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## *Public Security Exceptions and EU Free Movement Law*

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I. INTRODUCTION

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uite early on in the life of European integration, Member States assumed that the exceptions from the law on free movement reserved a regulatory space where the exercise of their sovereign powers would be immune to the disciplines imposed by EU rules. This assumption manifested itself in different contexts over the years. A striking example was provided in the area of economic sanctions against third countries. In *Centro-Com*, the British Government argued that it reserved the power to deviate from EU rules imposing economic sanctions against Serbia in order to ensure their effective application, because such a deviation constituted a foreign policy choice which was beyond the scope of the Union legal order.[[1]](#footnote-1)

The Court of Justice accepted that foreign policy was not covered by EU law. However, it added that, ‘while it is for Member States to adopt measures of foreign and security policy in the exercise of their national competence, those measures must nevertheless respect the provisions adopted by the Community in the field of the common commercial policy provided for by Article [207 TFEU, ex Article 133] of the Treaty’.[[2]](#footnote-2) The same conclusion was reached in relation to similar claims for reserved powers in other areas.[[3]](#footnote-3) This case-law, and the need for Member States to take into account the law of the European Union when the policy choices which they deem necessary deviate from EU law, prompted the current Vice President of the Court of Justice, writing in an extra-judicial capacity, to argue that ‘[t]here is no nucleus of sovereignty that Member States can invoke as such against the Community’.[[4]](#footnote-4)

Of all the grounds for exceptions from free movement, public security is most closely associated with what is traditionally understood as the core of national sovereignty, that is, the sphere of activity within which the State has primary responsibility to protect its territory and citizens. As such, the term is politically charged to an even greater extent than in relation to other grounds of justification. This characteristic not only makes it more difficult to define the scope and content of the term. It also raises questions about the intensity of judicial review and the criteria pursuant to which this should be exercised.

This chapter will examine in a non-exhaustive manner different contexts within which Member States seek to rely upon public security in order to impose restrictions on the application of EU rules. The analysis will explore three main themes: the wide range of different categorisations of public security in primary and secondary law and their implications for the definition of a concept which is already nebulous in its content; the extent to which public security is construed in different terms depending on the legal and policy context within which a Member State seeks to protect it; and the extent to which the Court of Justice provides guidance to national authorities as to how to protect public security in compliance with the substantive and procedural requirements laid down in EU law (and to national courts as to how to monitor such compliance). Given the central role of national courts in the interpretation and application of public security exceptions, the chapter will take into account national case-law where possible.[[5]](#footnote-5)

The analysis is structured in three parts. First, it examines public security exceptions provided in EU primary law. Secondly, it tackles exceptions set out in secondary law by focusing on the principle of sex discrimination in the armed forces and the exercise of rights flowing from EU citizenship. Thirdly, given their special status and extraordinary conditions for their application, it examines separately the exceptional clauses set out in TFEU which enable Member States to deviate from the entire corpus of EU law.

II. Public security in EU primary law – the case of trade

Public security constitutes a ground for exceptions from all four freedoms under the Union’s primary rules.[[6]](#footnote-6) The seminal case for the interpretation of this justification is *Campus Oil*.[[7]](#footnote-7) This preliminary reference was about an Irish rule that importers of petroleum products should purchase a certain proportion of their requirements from the only State refinery at a fixed price. The Irish Government argued that the restriction on free movement of goods which that requirement entailed was justified on public security grounds: it was essential that the State should be able to rely upon crude oil at all times, and, to that effect, it ought to ensure the viability of the only Irish refinery.

Three main features of the judgment are noteworthy. The first is the Court’s approach to the existence of secondary EU legislation in the area. Where a Member State seeks to deviate from free movement on the basis of a ground of justification recognised under EU law, one of the parameters which the Court examines as a matter of course is the existence of secondary EU legislation and the extent to which this protects the interest which a Member State seeks to protect: if the answer to this question is affirmative, then an exception from EU law is normally not justified as, by purporting to protect an interest already protected at EU level, such a deviation is no longer necessary.[[8]](#footnote-8) Conversely, even in the presence of EU secondary legislation, a Member State would be allowed to rely upon Article 36 TFEU if the substantive content of the former would not protect adequately the public interest mentioned in the latter. In other words, the degree of harmonisation in secondary legislation would have an impact on the scope for national authorities to rely upon the exceptional provisions set out in primary law. In *Campus Oil*, the Union had adopted secondary legislation dealing with difficulties in supplies of crude oil and petroleum products.[[9]](#footnote-9) However, the Court held that, such measures notwithstanding, the Member States do not have ‘an unconditional guarantee that supplies will in any event be maintained at least at a level sufficient to meets its minimum needs’.[[10]](#footnote-10) It then held that an interruption of supply of petroleum products was justifiable under the public security exception as such products, ‘because of their exceptional importance as an energy source in the modern economy, are of fundamental importance for a country’s existence since not only its services but above all its institutions, its essential public services and even the survival of its inhabitants depend upon them’.[[11]](#footnote-11)

The tenor of the judgment suggests that, once public security touches upon the most vital interests of the State, and therefore, gives rise to the core of the functions which a State carries out in order to protect its citizens, there is more leeway for autonomous action, the presence of EU secondary legislation in the area notwithstanding. This is not dissimilar to the position the Court had taken in *Chemial* in relation to Italian legislation taxing ethyl alcohol higher than alcohol obtained by fermentation.[[12]](#footnote-12) As the former was based on a petroleum derivative, the objective of the Italian measure was to deter the use of petroleum products for the production of alcohol in order to reserve them for products the use of which would be more important for the State. In subsequent judgments, the concept of public security was interpreted as encompassing both internal and external security.[[13]](#footnote-13)

However, to tolerate and sanction the choices made by the Member States is not tantamount to rendering them beyond the Union legal framework altogether. This is the second noteworthy feature of the judgment in *Campus Oil.* In assessing whether the Irish restriction was proportionate, the Court held that the quantities of petroleum products to which the purchasing obligation referred should not exceed the minimum supply requirements of the State ‘without which the operation of essential public services and the survival of its inhabitants would be affected’.[[14]](#footnote-14)

In fact, the Court engaged in quite a detailed examination of what the proportionality test would entail:

the quantities of petroleum products whose marketing can be ensured under such a system must not exceed the quantities which are necessary, so far as production is concerned, on the one hand, for technical reasons in order that the refinery may operate currently at a sufficient level of its production capacity to ensure that its plant will be available in the event of a crisis and, on the other hand, in order to that it may continue to refine at all times the crude oil covered by the long-term contracts which the State concerned has entered into so that it may be assured of regular supplies.[[15]](#footnote-15)

In doing so, it provided guidance to the referring court as to how to play its part in the application of the EU test about exceptions from free movement.

The detailed guidance given to the referring courts about the application of the principle of proportionality is the third main characteristic of the case-law of the Court of Justice in the area. There are different ways in which the Court may provide the referring court with detailed guidance and it may do so for different reasons. For instance, it may seek to provide assistance in an area where national courts have found it difficult to apply EU law tests.[[16]](#footnote-16) It may also apply itself an EU law test which it introduced recently in order to illustrate what is expected of national courts or to assuage fears that a newly introduced test may have profound practical implications for Member States.[[17]](#footnote-17) On the other hand, it may provide no guidance at all.[[18]](#footnote-18) Ultimately, there is no discernible pattern which would illustrate hard and fast rules about judicial behavior.[[19]](#footnote-19) In disputes where public security is invoked, detailed guidance functions as a counterbalance of the central role that national courts occupy not just in their capacity as referring courts but mainly in their task, entrusted by the Court itself, to police the outer limits of the wide discretion granted to national authorities. The more nebulous the public interest and the wider the discretion enjoyed by the Member State, the greater the need to set out with clarity the substantive and procedural conditions within which such discretion ought to be exercised.

Detailed guidance to national courts is also given in other areas where public security is invoked, a case in point being exports of dual-use goods.[[20]](#footnote-20) These are products of both civil and military application. In the light of this characteristic, Member States claimed that exports of such products were beyond the scope of EU law. The Court of Justice rejected this argument[[21]](#footnote-21) and focused, instead, on whether a national restriction on exports might be justified as necessary in order to protect public security. It answered the question in the affirmative and construed the scope for Member States to act in wide terms too. It also left it for the national courts to ascertain whether the national measures are necessary and proportionate. However, in doing so, the Court gave strong indication both as to the justifiability of the national restriction and the criteria on the basis of which the referring courts are to assess the principle of proportionality. For instance, it accepted in *Leifer* that,

depending on the circumstances, the competent national authorities have a certain degree of discretion when adopting measures which they consider to be necessary in order to guarantee public security in a Member State within the meaning indicated above. When the export of dual-use goods involves a threat to the public security of a Member State, those measures may include a requirement that an applicant for an export licence show that the goods are for civil use and also, having regard to specific circumstances such as inter alia the political situation in the country of destination, that a licence be refused if those goods are objectively suitable for military use.[[22]](#footnote-22)

Similarly, it held in *Richardt* that confiscating goods would be disproportionate if the return of the goods to the Member State of origin sufficed, and also referred to the issues which national courts ought to take into account, 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’.[[23]](#footnote-23)

All in all, in order to assess the construction of the public security exception by the Court, account should be taken of both the detailed analysis and strict application of the principle of proportionality[[24]](#footnote-24) and the clearly narrow terms in which the notion of public security was defined. Indeed, the circumstances in which the notion of public security as construed by the Court would apply would be truly quite exceptional.[[25]](#footnote-25) In a subsequent action against Greece,[[26]](#footnote-26) the Court was asked to deal again with a system of ensuring a minimum stock of petroleum products and the Union measure already mentioned in *Campus Oil,* which imposed such a requirement on Member States.[[27]](#footnote-27) The Greek authorities had, however, enabled the companies bound to store petroleum products to transfer that obligation to refineries based in Greece provided that they had purchased such products from these refineries during the previous year. The Court found this provision contrary to the principle of free movement of goods: it aimed to protect an interest of an economic nature and, in any case, ‘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’.[[28]](#footnote-28)

The judgment in *Commission v Greece* clearly suggests that the *Campus Oil* principle by no means provides Member States with a *carte blanche* when they claim that necessity related to public security entails a deviation from EU law. In its rather short judgment, the Court merely referred to the arguments made by the late Advocate General Ruiz-Jarabo Colomer in his Opinion, without even repeating them. He had expressed deep skepticism about the Greek defence, and the absence of a detailed and specific explanation of how public security entailed the adoption of the illegal measure.[[29]](#footnote-29)

Viewed along its strict and elaborate approach to the application of the principle of proportionality, the judgment in *Campus Oil* acknowledges the duty of the Member States to protect their citizens, whilst subjecting its exercise to Union law control. It is noteworthy that the latter is mediated through national courts by the application of the principle of proportionality. All in all, the judgment in *Campus Oil* is not couched in language of deference, but one of balanced coexistence of the rights of Member States as fully sovereign subjects of international law and the obligations imposed under the EU legal order.

In terms of the application of the principles set out in *Campus Oil*, there is no evidence of misuse of this balancing exercise by national courts. For instance, there are very few judgments by courts in the United Kingdom which refer expressly to the judgment in *Campus Oil* and, amongst these, one notices both a narrow interpretation of public security and a considered application of the proportionality test. In *Mabanaft,* for instance,[[30]](#footnote-30) the Court of Appeal in England and Wales dealt with the application of a Directive—replacing the measure with which the Court of Justice dealt in *Campus Oil—*imposing an obligation on Member States to maintain minimum stocks of crude oil and/or petroleum products.[[31]](#footnote-31) In a judgment by Lady Justice Arden, the Court of Appeal was mindful of the criteria set out in *Campus Oil* and the EU law constraints on the exercise of the right of national authorities to protect national security. In doing so, the national court struck the balance between, on the one hand, a strict construction of public security and a detailed analysis of the requirements of necessity and proportionality and, on the other hand, the need to avoid substituting its judgment for the policy choice made by the executive.

The analysis so far has highlighted two main points. The first is about the balancing exercise between the discretion of national authorities to determine how best to protect national security, and the procedural and substantive conditions which EU law requires them to meet. The second is about the central role of national courts and the detailed guidance by the Court of Justice as to how they are expected to carry it out. These points will also emerge below in the examination of how public security is construed in specific contexts of secondary legislation.

III. public security in secondary legislation

Provisions similar to the primary law exception clauses mentioned above are also laid down in secondary EU legislation. For instance, Council Regulation 3285/94 on imports from third countries enables Member States to deviate from its provisions and impose prohibitions, quantitative restrictions or surveillance measures on grounds of public morality, public policy or public security; the protection of health and life of humans, animals or plants, the protection of national treasures possessing artistic, historic or archaeological value, or the protection of industrial and commercial property.[[32]](#footnote-32) Similar provisions are set out in other EU instruments, and they refer to such non-economic interests either expressly,[[33]](#footnote-33) or by reference to the exception clauses set out in the Treaties.[[34]](#footnote-34) Furthermore, there may be special exclusions depending on the subject matter of the set of rules in question.[[35]](#footnote-35)

In its interpretation of such clauses, the Court has adopted the balanced approach which underpins its judgment in *Campus Oil*. This section will provide an outline of this approach in two areas where public security has given rise to interesting issues before national courts, namely equal treatment in the armed forces and the rights granted under EU citizenship.

**A. Equal treatment in the armed forces**

The prohibition on sex discrimination under primary law is developed further in EU secondary legislation.[[36]](#footnote-36) The application of this principle was the subject matter of three separate cases referred to the Court of Justice in the late 1990s and early 2000s. In *Sirdar*, the Industrial Tribunal (United Kingdom) raised the question of the legality of a British rule preventing women from joining the Royal Marines.[[37]](#footnote-37) In *Kreil*, the Administrative Court, Hannover, raised the question of the consistency with EU law of the German constitutional rule confining the access of women to the armed forces to medical and military-music services.[[38]](#footnote-38) Finally, in *Dory*, the Administrative Court, Stuttgart, focused on the legality of the German constitutional rule which confined compulsory military service to men.[[39]](#footnote-39)

In its judgments in *Sirdar* and *Kreil,* delivered in late 1999 and early 2000 respectively, the Court held that national measures were not excluded from the application of EU law merely because they aimed at the protection of public security or national defence. The public security derogations provided under primary law deal with exceptional and clearly defined cases and by no means introduce an inherent general exception excluding all measures aiming at the protection of public security from the scope of EU law. To assume otherwise would be tantamount to impairing the binding nature of EU law and its uniform application.[[40]](#footnote-40) In the absence of a public security exception in the social provisions of primary law, the Court held that secondary legislation on equal treatment was applicable to employment in the public service[[41]](#footnote-41) and, hence, in the armed forces.

The Court acknowledged that, in order to ensure their security, it was for the Member States to take decisions on the organisation of their armed forces. However, the discretion they enjoy in so deciding should be exercised in a manner which, on the one hand, would genuinely aim at guaranteeing public security and, on the other hand, would be appropriate and necessary to achieve that aim. In S*irdar,* these criteria were held to be met: the national deviation from the equal treatment principle was confined to a small force and was applied pursuant to the principle of inter-operability which required all Royal Marines, without exception and irrespective of their specialisation, to carry out a wide range of activities within the unit and to fight as front-line commandos. The German restriction in *Kreil* was held to be unjustified because, effectively, it excluded the national armed forces *in toto* from the application of the principle of equal treatment.

In *Dory,* the question was different, as the main focus was on the compulsory character of military service. In a paragraph worth citing in full, the Full Court held:

Certainly, decisions of the Member States concerning the organisation of their armed forces cannot be completely excluded from the application of Community law, particularly where observance of the principle of equal treatment of men and women in connection with employment, including access to military posts, is concerned. But it does not follow that Community law governs the Member States’ choices of military organisation for the defence of their territory or of their essential interests.[[42]](#footnote-42)

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The Court ruled that ‘[t]he decision of the Federal Republic Germany to ensure its defence in part by compulsory military service is the expression of such a choice of military organisation to which Community law is…not applicable’.[[43]](#footnote-43) This conclusion was supported by reference to the importance of the aims of compulsory military service as defined by the German Government in its written observations and at the hearing: in political terms and in terms of the organisation of the armed forces, these consisted of its contribution to the democratic transparency of the military, national integration, the link between the armed forces and the population and the mobilisation of the manpower needed by the armed forces in the event of a conflict. It was in the interests of the territorial security of Germany that military service was compulsory, hence taking precedence over the objectives of policies aimed at the work prospects of young people.

Another aspect of the German rule on which the Court focused was the limited scope of the application of compulsory military service. The Court acknowledged that that ‘will generally entail a delay in the progress of [their] career’ whilst pointing out that ‘military service allows some of [those concerned] to acquire further vocational training or subsequently to take up a military career’.[[44]](#footnote-44) However, it viewed that delay as ‘an inevitable consequence of the choice made by the Member State regarding military organisation’ and, as such, it ‘does not mean that that choice comes within the scope of Community law’.[[45]](#footnote-45) It, then, concluded as follows:

The existence of adverse consequences for access to employment cannot, without encroaching on the competences of the Member States, have the effect of compelling the Member State in question either to extend the obligation of military service to women, thus imposing on them the same disadvantages with regard to access to employment, or to abolish compulsory service.[[46]](#footnote-46)

The case-law on sex discrimination in the armed forces provides another example of the balance which the Court of Justice is keen to strike between the rights of Member States to protect the interests which are close to the core of their sovereignty and the constraints imposed by EU law on the exercise of these rights. Whilst not uncontroversial,[[47]](#footnote-47) the judgments struck the right balance between the effective application of EU law and the right of Member States to determine how best to protect their security interests. In *Sirdar* and *Kreil*, the Court sought to provide as comprehensive an answer as possible to a difficult problem: the former judgment illustrated how the discretion enjoyed by the Member States in the organisation of their armed forces may be exercised, whereas the latter made it clear that EU law would not grant a blanket exception to national measures regulating that area. As for the judgment in *Dory,* the outer limits of the exception were usefully drawn.[[48]](#footnote-48)

**B. EU citizens’ rights**

In secondary legislation governing the free movement of persons, the reference to public security is noteworthy for the grading scale of intensity of public security that the Citizens Rights Directive introduces in different sets of circumstances.[[49]](#footnote-49) Whilst a Member State may expel an EU citizen or a member of her family on grounds of public security,[[50]](#footnote-50) in cases where the citizen has the right of permanent residence on its territory (that is, she has been resident there for at least five years), expulsion is only justified ‘on serious grounds of public policy or public security’.[[51]](#footnote-51) In cases where the citizen has resided in the host Member State for ten years, expulsion is justified only ‘on imperative grounds of public security’.[[52]](#footnote-52) The introduction of this grading scale of what constitutes a public security interest reflects two main considerations. The first is related to the severity of the measure which a Member State seeks to justify by relying upon the public security exception: expulsion is a drastic measure with profound implications for both the EU citizen and her family. The second consideration is related to the developing link between the EU citizen and the host Member State: the longer the residence in the territory of the latter, the deeper the link with its society and the more difficult for the national authorities to break that link by expelling the citizen (and her family where relevant).[[53]](#footnote-53)

Whilst sensible in order to reflect the differing links between EU citizens and the host State, the different categories of public security in the CRD add further layers of complexity to the definition of a concept the content of which is already difficult to pinpoint. This is illustrated by the case-law on ‘imperative grounds of public security’. In *Tsakouridis,* the Grand Chamber held that it ‘presupposes not only the existence of a threat to public security, but also that such a threat is of a particularly high degree of seriousness’.[[54]](#footnote-54) That case was about a Greek citizen whom Germany sought to expel after having been convicted for criminal offences in connection with dealing in narcotics as part of an organised group. The Court had no difficulty finding that such activity constituted ‘a diffuse form of crime with impressive economic and operation resources and frequently with transnational connections’ and ‘could reach a level of intensity that might directly threaten the calm and physical security of the population as whole or a large part of it’.[[55]](#footnote-55) This conclusion was substantiated by reference to EU secondary legislation which deemed illicit drug trafficking a threat to health, safety and the quality of life of citizens of the Union, and to the legal economy, stability and security of the Member States.[[56]](#footnote-56)

In *PI*, another Grand Chamber judgment 18 months later, the Court dealt with an Italian citizen who had lived in Germany all of his adult life and who, at the age of 41, was convicted to imprisonment for the sexual assault, sexual coercion and rape of a minor, the daughter of his then partner.[[57]](#footnote-57) What is noteworthy about the case is the approach of the Court to ascertaining the seriousness of the conduct in question. The starting point is EU law itself, both primary and secondary. In relation to the former, reference is made to Article 83(1) TFEU which provides that the sexual exploitation of children is one of the areas of particularly serious crime with a cross-border dimension in which the EU legislature may intervene. There is, then, reference to Directive 2011/93 on combating the sexual abuse and sexual exploitation of children and child pornography which views sexual abuse and sexual exploitation of children as serious violations of fundamental rights and which provides for minimum prison sentences for specific offences.[[58]](#footnote-58) In the light of the above, the Court concluded that criminal offences amounting to sexual exploitation of children may be covered by the concept of ‘imperative grounds of public security’ under Article 28(3) CRD provided that they constitute ‘a particularly serious threat to one of the fundamental interests of society, which might pose a direct threat to the calm and physical security of the population’.[[59]](#footnote-59) This was a matter for the referring court to decide.

The definition of the term ‘imperative grounds of public security’ in *PI* has been criticised for its wide scope[[60]](#footnote-60) and has been deemed to undermine the enhanced protection which Article 28(3) CRD is designed to bestow.[[61]](#footnote-61) In his Opinion, Advocate General Bot argued that the high threshold suggested by the term and articulated in *Tsakouridis* was not met. He pointed out the confined context within which the crime in *PI* had been committed (family) and the fact that the applicant had acted alone and independently of any network, and suggested that the risk for the wider society did not necessarily follow from the abhorrence of the crime.

Whilst the scope of ‘imperative grounds of public security’ in *PI* may appear wide enough to cover interests related to public policy,[[62]](#footnote-62) it should be viewed within its specific context and the scheme set out in the CRD. Integration in the host Member State and social cohesion are central to the logic of the Directive. Criminal conduct of such nature as to attract the interest of the Union’s legislature may run counter to what is central in order to ‘strengthen the feeling of Union citizenship’.[[63]](#footnote-63) Viewed from this angle, the extent to which EU primary and secondary law is relied upon by the Court in order to assess the conduct which national authorities seek to target is telling. Reference is made in Article 83(1) TFEU to a number of ‘areas of particularly serious crime’.[[64]](#footnote-64) In accordance with this provision, the ‘cross-border dimension resulting from the nature or impact of such offences or from a special need to combat them on a common basis’ triggers the Union’s competence to adopt secondary legislation establishing minimum rules concerning the definition of criminal offences and sanctions in these areas. There is, therefore, a curious link which emerges from this line of reasoning: the existence of rules conferring on the EU the competence to legislate is relied upon in order to render a specific activity within the scope of powers of national authorities in order to restrict the application of EU law in cases where, otherwise, the moral underpinnings of EU citizenship might appear to be compromised.[[65]](#footnote-65)

The marginalisation of the distinction between public policy and public security is troubling and by no means conducive to the clarification of these elusive concepts. Nonetheless, the question that arises is whether this contextual construction of public security runs counter to the exceptional nature of the measures laid down in Article 28 CRD. The answer to this question is negative in the light of the specific conditions under which national authorities are required to apply this interpretation. Two considerations need to be taken into account. The first is the detailed elaboration of what compliance with the principle of proportionality would entail. The sources for this are twofold. On the one hand, there is secondary legislation: the CRD follows up the reference to the principle by setting out a number of factors that need to be taken into account by the authorities of the host Member State considering expulsion, namely the personal conduct of the individual concerned, whether that represents a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society,[[66]](#footnote-66) as well as considerations such as how long the individual concerned has resided on its territory, her age, state of health, family and economic situation, social and cultural integration into the host Member State and the extent of her links with the country of origin.[[67]](#footnote-67) This elaboration on what a proportionality assessment should entail draws upon the case-law of the Court of Justice which introduced the principles now laid down in the CRD.[[68]](#footnote-68) This illustration of a direct interaction between the EU legislature and judiciary in the context of the CRD is not confined to the latter’s derogations provisions.[[69]](#footnote-69)

On the other hand, the emphasis on what the monitoring of proportionality compliance would entail lies in the Court’s own case-law. The judgment in *Tsakouridis* is a case in point. It refers to the balance that needs to be struck between the exceptional nature of the threat to public security and the risk of compromising the social rehabilitation of the EU citizen in the State in which he has become genuinely integrated, the latter being not only in her interest but also in that of the EU in general. This balance requires that a range of factors be taken into account: as far as the risk to public security is concerned, these include the possible penalties and the sentences imposed, the degree of involvement in the criminal activity and the risk of reoffending,[[70]](#footnote-70) as well as fundamental human rights, in particular the right to respect for private and family life.[[71]](#footnote-71) As for the proportionality assessment, the Court sets out the factors which the referring court must take into account: the nature and seriousness of the offence committed, the duration of residence of the person concerned in the host Member State, the period which has passed since the offence was committed and the conduct of the person concerned during that period, and the solidity of the social, cultural and family ties with the host Member State.[[72]](#footnote-72)

The second feature of the application of the public security exception is its intense proceduralisation. Article 30(2) CRD refers to the right of the citizen targeted by an EU restriction to ‘be informed, precisely and in full, of the public policy, public security or public health grounds on which the decision taken in their case is based’. However, this provision introduces an exception from the principle of full disclosure if ‘this is contrary to the interests of State security’. In addition, Article 31 CRD sets procedural safeguards, including the right to appeal of the restrictive measure which should cover the examination of the legality of the decision, as well as of the facts and circumstances on which the latter is based.

These provisions were interpreted by the Court in another Grand Chamber judgment in *ZZ*.[[73]](#footnote-73) This case was about a citizen of dual French and Algerian nationality married to a British citizen and lawfully resident in the UK for 15 years. Following a trip to Algeria, the UK cancelled his right of residence and refused him entry back into the UK on public security grounds. On appeal, the Secretary of State objected to the disclosure of information relied upon against the applicant. Instead, and in accordance with UK legislation, this information was disclosed to the two special advocates appointed to represent his interests. Two hearings took place, an open and a closed one, the latter in the absence of the applicant and his personal advisers, but in the presence of the special advocates who made submissions on his behalf. Similarly, the Special Immigration Appeals Commission rendered two judgments: an open and a closed one, the latter being provided only to the Secretary of State and the applicant’s special advocates. The Commission relied on the information set out in the closed judgment and held that the applicant had been involved in terrorist activities and that he represented a genuine present and sufficiently serious threat which affects public security. It also acknowledged that little of the case against him had been disclosed to him and that what had been disclosed did not concern the critical issues of the case. The question referred by the Court of Appeal was whether the non-disclosure of information in the above circumstances was consistent with the right to judicial protection, set out in Article 30(2) CRD and guaranteed by Article 47 of the Charter on the right to an effective remedy and to a fair trial.

The Court articulates the answer to this question with reference to Article 47 of the Charter as well as the provision in Article 52(1) Charter according to which any limitations must respect the essence of the fundamental right and be proportionate and necessary in order to genuinely meet objectives of general interest recognised by the European Union. The main focus of the judgment is the balance that needs to be struck between security and defence rights and, in its effort to bring this home, the judgment oscillates between statements of considerable abstraction and specific issues related to the procedure before the referring court. The Court of Justice held that, in exceptional cases where a national authority opposes precise and full disclosure pursuant to the provisions of Article 27 CRD, the national court ‘must have at its disposal and apply techniques and rules of procedural law which accommodate, on the one hand, legitimate State security considerations regarding the nature and sources of the information taken into account in the adoption of such a decision and, on the other hand, the need to ensure sufficient compliance with the person’s procedural rights, such as the right to be heard and the adversarial principle’.[[74]](#footnote-74) In practical terms, this is about the provision by national law of ‘effective judicial review both of the existence and validity of the reasons invoked by the national authority with regard to State security and of the legality of the decision taken under Article 27 CRD’ as well as the provision of ‘technique and rules relating to that review’.[[75]](#footnote-75)

In the light of the above, the national court ‘must carry out an independent examination of all the matters of law and fact relied upon by the competent national authority and it must determine, in accordance with the national procedural rules, whether State security stands in the way of such disclosure’.[[76]](#footnote-76) If this question were answered in the affirmative, ‘judicial review must be carried out in a procedure which strikes an appropriate balance between the requirements flowing from State security and the requirements of the right to effective judicial protection whilst limiting any interference with the exercise of that right to that which is strictly necessary’.[[77]](#footnote-77) In practical terms, this suggests a distinction between the grounds for expulsion and the relevant evidence. As for the former, ‘the person concerned must be informed, in any event, of the essence of the grounds on which a decision refusing entry under Article 27 [CRD] is based, as the necessary protection of State security cannot have the effect of denying the person concerned his right to be heard and, therefore, of rendering his right of redress as provided for in Article 31 of that directive ineffective’.[[78]](#footnote-78) As for the evidence, the Court accepts that, [i]n certain cases, disclosure of that evidence is liable to compromise State security in a direct and specific manner, in that it may, in particular, endanger the life, health or freedom of persons or reveal the methods of investigation specifically used by the national security authorities and thus seriously impede, or even prevent, future performance of the tasks of those authorities’.[[79]](#footnote-79)

It is for the national court to assess ‘whether and to what extent the restrictions on the rights of the defence arising in particular from a failure to disclose the evidence and the precise and full grounds on which the decision taken under Article 27 [CRD] is based are such as to affect the evidential value of the confidential evidence’.[[80]](#footnote-80) It is also for the national court, ‘first, to ensure that the person concerned is informed of the essence of the grounds which constitute the basis of the decision in question in a manner which takes due account of the necessary confidentiality of the evidence and, second, to draw, pursuant to national law, the appropriate conclusions from any failure to comply with that obligation to inform him’.[[81]](#footnote-81)

The judgment in *ZZ* sets out an elaborate analysis of what national courts are required to do in applying the public security derogation under the CRD, as one might expect. In doing so, it follows the path set out in the *Kadi* line of cases (to which it refers expressly).[[82]](#footnote-82) The Court also refrained from deciding the substantive point at issue, a temptation which it does not always resist.[[83]](#footnote-83) When the case went back to the referring court, the Court of Appeal, in a judgment by Lord Justice Richards, held that the Court of Justice’s judgment in *ZZ* ‘lays down with reasonable clarity that the essence of the grounds on which the decision was based must always be disclosed to the person concerned. That is a minimum requirement which cannot yield to the demands of national security. Nor is there anything in particularly surprising about such a result in the context of restrictions on the fundamental rights of free movement and residence of Union citizens under EU law’.[[84]](#footnote-84)

Following a detailed and careful assessment of the Court’s judgment, the Court of Appeal held that the appellant had not been given the minimum level of disclosure that EU law required. It reached this conclusion having examined both the closed and open judgment of the Special Immigration Appeals Commission and having heard from one of the two special advocates and the barrister acting for the Secretary of State in closed sessions. It did not consider it necessary to render a closed judgment.

The *ZZ* litigation illustrates another aspect of the interpretation and application of the public security derogation, namely the close co-operation between national courts and the Court of Justice. Consistently with the picture which emerged from the analysis of the *Campus Oil* case-law in Section II, there is no evidence of misuse of the discretion granted to national courts by the EU’s judiciary. In fact, national courts engage actively in a detailed and meaningful assessment of proportionality on the basis of a careful reading of the guidance provided by the Court of Justice. For instance, in 2012, the Court of Appeal in England and Wales relied heavily on the judgment in *Tsakouridis* and held that committing a serious violent offence against the person justifying a sentence of eight years imprisonment, along with other offences, did not meet the standards required by the ‘imperative grounds of public security’ to justify deportation.[[85]](#footnote-85)

In another case, concerning a Dutch national convicted of handling stolen goods and, later, robbery, the Court of Appeal allowed the appeal against a decision of a First-Tier Tribunal which carried out a proportionality analysis without examining the EU law dimension.[[86]](#footnote-86) The Court of Appeal referred specifically to the judgment in *Tsakouridis* and the issues which the Tribunal ought to have examined in the context of the proportionality analysis (namely ‘the risk of compromising the social rehabilitation of the Union citizen in the State in which he has become genuinely integrated, which…is not only in his interest but also in that of the European Union in general’).[[87]](#footnote-87)

Whilst the discretion of the executive in the host Member State is recognised, national courts also accept that restrictions on free movement are to be interpreted narrowly and have accepted their duty to scrutinise the reasons for any such restrictions. The Court of Appeal in Northern Ireland, for instance, quashed a deportation order of two Dutch sisters which provided no analysis of the reasons for the deportation, such as the risk of reoffending.[[88]](#footnote-88) It held that the decision provided no evidence that it was based exclusively on the personal conduct of the individuals concerned.

The analysis so far highlighted three main points. First, the notion of public security is interpreted in a deeply contextualised manner which has given rise to controversy and may appear to render its definition somewhat elusive. Secondly, this approach is counterbalanced by a deeply proceduralised understanding of the requirements which national authorities must meet when they rely on the public security exception and a detailed guidance provided to national courts. Thirdly, the limited review set out in this chapter suggests that national courts appear to pay heed to the guidance provided by the Court of Justice.

IV. Wholly exceptional clauses in primary law

The above analysis dealt with the extent to which the Union legal order enables Member States to deviate when they deem it necessary. The exception clauses examined above enable national authorities to deviate from specific EU law principles and rules provided that certain conditions are met. However, there are two further clauses in primary law which are defined as ‘wholly exceptional’[[89]](#footnote-89) for two reasons: on the one hand, there is no limit to the type of measure which a Member State may adopt and, on the other hand, in adopting such a measure, the State in question may deviate from the entire body of EU law. These provisions are laid down in Articles 346 and 347 TFEU. The former is about trade in and production of arms, munitions and war materials, and the latter is about extraordinary circumstances related to national and international security.

**A. Article 347 TFEU**

Article 347 TFEU reads as follows:

Member States shall consult each other with a view to taking together the steps needed to prevent the functioning of the internal market being affected by measures which a Member State may be called upon to take in the event of serious internal disturbances affecting the maintenance of law and order, in the event of war, serious international tension constituting a threat of war, or in order to carry out obligations it has accepted for the purpose of maintaining peace and international security.

The poor drafting of the above provision is striking.[[90]](#footnote-90) The reference, first, to the consultation amongst Member States and then to the national deviation from EU law, as well as the use of the term ‘called upon’ may suggest that, rather than conferring a right, Article 347 TFEU acknowledges the inherent duty of the Member States to act as fully sovereign subjects of international law. After all, the four sets of circumstances mentioned therein under which Member States may deviate from the entire *corpus* of EU law are exceptional in their significance and touch upon the very core of the function of the State and, therefore, the latter’s sovereignty. That they render the action of the State necessary hardly seems worthy of further analysis.

However, the wholly exceptional nature of the circumstances which may necessitate national action and its implications notwithstanding, Article 347 TFEU introduces three sets of conditions which the Member State must meet. The first is substantive: it is only in the circumstances laid down therein that a Member State may deviate from EU law. The second set is procedural: the Member State which deems it necessary to act in such circumstances should consult with other Member States in order to adopt a common approach aiming to protect the internal market. In this context, the Commission is also to be involved. According to Article 348 subparagraph 1 TFEU,

If measures taken in the circumstances referred to in Articles 346 and 347 have the effect of distorting the conditions of competition in the internal market, the Commission shall, together with the State concerned, examine how these measures can be adjusted to the rules laid down in the Treaties.

The above are duties imposed under primary law, and the Member States are bound by the duty of co-operation which is set out in Article 4(3) TEU in terms more elaborate than in the previous constitutional arrangements:

Pursuant to the principle of sincere cooperation, the Union and the Member States shall, in full mutual respect, assist each other in carrying out tasks which flow from the Treaties.

The Member States shall take any appropriate measure, general or particular, to ensure fulfillment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the Union.

The Member States shall facilitate the achievement of the Union's tasks and refrain from any measure which could jeopardise the attainment of the Union's objectives.

The conditions set out in Article 347 TFEU and implied by the duty of cooperation are not the only reminders that the wholly exceptional role of Member States should be carried out within EU law parameters. Article 348 subparagraph 2 TFEU sets out an extraordinary procedure for judicial review to be relied upon by the Commission or a Member State in cases where another Member state ‘makes improper use of the powers provided for in Articles 346 and 347 TFEU. The seriousness of the issues at stake is illustrated by the provision for the Court’s ruling to be given in camera.

It follows from the above that a course of action deemed by Member States necessary in order to protect public security may not be chosen without any consideration at all for the Union legal order even in cases of extraordinary seriousness. This is entirely consistent with the picture which emerged from the analysis of the exceptional clauses set out in primary and secondary Union law. However, the ‘wholly exceptional’ nature of the circumstances set out in Article 347 TFEU as well as the Article 348 TFEU procedure raise questions about the enforcement of the EU law conditions outlined above. What is the level of supervision which the Commission and the Member States are prepared to exercise? What is the intensity of control which the Court of Justice deems appropriate? To what extent are Member States free to determine how best to respond to what they deem to be a serious threat to their ability to protect their citizens and their duty to protect their, as well as the international, security?

The record and the practice of the relevant actors so far, or rather the lack thereof, only allude to the answer to this question: there has only been one action brought against a Member State under Article 348 TFEU.[[91]](#footnote-91) Given the maturity of the Union legal order, this suggests reluctance by both the Commission and Member States to challenge choices made by a State in circumstances which the latter deems exceptional. This case was *Commission v Greece (re: FYROM*) the subject-matter of which was the embargo imposed by Greece against FYROM (Former Yugoslav Republic of Macedonia).[[92]](#footnote-92) The Commission alleged a violation of the precursor to Article 297 TFEU (Article 297 EC). The Court delivered no judgment on this case, as the embargo was lifted and the Commission withdrew the action early enough. However, Advocate General Jacobs delivered an Opinion which touched upon the most central issues raised when a State deems that a deviation from EU law is necessary in order to protect vital interests.

His analysis is based on a subtle understanding of the complex issues underpinning the case. Whilst he affirmed the existence of the role of both supervision by the Commission and judicial review by the Court in the areas covered by Articles 347 and 348 TFEU, he pointed out that the ‘scope and intensity of the review that can be exercised by the Court is…severely limited on account of the nature of the issues raised’.[[93]](#footnote-93) Advocate General Jacobs referred to the ‘paucity of judicially applicable criteria’ in the area[[94]](#footnote-94) and ‘the extremely limited nature of the judicial review that may be carried out in this area’.[[95]](#footnote-95) He argued that, in essence, such review was confined to determining whether reliance upon Article 347 TFEU involved manifest errors or abuse of power. He concluded that ‘the question must be judged from the point of view of the Member State concerned’ and elaborated as follows:[[96]](#footnote-96)

Because of differences of geography and history each of the Member States has its own specific problems and preoccupations in the field of foreign and security policy. Each Member State is better placed than the Community institutions or the other Member States when it is a question of weighing up the dangers posed for it by the conduct of a third State. Security is, moreover, a matter of perception rather than hard fact. What one Member State perceives as an immediate threat to its external security may strike another Member State as relatively harmless.

Choosing his words carefully,[[97]](#footnote-97) Advocate General Jacobs concluded that the imposition of the embargo by Greece could not be said to be ‘wholly unreasonable…even if [the threat of war] may be long-term and remote’.[[98]](#footnote-98) In addition to its careful wording, the Opinion in *Commission v Greece* is also characterised by the striking absence of any reference to the procedural aspects of Article 347 TFEU and the failure by Greece to comply with them.[[99]](#footnote-99) If anything, his nuanced and balanced approach struck a balance between State sovereignty and the Union legal order in a manner which left national authorities considerable leeway: the rejection of any claim by the Member States to a *domaine reservé* is accompanied by an acknowledgment of their discretion to determine how best to protect their security; the requirement that reliance upon the notion of necessity, purported to justify a national deviation from EU law, be subject to EU control is followed by an understanding of this notion in sufficiently broad terms to accommodate national concerns; the full application of EU control mechanisms entails the active involvement of national courts which are entrusted with the application of the principle of proportionality.

**B. Article 346 TFEU**[[100]](#footnote-100)

Article 346 TFEU reads as follows:

1. The provisions of the Treaties shall not preclude the application of the following rules:

(a) no Member State shall be obliged to supply information the disclosure of which it considers contrary to the essential interests of its security;

(b) any Member State may take such measures as it considers necessary for the protection of the essential interests of its security which are connected with the production of or trade in arms, munitions and war material; such measures shall not adversely affect the conditions of competition in the internal market regarding products which are not intended for specifically military purposes.

2. The Council may, acting unanimously on a proposal from the Commission, make changes to the list, which it drew up on 15 April 1958, of the products to which the provisions of paragraph 1(b) apply.

For a long time, this rather obscure provision of the EU Treaty was viewed as placing defence industries beyond the reach of EU law entirely. A broad interpretation of its wording was used to substantiate this: on the one hand, the scope of products which fell within the scope of Article 346 TFEU was viewed as potentially unlimited; on the other hand, the circumstances under which Member States could deviate from EU law were ignored or viewed as merely indicative of the general status of the defence industries as directly linked to national sovereignty. Therefore, the Member States were only too keen to presume that measures regulating their defence industries would be beyond the scope of EU law.[[101]](#footnote-101) This approach was tolerated by the EU institutions.[[102]](#footnote-102) The elusive character of the list mentioned in Article 346 (2) TFEU did not help either: it was only published in the *Official Journal of the European Union* forty three years following its adoption in a response by the Commission to a question by the European Parliament.[[103]](#footnote-103)

However, a careful reading of Article 346 TFEU suggests that this approach is misguided. First, the proviso of Article 346 TFEU is confined to the products which are described in the list mentioned in Article 346(2) TFEU. Therefore, the reference to ‘the production of or trade in arms, munitions and war material’ was not envisaged as an open-ended category of products. This suggests that at no point was it envisaged that dual-use goods, that is products which may be of both civil and military application should be regulated by national measures deviating from the entire body of EU law. Such an argument is supported both by the content of the list mentioned in Article 346(2) TFEU, and the reference to the effects that such measures should not have on ‘products which are not intended for specifically military purposes’ in Article 346(1)(b) TFEU.

Secondly, measures adopted by a Member State under Article 346 TFEU are not ipso factojustified; instead, the deviation from EU law which they entail must be ‘necessary for the protection of the essential interests of [national] security’. This is quite an emphatic statement that, rather than being merely a public security clause, Article 346(b) TFEU should be invoked only when the protection of the core of national sovereignty is at stake.

Thirdly, any reliance upon Article 346 TFEU should take into account the effects which its deviation from EU law may have on the status and movement of other products which fall beyond its rather narrow scope. In effect, this provision suggests that national measures deviating from EU law as a whole should not be adopted in a legal vacuum. Instead, Member States are under a duty to consider the implications that such measures may have for the internal market.

Fourthly, Article 348(1) TFEU provides for the involvement of the Commission in cases where reliance upon Article 346 TFEU by a Member State would lead to distortions of competition. This provision should be interpreted in the light of the duty of loyal cooperation enshrined in Article 4(3). In other words, a Member State invoking Article 346 TFEU is under a legal duty to cooperate with the Commission in order to adjust any ensuing distortions of competition to the EU law.

Finally, any deviation from EU law under Article 346 TFEU is subject to the jurisdiction of the Court of Justice. The reference to the ‘improper use of the powers provided for in Article…346’ in Article 348(2) TFEU refers both to the substantive and procedural conditions which need to be met by a Member State invoking Article 346 TFEU.

It follows from the above that, according to a strict reading of Articles 346 TFEU and 348 TFEU, Member States may regulate their defence industries by deviating from EU law only in so far as such a deviation is confined to a specific class of products, is exercised in accordance with certain principles, and is subject to the jurisdiction of the Court of Justice to ascertain whether it amounts to an abuse of power.

This interpretation has gradually been accepted as a matter of EU law. This has been due to the case-law of the Union’s judges.[[104]](#footnote-104) In its first judgment on the applicability of Article 346 TFEU, the Court of Justice left no doubt as to the strict interpretation of this provision. In Case C-414/97 *Commission v Spain,*[[105]](#footnote-105) the Court dealt with Spanish legislation exempting from VAT intra-Community imports and acquisitions of arms, munitions and equipment exclusively for military use. It examined the policy objective of the Spanish measure (to determine and allocate the financial resources for the modernisation of the Spanish armed forces) and held that VAT exemptions were not necessary for the protection of Spain’s essential security interests. This was because any income from payment of VAT (apart from a small percentage passed on to the EU) would flow in the State’s coffers.

This robust approach suggests that Article 346 TFEU does not entail a complete reserve of sovereignty for Member States. Instead, the latter are required to substantiate how the deviation from EU law they deem necessary meets the substantive conditions set out in primary law. Subsequent case-law by both the General Court and the Court of Justice[[106]](#footnote-106) has adopted this approach and has also stressed the narrow material scope of Article 346 TFEU.[[107]](#footnote-107)

There is a thread which brings together the case-law on the application of Article 346 TFEU and that on other public security exceptions, namely the absence of specific substantive arguments by Member States. Instead, the defence of national authorities is confined to vague arguments about public security and the national interest. In *Commission v Italy*, for instance, the Italian Government argued that a deviation from the EU public procurement rules was necessary, on the one hand, in order to protect the confidentiality of information about the production of helicopters and, on the other hand, in order to protect the inter-operability of the Italian fleet of helicopters.[[108]](#footnote-108) The Court dismissed both. It considered the former disproportionate and pointed out that no reasons were presented to justify why the confidentiality of the information communicated for the production of the helicopters manufactured by the company chosen by the Italian authorities would be less well guaranteed were such production entrusted to other companies, in Italy or in other Member States. Similarly, no reason was provided as to latter. In the same case, the defences put forward by the Italian Government were staggering in their generality and for the absence of any specific argument whatever which would substantiate, even remotely, their decision. The helicopters that the Italian Government sought to shield from the application of the EU’s public procurement rules were envisaged for the use of a wide range of forces, the links of which with the essence of national security were hardly obvious. They included the Corps of Fire Brigades, the Carabinieri, the Coastguard, the Guardia di Finanza Revenue Guard Corps, the State Police and the Department of Civil Protection in the Presidency of the Council of Ministers. Another example of poor defence tactics is illustrated by the series of actions by the Commission against a number of Member States concerning the application of customs legislation on imports of defence equipment and dual-use goods—in the context of which Advocate General Ruiz-Jarabo Colomer described the arguments of the Member States as ‘extremely confused’ and he stated that he was ‘unable to conceal [his] surprise at the manner in which the Member States’ approached Article 346 TFEU ‘throughout the proceedings’.[[109]](#footnote-109)

Viewed against this paucity of detailed arguments and the tendency of Member States to rely upon vague pronouncements about public security,[[110]](#footnote-110) the rigour with which the Court has interpreted and applied Article 346 TFEU recently is not surprising. The cases on which the Court has rendered the above rulings were about egregious violations of both the wording and spirit of Article 346 TFEU which exemplified the presumption, widely held by Member States, that primary law reserved for them complete freedom in a domain the scope of which they had the authority to define themselves. Viewed from this angle, it by no means follows that the Court would adopt an intrusive and activist approach once substantive policy choices are explained properly in relation to the requirements set out in Article 346 TFEU.

Finally, there is another theme which emerges from the more recent case-law of the Court of Justice on Article 346 TFEU and is about the role of the national courts. In *Insinööritoimisto InsTiimi Oy*, the Court left it to the referring Finnish court to decide whether the conditions laid down in Article 346 TFEU were met in the case of a supply contract of tiltable turnable equipment which the Finnish Government considered beyond the scope of EU public procurement legislation because it was intended for simulating combat situations.[[111]](#footnote-111) The judgment also provided guidance to national courts as to the issues which they needed to assess in order to ascertain the applicability of Article 346 TFEU to the products in question. On the one hand, this role of national courts is an inherent feature of the preliminary reference procedure. On the other hand, and the considerable divergence with which it has been respected by the Court of Justice notwithstanding, it becomes all the more significant viewed within the wholly exceptional context of Article 346 TFEU. After all, the examination of the sensitive matters related to the essential interests of security of the Member States is not to be carried out by a supranational institution which would be removed from the unique political realities which exist in different Member States. Viewed against the analysis of the primary and secondary law public security derogations examined above in this chapter, the role of national courts, as well as the guidance on proportionality review provided by the Court of Justice, emerge as a thread which brings together different stands of the case-law.

V. Conclusion

This chapter explored the interpretation and application of public security derogations in different contexts of EU primary and secondary law. It showed that EU law introduces various distinctions in the definition of public security in different areas, hence complicating further the interpretation of what is an inherently politically charged concept. To distinguish between ‘public security’, ‘serious grounds of public security’, ‘imperative grounds of public security’, ‘the essential interests of [national] security’ and the interests laid down in Article 346 TFEU would challenge even the subtlest and most discerning of judges.

An assessment of the interpretation and application of public security derogations ought to take into account two related practical considerations. The first is about the legal context within which cases reach the Court of Justice and the ensuing function of judgments to provide a specific answer to a set of specific questions aiming to settle a specific dispute. The temptation of legal scholars to expect a comprehensive treatise on EU law concepts every time the Court is called upon to decide a case is to be resisted, and we should expect that judgments may be confined to their specific factual and legal context. The second practical consideration is that the quest for complete certainty in the law of derogations is elusive. The co-existence of national courts and the CJEU, the principle of distinct roles for them and the practice of interlocking functions, as well as the deeply politicised nature of the issues related to public security are only some of the factors which highlight the inherently incremental development of the state of the law in the area.

Taking these considerations into account, a number of interrelated themes about the interpretation and application of public security exceptions emerge from the analysis in this chapter. First, the different formulations of public security in different legal settings have given rise to a contextual analysis of the content of this concept, at times questioning its distinction from public policy. However, where the content of public security may appear somewhat relativised, it is accompanied by heavy emphasis on the substantive and procedural conditions which national authorities must meet and detailed guidance on the issues that national courts ought to examine in the context of proportionality review. In the context of public security derogations, guidance on proportionality review and the articulation of a heavily proceduralised framework within which national authorities are expected to exercise their discretion counterbalance the criticism against the Court for lowering the bar for Member States.[[112]](#footnote-112)

Secondly, in relation to the Treaties’ wholly exceptional provisions, the Court has adopted a narrow approach to public security. To do otherwise would have been tantamount to granting Member States a policy area of ill-defined limits within which they could act with no regard for EU law. Viewed from this angle, a process of normalisation emerges which brings the law governing such areas closer to the mainstream of the EU legal order. However, this by no means suggests that the Court is keen to address substantive policy choices which fall within the discretion of national authorities and lie within the political sphere. Instead, the case-law examined in this chapter highlights the requirement that such choices are carried out and substantiated with due regard to EU law principles.

Thirdly, the political sensitivity of issues touching upon public security has made Member States complacent when it comes to justifying their choice to derogate from free movement. The absence of substantive engagement with the principles of necessity and proportionality and the reliance upon vague pronouncements about public interest in some of the cases discussed in this chapter is remarkable. The questionable quality of the arguments put forward by Member States in the context of free movement exceptions is by no means confined to public security cases. For instance, in the early case-law on free movement of services and health care, the Court noticed the failure of Member States to adduce any concrete evidence of the detrimental effect that reimbursement of the cost of operations in other Member States would have for the regulation of national health systems.[[113]](#footnote-113)

Fourthly, a finely balanced picture emerges: on the one hand, there is no evidence to suggest that the Court of Justice does not take the public security concerns of Member States seriously; on the other hand, there is no evidence to suggest that national courts do not take their duties to comply with the principles set out by the Court of Justice in the area seriously.

The analysis in this chapter focused on a public interest which lies near the core of national sovereignty. And yet, the interpretation and application of public security in EU legal clauses suggests that the case law in the area is not all that exceptional. Instead, it is based on the main principles of EU substantive law (broad interpretation of free movement provisions, narrow interpretation of exceptions, and intensive review based on proportionality), taking into account the policy setting against which public security is invoked and setting out a deeply proceduralised context within which national authorities are required to exercise their policy discretion and national courts are expected to monitor it.

1. \*I am grateful to Niamh Nic Shuibhne and Phil Syrpis for their comments and suggestions and to Niall Coghlan for his research assistance.

   Case C-124/95 *Centro-Com* EU:C:1997:8. [↑](#footnote-ref-1)
2. ibid para 27. [↑](#footnote-ref-2)
3. These include monetary policy (eg Joined Cases 6/69 and 11/69 *Commission v France* EU:C:1969:68 para 17; Case 57/86 *Greece v Commission* EU:C:1988:284 para 9; Case 127/87 *Commission v Greece* EU:C:1988:331 para 7), registration of vessels (eg Case C-221/89 *Factortame and Others* EU:C:1991:320 para 14), social policy (eg C-438/05 *The International Transport Workers’ Federation and The Finnish Seamen's Union* EU:C:2007:772 para 40), taxation (eg Case C-264/96 *ICI v Colmer* EU:C:1998:370 para 19; Case C‑334/02 *Commission v France* EU:C:2004:129 para 21; Case C 446/03 *Marks & Spencer* EU:C:2005:763 para 29; and Case C 524/04 *Test Claimants in the Thin Cap Group litigation* EU:C:2007:161 para 25), health care (Case C‑120/95 *Decker* EU:C:1998:167 paras 22 and 23; Case C‑158/96 *Kohll* EU:C:1998:171 paras 18 and 19; Case C-157/99 *BSM Geraets-Smits and HTM Peerbooms* EU:C:2001:404 paras 46), and services liberalisation. [↑](#footnote-ref-3)
4. K Lenaerts, ‘Constitutionalism and the many faces of federalism’ 38 *American Journal of Comparative law* (1990) 205, 220. [↑](#footnote-ref-4)
5. For practical reasons, this has been possible only to a limited extent and confined to the courts in the United Kingdom. Given the central role of proportionality review which this chapter will analyse, it is worth pointing out that the UK is a State where the application of the principle of free movement challenged national judges. See, for instance, the Sunday trading saga in the UK: Case C-312/89 *CGT v Conforama* EU:C:1991:93; Case C-332/89 *Marchandise* EU:C:1991:94; Case C-169/91 *Stoke-on-Trent and Norwich City Councils v B&Q* EU:C:1992:519 and the analysis in A Arnull, ‘What Shall We Do on Sunday?’ (1991) 16 *EL Rev* 195 and C Barnard, ‘Sunday Trading: A Drama in Five Acts’ (1994) 57 *MLR* 449. See also Lord Hoffmann, ‘The Influence of the European Principle of Proportionality upon UK Law’ in E Ellis (ed), *The Principle of Proportionality in the Laws of Europe* (Oxford, Hart Publishing, 1999) 107. [↑](#footnote-ref-5)
6. Arts 36 (goods), 45(3) and 52 (persons), 62 (services), and 65 TFEU (capital). [↑](#footnote-ref-6)
7. Case 72/83 *Campus Oil* EU:C:1984:256.  [↑](#footnote-ref-7)
8. See, for instance, Case 35/76 *Simmenthal* EU:C:1976:180; Case 5/77 *Tedeschi v Denkavit* EU:C:1977:144; and Case 251/78 *Denkavit* EU:C:1979:252. [↑](#footnote-ref-8)
9. Council Dir 68/414/EEC [1968] OJ English Special Edition II/586, Council Dir. 73/238/EEC [1973] L 228/1, Council Dec 77/706/EEC [1977] OJ L 292/9, and Council Dec 77/186/EEC [1977] OJ L 61/23. [↑](#footnote-ref-9)
10. Case 72/83 *Campus* Oil (n 7) para 31. [↑](#footnote-ref-10)
11. ibid para 34. See also Case C-503/99 *Commission v Belgium (golden shares)* EU:C:2002:328 para 46. [↑](#footnote-ref-11)
12. Case 140/79 *Chemial* EU:C:1981:1. [↑](#footnote-ref-12)
13. Case C-367/*89 Criminal Proceedings against Aimé Richardt and Les Accessoires Scientifiques SNC* EU:C:1991:376; Case C-83/94 *Criminal Proceedings against Peter Leifer and Others* EU:C:1995:329; Case C-70/94 *Fritz Werner Industrie-Ausrustungen GmbH v Federal Republic of* *Germany* EU:C:1995:328 paras 10-11. In the latter case, and with reference to German legislation on external trade, the Court accepts that public security would be undermined by the risk of serious disturbance to foreign relations or to peaceful coexistence of nations (para 27). [↑](#footnote-ref-13)
14. Case 72/83 *Campus Oil* (n 7) para 47. [↑](#footnote-ref-14)
15. ibid para 48. [↑](#footnote-ref-15)
16. See, for instance, Case C-368/95 *Familiapress* EU:C:1997:325 regarding the issues pertaining to proportionality review which the referring court should take into account. [↑](#footnote-ref-16)
17. See, for instance, Case C-392/93 *British Telecommunications* EU:C:1996:131 on the sufficiently serious test in the context of State liability. [↑](#footnote-ref-17)
18. See, for instance, Case C-405/98 *Gourmet* EU:C:2001:135 and the criticism in A Biondi, ‘Advertising alcohol and the free movement principle: the Gourmet decision’ (2001) 26 *EL Rev* 616. [↑](#footnote-ref-18)
19. On the different approaches to the construction of the principle of proportionality by the Court in the context of exceptions from free movement pursuant to primary law, see C Barnard, ‘Derogations, Justifications and the Four Freedoms: Is State Interest Really Protected?’ in C Barnard and O Odudu (eds), *The Outer Limits of European Union Law* (Oxford, Hart Publishing 2009) 273. [↑](#footnote-ref-19)
20. For an analysis of this area, see P Koutrakos, *Trade, Foreign Policy and Defence in EU Constitutional Law* (Oxford, Hart Publishing, 2001) Ch 6. [↑](#footnote-ref-20)
21. Case C-83/94 *Leifer* (n 13) paras 10-11 and Case C-70/94 *Werner* (n 13) paras 10-11. [↑](#footnote-ref-21)
22. Case C-83/94 *Leifer* (n 13) para 35. [↑](#footnote-ref-22)
23. C-367/89 *Richardt* (n13) para 25. [↑](#footnote-ref-23)
24. See T Tridimas, *The General Principles of EC Law* 2ndedn (Oxford, OUP 2007) 226. [↑](#footnote-ref-24)
25. See also P Craig and G de Búrca, *EU Law* 5thedn (Oxford: OUP 2011) 672. [↑](#footnote-ref-25)
26. Case C-398/98 *Commission v Greece* EU:C:2001:565. [↑](#footnote-ref-26)
27. Council Directive 68/414/EEC of 20 December 1968 imposing an obligation on Member States of the EEC to maintain minimum stocks of crude oil and/or petroleum products (OJ, English Special Edition 1968 (II) 586. [↑](#footnote-ref-27)
28. n 26 para 31. [↑](#footnote-ref-28)
29. See, for instance, para 44 of his Opinion, to which the judgment referred, which reads as follows: ‘As regards the risk for the distribution system of an industrial unit which is vital for national security, I am of the view that the defendant Government has not shown that, in order to protect national security, it is essential to link the transfer of the storage to the obligation to acquire the products. I myself see no reason why, if under the present system the refineries can store their own products, they cannot, under a system governed by the laws of the market and of free competition, store the products which the marketing undertakings acquire from other Member States’. [↑](#footnote-ref-29)
30. *R (Mabanaft Limited) v Secretary of State for Energy and Climate Change* [2009] EWCA Civ 224. [↑](#footnote-ref-30)
31. Directive 2006/67/EC [2006] OJ L 217/8, repealed by Council Directive 2009/119/EC OJ L 265/9. [↑](#footnote-ref-31)
32. Council Regulation 3285/94 [1994] OJ L 275/1, Art 24(2)(a)(i). [↑](#footnote-ref-32)
33. For instance, Council Regulation 2603/69 on common rules on exports [1969] OJ L 324/25, amended by Regulation 3918/91 [1991] OJ L 372/31 (Art 11). [↑](#footnote-ref-33)
34. See, for instance, Council Regulation 227/77 on Community transit [1977] OJ L 38/1, Art 10 as interpreted by the Court in Case C-367*/89 Richardt* (n 13) paras 17-18. [↑](#footnote-ref-34)
35. See, for instance, Directive 2004/18/EC on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts [2004] OJ L 134/114, Art 14 on secret contracts and contracts requiring special security measures. However, there is also a provision in the preamble (recital 6) according to which ‘[n]othing in this Directive should prevent the imposition or enforcement of measures necessary to protect public policy, public morality, public security, health, human and animal life or the preservation of plant life, in particular with a view to sustainable development, provided that these measures are in conformity with the Treaty’. [↑](#footnote-ref-35)
36. Dir 2006/54/EC on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation [2006] OJ L 204/23. The precursor to this measure was Dir 76/207 [1976] OJ L 39/40. The case-law examined in this section refers to the latter. [↑](#footnote-ref-36)
37. Case C-273/97 *Sirdar v The Army Board and Secretary of State for Defence* EU:C:1999:523. [↑](#footnote-ref-37)
38. C-285/98 *Kreil v Bundesrepublik Deutschland* EU:C:2000:2. [↑](#footnote-ref-38)
39. Case C-186/01 *Dory v Germany* EU:C:2003:146. [↑](#footnote-ref-39)
40. See also Case 222/84 *Johnston v Chief Constable of the Royal Ulster Constabulary* EU:C:1986:206. [↑](#footnote-ref-40)
41. See also Case 248/83 *Commission v Germany* EU:C:1985:214; Case C-1/95 *Gerster* EU:C:1997:452. [↑](#footnote-ref-41)
42. Case C-186/01 *Dory* (n 39) para 35. [↑](#footnote-ref-42)
43. ibid para 39. [↑](#footnote-ref-43)
44. ibid para 40. [↑](#footnote-ref-44)
45. ibid, para 41. [↑](#footnote-ref-45)
46. ibid. [↑](#footnote-ref-46)
47. In relation to the judgment in *Sirdar,* for instance, Ellis thought ‘the degree of gender-stereotyping contained within [the acceptance by the Court of the principle of operability as a valid rationale for excluding women form the Royal Marines] little short of staggering. Why, it may be asked, is it beyond question that a woman can be a chef but not a commando? And why did the Court not even pay lip service to the examination of this issue?’: E Ellis, ‘The recent jurisprudence of the Court of Justice in the field of sex equality’ (2000) 37 *CML Rev* 1403, 1414-5. [↑](#footnote-ref-47)
48. These issues are analysed in P Koutrakos, ‘EC law and equal treatment in the armed forces’, (2000) 25 *EL Rev* 433 and ‘How far is far enough? EC law and the organization of the armed forces after *Dory’* (2003) 66 *MLR* 759. [↑](#footnote-ref-48)
49. Dir 2004/38/EC [2004] OJ L 158/77. [↑](#footnote-ref-49)
50. ibid Art 27(1). [↑](#footnote-ref-50)
51. ibid Art 28(2). [↑](#footnote-ref-51)
52. ibid Art 28(3) where this highly restrictive condition is also imposed on expulsion orders on minors, except where such a measure is in accordance with the UN Convention on the Rights of the Child. [↑](#footnote-ref-52)
53. See recitals 23 and 24 of the preamble to CRD [↑](#footnote-ref-53)
54. Case C-145/09 *Tsakouridis* EU:C:2010:708. [↑](#footnote-ref-54)
55. ibid paras 46 and 47. [↑](#footnote-ref-55)
56. First recital of preamble to Council Framework Dec 2004/757/JHA laying down minimum provisions on the constituent elements of criminal acts and penalties in the field of illicit drug trafficking [2004] OJ L 335/8. [↑](#footnote-ref-56)
57. Case C-348/09 *PI* EU:C:2012:300. [↑](#footnote-ref-57)
58. [2011] OJ L 335/1. The Court refers to the preamble to and Articles 3 and 9 of the Directive. [↑](#footnote-ref-58)
59. Case C-348/09 *PI* (n 57) para 28 [↑](#footnote-ref-59)
60. See G Anagnostaras, ‘Enhanced Protection of EU Nationals against Expulsion and the Concept of Internal Public Security: Comment on the *PI* Case’ (2012) 37 *EL Rev* 627. [↑](#footnote-ref-60)
61. See D Kochenov and B Pirker, ‘Deporting the Citizens within the European Union: A Counter-Intuitive Trend in Case C-347/09, *P.I.*’(2013) 19 *Columbia Journal of European Law* 369 and D Kostakopoulou-Dochery and N Ferreira, ‘Testing Liberal norms: the Public Policy and Public Security Derogations and the Cracks in European Union Citizenship’ (2014) 20 *Columbia Journal of European Law* 167. [↑](#footnote-ref-61)
62. Azoulai and Coutts refer to ‘the socialization of the concept of public security’: L Azoulai and S Coutts, ‘Restricting Union citizens’ residence rights on grounds of public security. Where Union citizenship and and the AFSJ meet: *P.I.*’ (2013) 50 *CML Rev* 553, 559-561. [↑](#footnote-ref-62)
63. Recital 17 to CRD. For an analysis of the concept of integration from a different perspective, see the chapter by S Iglesias Sánchez and D Acosta Arcarazo in this volume. [↑](#footnote-ref-63)
64. These are set out in the second subpara of Art 83(1) TFEU as follows: terrorism, trafficking in human beings and sexual exploitation of women and children, illicit drug trafficking, illicit arms trafficking, money laundering, corruption, counterfeiting of means of payment, computer crime and organised crime. [↑](#footnote-ref-64)
65. See, to that effect, Azoulai and Coutts (n 62) 569-570. [↑](#footnote-ref-65)
66. According to the Court, this is about the existence in the individual concerned of a propensity to act in the same way in the future: Case C -348/09 *PI* (n 57) para 30. [↑](#footnote-ref-66)
67. Arts 27(3) and 28(1) CRD. See also Art. 33(2) CRD. [↑](#footnote-ref-67)
68. See, for instance, Case C-67/74 *Bonsignore* EU:C:1975:34 and Case 30/77 *Bouchereau* EU:C:1977:172. [↑](#footnote-ref-68)
69. See F Wollenschlaeger, ‘The judiciary, the legislature and the evolution of Union citizenship’ in P Syrpis (ed), *The Judiciary, the Legislature and the EU Internal Market* (Cambridge, Cambridge University Press, 2012) 302 and, in the same collection, N Nic Shuibhne, ‘The Third Age of EU citizenship: Directive 2004/38 in the case law of the Court of Justice’ 331. [↑](#footnote-ref-69)
70. See also Case 30/77 *Bouchereau* (n 68) para 29. [↑](#footnote-ref-70)
71. Case C-145/09 *Tsakouridis* (n 54)para 52 with reference to Case C-400/10 PPU *McB* EU:C:2010:582 para 53. [↑](#footnote-ref-71)
72. The Court points out that in the case of an EU citizen who has spent most or even all of her childhood and youth in the host Member State, ‘very good reasons would have to be put forward to justify the expulsion measure’: *Tsakouridis* (n 54)para 53. [↑](#footnote-ref-72)
73. Case C-300/11 *ZZ* EU:C:2013:363. [↑](#footnote-ref-73)
74. ibid para 57 with reference to Case C-415/05 P *Kadi* EU:C:2008:30 para 344. [↑](#footnote-ref-74)
75. ibid para 58. [↑](#footnote-ref-75)
76. ibid para 62. [↑](#footnote-ref-76)
77. ibid para 64. [↑](#footnote-ref-77)
78. ibid para 65. [↑](#footnote-ref-78)
79. ibid para 66. [↑](#footnote-ref-79)
80. ibid para 67. [↑](#footnote-ref-80)
81. ibid para 68. [↑](#footnote-ref-81)
82. Case C-415/05 P *Kadi* (n 74). [↑](#footnote-ref-82)
83. See, for instance, Case C-470/93 *Mars* EU:C:1995:224. [↑](#footnote-ref-83)
84. Case no SC/63/2007 *ZZ v Secretary of State for the Home Department* [2014] EWCA Civ 7 para 18. [↑](#footnote-ref-84)
85. *FV (Italy) v Secretary of State for the Home Department* [2012] EWCA Civ 1199. [↑](#footnote-ref-85)
86. *R (Daha Essa) v Upper Tribunal (Immigration and Asylum Chamber) & anr* [2012] EWCA Civ 1718. [↑](#footnote-ref-86)
87. Case C-145/09 *Tsakouridis* (n 54) para 50, quoted by the Court of Appeal in *Daha Essa* ibid. [↑](#footnote-ref-87)
88. *In the Matter of Applications by Siegnerella Elaine Flaneur and Siegnette Elaine Flaneur for Judicial Review* [2011] NICA 72. For an example of a proportionality analysis sanctioned by the Court of Appeal, see *Wolfgang Schmelz v The Immigration Appeal Tribunal* [2004] EWCA Civ 29. [↑](#footnote-ref-88)
89. Case 222/84 *Johnston* (n 40) para. 27. See also the Opinion of AG Jacobs in Case C-120/94 *Commission v Greece (FYROM)* EU:C:1996:116 para 46. [↑](#footnote-ref-89)
90. For an analysis, see P Koutrakos, ‘Is Article 297 EC “a reserve of sovereignty”?’ (2000) 37 *CML Rev* 1339, and C Stefanou and H Xanthaki, *A Legal and Political Interpretation of Articles 224 and 225 of the Treaty of Rome: The Former Yugoslav Republic of Macedonia Cases* (Aldershot, Dartmouth and Ashgate, 1997). [↑](#footnote-ref-90)
91. The precursor to Art. 347 TFEU was invoked in the late 1960s and 1970s by the Member States in order to impose economic sanctions on third countries: see Koutrakos, *Trade, Foreign Policy and Defence* (n 20) 58-60. [↑](#footnote-ref-91)
92. Case C-120/94 *Commission v Greece (FYROM)* (n 89). [↑](#footnote-ref-92)
93. ibid para 50. [↑](#footnote-ref-93)
94. ibid. [↑](#footnote-ref-94)
95. ibid para 60. [↑](#footnote-ref-95)
96. ibid para 54. [↑](#footnote-ref-96)
97. Further in his Opinion, AG Jacobs points out that ‘what matters is not so much that Greece’s fears may be unfounded but rather that those fears appear to be genuinely and firmly held by the Greek Government and, it would appear, by the bulk of the Greek people. Where a government and a people are fervently convinced that a foreign State is usurping a part of their cultural patrimony and has long-term designs on a part of their national territory, it would be difficult to say that war is such an unlikely hypothesis that the threat of war can be excluded altogether. If such matters were to be judged exclusively by what external observers regarded as reasonable behaviour, wars might never occur’ (para 58). [↑](#footnote-ref-97)
98. ibid para 56. [↑](#footnote-ref-98)
99. See the criticism in Koutrakos, ‘Is Article 297 EC “a reserve of sovereignty”?’ (n 90) 1356-1359. [↑](#footnote-ref-99)
100. This section draws upon P Koutrakos, ‘The application of EC law to defence-related industries—changing interpretations of Article 296 EC’ in C Barnard and O Odudu (eds), *The Outer Limits of European Union Law* (Oxford, Hart Publishing, 2009) 307. [↑](#footnote-ref-100)
101. In relation to public procurement, see COM (2004) 608 final *Green Paper on Defence Procurement* 6. [↑](#footnote-ref-101)
102. See Koutrakos, *Trade, Foreign Policy and Defence* (n 20) 175–82. [↑](#footnote-ref-102)
103. Written Question E-1324/01 [2001] OJ C/364E/85. In the meantime, it had only been published in academic analyses: see H Wulf (ed), *Arms Industry Limited* (Oxford, Oxford University Press, 1993) 214. [↑](#footnote-ref-103)
104. Another factor has been the gradual adoption of secondary legislation applicable to defence industries in areas such as public procurement and intra-Union transfers. See the analysis in P Koutrakos, *The EU Common Security and Defence Policy* (Oxford, Oxford University Press, 2013) Ch 9 and M Trybus, *Buying Defence and Security in Europe – The EU Defence and Security Procurement Directive in Context* (Cambridge: Cambridge University Press, 2014). [↑](#footnote-ref-104)
105. Case C-414/97 *Commission v Spain* EU:C:1999:417. [↑](#footnote-ref-105)
106. Case T-26/01 *Fiocchi* EU:T:2003:248; Case C-337/05 *Commission v. Italy* EU:C:2008:203; Case C-157/06 *Commission v. Italy* EU:C:2008:530; Case C-284/05 *Commission v Finland* EU:C:2009:778; Case C-294/05 *Commission v Sweden* EU:C:2009:779; Case C-372/05 *Commission v Germany* EU:C:2009:780; Case C-409/05 *Commission v Greece* EU:C:2009:782; Case C-461/05 *Commission v Denmark* EU:C:2009:783; Case C-378/05 *Commission v Italy* EU:C:2006:581; and Case C-239/06 *Commission v Italy* EU:C:2009:784; Case C-615/10 *Insinööritoimisto InsTiimi Oy*EU:C:2012:324. [↑](#footnote-ref-106)
107. In Case C-337/05 *Commission v Italy* ibid the Grand Chamber pointed out that ‘the purchase of equipment, the use of which for military purposes is hardly certain, must necessarily comply with the rules governing the award of public contracts. The supply of helicopters to military corps for the purpose of civilian use must comply with those same rules’ (para 47). [↑](#footnote-ref-107)
108. Ibid, [↑](#footnote-ref-108)
109. Opinion in Case C-284/05 *Commission v Finland* EU:C:2009:67;Case C-294/05 *Commission v Sweden*; Case C-372/05 *Commission v Germany*; Case C-409/05 *Commission v Greece*; Case C-461/05 *Commission v Denmark*; Case C-387/05 *Commission v Italy* paras 114 and 113 respectively. [↑](#footnote-ref-109)
110. For a similar argument in the context of consumer protection, see the chapter by S Weatherill in this book. [↑](#footnote-ref-110)
111. n 106 . [↑](#footnote-ref-111)
112. See C Barnard, ‘Free movement of natural persons’ in C Barnard and S Peers (eds), *European Union Law* (Oxford: Oxford University Press, 2014) 356, 398. [↑](#footnote-ref-112)
113. See the early analysis in P Koutrakos, ‘Healthcare as an Economic Service under EC Law’ in M Dougan and E Spaventa (eds), *Social Welfare and EU Law* (Oxford: Hart Publishing, 2005) 106. [↑](#footnote-ref-113)