commission v. Belgium (Walloon Waste)* [1992] ECR I- 4431, para. 34; Buy Irish, para. 11; Case 177/83 Kohl v. Ringelhan & Rennet SA [1984] ECR 3651 [Ringelhan], para. 19; Case C-21/88 *Du Pont de Nemours* [1990] ECR I-889, para 14; Joined cases C-321-4/94 *Pistre* [1997] ECR I-2343, para. 52.

been abandoned in favour of justifying directly discriminatory, indirectly discriminatory and non-discriminatory measures under both the express derogations (Article 36 TFEU) and the mandatory requirements, making categorising a restriction as "directly" discriminatory less important.[179] However, the Court still considers the possible justifications under Article 36 TFEU and mandatory requirements separately, but then applies the same proportionality test to a case irrespective of which ground the objective falls under.[180]

2.6 The Member States' Margin of Appreciation

The balance between EU law and the Member States' legislative autonomy is a delicate issue and relates to the question of which issues are to be decided by the ECJ, on the one hand, and the national courts, on the other.

According to the ruling in *Cassis de Dijon*, it is the Court that will decide if a measure is justified and proportionate, involving assessment of suitability and necessity, and where it applies, stricto sensu. However, there are some cases where the ECJ has left the proportionality assessment to the national court by providing a framework for the national court on how to assess proportionality.[181] Moreover, there are some cases where the ECJ has left the proportionality assessment to the national court with a complete "freedom".[182] Hence, the doctrine of margin of appreciation gives the Member States competence to decide matters of justification, fully or partially, through national courts.[183] The level of margin of appreciation given to the Member States shifts the balance between the Member States' judicial autonomy and EU law. However, it is uncertain whether the margin of appreciation has grown wider or narrower, and scholars have different opinions on the matter.[184] The Member States' margin of appreciation is closely linked to the concept of justification as the level/degree of margin of appreciation decides how extensive the ECJ's judicial review is in a case. As regards the ECJ competence, Article 19(1) TEU provides:

> "The Court of Justice of the European Union /…/ shall ensure that in the interpretation and application of the Treaties the law is observed."

In addition, Article 267 TFEU states that:

> "The Court of Justice of the European Union shall have jurisdiction to give preliminary rulings concerning /…/ the interpretation of the Treaties."

Accordingly, the ECJ interprets EU law. The question remains, however, how to define the task of "interpretation". Furthermore, the Court has stated that it will go beyond interpretation if

[179] For an example, *see* Case C-524/07 *Commission v. Austria (roadworthiness of cars)* [2008] ECR I-187, paras. 54–55,
[180] Barnard, *The Substantive Law*, 4 ed., p. 154.
[181] Mickelsson, paras. 26, 28, 44; Familiapress, paras. 27–32.
[182] Gourmet, para. 33.
[183] Zglinski, Jan, *The Rise of Deference: The Margin of Appreciation and Decentralized Judicial Review in EU Free Movement Law,* CMLR 55: 1341–1386, 2018 [Zglinski] p. 1344–1345.
[184] See for example Zglinski, p. 1353; Barnard in Barnard & Odudu, p. 295.

necessary.[185] This suggests a very wide definition of the task of "interpretation". In addition, according to Article 267 TFEU there is a division of responsibility between the ECJ and the national courts as regards the cases referred to the ECJ, namely the ECJ interprets the law and the national courts apply the judgement to the facts of the case. However, it can be difficult to make a clear distinction between interpreting the law and applying it to the facts.[186] This creates uncertainty as regards the separation of functions in relation to the notion of margin of appreciation.

The doctrine of margin of appreciation is very much present/applied in the area of free movement of goods, compared to other free movements. However, the Member States are not to be given a margin of appreciation if the measure in question discriminates against foreign products. Thus, a case where there is no discrimination will enjoy a wider margin of appreciation. To sum up, the degree of margin of appreciation may vary in relation to the presence or absence of discrimination in a case.

Furthermore, the level of discretion granted the Member States decreases as an area is harmonised.[187] In addition, the Court is more likely to give the Member States a margin of appreciation in areas where there is a consensus, or close to consensus, between the Member States as regards the measure in question.[188] More specifically, consensus between the Member States increases the margin of appreciation, whereas harmonisation decreases the margin of appreciation. In areas that have been harmonised, the EU has exercised its legislative competence and the Member States cannot legislate in conflict which the Union acts.

In chapter 3 justification under public policy and public security is presented and analysed.

[185]Mickelsson, paras. 40–41; The notion of the Court's activism is not addressed in this study.
[186] Barnard in Barnard & Odudu, p. 295.
[187] Zglinski, p. 1362.
[188] Zglinski, p. 1365.

3. Justification under Public Policy and Public Security: the Court's Arguments and Advocate Generals' Opinions

In this chapter public policy and public security derogations are examined mostly by presenting the relevant judgments and the arguments of the ECJ, as well as the AG opinions in these cases. These two derogations are different objectives under which different concerns are, in principle, protected, as can also be supported by the fact that Article 36 TFEU lists these two objectives separately. The main aim of this chapter is, by presenting the relevant case law and the arguments of the ECJ and the AGs, to show that what constitutes public policy and public security is, in fact, subject to interpretation as regards what kind of argument(s) may fall within the public policy and public security derogations. However, it should be stated that even though these two derogations are different objectives, the public policy and public security derogations are linked to some extent due to the fact that some aspects are common to all grounds for justification, which is analysed in chapter 4.

3.1 Public policy

The public policy argument has manifested itself in different ways, which can be seen in the Court's case law. It would not be wrong to state that there is no established interpretation of public policy. To put in the words of the Court:

> "/…/ whatever interpretation is to be given to the term public policy /…/."[189]

The public policy derogation tends to be invoked when other grounds are not suitable, given its more general nature, compared to the other grounds for justification which are more specific.[190] Due to its general nature, which arguments may fall within the public policy is difficult to guess, compared to for example protection of health. This can easily lead to the result that what constitutes public policy changes from one Member State to another. However, despite of its general nature, the public policy derogation has been narrowly interpreted by the ECJ and the Court has been reluctant to broadening its scope.[191] For example, in case *Ringelhan*, the German Government claimed that consumer protection falls within a broad interpretation of the concept of public policy. The Court rejected this argument and excluded the *consumer protection* considerations from the scope of the public policy derogation.[192] It can be argued that the exclusion of consumer interest from the public policy derogation is consistent with the Court's case law explicitly stating that Article 36 TFEU is to be interpreted strictly. However, as the Court has referred to public policy as "fundamental interests of society" it has been submitted that excluding for example consumer interest from the scope of public policy is a too narrow interpretation of public policy.[193] The notion of excluding certain objectives from the scope of Article 36 TFEU and categorising these objectives as mandatory requirements is further explored in sub-chapter 4.2.

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[189] Ringelhan, para. 19.
[190] Enchelmaier in Oliver, p. 251.
[191] Barnard, *Substantive law*, 5 ed., p. 152; Doukas, p. 168.
[192] Ringelhan, para. 19.
[193] Thym, Daniel, *The Constitutional Dimension*, in Koutrakos, Nic Shuibhne & Syrpis (Eds.), *Exceptions from EU Free Movement Law: Derogation, Justification and Proportionality*, Hart Publishing, Oxford, 2016, p. 170–
[189] [Thym] p. 173; Case 30/77 *R v. Bouchereau* [1977] ECR 1999 [Bouchereau].

Furthermore, in case *Schmidberger* the *protection of fundamental rights* was found to be considered a legitimate objective which could, in principle, justify an infringement of the fundamental freedoms provided for in the Treaty.[194] However, in the subsequent case *Omega Spielhallen*[195], the Court found the protection of human dignity to fall under the public policy derogation. It is difficult not to agree with the ruling in *Omega Spielhallen* in which the Court found fundamental rights to fall under public policy. Consequently, the need for a particular category of fundamental rights as a mandatory requirement, which seems to be the Court's intention in *Schmidberger,* is superfluous as protection of fundamental rights would fit under public policy. The notion of fundamental rights in relation to fundamental freedoms is further analysed under chapter 4.2.2.

Moreover, the concept of public policy indicates that the derogation is attributable to objectives such as preventing crime. However, the Court has referred to crime prevention as a mandatory requirement and not public policy, in a number of cases.[196] One example is *Commission v. Portugal*[197], which concerned a Portuguese ban on affixing of tinted film onto car windows, a national measure aimed at preventing crime. As previously mentioned the Court has qualified many objectives closely linked to the fundamental interests of society as mandatory requirements, which might have been included in the public policy derogation.[198] Crime prevention is one of the objectives which would fit under public policy as it is a fundamental interest of society. It can also be argued that measures as regards press diversity would fall under public policy with this argument, but this is not the case according to the Court's ruling in for example *Familiapress* where press diversity was found to comprise a mandatory requirement.

As seen from the examples stated above, what constitutes public policy is not clear, and which arguments or considerations would fall within the scope will be decided by the ECJ.

In the following sub-chapters, judgments of the ECJ relating to the interpretation and application of the public policy derogation, are presented.

3.1.1 Case Cullet

Case *Cullet*[199] concerned a French system of rules in which petroleum products were subject to price controls. In the system, the ceiling price is calculated on the basis of the rates recorded for fuel on the European market and on the French ex-refinery prices. However, when the European rates fall more than 8 % below the French ex-refinery prices, the French ex-refinery prices are the only decisive element in fixing the ceiling price. Consequently, when the competitive advantage of imported products reaches 8 %, the European market price is disregarded when

[194] Craig & De Burca, p. 414.
[195] Case C-36/02 *Omega Spielhallen- und Automatenaufstellungs GmbH v. Oberbürgermeisterin des Bundesstadt Bonn* [2004] ECR I-9609 [Omega Spielhallen].
[196] Enchelmaier in Oliver, p. 251, 253.
[197] Case C-265/06, *Commission v. Portugal*. [2008] ECR I-2245 [Commission v. Portugal].
[198] Thym, p. 173.
[199] Case C 231/83*Cullet v. Centre Leclerc Toulouse* [1985] ECR 305 [Cullet].

calculating the ceiling price, which affects imports negatively due to depriving them from their competitive advantage.[200] As regards the minimum price, which is based solely on French ex-refinery prices, imported products with an ex-refinery price lower than the French ex-refinery price cannot fully use that advantage when penetrating the national market which, in turn, affects imports negatively.[201] The Court stated that such a system thereby deprives imported products from enjoying competitive advantaged in sales to the consumer and thus constitutes restriction.[202]

The French authorities invoked public policy in an attempt to justify the rule and claimed that the unrestricted competition, which would follow an abolishment/amendment of the minimum price rule, would lead to protests which would, in turn, pose a threat to public order and security.[203] The Court did not accept this argument as it was disproportionate:

> "/…/ the French Government has not shown that an amendment of the regulations in question /…/ would have consequences for law and order (ordre public) and public security which the French Government would be unable to meet with the resources available to it."[204]

According to AG VerLoren Van Themaat's opinion delivered in the case, to include civil unrest in the public policy derogation would be interpreting Article 36 TFEU too widely. Furthermore, according to AG VerLoren Van Themaat, the Member States have an obligation to facilitate trade (free circulation of goods) by abolishing hinderances created by private (interest) groups and to successfully invoke public policy derogation in matters of such civil unrest caused by interest groups would pose a risk of undermining the free movement of goods as private interest groups then would determine the scope of the fundamental freedoms provided for in the Treaty.[205]

As seen, neither the Court nor the AG accepted the French Government's arguments for justification, but for different reasons. The Court did not reject the possibility to invoke the public policy derogation based on the threat to public order and security, but rather dismissed the argument due to the measure being unproportionate to protect public policy. More specifically, according to the Court, the French Government had neither shown that the measure was necessary in order to avoid disruption of public order nor that the French Government would be unable to meet the threat with the resources available to it. This indicates that the public policy derogation might successfully be invoked in a situation where a measure is necessary (the least restrictive or the only way) to avoid disruption of public order due to the fact that the Member State does not have the resources to handle such a threat to public order. In AG VerLoren Van Themaat's opinion, on the other hand, including civil unrest in public policy would be a too extensive interpretation of the term public policy. In the author's opinion, the AG's approach, i.e. the strict interpretation approach of derogations such as public policy,

[200] Cullet, para. 27.
[201] Cullet, para 28.
[202] Cullet, para. 29.
[203] Cullet, para. 32.
[204] Cullet, para. 33.
[205] Opinion of AG VerLoren Van Themaat in Cullet, at 312.

is consistent with the Court's case law as regards strict interpretation of Article 36 TFEU and *stricto sensu*.

It is apparent that the possible admissibility of a measure under the public policy derogation in matters of civil unrest causes concerns of a democratic nature as interest groups/private bodies are given the power to change/amend rules that are the result of democratic processes at both national and EU level. However, the view presented by AG VerLoren Van Themaat in his opinion in *Cullet,* that the Member States have an obligation to facilitate trade (free circulation of goods) by abolishing hinderances created by private (interest) groups has been criticised in the doctrine for being incompatible with the principle of proportionality, more specifically stricto sensu, and the right to protest because it would oblige the Member States to use all necessary means to ensure the free movement of goods in their territory at the expense of the protection of fundamental rights.[206] This means that protection of fundamental rights (the right to protest in case *Cullet*) should have prevailed over the free movement of goods in a balancing. Moreover, the scope of *all necessary means* seems rather limitless which creates uncertainty regarding what obligations the Member States might have in such a situation.

It is evident from the Court's case law, however, that situations have been assessed differently in cases where the free movement of goods is restricted due to protection of fundamental rights. The balance between free movements and fundamental (human) rights are analysed under sub-chapter 4.2.

The issues in case *Cullet,* especially those relating to the right to protest and the Member States' obligation to handle threats to public order are closely linked to the issues that arose in case *Spanish Strawberries*. The case is presented in the following sub-chapter.

3.1.2 Case Spanish Strawberries

In case *Spanish Strawberries* French farmers destroyed imported products. The attacks were particularly aimed at strawberries imported from Spain.[207] The French Police had done little to nothing to suppress the attacks and to prosecute those guilty of the destruction (crime).[208] The Commission initiated infringement procedure[209] against France based on the argument that the French government's inaction in dealing with the destruction which made imports from other Member States more difficult constituted a breach of Article 34 TFEU and Article 4(3) TEU on the duty of cooperation.[210] After the Commission carried the issue before the ECJ, in case *Spanish Strawberries* the ECJ ruled that Article 34 TFEU, when read with Article 4(3) TEU, obliges the Member States not only *not* to refrain from having/adopting national rules contrary to the free movement of goods, but also to ensure that the free movement of goods is respected

[206] Barnard, *Substantive law*, 4 ed., p. 157.
[207] Spanish Strawberries, paras. 4–6.
[208] Spanish Strawberries, paras. 48–50.
[209] Article 258 TFEU states that the Commission can take legal action against a Member State that fails to implement EU-law. The Commission can also refer the issue to the Court.
[210] Article 4(3) TEU states that "the Union and the Member States shall, in full mutual respect, assist each other in carrying out tasks which flow from the Treaties."

throughout the territory of that Member State.[211] This involves an obligation on the Member States not to abstain from adopting measures/acting in order to deal with obstacles to the free movement of goods which are not caused by the State, but by private parties.[212]

In AG Lentz opinion in the case, Article 34 TFEU in conjunction with Article 4(3) TEU, means that the conduct of private individuals can constitute an infringement of the free movement of goods if it can be attributed to the French Republic.[213] The key issue of the case is therefore, according to AG Lentz, whether the French Republic can be held responsible for the disturbances and acts of violence.[214] Furthermore, in AG Lentz opinion, Article 4(3) TEU read in conjunction with Article 34 TFEU results in:

> /…/ an obligation for Member States to take 'all appropriate measures, whether general or particular' to protect the free movement of goods. That applies also, and in particular, to the protection of the freedom in question against attacks by private individuals."[215]

According to AG Lentz, such an obligation to act arises from the first paragraph of Article 4(3) TEU and is crucial in securing the practical effectiveness of Article 34 TFEU.[216] This argument, that the conduct of private individuals can be attributed to a Member State, has in a previous case, been put forward by AG La Pergola.[217] Furthermore, AG Lentz points out, that it is only in exceptional cases that a Member State could be said to be in breach of its obligations under Article 34 TFEU in conjunction with Article 4(3) TEU:

> "In order to take account of the discretion which Member States undoubtedly have, it will in fact be possible to accept the existence of a failure to fulfil the obligations under Article 30, read in conjunction with Article 5, only when it is clearly and unambiguously established that a Member State has not taken all necessary and proportionate measures to protect the free movement of goods from acts of violence committed by private individuals."[218]

According to AG Lentz, this case is such an exceptional situation.[219]

In *Spanish Strawberries* the Court stated that:

> /…/ the Member States, which retain exclusive competence as regards the maintenance of public order and the safeguarding of internal security, unquestionably enjoy a margin of discretion in determining what measures are most appropriate to eliminate barriers to the importation of products in a given situation."[220]

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[211] Spanish Strawberries, para. 32; *See* also Case C-573/12 *Ålands vindkraft AB v. Energimyndigheten* EU:C:2014:2037, para. 74.
[212] Spanish Strawberries, para. 30.
[213] Opinion of AG Lentz in Spanish Strawberries, para. 13.
[214] Opinion of AG Lentz in Spanish Strawberries, para. 36.
[215] Opinion of AG Lentz in Spanish Strawberries, para. 41.
[216] Opinion of AG Lentz in Spanish Strawberries, para. 43.
[217] Opinion of AG La Pergola in Case C-16/94 *Dubois and Général Cargo Services* [1995] ECR I-2421.
[218] Opinion of AG Lentz in Spanish Strawberries, para. 49.
[219] Opinion of AG Lentz in Spanish Strawberries, para. 50.
[220] Spanish Strawberries, para. 33.

> "It is therefore not for the Union institutions to act in place of the Member States and to prescribe for them the measure which they must adopt and effectively apply in order to safeguard the free movement of goods on their territories."[221]

> "However, it falls to the Court /…/ to verify, in cases brought before it, whether the Member State concerned has adopted appropriate measures for ensuring the free movement of goods."[222]

Thus, what the Court meant is that the Member States enjoy a margin of discretion as regards which measures to adopt in protecting public order and internal security and, in turn, ensuring the free movement of goods within the territory of that Member State. The Court will, however, assess the appropriateness of the measures taken by the Member State in a case brought before it, which limits the Member States legislative autonomy.

Also, the Court emphasised that:

> "It is for the Member State concerned, unless it can show that action on its part would have consequences for public order with which it could not cope by using the means at its disposal, to adopt all appropriate measures to guarantee the full scope and effect of Community law so as to endure its proper implementation in the interest of all economic operators.
>
> In the present case the French Government has adduced no concrete evidence proving the existence of a danger to public order with which it could not cope."[223]

Lastly, the Court stated that, in this case, the French Government has:

> "/…/ manifestly and persistently abstained from adopting appropriate and adequate measures /…/."[224]

Hence, according to the Court, a Member State has an obligation to take all necessary action in order to ensure and maintain the free movement of goods in the territory of that Member State. However, the scope of the Member States' obligation to act is not limitless, as according to the Court, as the Member States are to use the means at its disposal. This seems to indicate that the public policy derogation might successfully be invoked in (extreme) cases where the Member State has no other option than to restrict the free movement of goods in order to handle a threat to public order.[225]

The Court was faced with balancing interests in yet another case, *Schmidberger,* namely the free movement of goods on the one hand, and the freedoms of expression and assembly on the other. This time, the Court accepted the arguments put forward by the Member State in question and found that the measure could be justified. The case, in which the ECJ makes comparisons to *Spanish Strawberries,* is presented in the following sub-chapter.

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[221] Spanish Strawberries, para. 34.
[222] Spanish Strawberries, para. 35.
[223] Spanish Strawberries, paras. 56–57.
[224] Spanish Strawberries, para. 65.
[225] Enchelmaier in Oliver, p. 253.

3.1.3 Case Schmidberger

In case *Schmidberger,* an Austrian environmental association arranged a demonstration in order to protest against the health and environmental risks posed by heavy traffic on motorways. The demonstration hindered transport on a major transit route for trade between Northern Europe and Italy for a duration of 30 hours. This led to a German transport company, Schmidberger, seeking damages for their loss of profit during the demonstration, based on the fact that their vehicles could not use the transit route during that 30-hour period.

AG Jacobs stated in his opinion in the case that the blockage of the route in question constitutes an obstacle to the free movement of goods and explores if this obstacle can be attributed to the Austrian government as the restriction is primarily the result of the conduct of private individuals.[226] With reference to the Court's ruling in *Spanish Strawberries,* AG Jacobs states that the Member States have an obligation to take all necessary and proportionate measures to assure the free movement of goods within its territory.[227] Furthermore, AG Jacobs points out what, in his opinion, distinguishes cases *Schmidberger and Spanish Strawberries*. In *Schmidberger*:

> /…/ only a single route was blocked, on a single occasion and for a comparatively short period; neither the intention nor the effect was to prevent imports of a particular kind or origin; no criminal conduct was involved."[228]

AG Jacobs states that the Austrian Government did not prevent an obstacle to the free movement of goods caused by private individuals, which the Austrian Government was obliged to.[229] However, in AG Jacobs' opinion, the measure is justified and proportionate based on the following arguments.

> "/…/ where a Member State seeks to protect fundamental rights recognised in Community law the Member State necessarily pursues a legitimate objective. Community law cannot prohibit Member States from pursuing objectives which the Community itself is bound to pursue."[230]

> "/…/ the disruption caused was of relatively short duration on an isolated occasion /…/"[231]

> "/…/ measures were taken to limit the disruption caused."[232]

> "/…/ excessive restrictions on the demonstration itself would have been liable to deprive the demonstrators of the rights which the authorities sought to protect."[233]

> "Such restrictions might even conceivably have caused reactions leading to greater disruption than was the case for a planned demonstration controlled in cooperation with the authorities."[234]

[226] Opinion of AG Jacobs in Schmidberger, paras. 67-68.
[227] Opinion of AG Jacobs in Schmidberger, para. 76.
[228] Opinion of AG Jacobs in Schmidberger, para. 78.
[229] Opinion of AG Jacobs in Schmidberger, para. 83.
[230] Opinion of AG Jacobs in Schmidberger, para. 102.
[231] Opinion of AG Jacobs in Schmidberger, para. 108.
[232] Opinion of AG Jacobs in Schmidberger, para. 109.
[233] Opinion of AG Jacobs in Schmidberger, para. 110.
[234] Opinion of AG Jacobs in Schmidberger, para. 111.

Thus, AG Jacobs means that the protection of fundamental rights is a legitimate objective which could justify a restriction of the free movement of goods. As regards proportionality, AG Jacobs points out that allowing the demonstration was suitable in order to attain the objective of protecting fundamental rights. Furthermore, the measure was necessary due to the demonstration being limited in time, that measures were taken by the Member State to limit the potential negative effects of the demonstration on the free movement of goods, and the fact that not allowing the demonstration could have worse effects on trade. In addition, AG Jacobs points out that the Member States enjoy a *margin of discretion* in determining whether to take action and which measures are most appropriate to eliminate or limit that interference.[235]

The Court agreed with the AG Opinion in the result. The Court ruled that non-intervention of the Austrian State with the demonstration was in breach of Article 34 TFEU and Article 4(3) TEU.[236] However, the measure was justified under Article 36 TFEU on the ground that the Austrian Government's reasons for non-intervening and thus allowing the demonstration was to comply with respecting the fundamental (human) rights, freedoms of expression and assembly, as enshrined in the European Convention on Human Rights (ECHR) and the Austrian Constitution.[237]

The ECJ stated that:

> "/…/ since both the [Union] and its Member States are required to respect fundamental rights, the protection of those rights is a legitimate interest which, in principle, justifies a restriction of the obligations imposed by Community law, even under a fundamental freedom guaranteed by the Treaty such as the free movement of goods."[238]

> "/…/ whilst the free movement of goods constitutes one of the fundamental principles in the scheme of the Treaty, it may, in certain circumstances, be subject to restrictions for the reasons laid down in Article 36 of that Treaty or for overriding requirements relating to the public interest."[239]

The Court thereby found that the protection of fundamental rights is a legitimate interest which can justify a restriction to the free movement of goods. Moreover, the Court emphasised that neither the fundamental rights in question, i.e. the freedoms of expression and assembly, nor the principles on free movement of goods are absolute.[240]

> "/…/ the interests involved must be weighed having regard to all the circumstances of the case in order to determine whether a fair balance was struck between those interests."[241]

[235] Opinion of AG Jacobs in Schmidberger, para. 102.
[236] Schmidberger, para. 64.
[237] Schmidberger, para. 89.
[238] Schmidberger, para. 74.
[239] Schmidberger, para. 78.
[240] Schmidberger, paras. 79–80.
[241] Schmidberger, para. 81.

> "The competent authorities enjoy a wide margin of discretion in that regard. Nevertheless, it is necessary to determine whether the restrictions placed upon intra-[Union] trade are proportionate in the light of the legitimate objectives pursued, namely /…/ the protection of fundamental rights."[242]

As regards as proportionality, firstly, non-intervention was suitable to protect the afore-mentioned human rights, as the Court stated that the protection of fundamental rights posed a legitimate interest which can, in principle, justify a restriction in breach of the provisions on the free movement of goods.[243] Secondly, as regards as necessity and stricto sensu, it would not be wrong to state that the ECJ made a kind of cumulative assessment. Moreover, this is one of the few cases where a stricto sensu assessment becomes obvious, as explained below. In the case at hand, the Court noted that the demonstrators had sought and received permission from the Austrian Government in advance and that the demonstration was limited in both scope and time.[244] The Court also stated that the purpose of the public demonstration was *not* to restrict trade in goods, as opposed to the objective pursued in *Spanish Strawberries,* in which the aim clearly was to reduce, or make difficult, import of goods originating in other Member States.[245] Furthermore, the Austrian authorities had taken several administrative and supportive measures in order to limit the effects of the demonstration on traffic, e.g. media campaigns and the designation of alternative routes.[246] The situation in *Spanish Strawberries* created an overall level of insecurity as regards trade which was not the case in *Schmidberger* which was related to an isolated incident.[247] Also, the Court acknowledged that unauthorised demonstrations and protests could potentially cause even worse trade hindering effects, such as acts of violence by the protestors due to the potential feeling of their fundamental rights not being respected/protected.[248] Thus, the national authorities were reasonably entitled, within their wide discretion as stated by the AG, to consider that the legitimate aim of that demonstration could not be achieved in the present case by measures less restrictive on intra-Union trade. [249] Finally, the Court stated that taking into account of the Member States' wide margin of discretion, in such circumstances, the competent national authorities were (are) entitled to consider that an outright ban on the demonstration would have constituted *unacceptable interference* with the fundamental rights of the demonstrators to gather and express peacefully their opinion in public.[250] This approach of the ECJ represents a *stricto sensu* assessment by giving "priority" to the protection of fundamental rights as a result of the balancing made on restriction on free movement of goods and the protection of fundamental rights.

To sum up, the measure was justified in *Schmidberger,* because the demonstration was preceded by proper authorisation and the obstacle to free movement was limited – for example, the area and duration was limited – as opposed to the obstacle in *Spanish Strawberries* where only few (inadequate) measures were taken by the French authorities. Also, it can be noted that the Court

[242] Schmidberger, paras. 84–85.
[243] Schmidberger, para. 74.
[244] Schmidberger, paras. 84–85.
[245] Schmidberger, para. 86.
[246] Schmidberger, para. 87.
[247] Schmidberger, para. 88.
[248] Schmidberger, para. 92.
[249] Schmidberger, para. 92 and this approach shows that necessity is fulfilled.
[250] Schmidberger, para. 89.

tends to broaden the scope for justification when commercial considerations are more remote, as was the case in *Schmidberger*.[251] It can also be argued that in *Schmidberger*, the objective for not preventing the restriction was to respect the fundamental rights of expression and assembly as opposed to *Cullet* and *Spanish Strawberries* where the inaction by the State was based solely on the objective of not creating a potential threat to public order. Furthermore, in *Schmidberger* the Member State was proactive and had done what it could to limit the restrictive effects on trade by using the means at its disposal.

Some scholars have interpreted the Court's arguments as regards protection of fundamental rights as an interest that did not fall under the derogation of public policy, but rather *a mandatory requirement*.[252] However, the view has been put forward in the doctrine that there is no need to look beyond the Treaty in order to justify a restriction with the objective of protecting fundamental rights.[253] This has been deduced from the clarification in case *Omega Spielhallen* in which the Court once again had to balance fundamental freedoms and fundamental rights. Case *Omega Spielhallen* is presented below.

3.1.4 Case Omega Spielhallen

In this case, Omega operated a laserdrome game where the players were shooting at each other with laser guns. The operation of the game in Germany perceived as acts of homicide and violence, which raised the question whether this activity was in violation of common fundamental values in Germany and it thereby posed a threat to public order. On this ground, the Police prohibited the laserdrome due to the breach of the principle of *human dignity* laid down in Article 1(1) in the German Basic Law/the German Constitution. The Court was asked through the preliminary reference procedure to interpret whether the prohibition of the laserdrome, a commercial activity, was in breach of the rules on freedom to provide services and/or the free movement of goods. Thus, the starting point was which free movement was affected and would thus be applicable.

The AG Stix-Hackl stated in her opinion that the free movement of goods could be disregarded as the measure restricted the free movement of goods (namely equipment used for the game which was imported from the UK) only in so far as they facilitate participation in the game in question.[254] This means that the goods used in the game would not be worth anything without the operation of the game, which is the freedom to provide services. The ECJ agreed with the AG. Thus, the restrictive effect of the measure on the freedom to provide services was scrutinised by the Court.[255]

[251] Weatherill, Stephen, *Justification, Proportionality and Consumer Protection,* in Koutrakos, Nic Shuibhne & Syrpis (Eds.), *Exceptions from EU Free Movement Law: Derogation, Justification and Proportionality,* Hart Publishing, Oxford, 2016, p. 240–264 [Weatherill] p. 255.
[252] Barnard, *The substantive law*, p. 155; Craig & De Burca, p. 414.
[253] Ackermann; Oliver, Peter and Roth, *The Internal Market and the Four Freedoms*, 41 CMLR 2004:417, p. 439.
[254] Opinion of AG Stix-Hackl in Omega Spielhallen, para. 32.
[255] Freedom to provide services and why such a rule constitutes restriction will not be explained as it is not the aim of this thesis. However, the case is presented to show parallel application of the public policy derogation.

AG Stix-Hackl examined further the possible justification for the Police's ban on the laserdrome, referring to the conflict between fundamental rights/human dignity and the freedom to provide services.[256] Furthermore, she stated that the ECJ should defend this fundamental right as general legal principles of EU law[257], and as general legal principles, the fundamental rights rank high in hierarchy as other primary sources of EU law, such as the Treaty and thereby the rules on free movements in the Treaty.[258] AG Stix-Hackl also noted that only fundamental rights arising from Union law, not national legislation, could serve as justification for restrictions on freedom to provide services. Moreover, as regards human dignity, AG Stix-Hackl introduced the notion of human dignity as an expression of the respect value to be attributed to each human being on account of his or her humanity.[259] The AG then referred to the case law of the European Court of Human Rights (ECtHR) and to the constitutional laws of the Member States which all protect human dignity, however not always explicitly.[260] In addition, according to the Court's judgment in *Netherlands v. Parliament and Council:*[261]

> "It is for the Court of Justice, in its review of the compatibility of acts of the institutions with the general principles of [Union] law, to ensure that the fundamental right to human dignity and integrity is observed."[262]

AG Stix-Hackl acknowledged this statement in her opinion in *Omega Spielhallen* saying that this reflects a broad understanding of human dignity which falls under Article 1 of the Charter of Fundamental Rights of the European Union (the Charter). The AG also found protection of human dignity to fall under the public policy derogation in Article 36 TFEU. As regards justification on the basis of public policy, the AG held that the prohibition of the simulated killing game could only be justified if it constituted:

> "/…/ a genuine and sufficiently serious threat to a fundamental interest of society."[263]

Hence, the protection of human dignity was, in her opinion, a fundamental interest which can be relied upon by a Member State when proving that a threat to public policy exists. The Opinion of AG Stix-Hackl in *Omega Spielhallen* is clearly inspired by the Court's judgment in *Schmidberger*. The ECJ followed this line of argument, referring in its judgment to paras. 82-91 of the Opinion of AG Stix-Hackl.[264] Furthermore, the Court referred to the *Schmidberger* judgement stating that safeguarding fundamental rights constitutes a legitimate interest that is capable of justifying a restriction of a fundamental freedom guaranteed by the Treaty.[265]

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[256] Opinion of AG Stix-Hackl in Omega Spielhallen, para. 44.
[257] Human rights were protected as general principles of EU law.
[258] Opinion of AG Stix-Hackl in Omega Spielhallen, para. 49.
[259] Opinion of AG Stix-Hackl in Omega Spielhallen, para. 75.
[260] See Opinion of AG Stix-Hackl in Omega Spielhallen, paras. 82–91.
[261] Case C-377/98 *Netherlands v. Parliament and Council* [2001] ECR I-7079 [Netherlands v. Parliament and Council].
[262] Netherlands v. Parliament and Council, para. 70.
[263] Opinion of AG Stix-Hackl in Omega Spielhallen, para. 100.
[264] Omega Spielhallen, para. 34.
[265] Omega Spielhallen, para. 33.

The Court further stated that:

> "…/ [Union] law does not preclude an economic activity consisting of the commercial exploitation of games simulating acts of homicide from being made subject to a national prohibition measure adopted on grounds of protecting public policy by reason of the fact that that activity as an affront to human dignity."[266]

Consequently, the ECJ ruled that an activity being contrary to human dignity can fall under public policy and thus can be justified if such measure satisfies the principle of proportionality. As seen, in both cases *Schmidberger* and *Omega Spielhallen* the ECJ balanced the fundamental freedoms and fundamental rights, which indicates *stricto sensu*. In both cases the protection of fundamental rights trumped the free movements freedoms, which are economic. This indicates that the Court intends to protect fundamental rights and also grant the Member States a *margin of discretion* as regards which level of protection will suffice in the territory of that Member State. This is a logical conclusion by the Court as both fundamental rights and fundamental freedoms are expressed in primary legislation. However, which acts can be contrary to human dignity is difficult to assess due to the subjective nature of the concept. This will be further analysed under chapter 4.

In conclusion, in my opinion, as seen from the cases above, what will be allowed under public policy depends on the argument invoked by the Member States concerned. What has become clear is that protection of human rights may be considered as falling within the scope of public policy. As regards as public security, in my opinion, what may fall within the scope of public security has been given more indication by the ECJ. Moreover, in my opinion, the margin of discretion of the Member States is more limited under public security, compared to public policy. The following sub-chapter is dedicated to the concept of public security with reference to the Court's arguments as well as the AGs opinions.

3.2 Public security

Public security is the derogation most closely related to the notion of national autonomy and the Member States' prerogative and responsibility to protect its citizens and territory.[267] In the following sub-chapter a review of the Court's case law and the AGs opinions on the subject are presented.

3.2.1 Case Campus Oil

A decisive case as regards public security is *Campus Oil.* The case concerns an Irish rule which obliged importers of petrol into Ireland to buy 35 % of their supplies from a state-owned refinery at prices fixed by the Irish Government. The rule was found to be a MHEE because of the protective effect of the rule by favouring national production to the detriment of producers

[266] Omega Spielhallen, para. 41.
[267] Koutrakos, Panos, *Public Security Exceptions and EU Free Movement Law*, in Koutrakos, Nic Shuibhne & Syrpis (Eds.), *Exceptions from EU Free Movement Law: Derogation, Justification and Proportionality*, Hart Publishing, Oxford, 2016, p. 190–217 [Koutrakos] p. 191.

in other Member States.[268] Ireland invoked both the public policy and public security derogations in order to justify the rule on the ground that it was crucial for Ireland to maintain its own oil refining capacity, namely, minimum supply of petrol, in case of emergency (crisis).

According to the Opinion of AG sir Gordon Slynn, *the maintenance of essential oil supplies* falls within public security based on that *it is vital to the stability and cohesion of the life of the modern State*.[269] The AG, in his opinion, added that if not falling under public security, the maintenance of essential oil supplies would fall within public policy. However, in order to decide whether a measure relating to restrictions affecting imports can be justified with the objective to protect public security, the necessity and the effect of the restrictions imposed must be assessed. The AG further stated that if Union rules ensure that oil shortages in the Union are dealt with and if these rules provide sufficient guarantees to a Member State in respect of its likely needs in an emergency, the application of Article 36 TFEU is excluded.[270] In AG sir Gordon Slynn's opinion, the Irish rule which required importers of oil products to purchase from the State-owned oil refinery up to 35 % of their requirements of petroleum oils was a restriction on free movement of goods and breached Article 34 TFEU. However, this rule could be justified under on the grounds of public security if it was necessary, other than on economic grounds, to maintain essential services and supplies.[271] From this perspective, the rule will not be necessary where the requisite oil supplies can be ensured by other means which are less restrictive, such as the keeping of stocks.[272]

As a starting point, the Court ruled out the possibility of successfully invoking public security[273] where Union rules provided the necessary protection for oil supplies and some rules existed at Union level as regards the protection in such a situation. However, the Court also stated that, irrespective of the existence of such rules, the Member States do not have an unconditional guarantee that supplies will, in any event, be maintained at least at a level sufficient to meet its minimum needs.[274] Hence, ensuring the supply of petroleum products was justifiable under the public security derogation as:

> "/…/ petroleum products, because of their exceptional importance as an energy source in the modern economy, are of fundamental importance for a county's existence since not only its economy but above all its institutions, its essential public services and even the survival of the inhabitants depend upon them. An interruption of supplies of petroleum products, with the resultant dangers for the country's existence, could therefore seriously affect the public security that Article [36 TFEU] allows States to protect."[275]

[268] Campus Oil, paras. 16, 20.
[269] Opinion of AG sir Gordon Slynn in Campus Oil, p. 2764.
[270] Opinion of AG sir Gordon Slynn in Campus Oil, p. 2764.
[271] Opinion of AG sir Gordon Slynn in Campus Oil , p. 2767–2768.
[272] Opinion of AG sir Gordon Slynn in Campus Oil , p. 2768.
[273] This approach applies to all objectives listed in Article 36 TFEU where the area has been harmonised by the EU legislation. Needless to say, to what extent the Member States can still benefit from derogations depends on to what extent the EU legislation is regulating the area, as also expressed by the Court in para. 31 of its judgment in *Campus Oil*.
[274] Campus Oil, para. 31.
[275] Campus Oil, para. 34.

Thus, according to the Court, petroleum products have exceptional importance. This *importance* may perhaps be explained by being of *critical importance* for a society in the sense that existence of petroleum products, at least at a minimum level, is crucial for the interest of a society in case an emergency situation occurs. Thus, this approach can be interpreted in the way that what would enable a Member State to invoke public security is the *critical importance* of the product in question.

As for the question of the proportionality of the rule, the ECJ examined whether the measure was capable of ensuring supplies and if it did not restrict intra-Union trade more than what is/was absolutely necessary. The Court stated that:

> "/…/ the presence of a refinery on the national territory /…/ can effectively contribute to improving the security of supply of petroleum products to a State which does not have crude oil resources of its own."[276]

Thus, according to the ECJ the measure of safeguarding the existence of a refinery on the national territory is a suitable means to attain the objective of securing supplies of petroleum products if the Member State does not have crude oil resources of its own. Crucially, Ireland is totally dependent on imports of petroleum products. Furthermore, the Court ruled that a Member State which is totally or almost totally dependent on imports for its supplies of petroleum products:

> "/…/ may rely on grounds of public security within the meaning of [Article 36 TFEU] for the purpose of requiring importers to cover a certain proportion of their needs by purchases from a refinery situated in its territory at prices fixed by the competent minister on the basis of the costs incurred in the operation of that refinery, if the production of the refinery cannot be freely disposed of at competitive prices on the market concerned. The quantities of petroleum products covered by such a system must not exceed the minimum supply requirement without which the public security of the State concerned would be affected or the level of production necessary to keep the refinery's production capacity available in the event of a crisis and to enable it to continue to refine at all times the crude oil for the supply of which the State has entered into long-term contracts."[277]

Thus, according to the Court, where a Member State is dependent on imports for its supplies, a restrictive rule requiring importers of crude oil to purchase a certain proportion of their needs from a national refinery can be justified, provided that the rule is not contrary to the principle of proportionality. As previously stated, the measure was found to be suitable. As regards the test of necessity, the Court ruled that the quantities covered by the system (i) may not exceed the minimum supply requirement without which the public security of the State concerned would be affected, *or* (ii) the level of production necessary to maintain the refinery's production capacity in the event of a crisis *and* to enable it to continue to refine at all times enough crude oil allowing the State concerned to fulfill its long term contracts.

[276] Campus Oil, para. 41.
[277] Campus Oil, para. 51.

Consequently, irrespective of the fact that the rule in question also involved matters of an economic nature, the rule was justified based on the objective of protecting public security.

> "/…/ in the light of the seriousness of the consequences that an interruption in supplies of petroleum products may have for a country's existence, the aim of ensuring a minimum supply of petroleum products at all times is to be regarded as transcending purely economic considerations and thus as capable of constituting an objective covered by the concept of public security."[278]

> "/…/ the rules in question must be justified by objective circumstances corresponding to the needs of public security. Once that justification has been established, the fact that the rules are of such a nature as to make it possible to achieve, in addition to the objectives covered by the concept of public security, other objectives of an economic nature which the Member State may also seek to achieve, does not exclude the application of [Article 36 TFEU]."[279]

Thus, according to the ECJ, when the economic nature of a measure is exceeded by the non-economic objectives, Article 36 TFEU can be applied.

Furthermore, the ECJ found that the *public policy* derogation was not relevant in this case, however, abstained from explaining this position further.[280] This can be an expression of the notion that public policy is a more general exception, applicable when other grounds are not.[281]

In case *Cullet*[282], the France attempt to "successfully" invoke public security derogation was unsuccessful. In his opinion in the case, AG Ver Loren Van Themaat pointed out some distinctive differences which are relevant to the different outcomes of the two cases and which can further explain the boundaries of the public security derogation as regards securing essential oil supplies. Shortage of oil supplies in France and Ireland would have different consequences due to their different geographical location. As regards Ireland, a shortage of oil supplies would be more difficult to handle in case of emergency due to the fact that Ireland is surrounded by sea. Furthermore, the French refineries have bigger domestic supplies than Irish refineries.[283] Moreover, reliance upon public security can be justified only when the production capacity in question is *necessary for the proper functioning of public institutions and essential public services and even the survival of its inhabitants*.[284] In AG Ver Loren Van Themaat's opinion, this includes the functioning of public utilities, a limited number of genuine public services and hospitals. Furthermore, the French Government's motives in case *Cullet* are of an *economic nature* as the aim is to ensure a geographical spread of petrol supplies.[285] Lastly, case *Campus Oil* involved the supply of crude oil as opposed to case *Cullet* which concerned petrol. In the

[278] Campus Oil, para. 35.
[279] Campus Oil, para 36.
[280] Campus Oil, para. 33.
[281] Enchelmaier in Oliver, p. 251; Mortelmans, Kamiel, *Case Note to Campus Oil* (1984) CMLR 21:687-713 [Mortelmans, *Campus Oil*], p. 705.
[282] *See* sub-chapter 4.3 for the assessment.
[283] Opinion of AG Ver Loren van Themaat in Cullet, p. 313–314.
[284] Campus Oil, paras. 34 and 47.
[285] Campus Oil, para. 35.

latter case the rule did not provide a better guarantee of supplies of crude oil in matters of emergency/crisis.[286]

The aim of ensuring minimum supply of petroleum products, as an argument to benefit from the public security derogation according to Article 36 TFEU was further assessed in *Commission v. Greece*[287]. The case is presented in the following sub-chapter.

3.2.2 Case Commission v. Greece

In case *Commission v. Greece,* the Commission initiated proceedings against the Greek Government for failure to comply with EU law. The case entailed a Greek rule aimed at ensuring minimum holdings of petroleum products in its territory and therefore required petrol companies to store minimum stocks of petrol. The petrol companies could transfer the minimum storage to refineries established in Greece, but only if the petrol companies had bought a large quantity of petroleum products from refineries established in Greece in the previous calendar year. This made selling petroleum products from other Member States more difficult compared to selling domestic products because the petrol companies had to buy their products from domestic refineries, in order to be able to transfer the minimum storage in compliance with the Greek rule. The rule was therefore found to be in breach of Article 34 TFEU.

The Greek Government invoked public security derogation in order to justify its restriction based on the main argument, securing supply of petroleum products. The Greek Government's arguments made to support this main argument are as follow:

> "The objective cannot be achieved by less restrictive means. The refineries' fundamental right to economic freedom would be excessively restricted if they were required to store the minimum stocks of petroleum products, and thus assume an obligation of the marketing companies, if the latter were not required in return to purchase their supplies from those refineries."[288]

Firstly, the Court stated that the maintenance of a stock of petroleum products on national territory which allows continuity of supplies to be guaranteed constitutes a public security derogation.[289] However, the Court continued with the proportionality requirement by stating that national rules adopted in order to achieve a legitimate objective must be appropriate (suitability) and must not exceed the limits of what is necessary in order to achieve the desired objective (necessity).[290] Following this, the Court found the Greek arguments, presented above, to be purely economic and rejected justification as purely economic arguments can never serve as a justification ground in order justify a restriction on free movement of goods.[291]

[286] Opinion of AG Ver Loren van Themaat in Cullet, p. 313–314.
[287] Case C-398/98 *Commission v. Greece* [2001] ECR I-7915 [Commission v. Greece].
[288] Commission v. Greece, para. 21.
[289] Commission v. Greece, para. 27.
[290] Commission v. Greece, para. 28.
[291] Commission v. Greece, para. 30. It should be stated that the same approach applies to all free movements.

Furthermore, the Court stated that:

> "/…/ the objective of public security could have been achieved by less restrictive measures without it being necessary to make the transfer of the storage obligation to refineries established in Greece conditional upon the obligation to obtain supplies of petroleum products from those refineries."[292]

The statement of the ECJ means that if the arguments of the Greek Government would not have been economic, justification would still not be accepted as the national rule in question would not satisfy necessity test as the minimum supply of petroleum products could have been achieved by less restrictive rule(s).

The outcome of the judgment of the ECJ is in line with the AG Ruiz-Jarabo Colomer opinion. The AG Ruiz-Jarabo Colomer, in his opinion, rejected the Greek Government's arguments based on the fact that *the economic freedoms of refineries or of undertakings in general* is not among the grounds listed in Article 36 TFEU.[293] Furthermore, the AG made references to *Campus Oil* and concluded that:

> "/…/ the arguments which the Hellenic Republic puts forward in the present proceedings in order to justify its legislation on grounds of national security lack the force of those put forward at the material time by the Irish Government in order to justify national legislation which adversely affected imports of petroleum products into Ireland and which convinced the Court of Justice that one of the justifying grounds set out in [Article 36 TFEU]was present."[294]

Thus, according to the AG, the Greek defense, which was based on the refineries right to economic freedom, was not as strong as the Irish defense in *Campus Oil.* In *Commission v. Greece,* the objective was of a purely economic nature whereas in the Irish case, the economic nature of the measure was transcended by the pressing objective of ensuring minimum supplies of petrol in case of a crisis.

To sum up, in both cases *Campus Oil* and *Commission v. Greece*, matters/concerns of *an economic nature* were present. However, in *Campus Oil*, the economic objectives were exceeded by the pressing need to guarantee the supply of oil in case of a crisis, which justified the measure (the rule) in the eyes of the Court. This indicates that measures based on matters of an economic nature can be accepted as long as they are transcended by the matters of a non-economic nature. It has been suggested that a measure cannot be justified when the economic nature of a measure is predominant, meaning that a measure can be justified both if the economic matters are transcended by the non-economic grounds and also when a measure is based equally on matters of a non-economic nature and of an economic nature. However, the economic considerations cannot be the incentive/the objective pursued.[295] The notion of *economic nature* is analysed under chapter 4.3.3.

[292] Commission v. Greece, para. 31.
[293] Opinion of AG Ruiz-Jarabo Colomer in Commission v. Greece, para. 43.
[294] Opinion of AG Ruiz-Jarabo Colomer in Commission v. Greece, para. 48.
[295] Oliver, p. 236.

However, it can also be argued that the safeguarding of the sensitive product, in this case petroleum product, could have been a legitimate objective had not the principle of proportionality been breached. The measure was found to be too restrictive and thus not necessary.[296]

3.2.3 Case Richardt

Case *Richardt*[297] concerns Luxembourg law requiring a special transit license (authorisation) for the import and export of goods of a strategic nature. Richardt imported such a good (bubble memory circuits) into France and transported it to Luxembourg prior to exporting it to Russia. The Luxembourg authorities seized the goods based on public security due to the fact that Richardt lacked the proper transit license. Following criminal charges against Richardt, the national court asked the ECJ whether the conduct, to refuse transit without the license, was compatible with EU law.

According to the Court, the notion of public security covers both a State's internal and external security. Hence, the importation, exportation, and transit of strategic goods can affect the public security of a Member State.[298] Based on this argument, a Member State is entitled to require special authorisation for goods to make possible verification of the nature of such goods.[299] However, the Court found that seizing goods because of lacking the special transit license as provided for in Luxembourg might be considered disproportionate as, for example, returning the goods to its origin could suffice.[300] The ECJ left it to the national court to determine whether the system established complied with the principle of proportionality:

> "Accordingly, in order to verify the nature of goods described as strategic material, the Member States are entitled under Article [36 TFEU] to make their transit subject to the grant of a special authorization.
>
> As regards the penalties laid down for failure to comply with the obligation to obtain such authorization, it should be stated, /…/ , that a measure involving seizure or confiscation may be considered disproportionate to the objective pursued, and thus incompatible with Article [36 TFEU], in a case where the return of the goods to the Member State of origin could suffice.
>
> However, it is for the national court to determine whether the system established complies with the principle of proportionality, taking account of all the elements of each case, such as the nature of the goods capable of endangering the security of the State, the circumstances in which the breach was committed and whether or not the trader seeking to effect the transit and holding documents for that purpose issued by another Member State was acting in good faith."[301]

To sum up, the Court allowed the Member State a margin of discretion as regards the proportionality assessment and interpreted the public security derogation broadly in this case.

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[296] *See* Commission v. Greece, para. 31.
[297] Case C-367/89 *Criminal Proceedings against Aimé Richardt and Les Accessoires Scientifique ANC* [1991] ECR I-4621 [Richardt].
[298] Richardt, para 22.
[299] Richardt, para. 23.
[300] Richardt, para. 24.
[301] Richardt, para. 2.

According to the Court, the special authorisation of goods – imported, exported, or in transit – can fall under the public security derogation if proportionate. This supports the notion that it is the Member State that decides which level of protection will suffice in the territory of that Member State. As seen, this case involved a strategically sensitive product which made justification of a rule restricting the free movement of goods possible provided that the principle of proportionality is satisfied.

3.2.4 Public Security and "Essential" - "Sensitive" Products

Case *Commission v. Spain*[302] is a case related to free movement of capital.[303] In the case, the Spanish Government had privatised five companies operating in the areas of petroleum, tobacco, electricity, energy, and banking. During the privatisation of the companies, the Spanish Government obtained a special right based on the national privatisation law. This right entailed the Government to give prior authorisation (approve) of certain decisions of those companies relating to the winding-up, demerger, merger and change of corporate area of those companies.[304] The ECJ ruled that such a special right constituted restriction on free movement of capital by affecting and limiting shareholdings in those companies and by deterring investors from investing in those companies.[305]

As regards justification, the Spanish Government invoked the public security derogation, which is stated in Article 65 TFEU that is the express derogation for free movement of capital.

The Court stated:

> "As regards a system of prior administrative approval of the kind at issue in the present case, the Court has previously held that such a system must be proportionate to the aim pursued, inasmuch as the same objective could not be attained by less restrictive measures, in particular a system of declarations ex post facto /…/ Such a system must be based on objective, non-discriminatory criteria which are known in advance to the undertakings concerned, and all persons affected by a restrictive measure of that type must have a legal remedy available to them."[306]

This statement of the Court is not different from the other free moments as related to proportionality. The only difference is that the restriction must satisfy legal certainty. In my opinion, this additional requirement is directly linked to the national rule. Thus, justification of such a prior authorisation requirement in the area of free movement of goods would also require compliance with legal certainty, as under which circumstances authorisation will be granted or refused must be clear for the individuals and legal persons.

What is interesting is that the Court found that the company that produces tobacco and the company that operates in the traditional banking sector and which are not claimed to carry out

[302] Case C-463/00 *Commission v. Spain* [2003] ECR I-4581 [Commission v. Spain].
[303] Free movement of capital and why such a rule constitutes restriction will not be explained as it is not the aim of this thesis. However, the case is presented to show parallel application of these public policy and public security derogations.
[304] Commission v. Spain, para. 54.
[305] Commission v. Spain, para. 61.
[306] Commission v. Spain, para. 69.

any of the functions of a central bank or similar body, were not companies with the objective to provide public service/sensitive services, and therefore the restriction could not be justified based on public security.[307] However, as regards the companies which operate in the areas of and provide petroleum, telecommunication, and electricity, the Court stated:

> **"/…/** it is undeniable that the objective of safeguarding supplies of such products or the provision of such services within the Member State concerned in the event of a crisis may constitute a public-security reason /…/ and therefore may justify an obstacle to the free movement of capital."[308]

In other words, the ECJ acknowledged the fact that the safeguarding of products in the areas of petroleum, telecommunication, and electricity in the event of a crisis can be justified under public security. This means that what made reliance on public security possible is the *sensitive character of the products and services* provided by the companies. In my opinion, this is a good indication to draw the boundary of public security, as examined in chapter 4 further.

However, as regards proportionality, the Court stated:

> "However, the Court has also held that the requirements of public security, as a derogation from the fundamental principle of free movement of capital, must be interpreted strictly, so that their scope cannot be determined unilaterally by each Member State without any control by the [Union]. institutions. Thus, public security may be relied on only if there is a genuine and sufficiently serious threat to a fundamental interest of society /…/."[309]

> "It is therefore appropriate to ascertain whether the rules at issue relating to those three entities provide assurance within the Member State concerned, in the event of a genuine and serious threat, that there would be a minimum supply of petroleum products and electricity and a minimum level of telecommunications services and do not go beyond what is necessary for that purpose.[310]

Thus, the public security derogation is to be interpreted strictly and can be relied upon in case of a *genuine and sufficiently serious threat to a fundamental interest of society*. Accordingly, such a rule must, in order to be justified, be suitable and necessary in order to safeguard a minimum supply of petroleum products and electricity and a minimum level of telecommunications services in the event of a crisis. As regards proportionality and legal certainty the Court stated:

> "/…/ Exercise of the State's right is not subject, under the relevant provisions, to any conditions. The investors concerned are given no indication of the specific, objective circumstances in which prior approval will be granted or withheld."[311]

> "Such lack of precision does not enable individuals to be apprised of the extent of their rights and obligations deriving from [63(1) TFEU]., with the result that such rules must be regarded as contrary to the principle of legal certainty /…/."[312]

[307] Commission v. Spain, para. 70.
[308] Commission v. Spain, para. 71.
[309] Commission v. Spain, para. 72.
[310] Commission v. Spain, para. 73.
[311] Commission v. Spain, para. 74.
[312] Commission v. Spain, para. 75.

> "The administrative authorities have in this sphere a particularly broad discretion which represents a serious threat to the free movement of capital and may end by negating it completely. The rules concerned therefore go beyond what is necessary to attain the objective relied on by the Spanish Government, namely preventing any impairment of supplies of petroleum products or electricity or of telecommunication services."[313]

The Court thereby found the rules in breach of the principle of legal certainty due to the lack of precision. The rules were, for that reason, also contrary to the principle of proportionality by going beyond what is necessary to attain the objective relied upon by the Member State concerned.

According to this case, the safeguarding of products in the areas of public service/sensitive services in the event of a crisis, such as petroleum, telecommunication, and electricity, can be justified under public security, if the national rules aimed at attaining these objectives are not contrary to the principles of legal certainty and proportionality. By analogy to this case, perhaps a "sensitive" products test can be introduced in the area of free movement of goods, and only public security could be invoked in cases where such products are present.

3.2.5 Additional Treaty Provisions Regarding Public Security

Besides Article 36 TFEU which is the express derogation for free movement of goods, it is important to mention that some provisions in the Treaty that regulate other issues allow reliance on public security for certain matter. Some of these provisions, Articles 346-348 TFEU will be presented and examined. At this point, it should be stated that Article 346 TFEU should be seen an *exclusion*, rather than a *derogation*. The distinction between the two for the purpose of application of EU law would, in principle, be that an exclusion is benefitted from when the matter falls within the exclusion, while derogation would not provide such an "automatic immunity".

According to Article 346(1)(b) TFEU the Member States can take measures necessary for the protection of the essential interests of its security which are connected with the production of trade in arms, munition, and war material, but such measures cannot adversely affect the conditions of competition in the internal market regarding products which are not intended for specifically military purposes. However, the Court has ruled that the burden of proof lies on the Member State invoking Article 346 TFEU, which means that the Member State needs to prove the necessity in taking advantage of the derogation to protect its essential security interests.

Furthermore, the ECJ has underlined that Article 346 TFEU must be interpreted strictly. This is apparent in case *Commission v. Italy*[314] which concerns duty-free imports of military equipment. In this case Italy had abstained from applying customs duties on imported military material from third countries, based on the argument that military material would cost more if custom duties were applied. This conduct was in breach of the *Community Customs Code* which

[313] Commission v. Spain, para. 76.
[314] Case C-239/06 *Commission v. Italy* [2009] ECR I-11913 [Commission v. Italy].

provides for the charging of customs duties on imports of products for military use from third countries.[315] The Court ruled that such conduct cannot be accepted as Italy would avoid paying customs duties on imports from third countries at the expense of other Member States that pay the customs duties of such imports.[316] Furthermore, Italy argued that the Union customs procedures were not capable of safeguarding the security of the Italian Republic, an argument that the Court rejected based on the need for an active involvement by the Member States when implementing the customs systems.[317] Hence, the Court rejected Italy's attempt to rely on Article 346 TFEU as the Italian Republic had not shown that the application of the article was necessary to protect its essential security interests. Apparently, the ECJ has the approach that the exceptions to free movement of goods, which is the main rule, is to be treated as *derogation* from the main rule and thereby such an exception must be interpreted strictly. In addition, a further observation that can be made as regards this case is that Italy's motivation (objective) to benefit from the exception was of a strictly economic-nature. However, this was not highlighted by the Court in the ruling, probably because customs duties do not fall under Article 36 TFEU.

Moreover, Article 347 TFEU provides that the Member States has an obligation to consult each other under certain circumstances. This obligation is aimed at preventing that the functioning of the internal market is affected by measures which a Member State may be urged to take in the event of serious internal disturbances. Such disturbances can affect the maintenance of law and order, in the event of war, or serious international tension constituting a threat of war. This obligation also includes measures that a Member State needs to take in order to carry out obligations it has accepted for the purpose of maintaining peace and international security.

Lastly, Article 348 TFEU states that, if measures are taken under Articles 346-347 TFEU which have the effect of distorting the conditions of competition in the internal market, the Commission together with the Member State concerned shall examine how these measures can be adjusted to the rules laid down in the Treaties. By way of exception from the procedure laid down in Articles 258-259 TFEU, the Commission or any Member State may bring the matter directly before the Court if it considers that another Member State is making improper use of the powers provided for in Articles 346-347 TFEU.[318]

The issues relating to Article 36 TFEU and other Treaty provisions in the area of security will be analysed in subchapter 4.3.1.

[315] Commission v. Italy, para. 43.
[316] Commission v. Italy, para. 51.
[317] Commission v. Italy, para. 52
[318] Articles 258-259 TFEU regulates infringement procedure, i.e. the possible legal action taken by the Commission when a Member State has failed to fulfil an obligation under the Treaties/failed to implement EU-law. As mentioned, Article 348 TFEU constitutes a derogation from this main rule.

3.3 Simultaneous Application of Public Policy and Public Security: *Church of Scientology*

Case *Church of Scientology*[319], even though a judgment ruled in the area of free movement of capital[320] has an interesting aspect, as the ECJ has accepted simultaneous application of public policy and public security, which indicates a close connection between the two derogations. In the case, a French national rule required prior authorization to be obtained from the relevant national authority before making a direct investment in France. In this case the ECJ stated that:

> "A provision of national law which makes a direct foreign investment subject to prior authorisation constitutes a restriction on the movement of capital."[321]

In other words, authorisation requirements are considered restrictions to the free movement of capital, which are prohibited by the Treaty provisions on free movement of capital. The Court proceeded to the question whether such a restriction could be justified on the grounds of public policy or public security where the ECJ gave an affirmative reply in regard to acceptance of these two derogations:

> "It should be observed, first, that while Member States are still, in principle, free to determine the requirements of public policy and public security in the light of their national needs, those grounds must, in the [Union] context and, in particular, as derogations from the fundamental principle of free movement of capital, be interpreted strictly, so that their scope cannot be determined unilaterally by each Member State without any control by the [Union] institutions /…/."[322]

> "/…/ measures which restrict the free movement of capital may be justified on public-policy and public-security grounds only if they are necessary for the protection of the interests which they are intended to guarantee and only in so far as those objectives cannot be attained by less restrictive measures."[323]

Accordingly, the ECJ stated that the Member States enjoy a margin of discretion as regards which level of protection will suffice in the territory of that Member State. However, the prior authorisation of foreign direct investments must be both suitable and necessary in order to protect public policy and/or public security in such a case.

> "In the case of direct foreign investments, the difficulty in identifying and blocking capital once it has entered a Member State may make it necessary to prevent, at the outset, transactions which would adversely affect public policy or public security. It follows that, in the case of direct foreign investments which constitute a genuine and sufficiently serious threat to public policy and public security, a system of prior declaration may prove to be inadequate to counter such a threat."[324]

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[319] Case C 54/99 *Association Eglise de Scientologie de Paris v. The Prime Minister* [2000] ECR-I1335 [Church of Scientology]

[320] As previously stated, free movement of capital and why such a rule constitutes restriction will not be explained as it is the aim of this thesis. However, the case is presented to show parallel application of the public policy and public security derogations.

[321] Church of Scientology, para. 14.

[322] Church of Scientology, para. 17.

[323] Church of Scientology, para. 18.

[324] Church of Scientology, para. 20.

According to the Court, the difficulty in identifying and blocking capital may make a restriction of requiring prior authorisation for direct foreign investments suitable and necessary, if such direct foreign investments constitute a genuine and sufficiently serious threat to public policy and public security.

> "In the present case, however, the essence of the system in question is that prior authorisation is required for every direct foreign investment which is 'such as to represent a threat to public policy and public security, without any more detailed definition. Thus, the investors concerned are given no indication whatever as to the specific circumstances in which prior authorisation is required."[325]

> "Such lack of precision does not enable individuals to be apprised of the extent of their rights and obligations deriving from Article [63(1) TFEU]. That being so, the system established is contrary to the principle of legal certainty."[326]

> "The answer to the question submitted must therefore be that Article [63(1) TFEU] must be interpreted as precluding a system of prior authorisation for direct foreign investments which confines itself to defining in general terms the affected investments as being investments that are such as to represent a threat to public policy and public security, with the result that the persons concerned are unable to ascertain the specific circumstances in which prior authorisation is required."[327]

However, the Court thereby found a system which requires prior authorisation for all direct foreign investment, without distinction for every direct foreign investment which is *such as to represent a threat to public policy and public security*, to be contrary to the Treaty provisions on free movement of capital. Moreover, in which circumstances a direct foreign investment would constitute a threat to public policy and public security was not clear and therefore the restrictive rule in this case lacked legal certainty. Consequently, the authorisation requirement could not be justified on the grounds of *public policy* and *public security* as neither proportionality nor legal certainty was satisfied.

This case indicates that a national rule requiring prior authorisation for all direct foreign investments can be justified under public policy or public security if such a direct foreign investment *represents a threat to public policy and public security* and if such a national rule is neither contrary to the principle of proportionality (thus suitable and necessary) nor contrary to the principle of legal certainty (not lacking precision). The interesting aspect, in my opinion, is that the argument "constitute a genuine and sufficiently serious threat" may also arise within the scope of public policy in the area of free movement of goods. As a result, the two derogations of public policy and public security, at the same time, could apply in a given case in the area of free movement of goods, especially where it is difficult to decide if the motivation of a Member State falls under public policy or public security. Such a suggestion on parallel application of public policy or public security would not expand the scope of public policy or public security, namely this would not breach the rule that derogations from rules of free

[325] Church of Scientology, para. 21.
[326] Church of Scientology, para. 22.
[327] Church of Scientology, para. 23.

movements are interpreted strictly, as it is only about “assessing” two ground in a given case. All in all, in the end, the national rule must satisfy proportionality. Thus, even where a separate proportionality assessment under public policy and also public security would be carried out, non-compliance with the proportionality principle under one ground would be sufficient to reject justification.

In the following chapter, further and deeper assessments are made as regards the public policy and public security derogations.

4. Assessments of Public Policy and Public Security

In this sub-chapter the Court's interpretation of the derogations of public policy and public security under Article 36 TFEU is analysed. As the Treaty separates between the two derogations of public policy and public security and thus the two derogations are different objectives, assessments are made separately. However, to some extent, the public policy and public security derogations are linked in the presentation due to the fact that some aspects are common to all grounds for justification, which will become evident in the following sub-chapters.

4.1 The Scope of Article 36 TFEU – In General

According to Article 4(2) TFEU, as regards the internal market the competence is shared between the EU and the Member States. The balance between "impermissible" restrictions on trade and the possibility of justification thereof is an example of this balance between the EU and the Member States. The assessment of whether or not a measure is justified is always preceded by the question if the measure poses a restriction on trade. If a national measure is not considered to fall within the scope of the Treaty provisions on free movement, the question of justification and proportionality will be superfluous. However, as the provisions on restriction to free movement is construed broadly, many measures will fall within their scope, making justification and proportionality issues of crucial importance.[328]

As previously explained, the concept of restriction falling within the scope of Article 34 TFEU has been interpreted broadly and the derogations that may justify restrictions under Article 36 TFEU have been given a strict interpretation by the ECJ. Furthermore, it is evident from the previous chapters that what constitutes public policy and public security is not clear, which requires interpretation and what constitutes public policy and public security changes from one Member States to another, which indicates that the Member States have margin of discretion in principle.

As seen from the cases presented in chapter 3, acceptance by the ECJ that public policy and/or public security can be invoked in a given case does not mean that the restriction in question is justified. This could be explained as "acceptance of the invoked ground – objective". The next step is that the rule that constitutes restriction must satisfy the principle of proportionality. In order to do so, some tests must be satisfied, as stated in previous chapters. There must be a *causal link* between the justification and the restrictive national measure, which means that the test of *suitability* must be satisfied.[329]

[328] Nic Shuibhne, Niamh & Maci, Marsela, *Proving Public Interest: The Growing Impact of Evidence in Free Movement Case Law* [2013] CMLR 50: 965–1006 [Nic Shuibhne & Maci] p. 970.
[329] Nic Shuibhne & Maci, p. 981.

For example, in case *Commission v. Poland* the Court states that it, itself, is:

> "/…./ required to examine a justification /…/ only in so far as it is common ground or properly established that the national legislation concerned does in fact pursue the purposes that the defendant Member State attributes to it."[330]

In the following sub-chapter, the scope of the public policy derogation is examined.

4.2 The Scope of Article 36 TFEU – Public Policy

As can be seen from the cases presented in chapter 3, the concept of public policy is a matter of interpretation. The ECJ has tried to give an interpretation to the concept of public policy in case *Bouchereau*. According to the ECJ

> "/…/ the particular circumstances justifying recourse to the concept of public policy may vary from one country to another and from one period to another".[331]

Therefore, the competent national authorities of the Member States should have a degree of discretion within the limits imposed by the Treaty.[332] Finally, reliance on public policy requires the existence of a genuine and sufficiently serious threat to the requirements of public policy affecting one of the fundamental interests of society, in addition to the perturbation of the social order which any infringement of the law involves.[333]

It can be argued that public policy is a general derogation which is applicable when other derogations are not. If this argument is true, the boundaries between the derogation grounds are uncertain and the scope of public policy becomes limited. Several judgements from the Court suggest that objectives which might have fallen under Article 36 TFEU and the derogation of public policy, instead have been accepted as mandatory requirements, such as protection of fundamental rights[334], consumer protection[335], or crime prevention.[336] This also adds to the uncertainty of the scope of the public policy exception. On the one hand, it can be argued that Article 36 TFEU is to be interpreted strictly and placing, for example, the protection of fundamental rights under public policy would be a wide interpretation and thereby broaden the scope of public policy, which would be contrary to the strict interpretation of derogations. On the other hand, as has been critised in the doctrine, the Court's approach excluding certain public interests from the scope of public policy would lead a *too narrow* interpretation of the

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[330] Case C-165/08 *Commission v. Poland* (Genetically modified organisms) [2009] ECR I-6843, para 53; *See* for example *Commission v. Greece* where there was no causal link.
[331] Bouchereau, para. 34.
[332] Bouchereau, para. 34.
[333] Bouchereau, para. 35.
[334] As regards the protection fundamental rights, it has been clarified, with case *Omega Spielhallen,* that the protection of fundamental rights can fall under public policy to which the Treaty refers. However, it remains uncertain if the Court will continue this line of argument - i.e. recognise that several overriding interests which, by the Court, have been referred to as posing legitimate interests not falling within the scope of any of the express derogations under Article 36 TFEU, in fact can be integrated with the written grounds (Ackermann, p. 1115.). As it is the Court that has been given the task to interpret the Treaties, this is a possible outcome.
[335] *See* for example Oosthoek.
[336] *See* for example Commission v. Portugal.

concept of public policy and thereby Article 36 TFEU. [337] In fact, it has been suggested that all mandatory requirements could be placed under the public policy derogation due to the Court's reference to *fundamental interests of society* and that there is nothing in the Court's definition of the interpretation of the concept of public policy to suggest a distinction between the written (Article 36 TFEU) and unwritten (mandatory requirements) grounds for justification.[338]

At this point it is important to notice that, according to the Court's previous case law, Article 36 TFEU could justify both distinctly applicable (directly discriminatory) and indistinctly applicable (indirectly discriminatory) measures, whereas the mandatory requirements could justify only indistinctly applicable measures and non-discriminatory measures. Therefore, in my opinion, the above-mentioned suggestion that all mandatory requirements could be placed under the public policy derogation is too far-reaching and it would allow more objectives under which directly discriminatory measures could possibly have been justified. However, the following counter argument can be made. As previously mentioned, the relevance of/need for making a distinction between the express derogations and the mandatory requirements has lessened as the case law of the ECJ has shifted towards referring to both the express derogations and the mandatory requirements in cases, regardless of the measure's discriminatory aspects.[339] This means that placing an objective under the mandatory requirements, instead of Article 36 TFEU, would previously exclude justification of distinctly applicable measure based on such an objective. In my opinion, the approach introduced by the ECJ that directly discriminatory measures can be justified only under Article 36 TFEU must be preserved as the Treaty rules on free movements explicitly prohibits directly discriminatory measures and with the aim to punish the "worst" form of discrimination which undoubtedly undermines the free circulation and thereby the goal behind the internal market.

Several attempts have been made by Member States to invoke the public policy derogation in cases where there has been a potential threat to public policy due to civil unrest, which raises questions as regards the duty of cooperation and the protection of fundamental rights, such as the right to assembly and expression. These issues are assessed in the following sub-chapter.

4.2.1 Duty of Cooperation

As previously mentioned, Article 4(3) TEU relates to the Member States' duty to cooperate and has, in conjunction with Article 34 TFEU, been a basis for the Court's judgements in cases concerning civil unrest and the public policy derogation in relation to the free movement of goods. As the Court has established that the inaction (failure to act) of a Member State to handle an obstacle to trade created by private bodies can be in breach of Article 34 TFEU, when read in conjunction with Article 4(3) TEU, the scope of Article 34 TFEU is broadened.[340] In *Spanish Strawberries* and *Cullet,* the State was found to be in breach of Article 34 TFEU by being inactive to intervene (non-intervention) with the conducts by private bodies that hinder free movement of goods. Moreover, reliance on the public policy objective based on the argument

[337] Thym, p. 173.
[338] Thym, p. 174.
[339] Barnard, *The substantive law,* 5ed., p. 150.
[340] As previously stated, the scope of Article 34 TFEU has already been broadened by catching non-discriminatory national rules that has the potential to hinder intra-Union trade, which was confirmed with *Cassis de Dijon.*

that civil unrest/threat to public order would have arisen if the inactive State had intervened, was not accepted. If the public policy derogation could successfully be invoked based on this argument of civil unrest/threat to public order, this would lead to threats to democracy because private bodies/interest groups could be able to set the agenda for free movement of goods[341] by knowing that the State would not have an initiative to intervene as non-intervention would be justified in any case. However, almost all the cases show that there is a close link between the obligation of a Member State to intervene and put an end to trade obstacles created by interest groups, as ruled in *Spanish Strawberries*, and the protection of the fundamental (human) right to protest.[342] In fact, the Member States' obligation to handle threats to the free movement of goods created by private bodies, e.g. interest groups, has been criticised in the doctrine for being incompatible with the principle of proportionality and the protection of fundamental rights.[343] Moreover, the scope of the Member States' obligation to handle threats to public order created by private bodies/private individuals is uncertain, an issue which creates legal difficulties, and which is attempted to be clarified in the following sub-chapters.

4.2.2 Non-intervention of a Member State with Conducts of Private Bodies and Public Policy

The obligation of a Member State having to give full effect to EU law unless it can show that action on its part would have (adverse) consequences for public order with which it could not cope by using the means at its disposal was introduced by the Court in *Cullet*.[344] Furthermore, the ECJ followed this line of argument in *Spanish Strawberries.*[345] As regards the scope of this obligation, it seems as if the Member State needs to show that it has done something in order to try to control/limit the threats to public order and the measure restricting free movement of goods cannot be the first resort. If a Member State can show that it does not have the means at its disposal to handle the threat to public order if the Member State concerned would intervene, justification under public policy might be possible.[346] This indicates that risk of civil unrest might fall under public policy in extreme cases where there is a clearly proven risk[347] and where other, less restrictive, means render the Member State unable to handle the risk, meaning that non-intervention is the only mean to prevent civil unrest. However, what clearly proven risk means and how existence of such a risk will be decided remains uncertain.

To sum up, as also stated in sub-chapter 4.2.1, there seems to remain a possibility for the Member States to successfully invoke the public policy derogation in cases of civil unrest, namely when there is a *clearly proven risk* and the Member State does not have the *sufficient means at its disposal* to handle such a threat.[348] This may give private individuals the

[341] This view has also been pointed out by AG Ver Loren van Themaat in his opinion in Cullet. *See* sub-chapter 3.1.1.
[342] As seen from the cases presented in chapter 3, most cases are related to right to protest and right to assembly.
[343] The potential conflict between fundamental rights and free movement of goods is addressed below in sub-chapter 4.2.3.
[344] Cullet, para. 56.
[345] Spanish Strawberries, paras. 56–57.
[346] Jarvis, Malcolm A., *Case C-265/95, Commission v. French Republic, Judgment of the Court of Justice of 9 December 1997, [1997] ECR I-6959*, CMLR 53: 1371–1383, 1998 [Jarvis] p. 1381.
[347] Enchelmaier in Oliver, p. 253.
[348] Cullet; Spanish Strawberries.

opportunity to restrict the free movement of goods, which has been criticised.[349] These issues are closely linked to the balance between fundamental rights and the fundamental freedoms which will be assessed in the following sub-chapter.

4.2.3 Fundamental Rights v. Fundamental Freedoms

One issue of significance is the relationship or "hierarchy" between the free movements and the protection of fundamental (human) rights as general principles of EU law and also those enshrined in the Charter.[350] Furthermore, both the Treaty and the Charter are primary law. Articles 6(1) and 6(3) TEU state:

> "The Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union, as adapted at Strasbourg on 12 December 2007, which shall have the same value as the Treaties."

> "Fundamental rights, as guaranteed by the European Convention for the protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law."

Thus, the Charter ranks as high as the Treaty. Moreover, human rights which are not protected in the Charter will still continue to be protected as the general principles of EU law. The ECJ has stated, in several cases, that the ECHR enjoys "special significance" in the EU.[351] Furthermore, the Charter does not only apply to Union institutions, but also to the Member States when they are acting within the scope of Union law.[352] Article 51(1) of the Charter states:

> "The provisions of this Charter are addressed to the institutions and bodies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law /…/"

In *Schmidberger* the Austrian government allowed a demonstration which restricted the free movement of goods with the aim of respecting some fundamental rights as enshrined in the ECHR and the Austrian constitution. Hence, in this case, the fundamental rights to assembly and expression conflicted with the free movement of goods. In such a case, Article 36 TFEU can be invoked.[353] The Court stated that neither the free movement of goods nor the fundamental right to assembly and expression were absolute. However, the Court, in this case, ruled that the right to assembly and expression would surpass free movement of goods. This outcome is the result of a *stricto sensu* assessment. In other words, the ECJ made a balancing

[349] Opinion of AG VerLoren van Themaat in Cullet; Jarvis, p. 1381.
[350] All Member States of the EU are party to the ECHR, whereas the EU itself is not a party to the ECHR. Even though the ECHR is a valuable legal instrument for the protection of human rights in the EU, the judgments of the ECtHR does *not* bind the ECJ and the General Court.
[351] See for example Case C-274/99P *Connolly v. Commission* [2001] ECR I-1611, para. 37; Case C-94/00 *Roquette Frères v. Directeur général de la concurrence* [2002] ECR I-9011, para. 25; Joined cases C-20/00 and C-64/00 *Booker Aquaculture v. Scottish Ministers* [2003] ECR I-7411, para. 65; Joined cases C-402/05P and C-415/05P *Kadi and Al Barakaat International Foundation v. Council and Commission* (GC) [2008] ECR I-6351, para. 283.
[352] Case C-299/95 *Kremzow v. Austria* [1997] ECR I-2629; Case C-309/96 *Annibaldi v. Lazio* [1997] ECR I-7493.
[353] However, the fundamental rights can never widen the scope pf Article 34 TFEU but, in such a case, a restriction becomes more difficult to justify (Enchelmaier in Oliver, p. 242).

between the protection of free movement of goods and the proception of the aforementioned two human rights. As the non-intervention of the Austrian authorities was suitable and necessary, this made it "easier" for the aforementioned two human rights to prevail over the free movement of goods under a *stricto sensu* assessment.[354] However, how the conflict between the protection of fundamental rights and free movement of goods was dealt with in this case, in other words, "primacy" of human rights over the (economic) free movements should not be seen as "established". The assessment of the Court will involve different factors, such as the degree of the restriction of free movement of goods, seriousness of the situation, and if the other tests of proportionality were satisfied or not.[355] In some cases, the Court leaves it to the national courts to decide, fully or partially, based on the facts of the case[356], which is linked to the *margin of appreciation.*[357]

Moreover, it has been suggested that case *Omega Spielhallen* raises questions as regards State interference with the free movements, which create legal difficulties. The notion of human dignity widens the scope of the public policy derogation in a manner which is less predictable than the reliance on fundamental rights from a conventional perspective.[358] The definition of the concept human dignity or what constitutes human dignity is not clear and rather subjective. Merely referring to the concept of human dignity as an individual's inherent right that must be respected as a person/subject does not solve the issue, as the understanding attributed to *personal identity* can significantly differ between the Member States (and also within a Member State).[359] The fact that the notion of human dignity is not common to all Member States and that the ECJ does not limit the scope of the concept of human dignity has been criticised in the doctrine for giving the Member States unlimited possibilities of invoking the public policy derogation in order to protect human dignity under Union law.[360] Obviously, the notion of which activities can be contrary to human dignity is subjective and the Court's reluctance to introducing objective criterion/criteria creates legal uncertainty. It must be noted, however, that these potential differences between the Member States' conception of human dignity makes it difficult to develop principles at EU level as "common constitutional traditions" within the Union are not present.[361]

However, it can be argued that the Court's numerous statements, that the Member States enjoy a margin of discretion as to which level of protection is sufficient in that particular Member State, can serve as guidance as regards the definition of human dignity, for instance it is for the Member States to ascertain what the notion of human dignity entails. Furthermore, a potential limit to the scope of human dignity as justification, is presented by AG Stix-Hackl who

[354] As previously stated, stricto sense assessment is made by the ECJ mostly in such cases where human rights and economic free movements compete.
[355] For an opposite outcome, see Spanish Strawberries, sub-chapter 3.1.2.
[356] *See* for example Mickelsson, Familiapress.
[357] The *margin of appreciation* is analysed under sub-chapter 4.4.
[358] Ackermann, Thomas, *Case C-36/02, Omega Spielhallen- und Automatenaufstellungs-GmbH v. Oberbürgermeisterin der Bundesstadt Bonn, Judgment by the Court of Justice (First Chamber) of 14 October 2004, nyr,* CMLR 42:1107–1120, 2005 [Ackermann] p. 1114.
[359] Opinion of AG Stix- Hackl in Omega Spielhallen, para. 78; Ackermann, p. 1116.
[360] Ackermann, p. 1116.
[361] Craig & De Burca, p. 390.

suggested, in her opinion in *Omega Spielhallen,* that in order to restrict free movements based on the protection of human dignity the Member State needs to show that the activity which is being restricted poses a genuine and sufficiently serious threat to a fundamental interest of society.[362] The notion of *a genuine and sufficiently serious threat affecting one of the fundamental interests of society* has previously been introduced by the Court in case *Bouchereau*.[363] This can be compared to the Court's judgments as regards public policy and civil unrest which supports the assumption that *a clearly proven risk* to public policy due to civil unrest could serve as basis for justification under the public policy derogation in Article 36 TFEU. In sum, it can be argued that the concepts of *clearly proven risk* and *sufficiently serious threat* introduce a lower threshold under which threats to public policy cannot be accepted based on risks of civil unrest or an activity being contrary to the notion of human dignity. However, what *clearly proven risk* and *genuine and sufficiently serious threat* mean remains uncertain.

In *Omega Spielhallen* the individuals willingly participated in the game of simulated killings and the protection based on human dignity can be argued to have been forced upon them. However, it has been suggested in the doctrine that what is protected is the dignity of mankind in general and that the activity in question could potentially have a negative influence on people's attitudes towards the use of physical violence.[364] It can be argued that the provisions on free movement are to be applied as regards the actions of private individuals only through the Member State's inaction to handle/prevent such behaviour among individuals in the territory of that Member State. Moreover, the obligation to prevent treatment among individuals that can violate the right to human dignity, can be linked to the duty of cooperation according to Article 4(3) TEU – an article which was read in conjunction with Article 34 TFEU when obliging the Member States to prevent/handle actions by private bodies that restrict the free movement of goods.[365] It can be argued that the Union rules on fundamental rights (including human dignity) are to be respected and enforced by the Member States according to Article 4(3) TEU. However, the Court abstained from referring to the provisions on free movements in conjunction with Article 4(3) TEU in cases *Omega Spielhallen* and *Schmidberger,* as opposed to *Spanish Strawberries.* This suggests that in cases *Omega Spielhallen* and *Schmidberger,* the Member State's obligation to abstain from any action that would violate human rights (case *Schmidberger)* and the Member State's willingness to prevent a game which that Member State considers to be in breach of a human right – human dignity (case *Omega Spielhallen)* are based solely on the provisions on the rules on free movement and not the duty to cooperate.

As seen, which arguments fall under public policy is not always clear, however certain aspects have been analysed in this chapter as to interpret/clarify the Court's case law in this area. In the following sub-chapter, the notion of public security will be analysed.

[362] Opinion of AG Stix-Hackl in Omega Spielhallen, para. 100.
[363] Bouchereau, para. 3.
[364] Ackermann, p.1118.
[365] Spanish Strawberries.

4.3 The Scope of Article 36 TFEU – Public Security

The Court stated, in the decisive case *Campus Oil*, that under certain circumstances, the public security derogation covers the maintenance of essential oil supplies, due to the fact that not only the economy of a Member State, but above all, its institutions, its essential public services and the survival of its inhabitants depend on it. However, it is not enough for a Member State to claim that an interruption of the supply of petroleum products would seriously affect public security to successfully benefit from public security. This means that the measures also need to satisfy the principle of proportionality.[366] Furthermore, the quantities accepted within a system, such as the one in *Campus Oil,* may not exceed what is to be considered "adequate"[367] to guarantee the minimum supply without which the public security of the State concerned would be affected, or the level of production necessary to maintain the refinery's production capacity,, all aiming at having a minimum supply of such important products in the event of a crisis. Moreover, the other aim is to enable the State to continue to refine at all times enough crude oil allowing the State concerned to fulfill its long-term contracts. This reflects the principle of proportionality according to which a measure can be justified only if the objective aimed at cannot be reached by means less restrictive.

The Court did not explain why the public security derogation was applicable in this case and not public policy. According to AG sir Gordon Slynn, the public policy derogation would be applicable, if public security had not.[368] It can be argued that the Court considered that public policy, being more general in nature, is a derogation applicable where other derogations listed in Article 36 TFEU are not applicable. This means that the more specific grounds for justification are to be applied before the general ground(s) for justification.[369] This is, not surprising, in line with the principle rule of *lex specialis* surpassing *lex generalis*. However, an additional argument can be made. As seen from *Commission v Spain*[370], the ECJ considered public security derogation for the purpose of justification as regards as minimum supply of telecommunication services, petroleum products and electricity in the event of a crisis within the territory of the Member State concerned, while the ECJ rejected the reliance on public security derogation as regards as tobacco products and banking services which were not provided by the Central Bank of the Member State concerned. This case may indicate that rather than the public policy derogation being more general in nature, the "sensitivity" of the products and the services for the fundamental interest of the society is taken into account. In other words, what is decisive to delineate between public policy and public security in such cases is the question of whether there is a *crucial product (or service) for the benefit of the whole society*. If the answer is affirmative, then the public security derogation will be of relevance. If one considers petroleum products, telecommunication services, and electricity, it cannot be doubted that at least minimum availability of petroleum, telecommunication at least at the minimum level, and minimum availability of electricity in a Member State where a crisis that poses a

[366] Mortelmans, *Campus Oil*, p. 707. See for example Commission v. Greece; De Peijper; Campus Oil; Cullet.
[367] It should be stated that there is no fixed threshold as regards as what is "adequate". It should be assessed case by case and depending on the circumstances.
[368] Opinion of AG sir Gordon Slynn in Campus Oil, p. 2764.
[369] Oliver, Peter, *A review of the case law of the Court of Justice on Articles 30 to 36 EEC in 1984,* [1985] CMLR 22: 301-328 [Oliver, A review of the case law] p. 310; Mortelmans, *Campus Oil*, p. 705.
[370] Case C-463/00 *Commission v. Spain* [2003] ECR I-4581 [Commission v. Spain].

threat to the security of that Member State, is crucial. With the facts that *Campus Oil* was ruled before *Commission v. Spain* and the approach of the ECJ, which is explained above, towards the reliance on public security in the area of free movement of capital is well-established, and that *Campus Oil* was also about petroleum, an argument that it is naturally the public security derogation that is of relevance where there is a product of crucial importance for the society, may be reasonable.

4.3.1 Public Security and Other Treaty Exceptions Relating to Security

In *Campus Oil* the Court neither determined the limits of "public security" nor its relationship to Articles 346-348 TFEU. It is important to notice that under Articles 346 - 348 TFEU, unilateral action by the Member State is not permitted, which makes the distinction/relationship between Article 36 TFEU and Articles 346-348 TFEU of crucial importance.[371] It is clear from the Court's case law that the public security derogation, as well as Article 346 TFEU cover both internal security and external security.[372] Some guidance is given in Article 346 TFEU which refers to "war material" and "specifically military purposes". This indicates that crime detection, crime prevention, and traffic regulations fall outside the scope of the provision. It has been argued that these matters are covered by the public security derogation.[373] However, as previously mentioned, the ECJ has, on one occasion, categorised crime prevention as a mandatory requirement.[374] Also, supplies not intended for specifically military purposes are excluded from the scope of Article 346 TFEU. Thus, petrol, which can be used for military purposes but is not specifically intended for that purpose, is excluded from the scope of Article 346 TFEU.[375]

As regards petrol, in AG sir Gordon Slynn's opinion in *Campus Oil*, the maintenance of essential oil supplies can fall within the public security derogation in Article 36 TFEU, due to the fact that it is vital to the stability and cohesion of the life of the modern State.[376] It can be argued that the Court's approach that the aim of ensuring a minimum supply of petroleum products transcends purely economic considerations is to be regarded as an aim covered by the notion of public security rules out the possibility of applying the public policy derogation or Articles 346-348 TFEU in such a situation.[377]

The Court's case law as regards other free movements than that of goods indicates that Article 347 TFEU is to be applied when more specific provisions are not.[378] It can be argued that this is also to be applied as regards free movement of goods due to the principle rule that a special

[371] Mortelmans, *Campus Oil,* p. 711.
[372] Case Richardt, para. 22; Case C-83/94 *Leifer* [1995] ECR I-3231 [Leifer] para. 26; Case C-273/97 *Sirdar v. Secretary of State for Defense* [1999] ECR I-7403 [Sirdar] para. 17.
[373] Johnston, Angus in Oliver (ed.) *Free movement of goods in the European Union,* 5 ed, Hart Publishing Ltd, 2010, p. 370 - 400 [Johnston] p. 387.
[374] Commission v. Portugal.
[375] Johnston, p. 387.
[376] Opinion of AG sir Gordon Slynn in Campus Oil , p. 2767–2768.
[377] Mortelmans, *Campus Oil,* p. 706.
[378] Case 222/84 *Johnston v. Chief Constable of the Royal Ulster Constabulary* [1985] ECR 1651; Leifer; Sirdar; Case C-423/98 *Albore* [2000] ECR I- 5965.

provision surpasses a general provision. Therefore, in such a case, Article 36 TFEU and the public security derogation would surpass Article 347 TFEU.

4.3.2 The Notion of Essential Public Service

The expression "essential public service" which the ECJ referred to in *Campus Oil* has been criticised for being too vague and not further defined by the Court.[379] What is meant by "essential public service" is crucial to define as this is the de minimis of societal security within the public security derogation, according to the Court. In the opinion of AG VerLoren van Themaat in *Cullet* the following conclusions can be drawn from the judgments in Campus Oil.

> "/…/ it is apparent from paragraphs 34 and 47 of the judgment in Campus Oil that reliance upon public security can be justified only in so far as the production capacity in question is necessary for the proper functioning of Irish public institutions and essential public services and even the survival of its inhabitants. In addition to public utilities and a limited number of genuine public services, this will also include hospitals."[380]

This statement may serve as some guidance and the notion may perhaps be defined as "services that must be available to all persons in the territory of a Member State and that are necessary for the continuity and survival of the society, especially in the event of a serious threat. However, it is uncertain how the Court will define the notion of essential public service if given the opportunity.

Furthermore, the Court has stated that purely economic matters will not fall under Article 36 TFEU.[381] The notion of measures of a non-economic nature is analysed in the following sub-chapter.

4.3.3 Measures of a Non-Economic Nature

In many cases, for example *Commission v. Greece*, the ECJ ruled that Article 36 TFEU is only applicable in cases of a non-economic nature.[382] This means that the notions of public policy and public security do not include the economic systems of the Member States/the legislation designed to implement such systems, i.e. price regulatory measures, economic legislation and distribution laws. Such measures are capable of hindering trade, either directly or indirectly, which means that such measures fall within Article 34 TFEU, without standing any chance of justification within Article 36 TFEU.[383]

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[379] Gormley, Laurence, *Prohibiting Restrictions on Trade within the ECC*, Amsterdam, North Holland, 1985, p. 139.
[380] Opinion of AG VerLoren van Themaat in Cullet, p. 313.
[381] See for example Campus Oil; Commission v. Italy; Commission v. Greece.
[382] See also Case 7/61 *Commission v. Italy* [1961] ECR 317.
[383] VerLoren van Themaat & Gormley, *Prohibiting Restriction of Free Trade within the Community: Articles 30-36 of the EEC Treaty*, 3 Nw. J. Int'l L. & Bus. 577 (1981) [VerLoren van Themaat & Gormley] p. 601.

Furthermore, in *De Peijper*, the Court stated that:

> "Article 36 cannot be relied on to justify rules or practices which, even though they are beneficial, contain restrictions which are explained primarily by a concern to lighten the administration's burden or reduce public expenditure, unless, in the absence of the said rules or practices, this burden or expenditure clearly would exceed the limits of what can reasonably be required."[384]

Hence, in *De Peijper,* the Court set further boundaries as regards the application of Article 36 TFEU. However, previous case law of the ECJ had been too vague in finding a solution how to handle matters of a non-economic nature. In case *Campus Oil*, the Court clarified its views on the subject.[385] In *Campus Oil,* matters of an economic nature were present but these matters were so *closely linked* to the objective of protecting *public security* that the ECJ found the latter to surpass the former.[386] Furthermore, in case *Duphar*[387] the Court was faced with a measure of an economic nature. The Dutch authorities had excluded certain pharmaceuticals from the list of pharmaceuticals qualified for State reimbursement. AG Mancini stated in his opinion that the measure constituted a MHEE under Article 34 TFEU, however, the measure could be justified under public health grounds, despite the presence of matters that were of obvious economic nature. AG Mancini's point of view was that the aim of the measure was to protect public health, and that a means to this end was to reduce public spending.[388] Thus, in AG Mancini's opinion, the public health objective transcended the objective to reduce public spending. Furthermore, AG Mancini stated that it was contradictory and deceitful to recognise the importance of the protection of public health, yet denying the Member States the means for ensuring proper health care.[389] Irrespective of the fact that AG Mancini's opinion is not compatible with the subsequent ruling by the Court in the case, it is interesting as regards the ruling of the ECJ in *Campus Oil*. In line with AG Mancini's opinion in *Duphar,* it can be argued that the price regulation was a means to ensuring oil supplies in order to protect public security and thereby a causal link could be established. The ruling in *Duphar*[390] came before the ruling in *Campus Oil*[391] and one might speculate that the ECJ was influenced by the AG Mancini's opinion in *Duphar* in its ruling in *Campus Oil*.

In subsequent cases (cases ruled after *Campus Oil*) the Court has indicated that, despite interests of an economic nature, certain objectives can serve as justification for a restriction on freedom of movement.[392] For example, in *Essent*[393], the Court, as opposed to the AG Jääskinen opinion, found that there was a connection between the Dutch rules on gas and electricity distribution and the objective of guaranteeing undistorted competition within the market which, in turn,

[384] De Peijper, p. 636.
[385] Mortelmans, *Campus Oil,* p. 699.
[386] Campus Oil, para. 35.
[387] Case 238/82 *Duphar v. Netherlands* ECLI:EU:C:1984:45 [Duphar].
[388] Opinion of AG Mancini in Duphar, p. 551.
[389] Opinion of AG Mancini in Duphar, p. 552.
[390] Judgment of 7 February 1984.
[391] Judgment of 10 July 1984.
[392] Nic Shuibhne & Maci, p. 998.
[393] Joined cases C-105 and 107/12 *Essent* EU:C:2013:677 [Essent].As the case has been ruled in the area of free movement of capital and due to the page-limit, the case will not be analysed in detail.

contributed to the general interests of consumer protection and public security.[394] AG Jääskinen had argued that there was no such connection.[395] What seems to be crucial in order for an economic measure *not* to be excluded from the provisions of free movement of goods is the existence of a close connection (causal link) between the *economic* and the *non-economic* motives. Furthermore, the *non-economic* motives must transcend, or at least be equal to the *economic* motives. However, how close a connection is necessary, namely the degree of directness needed, remains uncertain.[396] It has been claimed in the doctrine that the economic objectives cannot be predominant but as long as the matters of economic nature and non-economic nature are equally important, justification might be possible.[397] Moreover, it can be argued that the Court's judgement in *Duphar*, where measures of a primarily budgetary objective was found not to fall within Article 36 TFEU, indicates that the judgement in *Campus Oil* means that measures which have a primarily public security objective are covered by Article 36 TFEU.[398]

Again, the judgement in *Campus Oil* (relating to public security) has not escaped criticism due to the acceptance of a price regulation and with a clearly protectionist aim. The Court's complex approach to motives of an *economic nature* has raised questions which cannot be answered with complete certainty. It is unclear how the Court will balance or make a distinction between protectionism that hinder trade, on the one hand, and public interest choices, on the other.[399] Furthermore, the Court has been criticised for resorting to different lines of argument in an inconsistent manner, as regards which measures of *economic nature* can be accepted.[400] As seen, a price regulation, which is of obvious economic nature, can be accepted if there are other objectives present which exceed the economic nature of the price regulation.[401] It needs to be underlined, however, that what may be economic is the motive, not the objective.

Lastly, the Union might offer some collective protection, as regards smaller Member States which cannot satisfy the need for protection/security on their own. However, at the same time, the possibility/freedom for the Member States to protect their territory and their citizens is reduced, especially as regards economic insecurity, as the objective of the measure cannot be economic.[402] By allowing the Member States a margin of discretion as regards measures of an *economic nature* which restrict the free movement, the ECJ shifts the balance between EU law and the Member States legislative autonomy. The Member State's margin of discretion will be analysed in subchapter 4.4.

[394] Essent, paras. 58–66.
[395] Opinion of AG Jääskinen in Essent, para. 88.
[396] Snell, Jukka, *Economic Justifications and the Role of the State,* in Koutrakos, Nic Shuibhne & Syrpis (Eds.), *Exceptions from EU Free Movement Law: Derogation, Justification and Proportionality,* Hart Publishing, Oxford, 2016, p. 12 - 31 [Snell] p. 19.
[397] Oliver, p. 236.
[398] Mortelmans, *Campus Oil,* p. 707.
[399] Nic Shuibhne & Maci, p. 1001.
[400] Snell, p. 17.
[401] Campus Oil.
[402] Snell, p. 14.

4.4 The Member States' Margin of Discretion - Public Policy and Public Security

In the decisive case *Costa v. E.N.E.L.* the ECJ held that the separation of functions between the ECJ and the national Courts is clear.[403] However, contrary to this statement, the development in the Court's case law indicates that this distinction is *not* always clear. In some cases, but not all, the Member States are given a margin of discretion, for example when the ECJ finds that it does not have sufficient information to decide the case or when the national court is better equipped to do so.[404] In this sub-chapter, the Court's case law is assessed as regards the margin of discretion focusing on public policy and public security.

The Court stated in *Spanish Strawberries* that the Member States enjoy a margin of discretion as regards which means/actions are appropriate to eliminate obstacles to the free movement of goods. However, the Court was to verify if a Member State had taken all appropriate and necessary means to do so in a case referred to it.[405] Thus, it has been suggested that the Member States enjoy a margin of discretion as regards the choice of means, only when the ECJ or the national courts have found several means to be appropriate.[406] As regards the margin of discretion relating to public policy, the Court has confirmed the notion of the Member States' enjoying a level of discretion by stating that:

> "/…/ the particular circumstances justifying recourse to the concept of public policy may vary from one country to another and from one period to another, and it is therefore necessary in this matter to allow the competent national authorities an area of discretion within the limits imposed by the Treaty."[407]

No such statement has been made as regards public security which indicates that the margin of discretion is more limited in the area of public security compared to public policy. In my opinion, the fact that the ECJ has given a clearer indication as regards public security compared to public policy, supports this argument.

Furthermore, as previously stated the margin of discretion is lessened when an area is harmonised and widened in areas where there is no harmonisation, but the Member States have common interests as regards justification. In the EU's attempts to create an internal market within the Union it makes sense to give the Member States a wider margin of discretion in a case where the Court knows that the interests of the Member States are the same. It can be argued that this is a way of creating harmonisation through national legislation instead of Union legislation, which perhaps adds to the legitimacy of the EU.

In *Schmidberger* the Court stated that the Member States enjoy a *wide margin of discretion* as regards the balancing of hindrance on free movement and protection of fundamental rights.[408]

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[403] Case 6/64 *Costa v. E.N.E.L* EU:C1964:66.
[404] Zglinski p. 1369.
[405] Spanish Strawberries.
[406] Jarvis, p. 1380.
[407] Case 41/74 *Van Duyn* ECLI:EU:C:1974:133 para. 18; Bouchereau, para. 34; *Omega Spielhallen*, para. 31.
[408] Schmidberger, para. 82.

In *Omega Spielhallen,* AG Stix-Hackl stated, in her opinion, that only fundamental rights recognised by Union law should be able to serve as basis for justification of a restriction to free movement.[409] The Court, however, stated that the measure was justified as it corresponded to the level of protection of human dignity guaranteed by the German constitution and was necessary to attain the objective pursued. Thus, once again to underline, the Member States are given a wide margin of discretion as the level of protection aspired for, can be decided by the Member States and not solely subject to Union law. This is evident from the judgments in cases *Schmidberger* and *Omega Spielhallen.* Moreover, with cases *Schmidberger* and *Omega Spielhallen* the ECJ has clarified that the Member States are given a margin of discretion not only when assessing if there is an obligation to act in order to *prevent a restriction* on free movement of goods but also when a Member State *actively, such as through national rule, restricts* free movement of goods with the aim of protecting fundamental rights.[410]

To sum up, in my opinion, the Member States are given a wide margin of appreciation as regards public policy. The margin of appreciation as regards public security is more limited compared to public policy.

In the following chapter, conclusions are presented.

[409] Opinion of AG Stix-Hackl in Omega Spielhallen, para. 49.
[410] Ackermann, p. 1115.

5 Conclusions

Article 36 TFEU creates a possibility for the Member States to derogate from the principle of free movement of goods in order to protect certain objectives of public interest. According to the ECJ, the article must be interpreted in such a way that its scope is interpreted strictly and not extended any further than what is necessary for the protection of the objectives, which it is intended to protect. Moreover, a national measure must not be disproportionate to the objectives that it seeks to protect. In other words, Article 36 TFEU can only provide for justification if a measure serves the objectives which it aims to protect by satisfying the proportionality principle. In order to satisfy the principle of proportionality, the measure must be *suitable* (appropriate) to the objective that it intends to protect, the measure must be *necessary* by being the least restrictive mean to protect the objective in question, and finally the restrictive effect of the measure and the protection of the objective in question must be balanced, which is proportionality in narrow sense, *stricto sensu*. As obvious, justifying a measure is not easy.

This thesis has shown that the express derogations of public policy and public security that are listed under Article 36 TFEU have been inconsistently referred to by the ECJ. For example, how to balance between the free movements and fundamental (human) rights is not obvious and the manner in which economic measures are assessed creates legal uncertainty.

In some cases, the Member States are given a margin of discretion which, in turn, provides for some freedom for the Member States as regards which level of protection will suffice in the territory of each Member State. This shifts the balance between EU law and the Member States' judicial autonomy, in favour of the Member States. However, the Court's reluctance in providing guiding principles in this field leads to unpredictability as regards the interpretation of the rules relating to justification which can be criticised for creating legal uncertainty. Moreover, as seen from the cases presented and analysed in the previous chapters, what will be allowed under public policy depends on the argument/motive invoked by the Member States concerned and its analysis, which is not subject to a guidance provided by the ECJ, is to be made case by case and depending on the circumstances. The different outcomes in *Spanish Strawberries* and *Schmidberger* are very good examples of this.

The public policy derogation relates to *genuine and sufficiently serious threats to one of the fundamental interests of society*. In the cases where the Member State has invoked the public policy derogation in matters of civil unrest posing a potential threat to public order, the Court has established and underlined that the Member States have an obligation not only to abstain from applying national rules that are contrary to the Treaty objectives as regards free movement of goods, but also to prevent conducts of individuals/private bodies that can hinder intra-Union trade. This means that the Member States must ensure that the free movement of goods is respected by private bodies within their territory. The obligation to ensure the free movement of goods is based on the interpretation of Article 34 TFEU in conjunction with Article 4(3) TEU, according to the Court. In line with this, the Court's case law suggests that threats to public order due to civil unrest can fall within the "undetermined" scope public policy if there

is a clearly proven risk and if the Member State has been unable to handle the risk by using the means at its disposal. However, the scope of the obligation, to ensure the free movement of goods, is uncertain. Moreover, this "rule" introduced by the ECJ has broadened the already broad scope of "State measure". One should remember that the provisions on free movement of goods in the Treaty are directed at the Member States by prohibiting their protective (discriminatory) rules. Thus, the outcome that the concept of State measure and naturally restriction is broadened is too far-reaching.

Furthermore, the protection of fundamental/human rights can fall under public policy, and thus justify an infringement of free movement of goods. In addition, the Member States have an obligation to protect fundamental rights and to prevent actions among individuals that can be contrary to the Treaty objectives as regards fundamental rights, including human dignity.

Thus, the Member States have an obligation to ensure free movement of goods in the territory of that Member State. At the same time, the Member States also have the obligation to protect fundamental rights as enshrined in the ECHR, the Charter, and those that are protected as general principles of EU law. This could pose potential legal problems as both the Treaty and the Charter are primary legislation. Furthermore, the Court has handled situations in which free movements have conflicted with fundamental rights by acknowledging the Member States obligations and the potential conflicting interests, as well as giving the Member States a margin of discretion as regards which level of protection will suffice in the territory of each Member State. This gives the Member State judicial autonomy, but also creates legal uncertainty/unpredictability, as it is not evident how the separation of functions will be exercised in a particular case.

In my opinion, what may fall within the scope of public security has been given more indication by the ECJ compared to public policy. The public security derogation includes protection of both internal and external security, and regulates the management of strategically sensitive goods, such as securing oil supplies especially in event of a crisis in a Member State that is totally or almost totally dependent on imports of crude oil. Thus, a restriction in protection of a *crucial product (or service) for the benefit of the whole society* (such as petroleum, telecommunication, and electricity) can fall within the scope of public security. As regards as the choice between public policy and public security as a justification ground, as previously discussed related to and within the scope of *Campus Oil*, where a product that has *critical importance* is present, the public security derogation will likely be the invoked derogation. Moreover, the margin of discretion of the Member States is more limited under public security, compared to public policy, which can be a linked to the Court's establishing the scope of public security in a clearer manner compared to public policy.

Finally, a dual application of the public policy and public security derogations may be possible. The argument "constitute a genuine and sufficiently serious threat" has arisen both within the scope of public policy and public security which supports this. Thus, the two derogations of public policy and public security could, at the same time, apply in a given case in the area of

free movement of goods, especially where there it is difficult to decide if the motivation of a Member State falls under public policy or public security.

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