Schengen's Judicial Gap

Master Thesis International and European Public Law

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1 Introduction

The case of Mr. de Vries:

"In this case, Mr. de Vries started legal proceedings before the German court against the decision of the German authorities to refuse him entry permission as well as the decision to fine him for non compliance with the checks which were temporarily reintroduced at a single border crossing point between the Netherlands and Germany near the AWACS base in Geilenkirchen, Germany. The decision of the German government to invoke this measure was based on Article 23 of the Schengen Border Code and was strongly connected to the tense situation which existed in this area. This tense situation is caused by the conflict which has existed between the Dutch village, Schinveld, and the AWACS base in Geilenkirchen since the establishing of the AWACS in this area. Since the beginning, this Dutch village has been confronted with AWACS aircrafts which fly over the houses.[1] This resulted in a great deal of distress with the citizens of this village because the aircrafts caused a lot of noise. Apart from the noise aspect, the citizens especially feared that the old-fashioned engines of these aircrafts would endanger their safety and health.[2]

The objection of the citizens against the AWACS base increased as a result of the plans of the Dutch government, requested by the AWACS base, to cut the forest between the AWACS base and the village.[3] It is the opinion of the AWACS base that the cutting of these trees, which are located near the approach route, would increase the safety of the pilots during the ascending and landing procedure; the pilots would have a better view of the airstrip.[4] The citizens, on the other hand, feared that this step would cause more danger to their health and safety. In their eyes, these trees prevented the aircrafts from flying lower over the houses.[5] In 2004, once these plans of the Dutch government became more defined, environmental groups became involved in the conflict; they were against the 'destruction' of the forest.[6] This indicates, however, that the incentive of these groups to become involved in the conflict differed from the incentive of the citizens to participate in the conflict.[7] The aim

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[1] P. de Graaf, 'Schinveld begint eigen bulderbos tegen het gebrul', *de Volkskrant* 7 februari 2004 retrieved via http://www.volkskrant.nl on 3 October 2007; 'AWACS vliegt 25 jaar over Schinveld' retrieved via http://www.l1.nl/L1NWS/_rp_links4_elementId/1_583865 on 1 October 2007.
[2] 'Verbod op aanwezigheid in 'NAVO-bos' *NRC Handelsblad* 4 januari 2006, retrieved via http://www.nrc.nl on 1 October 2007.
[3] P. de Graaf, 'Schinveld begint eigen bulderbos tegen het gebrul', *de Volkskrant* 7 februari 2004 retrieved via http://www.volkskrant.nl on 3 October 2007; M. Hegener, 'Voor GroenFront! is het gekapte bos van Schinveld een overwinning: Bosbezetters in polonaise', *NRC Handelsblad* 14 januari 2006 retrieved via http://www.nrc.nl on 1 October 2007.
[4] 'Vliegen in de achtertuin' *NRC Handelsblad* 20 juli 2007 retrieved via http://www.nrc.nl on 1 October 2007.
[5] 'Verbod op aanwezigheid in 'NAVO-bos' *NRC Handelsblad* 4 januari 2006, retrieved via http://www.nrc.nl on 1 October 2007.
[6] M. Hegener, 'Voor GroenFront! is het gekapte bos van Schinveld een overwinning: Bosbezetters in polonaise', *NRC Handelsblad* 14 januari 2006 retrieved via http://www.nrc.nl on 1 October 2007.
[7] M. Hegener, 'Voor GroenFront! is het gekapte bos van Schinveld een overwinning: Bosbezetters in polonaise', *NRC Handelsblad* 14 januari 2006 retrieved via http://www.nrc.nll on 1 October 2007.

of the citizens is the shifting of the AWACS base to another place or, at least, improvement of the engines of the aircrafts to promote the safety and health of the citizens.[8] *The protection of the forest is less important to them. The interest of the environmental groups, on the contrary, is exclusively on the protection of the forest; for them, the environmental aspect of this plan is important.*[9]

After the decision of the Dutch government to cut the trees in the beginning of 2006 was published, the environmental groups occupied the forest in the period between Christmas 2005 and the first two weeks of January 2006.[10] *Despite the fact that most citizens of the village supported this action, mainly members of the environmental groups participated in this action. Except for the use of force in order to coerce the environmental groups to leave the trees, during this action there was no use of violence. Following that action, these trees were cut by the Dutch government. During the preparations for the celebration of twenty-fifth anniversary of the AWACS base*[11]*, the news spread that the environmental groups planned to occupy another part of the forest in the period before the festivities.*[12] *This news evoked the fear of the German government that the media attention during the festivities would cause the environmental groups to take actions which would lead to an uncontrollable situation. The German government, therefore, decided to rely on Article 23 of the Schengen Border Code to keep these 'troublemakers from outside' away from their territory during the period of the festivities.*

However, the German government did not take into account the many persons who pass this border crossing point daily to reach their work at the AWACS base. Mr. de Vries is one of those citizens who have not become involved in the conflict because he works at the AWACS base. Mr. de Vries is employed by the AWACS base as a mechanic since 1989. He depends on the continuing presence of the AWACS base in this area in order to support his wife and two children. Because he is middle-aged it would be problematic for him to find a new job if the AWACS base would be moved as a result of the continuing conflict. In the period of the festivities, he was confronted with the controls on persons and goods at this border crossing point and was hindered by them on his way to work. In the first days, he complied dutifully with these checks but, as days, passed he noticed that the waiting time at the border crossing point increased daily as a result of the border controls. On the fourth day of the border controls, he became so agitated as a result of the long waiting period, because he feared that he would lose his job as a result of his being late for work, that he caused a stir which led to the

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[8] 'Verbod op aanwezigheid in 'NAVO-bos' *NRC Handelsblad* 4 januari 2006, retrieved via http://www.nrc.nl on 1 October 2007.
[9] M. Hegener, 'Voor GroenFront! is het gekapte bos van Schinveld een overwinning: Bosbezetters in polonaise', *NRC Handelsblad* 14 januari 2006 retrieved via http://www.nrc.nl on 1 October 2007
[10] M. Hegener, 'Voor GroenFront! is het gekapte bos van Schinveld een overwinning: Bosbezetters in polonaise', *NRC Handelsblad* 14 januari 2006 retrieved via http://www.nrc.nl on 1 October 2007; 'Verbod op aanwezigheid in 'NAVO-bos' *NRC Handelsblad* 4 januari 2006, retrieved via http://www.nrc.nl on 1 October 2007.
[11] 'AWACS vliegt 25 jaar over Schinveld' retrieved via http://www.l1.nl/L1NWS/_rp_links4_elementId/1_583865 on 1 October 2007.
[12] 'Nieuwe bezetting bossen Schinveld voorbereid' *NRC Handelsblad* 13 June 2007 retrieved via http://www.nrc.nl/anp/binnenland/article722195.ece/Nieuwe_bezetting_bossen_Schinveld on 1 October 2007.

decision to refuse him entry permission as well as to fine him. In the legal proceedings before the German Court, Mr. de Vries argued that the decision to refuse him entry permission and to fine him as a result of the border controls was an obstruction of his right to move freely between two Member States without the hurdles of internal border controls as stated in Article 14 EC and Article 39 EC. The German government, on the other hand, claimed that the decision to rely on temporary border controls to protect its public policy was legitimate on the grounds of Article 23 of the Schengen Border Code. The German court has to address the question whether to apply the rules on the right of free movement of persons or the rules of the Schengen acquis?"

This case presents the problem which is caused by the exclusion of jurisdiction of the Court of Justice which is included in Title IV of the EC Treaty. As the previous description pointed out, in this case there is a Union citizen who claims that his right to move freely between Member States is obstructed as a result of the temporary border controls, while on the other hand the Member State relies on its competence to reintroduce temporary border controls in exceptional situations. Despite the fact that both of these rights are based on Community law, both rights derive from Article 14 of the EC Treaty, the Court is forbidden to pass a judgement in this conflict.[13] Article 68(2) forbids the Court to rule on the validity of the decision to reintroduce temporary border controls.[14] This provision was introduced in Community law to compensate the Member States for the "loss of control" at their internal borders. This provision offers the Member States freedom in relying on the competence to reintroduce temporary border controls; because they do not have to fear being reprimanded by the Court of Justice about the invocation of this competence.[15] For the Union citizens, however, this provision entails that the Court of Justice is excluded from reviewing a measure which affects their fundamental freedom of movement. As a result the Union citizens are not offered complete judicial protection because the Court of Justice, which is most competent to rule on Community law matters, is denied competence.

The central question which needs to be answered in this thesis is: *How should the national court handle a conflict between the right to reintroduce temporary controls at internal borders and the right of free movement of persons?* By answering this central question I hope to establish guidelines which will provide assistance to the national courts in handling this matter.

For a better understanding of the subject of the thesis, I will discuss in the second chapter of this thesis the position of Mr. de Vries in this case. In this chapter I will focus on the argument put forward by Mr. de Vries. His main argument against the reintroduction of temporary border controls is that this measure does not meet the strict conditions of Article 27 and 28 of Directive 2004/38/EC, which must be fulfilled to derogate from the right of free movement of persons. Before these strict conditions will

[13] Guild and Peers 2001, p. 284-285; Craig & De Burca 2003, p. 1180-1183.
[14] Monar, 2000, p. 31.
[15] Monar 1998, p. 330-331; Papagianni 2001-2002, p. 123; Groenendijk 2004, p. 157-158; Groenendijk 2004, p. 150-151.

be applied to this case, I will give an overview of the development of both the right of free movement and these strict conditions.

In the third chapter, the focus will be on the position of the German government in this conflict. The German government claims that the decision to reinstate temporary border controls was legitimate because Article 23 of the Schengen Borders Code attributes to a Member State the competence to reinstate temporary controls at the internal borders, if it is necessary for maintaining public policy or internal security. In order to establish a complete picture of this competence of the Member States, I will discuss the legal background of the notion of the abolition of internal border controls in the European Union, before I will apply the conditions of Article 23 Schengen Borders Code to this case. The discussion of the legal background will focus on the problematic development of the realisation of the notion of the abolition of internal border controls in the European Union. Secondly, this chapter will focus on the way in which the Member States have used the public policy exception to derogate from the duty of no internal border controls by referring to the research of Mr. Kees Groenendijk on the conduct of Member States in relying on the competence to reintroduce temporary border controls.

The fourth chapter will discuss the problems with which the German court is confronted in dealing with this conflict. First the German court will be confronted with the prohibitions of Article 68 of the EC Treaty. The German court will not be able to ask the Court of Justice for guidance in dealing with this conflict, because the first paragraph of this provision denies lower national courts to refer a preliminary question to the Court of Justice and, secondly, the second paragraph denies the Court of Justice jurisdiction in the matter of temporary controls at internal borders.[16] Because it is undesirable that this provision can prevent the Union citizens from receiving effective judicial protection against a measure based on Article 62(1) of the EC Treaty, it is necessary to answer whether or not it is possible for the Court of Justice to bypass the prohibition of Article 68(2) EC? If it is indeed possible to bypass the prohibition of Article 68(2) and, consequently, to grant the Court of Justice jurisdiction in this conflict, the substantive discussion of the conflict becomes important: How will the Court of Justice possibly deal with this case? By answering this last question I hope to establish some guidelines for the German court with which it can resolve the conflict.

In the last chapter I will answer my research question.

[16] Monar 1998, p. 330-331.

2 The Right of Free Movement of Persons

2.1 Introduction

After the introduction of the case in the first chapter, this chapter will focus on the argument set forth by Mr. de Vries. He is a Dutch national who was confronted with checks at the border crossing-point near the AWACS base in Geilenkirchen, Germany. Mr. de Vries argued that the decision to reintroduce temporary border controls hindered him in travelling to another Member State to work. His argumentation is based on the right to free movement of persons which has become one of the fundamental freedoms in Community law.[17] Especially the strict conditions developed by the Court of Justice to limit the public policy concept in the field of the right of free movement of persons are important in his argument.[18] In his eyes, the reintroduction of temporary border controls does not meet the conditions that the Court of Justice has developed in its case law. However, before we can apply the case law of the Court of Justice on the right of free movement as well as the public policy concept to his situation, it is important to establish the complete legal framework. This description will focus on the legal conditions that can both be deduced from the legal instruments, as well as the case law of the Court of Justice.

In the second paragraph, I will try to establish a complete picture of the development of the right of free movement by focusing both on the right of free movement as such and the derogations to this right. The next paragraph will entail a more detailed discussion of both the material and procedural conditions which have been developed by the Court of Justice. In the fourth paragraph I will apply these conditions to the case of Mr. de Vries. In the last paragraph I will give my conclusion.

2.2 The right of free movement of persons

2.2.1 The right of free movement

If a person speaks about the right to free movement of persons within the European Union he has in mind the right of citizens to travel freely to a different Member State as well as the right to reside freely in that Member State.[19] This fundamental freedom is, together with the other three fundamental freedoms, found in Article 3(1) (c) of the EC Treaty, and regarded as one of the foundations of the

[17] Case 41/74 *Van Duyn* [1974] ECR I-01337, consideration 18; Eijsbouts, Jans & Vogelaar 2004, p. 67-69 and 100; Hall 1991, p. 488.
[18] These strict conditions will be discussed in paragraph 2.3; see also Craig & De Burca 2003, p. 825-841.
[19] Consideration 5 and Article 3 of Directive 2004/38/EC O.J. L 158, 30-04-2004, p. 79 and 88-89; Weiss and Wooldridge 2002, p. 11.

internal market.[20] In other words, the creation of an internal market between the Member States can only be accomplished if citizens have the possibility to exercise these freedoms within the common area of the Member States.[21] The connection of the right of free movement of persons with the internal borders market is elaborated in Article 14 of the EC Treaty.[22] This Article provides that the Community must establish an internal market which exists, on the one hand, of an area without internal border controls and, on the other hand, of free movement of persons.[23] In *Wijsenbeek*[24], the Court of Justice concluded that until the necessary flanking measures were adopted to realise the area without border controls,[25] the Member States continued to be allowed to perform checks occasionally but not in a manner that would be systematic.[26] Persons enjoying the right to move freely between the Member States may no longer be subjected to standard checks at the internal borders.[27] Due to the importance of these freedoms with regard to the internal market which is necessary to attain the objective of the EU, an economically stable and durable Community, these freedoms have been awarded the status of fundamental principles.[28] The general legal codification of the right of free movement can be found in Article 18(1) EC which provides the following:[29]

> *"1. Every citizen of the Union shall have the right to move and reside freely within the territory of the Member States, subject to the limitations and conditions laid down in this Treaty and by the measures adopted to give it effect"*[30]

This provision was introduced by the Maastricht Treaty and it mentions that only Union citizens are considered to be beneficiaries of the right to move and reside freely within the territory of the Member States.[31] The only precondition that, in principle, must be fulfilled is the status of citizen of the Union.

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[20] Article 3(1) (c) of the EC Treaty O.J. C 325 24-12-2002, p. 40; Weiss and Wooldridge 2002, p. 15.
[21] Eijsbouts, Jans & Vogelaar 2004, p. 67-68; Hall 1991, p. 488.
[22] Craig & De Burca 2003, p. 1180; Guild and Peers 2001, p. 280 and 284-285.
[23] Craig & De Burca 2003, p. 1180; see the description of the internal market in Article 14(2) of the EC Treaty O.J. C 325 24-12-2002, p. 44.
[24] Case C-378/97 *Wijsenbeek* [1999] ECR I-6207.
[25] Case C-378/97 *Wijsenbeek* [1999] ECR I-6207, consideration 42; Weiss and Wooldridge 2002, p. 17-18 and 54.
[26] Barnard 2007, p. 422-423; Weiss and Wooldridge 2002, p. 17-18 and 53; Case C-378/97 *Wijsenbeek* [1999] ECR I-6207, consideration 42; Staples 2000, p. 3.
[27] Staples 2000, p. 6; Guild and Peers 2001, p. 280; Weiss and Wooldridge 2002, p. 53-54.
[28] Eijsbouts, Jans & Vogelaar 2004, p. 67-69 and 100; Craig & De Burca 2003, p. 23 and 628; Articles 2 and 3(1) (c) of the EC Treaty O.J. C 325 24-12-2002, p. 40; Weiss and Wooldridge 2002, p. 14-15; Hall 1991, p. 488.
[29] Case C-50/06 *Commission v. the Netherlands* [2007] ECR I-04383, considerations 2 and 32-33; Weiss and Wooldridge 2002, p. 16.
[30] Text of Article 18 of the EC Treaty via http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:12002E018:EN:HTML downloaded on 14 September 2007.
[31] Craig & De Burca 2003, p. 755. Case C-50/06 *Commission v. the Netherlands* [2007] ECR I-04383, consideration 32; Weiss and Wooldridge 2002, p. 16 and 25.

As follows from Article 17(1) EC this status is conferred upon nationals of the Member States.[32] The scope of Article 18 was recently emphasized by the Court of Justice in *Commission v. the Netherlands.*[33] This case concerned an action of the Commission under Article 226 EC against the Netherlands regarding its legal measures taken against convicted foreigners on grounds of public policy. Under Dutch law, both third country nationals and Union citizens could automatically be expelled following a conviction.[34] The Commission argued that this conduct of the Netherlands was not compatible with secondary Community legislation concerning exceptions to the free movement of persons on grounds of public policy, Directive 64/221/EEC.[35] The Netherlands, on the other hand, argued that this legislation was not applicable because it concerned Union citizens who did not reside lawfully in the Netherlands.[36] The Court of Justice resolved this conflict by stating that every Union citizen, lawful or not lawful resident in a Member State, has the right of free movement as codified in Article 18(1) EC and can consequently invoke the protection offered by Directive 64/221/EEC.[37] If unlawfully residing Union citizens could not benefit from this directive, the effectiveness of the safeguards of Directive 64/221/EEC would decrease.[38] A Member State is therefore obliged to prove that the restriction fulfils the strict Community public policy concept. In a later paragraph of this chapter, I will discuss this public policy concept, developed by the Community, in detail.[39]

In the beginning of the process of establishing the EU framework the conferment of the right to move and reside freely was strongly connected to the economical aspect of this Community between the Member States.[40] The right of free movement found in the ECSC and EAEC Treaties was limited to workers who were employed in respectively the coal and steel sectors and nuclear sectors.[41] The EEC Treaty widened the scope of the free movement to all the economically active persons within the EU, employed, self-employed and service providers, irrespective of their profession.[42] The reason behind granting the right of free movement to economically active persons is connected with the view that this freedom would provide these 'factors of production'[43] an incentive to move from the place where there were no opportunities for them to the place where there were enough opportunities for them.[44]

In the current EC Treaty the rules governing the free movement for these three groups of economically active persons can still be found in three separate provisions; Article 39 applies to

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[32] Craig & De Burca 2003, p. 755; Barnard 2007, p. 409 and 416; Eijsbouts, Jans & Vogelaar 2004, p. 71.
[33] Case C-50/06 *Commission v. the Netherlands* [2007] ECR I-04383.
[34] Case C-50/06 *Commission v. the Netherlands* [2007] ECR I-04383, considerations 17 and 28.
[35] Case C-50/06 *Commission v. the Netherlands* [2007] ECR I-04383, considerations 17 and 28-30.
[36] Case C-50/06 *Commission v. the Netherlands* [2007] ECR I-04383, consideration 18.
[37] Case C-50/06 *Commission v. the Netherlands* [2007] ECR I-04383, considerations 35-37 and 40
[38] Case C-50/06 *Commission v. the Netherlands* [2007] ECR I-04383, considerations 32-37.
[39] Case C-50/06 *Commission v. the Netherlands* [2007] ECR I-04383, consideration 40.
[40] Barnard 2007, p. 249-250.
[41] Weiss and Wooldridge 2002, p. 12-13.
[42] Barnard 2007, p. 249.
[43] Barnard 2007, p. 250.
[44] Barnard 2007, p. 250.

workers, Article 43 to self-employed persons and Article 49 to service providers.[45] In the nineties a set of directives was adopted by the Council that widened the scope of free movement to economically inactive persons like students, Directive 93/96/EEC.[46] However, still not all Member State nationals can benefit from these directives because two strict prerequisites must be fulfilled; the person must possess at first sufficient financial resources and a health insurance covering all risks in the host Member State in order to prevent that this person would become a financial burden on the host Member State.[47]

The adoption of these different directives, regulating the free movement of the different groups, illustrates a fragmented approach towards this subject of Community law.[48] The adoption of Directive 2004/38/EC *on the right of the citizens of the Union and their family members to move and reside freely within the territory of the Member States of 29 April 2004*[49] changed this approach. The so-called Citizens' Rights Directive[50] is, at this moment, the most significant legal instrument in this field because it repeals the existing directives on the economically active as well as the economically inactive persons and provides one uniform set of rules in one document.[51]

The case study that was introduced at the beginning of the thesis concerned Mr. de Vries, a Dutch national, who is employed by the AWACS base in Germany and must thus travel on a daily basis from one Member State to another in order to get to work. Consequently, he enjoys a right of free movement as a worker, Article 39 EC. The previous section showed that this right of free movement of workers is elaborated by the new Directive 2004/38/EC; the provisions of this directive also apply to workers who exercise their right to free movement.[52] In the following section we will, therefore, while discussing the possibility of a Member State to restrict the free movement of a worker, not only take into account Article 39 EC but Directive 2004/38/EC as well.

2.2.2 The public policy exception

In this paragraph, the focus will be on the possibility to restrict the right of free movement of persons, in particular on the role of public policy: Is it possible to use this concept as a justification for derogating from the right of free movement of the Union citizens? If we take a look at the provisions

[45] Barnard 2007, p. 249.
[46] Besides this directive, the Council also adopted Directive 90/364/EEC concerning retired persons and Directive 90/365/EEC concerning people with sufficient financial resources and health insurance in the host member state, see Weiss and Wooldridge 2002, p. 19 footnote 25 and p. 42.
[47] Barnard 2007, p. 250.
[48] Weiss and Wooldridge 2002, p. 19.
[49] Directive 2004/38/EC *on the right of the citizens of the Union and their family members to move and reside freely within the territory of the Member States of 29 April 2004* OJ L 158, 30-04-2004, further addressed as Directive 2004/38/EC.
[50] Barnard 2007, p. 251.
[51] Barnard 2007, p. 250-251.
[52] Considerations 4 and 5 of Directive 2004/38/EC OJ L 158, 30-04-2004, p. 79.

of the EC Treaty concerning the four fundamental freedoms of movement in general, it is possible to distinguish provisions that include public policy as one of the reasons derogating from this right. In relation to the free movement of goods, for instance, public policy as a reason for exception is found in Article 30 EC.[53] As mentioned before, we will focus on the right of free movement as a worker and it must thus be noted that the relevant provision in relation to the public policy in this situation is Article 39(3) EC. This provision states the following:

> *"3. It shall entail the right, subject to limitations justified on grounds of public policy, public security or public health:*
> *(a) to accept offers of employment actually made;*
> *(b) to move freely within the territory of the member states for this purpose;*
> *(c) to stay in a member state for the purpose of employment in accordance with the provisions governing the employment of nationals of that state laid down by law, regulation or administrative action;*
> *(d) to remain in the territory of a member state after having been employed in that state, subject to the conditions which shall be embodied in implementing regulations to be drawn up by the Commission."*[54]

Like the other exceptions, public security and public health, found in this provision, public policy is used by the Member States as a shield against the interference of "Brussels". In other words, the reason of the Member States behind their decision to derogate from the fundamental freedoms, by using these exceptions, is the protection of their interests.[55] The fundamental freedoms are regarded as the instruments of the Community against which the Member States want to protect themselves via their own instruments, the exceptions.[56] I already noted above that the Court of Justice regards the rights of free movement as a fundamental principle of Community law and, consequently, interprets the derogations to these rights in a strict manner.[57] Because the wording of the EC Treaty provisions entailing the public policy exception do not provide the national authorities with any indication on how this concept had to be interpreted, this could indicate that the Member States have a broad margin of appreciation in interpreting this public policy concept in their national measures. In its case law concerning the public policy exception, the Court of Justice has stated that the Member States indeed have a discretionary power when applying the public policy exception in the field of the fundamental

[53] Craig & De Burca 2003, p. 626.
[54] Text of Article 39(3) of the Treaty establishing the European Community O.J. C 325 24-12-2002, p. 51 via http://eur-lex.europa.eu/en/treaties/dat/12002E/pdf/12002E_EN.pdf downloaded on 26 October 2007; Hall 1991, p. 467.
[55] Mortelmans 2004, p. 240-241.
[56] Mortelmans 2004, p. 240-241.
[57] Barnard 2007, p. 461; Craig & De Burca 2003, p.628-629 and 825; Eijsbouts, Jans & Vogelaar 2004, p. 67-69.

freedoms but that this discretionary power is subject to the control of the Court of Justice.[58] The Court of Justice underlined that since the public policy concept is used to restrict one of the fundamental rights in Community law, the right of free movement of persons, a Community approach towards this concept is required.[59]

The Council as well limited the discretionary power of the Member States in relation to the public policy exception in the field of free movement of persons by adopting Directive 64/221/EEC of 25 February 1964 *on the Coordination of Special Measures concerning the Movement and Residence of Foreign Nationals which are justified on Grounds of Public Policy, Public Security or Public Health.*[60] This directive contained provisions adopted in order to assist the national authorities in applying the public policy exception in a strict and precise manner.[61] The key provisions of this directive were Article 3(1) and (2) which stated the following:

> "1. Measures taken on grounds of public policy or of public security shall be based exclusively on the personal conduct of the individual concerned.
>
> 2. Previous criminal convictions shall not in themselves constitute grounds for the taking of such measures."[62]

However this directive did not provide a detailed definition of the public policy concept but merely delineated the circumstances which have to be taken into account when interpreting this notion.[63]

Recently, Directive 2004/38/EC *on the right of the citizens of the Union and their family members to move and reside freely within the territory of the Member States of 29 April 2004*[64] was adopted by the Council.[65] This directive introduces a uniform approach to the right of free movement within Community law by codifying the rules of Directive 64/221/EC on public policy and the subsequent case law of the Court of Justice in one legal instrument.[66] The merit of this directive is that all material and procedural safeguards that have to be taken into account when the public policy exception is invoked by a Member State can be found in one legal instrument.[67] In other words, with this directive,

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[58] Case 41/74 *Van Duyn* [1974] ECR I-01337, consideration 18; Case C-413/99 *Baumbast* [2002] ECR I-07091, consideration 91; Hall 1991, p. 480-481 and 484.
[59] Case 41/74 *Van Duyn* [1974] ECR I-01337, consideration 18.
[60] Directive 64/221/EEC *on the coordination of special measures concerning the movement and residence of foreign nationals which are justified on grounds of public policy, public security or public health* of 25 February 1964, O.J. 056 04-04-1964, p. 0850-0857; Hall 1991, p. 468; Boonk 1977, p. 119-127 and 132-136.
[61] Barnard 2007, p. 462-463; Case 41/74 *Van Duyn* [1974] ECR I-01337, consideration 13.
[62] Text of Article 3 of Directive 64/221/EEC O.J. 056 04-04-1964, p. 0850-0857 via http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31964L0221:EN:HTML, visited on 31 July 2007.
[63] Craig & De Burca 2003, p. 825-827.
[64] Directive 2004/38/EC *on the right of the citizens of the Union and their family members to move and reside freely within the territory of the Member States of 29 April 2004* O.J. L 158, 30-04-2004, p. 77-123.
[65] Barnard 2007, p. 462; Craig & De Burca, 2003, p. 840.
[66] Barnard 2007, p. 462.
[67] Barnard 2007, p. 462; Craig & De Burca, 2003, p. 840.

the Council offers the Member States a tighter definition of the conditions which will restrict the invocation of the public policy exception by the national authorities to even more exceptional situations.[68]

2.3 The conditions under Directive 2004/38/EC, based on the Court of Justice's case law and Directive 64/221/EEC

As I noted in the previous paragraph, despite the purpose of Directive 64/221/EC to assist the national authorities of the Member States in regard to the application of the public policy concept, it has particularly been the Court of Justice which has developed the conditions of the public policy concept which are codified in Directive 2004/38/EC.[69] In this paragraph I will discuss the conditions laid down by the Court by referring to the relevant provisions of Directive 2004/38/EC.

Substantive conditions

The relevant provisions of Directive 2004/38/EC concerning the substantive conditions for applying the public policy exception are Articles 27 and 28. These two provisions codify the substantive conditions that could be deduced from Article 3 of Directive 64/221/EEC and the Court's case law on this provision.[70] The discussion will first focus upon the conditions of Article 27 of Directive 2004/38/EC. This provision provides the following conditions:

> *"1. Subject to the provisions of this Chapter, Member States may restrict the freedom of movement and residence of Union citizens and their family members, irrespective of nationality, on grounds of public policy, public security or public health. These grounds shall not be invoked to serve economic ends.*
>
> *2. Measures taken on grounds of public policy or public security shall comply with the principle of proportionality and shall be based exclusively on the personal conduct of the individual concerned. Previous criminal convictions shall not in themselves constitute grounds for taking such measures. The personal conduct of the individual concerned must represent a genuine present and sufficiently serious threat affecting one of the fundamental interests of society.*

[68] Consideration 22 of Directive 2004/38/EC O.J. L 158, 30-04-2004, p. 84.
[69] Consideration 22 and Articles 27 and 28 of Directive 2004/38/EC O.J. L 158, 30-04-2004, p. 84 and 113-115; Barnard 2007, p. 461-462; Craig & De Burca, 2003, p. 840.
[70] Consideration 22 and Articles 27 and 28 of Directive 2004/38/EC O.J. L 158, 30-04-2004, p. 84 and p. 113-115; Barnard 2007, p. 462.

Justifications that are isolated from the particulars of the case or that rely on considerations of general prevention shall not be accepted."[71]

2.3.1 No economic ends

The first condition which is stated in Article 27(1) EC is the prohibition of an economic purpose for invoking this exception. In other words, the invocation of the public policy by the national authorities cannot be based upon the desire to protect their economy.[72] If the reason behind the decision of a Member State to use public policy to exclude or expel a Union citizen is the economic situation in its country, for instance the high level of unemployed persons, this decision will not pass the control of the Court of Justice. In other words, it is not allowed to use the public policy exception in relation to the fundamental freedom of persons as a disguised method of protectionism of the economic interests of the Member State.[73]

2.3.2 Personal conduct

In Article 27(2) of Directive 2004/38/EC the central condition is included: the decision to restrict the right to enter or to reside of a Union citizen must be exclusively based on the personal conduct of the individual concerned. What is regarded as personal conduct of the individual? In the cases, which will be discussed here, the Court of Justice has answered this question.

An important case in respect to the delineation of the concept of personal conduct is *Bonsignore.*[74] This case concerned the decision of the German authorities to deport an Italian national residing in Germany based upon public policy. The Italian national was convicted by a German court for his involvement in the accidental death of his brother which was caused by the careless handling of the firearm that the Italian national possessed unlawfully.[75] Due to the strong psychological problems the Italian national suffered from his involvement in the death of his brother he was punished less severely than in normal circumstances, but it still led to the decision to deport him.[76] The decision to expel him was strongly influenced by the increased violence among migrants in Germany; the expulsion measure thus functioned as a warning for other migrants to behave differently.[77] The Court of Justice stated that this decision to deport could not be justified by public policy because it was based upon general preventive reasons instead of reasons that proved that the presence of the individual in the Member State would lead to disturbance of the peace and security of the Member State. The individual himself,

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[71] Text of Article 27 of Directive 2004/38/EC O.J. L 158, 30-04-2004, p. 113-114.
[72] Craig & De Burca 2003, p. 826-827.
[73] Barnard 2007, p. 461.
[74] Case 67/74 *Bonsignore* [1975] ECR 00297.
[75] Case 67/74 *Bonsignore* [1975] ECR 00297, considerations 1 and 2.
[76] Case 67/74 *Bonsignore* [1975] ECR 00297, considerations 1 and 2.
[77] Case 67/74 *Bonsignore* [1975] ECR 00297, consideration 4; Hall 1991, p. 482.

the subject of the decision, must be responsible for the breach of the peace and security within the territory of the Member State.[78] In a later case, *Rutili,*[79] which concerned the decision to prohibit the residence of an Italian national in four departments of France based upon his political and trade union activities[80], the Court of Justice underlined that only the individual circumstances of a person must be regarded when discussing the personal conduct of the person subject to a measure concerning the restriction of free movement and residence.[81]

The Court of Justice introduced, through its decision, the restriction that free movement and residence of a person can only be justified by *the individual circumstances of the person and not general considerations* which exist in the Member State; the condition 'personal conduct' is thus linked to the individual circumstances.[82] This limitation is included in Article 27(2) of Directive 2004/38/EC. But what must be understood by individual circumstances of the person? Does the membership of an organization play a role in the assessment of the individual circumstances in a case?

This matter was decided in the V*an Duyn*[83]case. In this case a Dutch national was prohibited from taking up employment with the Scientology Church in the United Kingdom on grounds of public policy.[84] The Court of Justice decided that a Member State is competent to restrict the free movement or residence of a person based upon the public policy due to his or her membership of an organization if, on the one hand, this organization is regarded as socially harmful in that Member State and, on the other hand, that administrative measures have been taken by the host Member State.[85] The nationals of the Member State must be affected by these administrative measures in such a way that limits the disparities between the nationals and non-nationals:[86] these measures must decrease the discriminatory effects which exist as a result of the restriction of the right of free movement of non-nationals. [87]

Only a present membership of an organisation which expresses the voluntary choice of the person to take part in the activities of the organization based on shared values, however, falls within the scope of personal conduct.[88] In regards to the existence of a criminal conviction in the past of the person concerned, the Court of Justice stated in *Bouchereau*[89], that the past conviction of the French national for drugs possession could not justify the decision of the United Kingdom to expel him.[90] The stance

[78] Case 67/74 *Bonsignore* [1975] ECR 00297, considerations 6; C. Barnard 2007, p. 463.
[79] Case 36/75 *Rutili* [1975] ECR 01219.
[80] Case 36/75 *Rutili* [1975] ECR 01219 considerations 1-6.
[81] Case 36/75 *Rutili* [1975] ECR 01219, considerations 28-29; Craig & De Burca 2003, p. 831-835; Weiss and Wooldridge 2002, p. 148-149.
[82] Weiss and Wooldridge 2002, p. 148-149; Barnard 2007, p. 463.
[83] Case 41/74 *Van Duyn* [1974] ECR I-01337.
[84] Case 41/74 *Van Duyn* [1974] ECR I-01337, considerations 2-3; Barnard 2007, p. 463.
[85] Craig & De Burca 2003, p. 827-829.
[86] Barnard 2007, p. 469; Staples 2002, p. 239-240.
[87] Craig & De Burca 2003, p. 829-832.
[88] Case 41/74 *Van Duyn* [1974] ECR I-01337, considerations 17-19 and 24; Craig & De Burca 2003, p. 825-829; Weiss and Wooldridge 2002, p.146-147; Barnard 2007, p. 463-464.
[89] Case 30/77 *Bouchereau* [1977] ECR 01999.
[90] Case 30/77 *Bouchereau* [1977] ECR 01999, considerations 27-29; Barnard 2007, p. 465; Craig & De Burca 2003, p. 834-835.

of the Court of Justice was that a previous conviction only plays a role in so far as the behaviour which led to the conviction provides evidence that the person at the present moment is still a threat to the fundamental interests of society.[91] The relevant factor is that there must be a present threat to public policy.[92] Certain conduct within the past can only be taken into account in the assessment of the personal conduct, in so far as it proves that the present conduct still has the same features and can be recognized as a serious threat to public policy. [93]

2.3.3 Affecting the fundamental interests of society

In 1977, the Court of Justice for the first time gave an indication what is meant by public policy within the area of free movement; in *Bouchereau* the Court of Justice delineated the notion of public policy to the fundamental interests of a society.[94] However the question what must be understood by the fundamental interests of society is not answered by the Court of Justice. In *Calfa*[95], where an Italian woman was expelled for life by the Greek authorities due to the fact that she was convicted for drugs possession, the Court of Justice decided that the fact that the Member State regarded this offence as a disturbance of the social order is not enough to permit the restriction of the right of free movement.[96] The Court of Justice held that a criminal conviction does not automatically warrant the expulsion of a Union citizen; a criminal conviction may not be automatically linked to an expulsion measure.[97]

It can be argued that the condition of fundamental interests of society can only be fulfilled if it concerns values within a Member State that are essential to its existence; principles on which a State is founded.[98] In my opinion, fundamental interests of society should be interpreted as the principles on which a stable democratic State is founded[99]; the Court of Justice, for example, referred in *Bonsignore* to peace within a Member State as being part of public policy, thus falling within the notion of fundamental interests of a society.[100]

The previous description indicates that the Member State must prove that "the personal conduct represents a genuine, present and sufficiently serious threat to the fundamental interests of society".[101]

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[91] Case 30/77 *Bouchereau* [1977] ECR 01999, considerations 28.
[92] Barnard 2007, p. 465-466; Case 41/74 *Van Duyn* [1974] ECR I-01337, consideration 17.
[93] Case 30/77 *Bouchereau* [1977] ECR 01999, considerations 28.
[94] Case 30/77 *Bouchereau* [1977] ECR 01999, consideration 35; Barnard 2007, p. 465.
[95] Case C-348/96 *Calfa* [1999] ECR I-00011.
[96] Case C-348/96 *Calfa* [1999] ECR I-00011, considerations 21-25; Barnard 2007, p. 466.
[97] Case C-348/96 *Calfa* [1999] ECR I-00011, consideration 27; Barnard 2007, p. 466.
[98] Hall 1991, p. 485.
[99] Hall 1991, p. 485.
[100] Case 67/74 *Bonsignore* [1975] ECR 00297, consideration 6.
[101] Article 27 of Directive 2004/38/EC OJ L 158, 30-04-2004, p. 114.

The presence of the person concerned on the territory of the host Member State should thus present a grave danger to the fundamental interests of society.[102]

2.3.4 Proportionality

The fact that a Member State can prove that the conditions of Article 27 of Directive 2004/38/EEC have been fulfilled in a particular situation does not immediately justify the decision to exclude or expel a Union citizen from its territory. The Member State will only be competent to act that way if the decision passes the proportionality test.[103] In other words, the question which must be answered is whether or not the decision to exclude or expel is proportionate in the light of the objective that is protected by the decision. Article 28(1) states the circumstances that must be taken into account in the decision-making by the national authorities:

> *"1. Before taking an expulsion decision on grounds of public policy or public security, the host Member State shall take account of considerations such as how long the individual concerned has resided on its territory, his/her age, state of health, family and economic situation, social and cultural integration into the host Member State and the extent of his/her links with the country of origin"*[104]

The circumstances which were codified by the Council in this provision were stated by the Court of Justice in *Orfanopoulos/Olivieri*.[105] In these joined cases, the Court of Justice ruled that a decision to expel a Union citizen from the territory of his host Member State is only allowed after the national authorities have taken these circumstances into account.[106] The Court of Justice deduced these circumstances from the case law of the European Court of Human Rights.[107] This indicates that the stronger the bond of the Union citizen is with the host Member State, the more difficult it becomes for the national authority of that Member State to prove that the expulsion or exclusion is necessary. This bond is defined by the individual circumstances, the duration of the stay in the host Member State as well as the integration in the host Member State of the Union citizen.[108]

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[102] Case 41/74 *Van Duyn* [1974] ECR I-01337, considerations 17-19; Case 30/77 *Bouchereau* [1977] ECR 01999, considerations 28 and 35; Case 67/74 *Bonsignore* [1975] ECR 00297, consideration 6; Case 30/77 *Bouchereau* [1977] ECR 01999, consideration 35.
[103] Oosterom-Staples. 2006, p. 170.
[104] Text of Article 28(1) of Directive 2004/38/EC O.J. L 158, 30-04-2004, p. 115.
[105] Joined cases 482/01 and 493/01 *Orfanopoulos/Olivieri* [2004] ECR I-5257.
[106] Joined cases 482/01 and 493/01 *Orfanopoulos/Olivieri* [2004] ECR I-5257, consideration 99; Oosterom-Staples 2006, p. 170.
[107] Joined cases 482/01 and 493/01 *Orfanopoulos/Olivieri* [2004] ECR I-5257, consideration 99.
[108] Oosterom-Staples 2006, p. 170.

Procedural safeguards

After discussing the material conditions that must be fulfilled for a successful appeal to the public policy exception, I will discuss, in this paragraph, the procedural safeguards that must be taken into account by the national authorities. In other words, if the conditions of Article 27 and 28(1) of the directive have been fulfilled and thus merit the decision to exclude or expel an Union citizen, certain procedural safeguards in relation to this person have to be observed, if not, the decision will not pass the judicial control of the Court of Justice. The importance that is attributed to the safeguarding of these procedural rules is related to the notion that the individual must have the possibility to defend himself against the decision; that he has the opportunity to convince the competent authority that the situation is different.[109] The procedural safeguards, notification of the decision and access to the judicial control, can be found in Articles 30-33 of Directive 2004/38/EC.[110]

The first procedural safeguard that must be taken into account is included in Article 30 of the directive and entails that the person concerned is informed about the decision about him or her. The individual is informed by means of a written notification that entails the decision and the reasons on which the decision was founded.[111]

The second procedural safeguard can be found in Article 31 of Directive 2004/38/EC. This provision offers the individual concerned the possibility, after he has received the notification of the decision, to start an appeal procedure against this decision before an administrative body or a judicial body under the same conditions as a national of that Member State. The Member States are therefore not allowed to prevent the person concerned from challenging the decision that affected his position in his host Member State.[112] Article 31 of the Directive also requires that the national court focuses on both the legal and factual side of the case. [113] The condition of "present threat" in Article 27(2) of Directive 2004/38/EC indicates that the national court is obliged to review the case *ex nunc;* not *ex tunc*.[114] In other words, as follows from the case law of the Court of Justice, the national court also has to take the circumstances of the case into account which have occurred after the decision was taken by the national authorities when deciding if the decision is lawful.[115]

Thirdly, if the individual is indeed expelled from the host Member State, it does not entail a lifelong banishment from the territory of the Member State. Article 32(1) of Directive 2004/38/EC

[109] Weiss and Wooldridge 2002, p. 150.
[110] Articles 30-33 of Directive 2004/38/EC O.J. L 158, 30-04-2004, p. 116-119.
[111] Barnard 2007, p. 477.
[112] Barnard, p. 477-480.
[113] Oosterom-Staples 2006, p. 171.
[114] Oosterom-Staples 2006, p. 170; Barnard 2007, p. 466; Article 27(2) of Directive 2004/38/EC OJ L 158, 30-04-2004, p. 114.
[115] Oosterom-Staples 2006, p. 170-171; Barnard 2007, p. 466.

forbids exclusion for life; instead it governs that the individual can apply for a lifting of the expulsion decision after a reasonable period of time.[116]

Article 33 of Directive 2004/38/EC codifies the prohibition that an expulsion measure may not automatically follow a conviction; it may not be used as a penalty.[117]

2.4 Case study

The case study which was presented in the introduction of this thesis concerned the case of Mr. de Vries, a Dutch national, who is employed by the AWACS base in Geilenkirchen, Germany. Because of his employment in Germany, he falls within the scope of Article 39 EC which governs the free movement as a worker. The provisions of Directive 2004/38/EC apply to this case because Article 3 states that this directive applies to Union citizens who move to or reside within a Member State that is not the Member State of origin; in this case, Mr de Vries must travel between the Netherlands and Germany every day to reach his job.[118] In this case, however, he was hindered at the border on his way to work by the internal border controls that were temporarily reintroduced by the German authorities. Article 5 Directive 2004/38/EC grants Mr de Vries, as a Union citizen, the right to enter another Member State subject to the condition that he is in the possession of a valid passport or identity card. As has been explained before the limitation of the right of Mr. de Vries to enter Germany on grounds of public policy is only allowed if all the material and procedural conditions of the Directive have been fulfilled. In this section I will assess if the right of Mr. de Vries is rightfully or not curtailed as a result of the internal border controls.

At first I will discuss whether or not the condition of Article 27(1) of Directive 2004/38/EC has been fulfilled; that the motive behind the decision of the German authorities to reinstate temporary border controls was not an economical one.

No economic reasons: Since the beginning of the presence of the base near Schinveld, there has been a legal conflict about whether or not to cut the trees in the forest between the base and the village on grounds of increasing the safety during the landing of the planes.[119] The peak in this conflict occurred during 2006 when Groenfront, a group of environmentalists, and a small number of the residents

[116] Barnard 2007, p. 473; Case C-348/96 *Calfa* [1999] ECR I-00011 consideration 18; Weiss and Wooldridge 2002, p. 154.
[117] Barnard 2007, p. 468.
[118] Article 3 of Directive 2004/38/EC O.J. L 158, 30-04-2004, p. 88-89.
[119] M. Hegener, 'Voor GroenFront! is het gekapte bos van Schinveld een overwinning: Bosbezetters in polonaise', *NRC Handelsblad* 14 januari 2006 retrieved via http://www.nrc.nl on 1 October 2007.

occupied the forest in protest against the cutting of the trees.[120] This continuous conflict between, on the one hand, the community of the Dutch hometown of Mr. de Vries and, on the other hand, the Dutch government in cooperation with the NATO is the reason behind the temporary reintroduction of the border controls. Through these border controls, the German authorities want to prevent the escalation of the conflict during the festivities. The condition of Article 27(1) of Directive 2004/38/EC is fulfilled because the foregoing description indicates that there was no economic motive behind the reintroduction of the temporary border controls.

Secondly, it is necessary to ascertain whether or not the condition of Article 27(2) of Directive 2004/38/EC is fulfilled. Whether or not the personal conduct presents a present and serious threat to the fundamental interests of society?

Personal conduct: First we have to assess the personal conduct of Mr. De Vries. Does his conduct warrant the infringement of his right to enter Germany by the German authorities as a result of the internal border controls? As mentioned in *Bonsignore*[121] and later in *Rutili,*[122] the key factor in the assessment of the personal conduct are the individual circumstances of the person concerned.[123] The facts of the case have shown us that Mr. de Vries has lived all of his life in the small Dutch village near the AWACS base which is constantly fighting against the presence of the AWACS base. Mr. de Vries has been employed by the AWACS as a mechanic after he lost his previous job in 1990. As a result of being employed by the AWACS base he was put in an awkward position in the conflict and consequently he did not participate in the conflict; he did not show publicly any form of solidarity with the AWACS base or the demonstrators. Because for him, the continuing presence of the AWACS base in Geilenkirchen will mean that he keeps his job and thus has a regular income to provide for his family; thus what would he gain if the situation would become so out of control that NATO would decide to move the base? When Mr. de Vries arrived at the particular border crossing-point and first learned about the checks, his intention was to cooperate in order to continue his way to work like every other day. However, as time proceeded while waiting for his turn, he became restless and because he was afraid of the consequences of the delay; he was afraid to lose his job. As a result of his restlessness, he caused a commotion which consequently led to the decision to refuse him entry at that moment.

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[120] M. Hegener, 'Voor GroenFront! is het gekapte bos van Schinveld een overwinning: Bosbezetters in polonaise', *NRC Handelsblad* 14 januari 2006 retrieved via http://www.nrc.nl on 1 October 2007.
[121] Case 67/74 *Bonsignore* [1975] ECR 00297.
[122] Case 36/75 *Rutili* [1975] ECR 01219.
[123] Case 67/74 *Bonsignore* [1975] ECR 00297, consideration 6; Case 36/75 *Rutili* [1975] ECR 01219, considerations 27-29.

The fundamental interests of society: As follows from the text of Article 27(2) of Directive 2004/38/EC, the personal conduct of Mr. de Vries must affect the fundamental interests of Germany.[124] The fundamental interests that Germany wants to protect by invoking the competence of Article 23 of the Schengen Borders Code are the peace and security during the period of the festivities. The government wanted to keep the group of demonstrators outside its territory to prevent that this group could incite the situation until it would become uncontrollable. As I stated above, this was not the intention of Mr. de De Vries; he was not interested in causing problems instead he wanted to get to his work in time in order to maintain a good reputation as an employee. He did not want to cause grave danger to the peace and security in the area of the AWACS base.

In my opinion, based on this exposition of the facts, it is very unlikely that Mr. de Vries would act in any way which could affect the fundamental interests of Germany. The condition of Article 27(2) is thus not fulfilled because the conduct of Mr. de Vries cannot be regarded as presenting a serious and present threat to the fundamental interests of Germany.

Proportionality: Despite the fact that it must be concluded that the condition of Article 27(2) has not been fulfilled, we will still carry out the proportionality test of Article 28(1) of Directive 2004/38/EC. With this test we want to ascertain whether or not the infringement of the right of free movement of Mr. de Vries is proportionate in the particular circumstances of the case.

In principle, it must be said that the connection between Mr. de Vries and the Netherlands, his Member State of origin, is much stronger than the one he has with Germany, the host Member State because he and his family continue to live in the Netherlands. His job is the only reason that he travels daily between the Netherlands and Germany. However, this job is very important in sustaining his family life in the Netherlands. It provides him with the financial resources to buy food and provide health insurance for his family; he is economically dependent on this job. Moreover, due to his age he would have trouble finding a new job if he would be fired as a result of the fact that he was too late; it could be difficult for a person who is in his fifties to find a job these days. For that reason an infringement of his right to move freely due to the internal border controls would have grave consequences for him.

On the other hand, the measure of temporary border controls does not entail an absolute restriction of the right of free movement of persons. In principle the checks at the border crossing-point only present a hindrance in entering Germany. The persons only have to identify themselves by passport or identity card while passing the border crossing-point; after this has been done, the persons can continue their journey. Secondly, the reintroduction of internal border controls is a temporary measure. The border controls were only introduced for the duration of the celebration in order to prevent public

[124] Case 30/77 *Bouchereau* [1977] ECR 01999, consideration 35.

disorder which could disrupt the festivities. As soon as the celebration weekend was over, the controls at the border were stopped. Consequently, the impact of the temporary border controls on the right of free movement of Mr. de Vries is small.

As a result of the not so strong bond between Mr. de Vries and Germany as well as the limited effect of the temporary border controls on the right of free movement, it must be concluded that the decision of the German authorities is not disproportionate to Mr. de Vries.

Notification of the decision: Article 30 of Directive 2004/38/EC requires that the person concerned must be informed through a written notification of the decision.[125] The relevant decision in this case was the decision of the German authorities to refuse Mr. de Vries entry at that moment, taken at the border crossing-point as a result of the commotion that he caused. Mr. de Vries was formally notified by the border guards of the decision to refuse him entry. The written decision provided the information for Mr. de Vries regarding the possibilities for judicial redress against the decision. Taking into account these facts, it must be concluded that the procedural safeguard of Article 30 of Directive 2004/38/EC has been fulfilled.

2.5 Conclusion

The focus of this chapter was on the right of persons to move and reside freely in another Member State which is one of the fundamental rights of the EU.[126] In the last decades, the scope of this right has widened from only applying to the economically active to all Union citizens. At this moment the only requirement is that the person possesses the nationality of a Member State and consequently qualifies as a Union citizen.[127] As a result of the case law of the Court of Justice, a restriction of this right by a Member State is permitted on grounds of public policy only under strict conditions.[128] These conditions deduced from the Directive 64/221/EEC as well as the case law of the Court of Justice are codified in Directive 2004/38/EC.[129] The provisions of the directive express that the significant requirement is the conduct of the person concerned.[130] It is required that the conduct of the individual represents a genuine and sufficiently serious threat to the fundamental interests of society; he cannot

[125] Article 30(1) of Directive 2004/38/EC O.J. L 158, 30-04-2004, p. 116.
[126] Case 41/74 *Van Duyn* [1974] ECR I-01337, consideration 18; Eijsbouts, Jans & Vogelaar 2004, p. 67-69 and 100; Hall 1991, p. 480 and 488.
[127] Weiss and Wooldridge 2002, p. 16; Eijsbouts, Jans & Vogelaar 2004, p. 71; Craig & De Burca, 2003, p. 755.
[128] Craig & De Burca 2003, p. 825-835; consideration 22 and Articles 27 and 28 of Directive 2004/38/EC O.J. L 158, 30-04-2004, p. 84 and 113-115.
[129] Barnard 2007, p. 462; consideration 22 and Articles 27 and 28 of Directive 2004/38/EC O.J. L 158, 30-04-2004, p. 84 and 113-115; Craig & De Burca, 2003, p. 840.
[130] Article 27 of Directive 2004/38/EC O.J. L 158, 30-04-2004, p. 113-114.

be expelled or excluded for reasons that have nothing to do with him.[131] As we saw in the case of this thesis, the right of free movement of Mr. de Vries was hindered as a result of temporary border controls reintroduced by the German authorities. In the following chapter I will focus on the legal basis of the decision by a Member State to reintroduce temporary checks at its internal borders which is found in the *Schengen acquis*.[132] Because of the fact that the border controls are reintroduced for a short period, the effect of this measure on the right of free movement of Mr. de Vries is limited.[133] However, does the limited effect of this measure justify the restriction of the right to free movement of a Union citizen considering the fact that, as I will address in the third chapter, the decision to reintroduce temporary internal border controls is based on public policy reasons of a general preventive nature? This chapter showed us that this notion stands in strong contrast with the public policy concept in the field of free movement of persons which requires that the behaviour of the individual represents a threat to the fundamental interests of society.[134]

[131]Case 67/74 *Bonsignore* [1975] ECR 00297, considerations 6; Case 36/75 *Rutili* [1975] ECR 01219, considerations 28-29; Case 30/77 *Bouchereau* [1977] ECR 01999, considerations 28 and 35; Article 27 of Directive 2004/38/EC OJ L 158, 30-04-2004, p. 113-114.
[132] Article 2(2) of the 1990 Schengen Implementing Agreement in: *Schengen acquis* O.J. L 239 22-09-2000, p. 20; Article 23 of Schengen Borders Code O.J. L 105 13-04-2006, p. 12.
[133] Article 23 of Schengen Borders Code O.J. L 105 13-04-2006, p. 12.
[134] Case 30/77 *Bouchereau* [1977] ECR 01999, consideration 35.

3 The Right of Member States to reintroduce temporary controls at internal borders

3.1 Introduction

The case in the first chapter introduced us to a situation in which Mr. de Vries, a Dutch citizen, was hindered by the controls that were reintroduced at the specific border which he has to cross daily, in order to reach his work. In the previous chapter I discussed the argument put forward by Mr. de Vries that these border controls restricted his right to move to another Member State as well as his right to work in another Member State. This chapter will focus on the other side of the conflict: the argument presented by Germany. The German authorities argue that Community law does not prevent the reintroduction of temporary border controls at this border-crossing point between Germany and the Netherlands in the area surrounding the AWACS base founded on the desire to prevent public disorder during the celebration of the twenty-fifth anniversary of the AWACS base.

This temporary reintroduction of the border controls at these border-crossing points confronted the people, who crossed these borders, with a phenomenon of the past. Especially, younger people who live in the original Member States are not used to checks at the borders between Member States; for them, it is a natural thing to travel from one Member State to another without being hindered by border controls.[135] This can be explained by the fact that these days, the situations in which a person will be hindered by checks at the borders between two Member States are limited to the exceptional situations in which the strict conditions of Article 23 of the Schengen Borders Code are fulfilled.[136] The situation in Europe in which the border controls are restricted to exceptional circumstances has been developed gradually within and outside the EU framework.[137]

As mentioned before, the focus of this chapter is the justification presented by Germany to temporarily reintroduce checks at its borders with the Netherlands in the area surrounding the AWACS base. For a comprehensive illustration of the legal background of the decision of the German authorities, it is necessary to describe the development of the legal framework on the abolition of border controls between the European States. The second paragraph of this chapter will, consequently, focus on the development of this legal framework, in particular the *Schengen acquis*, concerning the abolition of the internal border controls between the Member States. In the third paragraph I will discuss the possibility that a Member State reintroduces temporary border controls in exceptional circumstances and, consequently, departs from the idea of no border controls between the Member

[135] Groenendijk 2004, p. 169.
[136] Article 23 of Schengen Borders Code O.J. L 105 13-04-2006, p. 12.
[137] Groenendijk 2004, p. 151-158.

States. The discussion will focus on the theoretical as well as the practical angle of this exceptional competence of the Member States. The last paragraph will offer a conclusion, based on the previous paragraphs of this chapter and will also function as a preview to the following chapter.

3.2 The legal background of the abolition of border controls

3.2.1 Introduction

In the period between the Treaty of Westphalia of 1648 and the nineteenth century borders had a more prominent position because they expressed the idea of sovereignty of States that existed at that time.[138] The States regarded themselves as the supreme authority and, subsequently, as the enforcer of the law on their territory.[139] The States favoured, during this period, the preservation of their sovereignty above the creation of cooperation with other States.[140] But the controls at the borders between States were only introduced as a reaction to the two World Wars that occurred during the beginning of the twentieth century[141]: by checking everyone who passes through the border-crossing points, the State was able to decide who is allowed to enter its territory.[142] Border controls functioned in the period following the two World Wars as a security measure of the States. [143]

During the second half of the twentieth century the focus of the States changed from protecting their own position in the international community to maintaining relations with other States.[144] The founding of many international organisations in the second half of the last century illustrated this changed approach towards the relationships between the States.[145] The change has, consequently, led to a behaviour towards each other that is much more characterised by trust instead of distrust which has decreased the importance of borders and the inherent controls between the States.[146]

The idea to abolish border controls has been given effect in three separate regional agreements between States in Europe, outside the scope of the EU legal framework.[147] The first agreement which came into effect was the Nordic Passport Control Agreement of 1952. This agreement was concluded between the four Nordic States in Europe, Finland, Denmark, Sweden and Norway, and governed that the national authorities of these States stopped checking their own nationals at their common borders;

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[138] Anderson and Bort 2001, p. 17.
[139] Anderson and Bort 2001, p. 7, 17-21; Donner 1993, p. 6; Groenendijk 2004, p. 151.
[140] Anderson and Bort 2001, p. 17-21.
[141] Groenendijk 2004, p. 150.
[142] Staples 2000, p. 3.
[143] Anderson and Bort 2001, p. 22-25; Groenendijk 2004, p. 150-151.
[144] Anderson and Bort 2001, p. 7 and 21-24.
[145] Malanczuk 1997, p. 91-96; Anderson and Bort 2001, p. 7 and 21-24.
[146] Anderson and Bort 2001, p. 7-8, 16-21 and 22-24.
[147] Groenendijk 2004, p. 151-155.

in 1957 the scope of this agreement was widened to third country nationals.[148] The second agreement to abolish border controls was concluded in 1960 by the three Benelux countries, Belgium, the Netherlands and Luxembourg.[149] Thirdly, the United Kingdom and Ireland agreed to establish the Common Travel Area which entailed the abolition of the border controls at their common borders.[150]

3.2.2 The Community initiative

Since its creation, the objective of the EC has been to establish a economically stable and durable framework in which the Member States work together.[151] However, it would not be able to realise this objective unless there was a certain degree of openness between the Member States.[152] The EU institutions acknowledged that the abolition of the border controls between the territories of the Member States would be beneficial in its goal to realise more openness in the EC which would consequently promote the integration of the Member States.[153] Due to the importance that was attributed to this notion by the EU institutions, it has been an ongoing topic on the agenda of the EU.[154] The idea of abolishing the border controls between the Member States was, however, not included in the legal framework of the EU until the Single European Act of 1986.[155] The Single European Act introduced the current Article 14 EC (ex Article 7a EC) which states that the internal market must not only consist of the right of free movement of persons, goods, services and capital but of the abolition of the internal border controls as well[156]:

> *"1. The Community shall adopt measures with the aim of progressively establishing the internal market over a period expiring on 31 December 1992….*
>
> *2. The internal market shall comprise an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured in accordance with the provisions of this Treaty."*[157]

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[148] Kjaer, 2002, p. 185-187; Groenendijk 2004, p. 151.
[149] Kruijtbosch 1993, p. 31-34.
[150] Toner 2000, p. 417; Staples 2000, p. 5.
[151] Hall 1991, 474 and 488; Weiss and Wooldridge 2002, p. 14-15; Eijsbouts, Jans & Vogelaar 2004, p. 67-68; Articles 2 and 3(1) (c) of the EC Treaty O.J. C 325 24-12-2002, p. 40; Craig & De Burca 2003, p. 23.
[152] Anderson and Bort 2001, p. 9-10 and 17.
[153] Groenendijk 2004, p. 150; Anderson and Bort 2001, p. 5-6 and 9-10.
[154] The introduction of *The Schengen area and cooperation* via http://europa.eu/scadplus/leg/en/lvb/l33020.htm visited on 16 November 2007; Donner 1993, p. 5-6; Anderson and Bort 2001, p. 9.
[155] Donner 1993, p. 5-6; Toner 2000, p. 415-417; Anderson and Bort 2001, p. 1.
[156] Craig & De Burca 2003, p. 1180.
[157] Text of Article 14 (1) and (2) of the Treaty establishing the European Community O.J. C 325 24-12-2002, p. 44 via http://eur-lex.europa.eu/en/treaties/dat/12002E/pdf/12002E_EN.pdf, downloaded on 26 October 2007.

The inclusion of this provision in the EC Treaty, however, did not automatically ensure the creation of the EU as an area, in which people would no longer be confronted with border controls. The Court of Justice held in *Wijsenbeek*[158] that the creation of an area in which the internal border controls were abolished, required the adoption of flanking measures which would intercept the consequences of this step.[159] These flanking measures consisted, among others, of a common policy on the topics of external borders, asylum and visa, as well as improved police and judicial cooperation between the Member States.[160] The Court of Justice pointed out that the abolition of the internal border controls could not be realised if these flanking measures were not sufficiently organised by the EU.[161] However, it was not possible to realise these flanking measures within the legal framework of the EU due to the political disagreement between the Member States on the appropriate way to realise the abolition of the internal border controls and the subsequent flanking measures.[162] Especially, the position of the United Kingdom, supported by Ireland as a result of the Common Travel Area between these two countries, created an obstacle in the discussions on this issue.[163] The two Member States were against the abolition of controls at their borders with the other Member States in order to benefit the further integration of the EC; particularly against the idea that third country nationals would also no longer be subjected to controls at the internal borders.[164] The deadlock[165] concerning the realisation of this issue on EU level led to an extra-community initiative between the Member States that were ready and able to take the integration a step further and abolish the border controls between their territories.[166]

3.2.3 The Schengen acquis

The Schengen Agreement on the Gradual Abolition of Checks at their Common Borders of 14 June 1985 was concluded between Germany, France, the Netherlands, Belgium and Luxembourg.[167] The origin of this agreement was the 1960 initiative of the Benelux countries to abolish their internal

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[158] Case C-378/97 *Wijsenbeek* [1999] ECR I-6207.
[159] Case C-378/97 *Wijsenbeek* [1999] ECR I-6207, consideration 42; Toner 2000, p. 419; Weiss and Wooldridge, 2002, p. 17 and 54; Papagianni 2001-2002, p. 107.
[160] Case C-378/97 *Wijsenbeek* [1999] ECR I-6207, consideration 42; Cholewinski 2007, p. 303; Donner 1993, p. 7-8 and 10; Weiss and Wooldridge 2002, p. 54.
[161] Case C-378/97 *Wijsenbeek* [1999] ECR I-6207, consideration 42; Toner 2000, p. 419; Weiss and Wooldridge, 2002, p. 17; Guild and Peers 2001, p. 280.
[162] Toner 2000, p. 415-417; The introduction of *The Schengen area and cooperation* via http://europa.eu/scadplus/leg/en/lvb/l33020.htm visited on 16 November 2007; Romein 2006, p. 24; Anderson and Bort 2001, p. 9-10.
[163] Toner 2000, p. 417
[164] Toner 2000, p. 416-417; Groenendijk 2004, p. 155; The introduction of *The Schengen area and cooperation* via http://europa.eu/scadplus/leg/en/lvb/l33020.htm visited on 16 November 2007; Guild and Peers 2001, p. 278; Staples 2000, p. 2-3.
[165] Groenendijk 2004, p. 155.
[166] Eisel, p. 3-4; Craig & De Burca 2003, p. 750-752.
[167] The 1985 Agreement between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders in: *Schengen Acquis* O.J. L 239 22-09-2000, p. 13-18, further addressed as the 1985 Schengen Agreement.

border controls as well as the initiative of France and Germany to abolish their internal border controls.[168] This agreement expresses the intention of these Member States to negotiate further on the issue of abolition of internal border controls, especially on the adoption of flanking measures like a uniform policy on the controls at the external borders, visa and asylum policy as well as cooperation between the police and judicial authorities of the participating Member States.[169] Article 17 of the 1985 Schengen Agreement codified the ultimate goal of the parties; the creation of an area in which people are not bothered by border controls.[170] That objective, however, could not be realised until the aforementioned complementary measures were adopted by the parties.[171] In other words, the provisions of the first title of the 1985 Schengen Agreement provided that until these flanking measures were adopted, the controls at the common borders of the parties would not be abolished completely but would be reduced to simple surveillance and, if necessary, spot checks.[172]

After the entry into force of the 1985 Schengen Agreement, it was not until 1990 that the further negotiations between these States led to the adoption of another legal instrument concerning this issue.[173] The 1990 *Convention Implementing the Schengen Agreement*[174] was the result of the negotiations which had taken place since 1985 on the issue of the abolition of internal border controls and the required flanking measures.[175] The 1990 Schengen Implementing Agreement is the legal instrument within the *Schengen acquis* which established the legal obligation of the participating Member States to abolish the border controls between their territories as well as to take the necessary flanking measures.[176] The provision of the Schengen Implementing Agreement that provides the legal basis for the abolition of all checks at the borders between these States is Article 2(1):

> *"1. Internal borders may be crossed at any point without any checks on persons being carried out."*[177]

This provision of the 1990 Schengen Implementing Agreement codified the key objective of the *Schengen acquis* while the other provisions of this Schengen Implementing Agreement dealt with the

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[168] Groenendijk 2004, p. 151-153.
[169] Donner 1993, p. 6-9; Weiss and Wooldridge 2002, p. 34-35 and 54; Barnard 2007, p. 505.
[170] Article 17 of the 1985 Schengen Agreement in: *Schengen Acquis* O.J. L 239 22-09-2000, p. 15.
[171] Weiss and Wooldridge 2002, p. 34-35; Donner 1993, p. 6-9.
[172] Title I 'Measures applicable in the short term' of the 1985 Schengen Agreement in: *Schengen Acquis* O.J. L 239 22-09-2000, p. 13-15.
[173] Donner 1993, p. 9.
[174] The 1990 Convention Implementing the Schengen Agreement of 14 June 1985 between the Governments of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders in: *Schengen Acquis* O.J. L 239 22-09-2000, p. 19-62, further addressed as the 1990 Schengen Implementing Agreement.
[175] Donner 1993, p. 9.
[176] Weiss and Wooldridge 2002, p. 34-36; Donner 1993, p. 6 and 9-10; Barnard 2007, p. 505.
[177] Text of Article 2(1) of the 1990 Schengen Implementing Agreement in: *Schengen Acquis* O.J. L 239 22-09-2000, p. 20

consequences of the elimination of the internal border controls.[178] The Schengen Implementing Agreement did not only abolish the border controls between the participating States for the own nationals of these States but also for the nationals of the non-participating Member States and third country nationals.[179] The 1990 Schengen Implementing Agreement entered into force in September 1993 and was operational by March 1995.[180] In the years following the conclusion of the 1990 Schengen Implementing Agreement, these 'Schengen-countries' were joined by the other EU Member States, with the exception of the United Kingdom and Ireland.[181] Two non EU Member States, Norway and Iceland, joined as well; their position was regulated through separate association agreements.[182]

The purpose of 1985 Schengen Agreement and its successor, the 1990 Schengen Implementing Agreement, has always been to function as an experiment for the Member States[183]; from the beginning, the ultimate goal was to incorporate the *Schengen acquis* into the EU legal framework one day.[184] By adopting the Schengen Agreement on an intergovernmental level, the willing Member States were able go ahead with realising the abolition of controls at their internal borders without being held back by the deadlock[185] existing within the EU.

3.2.4 Integrating the Schengen acquis in Community law[186]

The participation of all the Member States, except the United Kingdom and Ireland, at the time of the negotiations of the 1997 Treaty of Amsterdam, amending the EC and EU Treaties, led to a changed political climate in which it was possible to take the step of incorporating the *Schengen acquis* into the legal framework of the EU.[187] The agreement between the Member States to incorporate the provisions of the *Schengen acquis* into the legal framework of the EU was expressed by the *Protocol integrating the Schengen acquis into the framework of the European Union*[188] which was annexed to the amended EU and EC Treaties.[189]

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[178] Weiss and Wooldridge 2002, p. 35; Donner 1993, p. 10; Thym 2002, p. 233.
[179] Barnard 2007, p. 505; Cholewinski 2002, p. 113; Staples 2002, p. 221.
[180] Barnard 2007, footnote 86, p. 511; Groenendijk 2004, p. 154; Staples 2002, p. 234; Development of Schengen cooperation and extension of the Schengen area in: *'The Schengen area and cooperation'* via http://europa.eu/scadplus/leg/en/lvb/l33020.htm visited on 16 November 2007.
[181] Development of Schengen cooperation and extension of the Schengen area in: *'The Schengen area and cooperation'* via http://europa.eu/scadplus/leg/en/lvb/l33020.htm visited on 16 November 2007.
[182] Relations with Iceland and Norway in: *The Schengen area and cooperation'* via http://europa.eu/scadplus/leg/en/lvb/l33020.htm visited on 16 November 2007; Kjaer 2002, p. 172-175.
[183] Barnard 2007, p. 504.
[184] Eisel 2000, p. 3-4; Barnard 2007, p. 504; Monar 2000, p. 21.
[185] Groenendijk 2004, p. 155.
[186] Barnard 2007, p. 504.
[187] Barnard 2007, p. 504-506; Toner 2000, p. 417.
[188] Protocol integrating the Schengen acquis into the framework of the European Union, O.J. C 340 10-11-1997, p. 0093.
[189] Protocol integrating the Schengen acquis into the framework of the European Union, O.J. C 340 10-11-1997, p. 0093.

Article 2(1) of this Protocol ordered the Council to determine the legal basis for the separate provisions of the *Schengen acquis* in the EU and EC Treaties.[190] The Council divided the provisions of the *Schengen acquis* into two different titles of the EC and EU Treaties. The provisions which governed the cooperation of the Member States in criminal matters were included in Title VI of the EU Treaty,[191] while the provisions concerning migration matters were included in Title IV of the EC Treaty.[192] The provisions of Title IV of the EC Treaty regulate the right of free movement of the third-country nationals in the EU.[193]

In the EC Treaty, the obligation of the Community institutions to abolish the internal border controls is included in Article 62(1) EC of title IV.[194] This provision obliges the Council "to ensure, within a time period of five years after the Treaty of Amsterdam came into force, that all persons, whether or not Union citizens, are not confronted by border controls if travelling between the Member States, by taking the necessary measures".[195] This objective, however, was not attained by the Council until in 2006, when it was able to adopt legislation concerning the part of *Schengen acquis* governing the internal borders and external borders of the Member States. Since 13 October 2006, the matter of internal borders and external borders is governed by Regulation 562/2006 *establishing a Community Code on the rules governing the movement of persons across borders.*[196] The so-called Schengen Borders Code is the last stage of the three-stage rocket concerning the abolition of internal border controls within the EU framework. This process started with the introduction of Article 14 EC by the Single European Act of 1986 which provided that the abolition of internal border controls was a precondition for the creation of the internal market within the EU.[197] After the incorporation of the *Schengen acquis* into the EU legal framework, this precondition was given effect by Article 62(1) EC.[198] The obligation mentioned in this latter provision is once more effected in Article 20 of the SBC:

> *"Internal borders may be crossed at any point without a border check on persons, irrespective of their nationality, being carried out."*[199]

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[190] Article 2 of the Protocol integrating the Schengen acquis into the framework of the European Union, O.J. C 340 10-11-1997, p. 0094.
[191] Barnard 2007, p. 503.
[192] Weiss and Wooldridge 2002, p. 27; Barnard 2007, p. 503.
[193] Staples 2002, p. 246-247; Barnard 2007, p. 501.
[194] Barnard 2007, p. 511-512; Article 2 of the Protocol integrating the Schengen acquis into the framework of the European Union, O.J. C 340 10-11-1997, p. 0094.
[195] Barnard 2007, p. 511; Article 62(1) of the Treaty establishing the European Community O.J. C 325 24-12-2002, p. 58 via http://eur-lex.europa.eu/en/treaties/dat/12002E/pdf/12002E_EN.pdf downloaded on 27 October 2008.
[196] Regulation 562/2006 *Establishing a Community Code on the rules governing the movement of persons across borders (Schengen Borders Code)* O.J. L 105 13-04-2006,p. 1-32, further addressed as Schengen Borders Code.
[197] Craig & De Burca 2003, p. 1180-1183; Guild and Peers 2001, p. 284-285; Donner 1993, p. 5-6; Toner 2000, p. 415-417.
[198] Barnard 2007, p. 504 and 511-514; Cholewinski 2002, p. 113-114; Consideration 1 of Schengen Borders Code O.J. L 105 13-04-2006, p. 1; Guild and Peers 2001, p. 284-285; Toner 2000, p. 417.
[199] Text of Article 20 of the Schengen Borders Code O.J. L 105 13-04-2006, p. 11.

The Schengen Borders Code, however, does not replace the 1990 Schengen Implementing Agreement completely; the regulation only repeals the provisions of the Schengen Implementing Agreement which covered the measures on the internal borders and external borders as follows from Article 39 of the Schengen Borders Code.[200] The purpose of the Schengen Borders Code is to provide rules on both the crossing of internal borders and external borders together in one legal document.[201] Provisions of the Schengen Implementing Agreement which continue to be operational until this day are the provisions on the Schengen Information System (SIS).[202] These provisions will continue to govern the application of the SIS by the Member States until the new regulation on SIS II becomes operational [203]

One matter which needs to be discussed in the light of the incorporation of the *Schengen acquis* into the EU framework is the position of the (non-) participating Member States and the third parties to the Schengen Agreement. Did the incorporation of the *Schengen acquis* change their position? Except for the United Kingdom, Ireland and Denmark, the incorporation of the Schengen Acquis did not entail a big modification of the position of the Member States[204]; it would continue to apply to the Member States, which were already participants in the Schengen Acquis.[205] Article 3 of the Protocol integrating the *Schengen acquis* into the framework of the European Union concerns the position of Denmark in relation to the *Schengen acquis*. Unlike the United Kingdom and Ireland, Denmark had been a party to the Schengen Implementing Agreement since 1996 and was thus bound by the provisions of the *Schengen acquis*.[206] The incorporation of the *Schengen acquis*, however, did not transfer the rights and obligations of Denmark to the legal framework of the EU. If Denmark decides to participate in future Community legislation concerning the *Schengen acquis* it is only bound by international law.[207] The position of the United Kingdom and Ireland was, as indicated before, different from the position of Denmark because these two Member States had never been a party to the *Schengen acquis* as a result of their reluctance to abolish their border controls.[208] Article 4 of the Protocol integrating the *Schengen acquis* into the framework of the European Union states that the integration of the *Schengen acquis* would not have the consequence that these two Member States would become bound by the *Schengen acquis* as part of Community law, rather they were granted the

[200] Monar 2006, p. 85-86; Romein 2006, p. 32-33.
[201] Romein 2006, p. 33.
[202] Development of Schengen cooperation and extension of the Schengen area in: '*The Schengen area and cooperation'* via http://europa.eu/scadplus/leg/en/lvb/l33020.htm visited on 16 November 2007; Romein 2006, p. 29-31.
[203] The second-generation Schengen Information System (SIS II) in:'*The Schengen area and cooperation'* via http://europa.eu/scadplus/leg/en/lvb/l33020.htm visited on 16 November 2007.
[204] Barnard 2007, p. 503-504.
[205] Article 1 and 2 of the Protocol integrating the Schengen acquis into the framework of the European Union, O.J. C 340 10-11-1997, p. 0093-0094.
[206] Article 3 of the Protocol integrating the Schengen acquis into the framework of the European Union, O.J. C 340 10-11-1997, p. 0094; Barnard 2007, p. 506; Weiss and Wooldridge 2002, p. 34 and 36-38; Kjaer 2002, p. 169-170.
[207] Barnard 2007, p. 502-506; Kjaer 2002, p. 169-170 and 176-180.
[208] Barnard 2007, p. 502-506.

possibility of an opt-in in relation to future Community legislation developing the Schengen acquis.[209] In relation to the new Member States, the integration of the *Schengen acquis* entails that they will be directly bound by its provisions, according to Article 2 of the Protocol integrating the *Schengen acquis* into the framework of the European Union.[210] However, the abolition of the controls at the borders between the existing Member States and the new Member States will not be accomplished until the Council has decided that the new Member States have fulfilled the conditions.[211] The external border policy, on the other hand, will apply from the start to the borders between the new Member States and third countries.[212]

Recently, it was reported that the controls at the 'internal' borders between the 'new' and 'old' Member States will be abolished on 21 December 2007.[213] From this date on, a person, whether or not a Union citizen, will not be confronted with border controls while travelling between the Member States and Norway and Iceland unless he or she travels between the United Kingdom or Ireland and the other Member States as well as Iceland and Norway.[214]

3.3 The right to reinstate temporary border controls

3.3.1 The temporary reintroduction of internal border controls in theory

As of 21 December 2007, the standard situation in the EU will be that the internal border controls will be abolished[215]; every person who crosses a border between two Member States will not be hindered by checks. [216] In exceptional cases, however, it is possible that the Member States take a specific measure to derogate from this standard situation; the temporary reintroduction of the internal border controls. This possibility of the temporary reintroduction of the internal border controls is included in Article 23(1) of the current Schengen Borders Code:

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[209] Article 4 of the Protocol integrating the Schengen acquis into the framework of the European Union, O.J. C 340 10-11-1997, p. 0094; Weiss and Wooldridge 2002, p. 34 and 36-38.
[210] Article 1 and 2 of the Protocol integrating the Schengen acquis into the framework of the European Union, O.J. C 340 10-11-1997, p. 0093-0094.
[211] Application of the Schengen acquis to the new Member States in: *The Schengen area and cooperation'* via http://europa.eu/scadplus/leg/en/lvb/l33020.htm visited on 16 November 2007; Romein 2006, p. 25 and 27.
[212] Romein 2006, p. 28.
[213] 'Grenscontroles Oost-Europa verdwijnen voor kerst' *NRC Handelsblad*, 4 november 2007 via http://www.nrc.nl/europa/article808702.ece/Grenscontroles_Oost-Europa_verdwijnen_voor_kerst visited on 16 November 2007.
[214] Romein 2006, p. 25; Hailbronner 1998, p. 1057-1059; Staples 2000, p. 5; Weiss and Wooldridge 2002, p. 34 and 54.
[215] 'Grenscontroles Oost-Europa verdwijnen voor kerst' *NRC Handelsblad*, 4 november 2007 via http://www.nrc.nl/europa/article808702.ece/Grenscontroles_Oost-Europa_verdwijnen_voor_kerst visited on 16 November 2007.
[216] Article 20 of the Schengen Borders Code O.J. L 105 13-04-2006, p. 11; Cholewinski 2002, p. 113-114.

"1. Where there is a serious threat to public policy or internal security, a Member State may exceptionally reintroduce border control at its internal borders for a limited period of no more than 30 days or for the foreseeable duration of the serious threat if its duration exceeds the period of 30 days…." [217]

The Treaty legal basis of this competence is Article 64(1) of the EC Treaty which preserves the competence of the Member States to take measures to protect the public policy or internal security on its territory.[218] This provision explicitly provides that the responsibility of the Member States to protect these interests must not be affected by the responsibilities that follow from their participation in title IV of the EC Treaty.[219] The text of Article 23(1) expresses this preservation function because it only allows for reinstatement of internal border controls where this is necessary to protect the public policy or internal security in the territory of the Member State; the reliance on this exception is only justified if the Member States regard the measure necessary in order to fulfil their responsibility of maintaining public policy and safeguarding internal security.[220]

The competence of the Member States to make an exception from the situation without border controls is not new. In the earlier initiatives on the abolition of border controls between European States a similar provision was included.[221] The inclusion of this provision in the agreements which guarantee the abolition of border controls is strongly connected to the reluctance of many States to take this enormous step.[222] The exception to the abolition of the border controls functions as a way to take away some of this reluctance from the Member States and, consequently, to offer them a degree of compensation for their loss of control regarding their border controls.[223]

As mentioned before, Article 23(1) of the Schengen Borders Code affirms the competence of the Member States to reintroduce temporary internal border controls. This competence, however, is not an absolute competence because it is subject to both substantive and procedural requirements. The substantive condition requires that the Member State has to prove that this measure is necessary in order to protect the public policy or internal security in its territory.[224] But what exactly must be understood by the term public policy is not clear; an exact definition has not been given.[225] The reason behind the fact that no common European definition of the public policy exception has been established has to be found in the absence of judicial scrutiny by a supranational judicial authority.[226]

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[217] Text of Article 23 of the Schengen Borders Code O.J. L 105, 13-04-2006, p. 12.
[218] Romein 2006, p. 28; Cholewinski 2002, p. 114; Fennelly 2000, p. 5.
[219] Weiss and Wooldridge 2002, p. 31; Romein 2006, p. 28; Cholewinski 2002, p. 113-114.
[220] Article 23 of the Schengen Borders Code O.J. L 105 13-04-2006, p. 12.
[221] Groenendijk 2004, p. 151-155; Kruijtbosch 1993, p.33-34.
[222] Groenendijk 2004, p. 151.
[223] Groenendijk 2004, p. 150-151.
[224] Article 23 of the Schengen Borders Code O.J. L 105 13-04-2006, p. 12.
[225] In the following section I will elaborate further on the consequences of the absence of a precise definition of public policy.
[226] Staples 2002, p. 246 and 248; Papagianni 2001-2002, p. 121.

Besides this substantive requirement, the Schengen Borders Code regulates the conduct of the Member States concerning this competence as well by stating certain procedural requirements which must be taken into account.[227] These procedural conditions were first introduced in the Decision of the Schengen Executive Committee of 20 December 1995 *on the procedure for applying Article 2(2) of the Convention implementing the Schengen Agreement*.[228] This decision was taken in order to set out general principles and procedures that had to be respected by all Member States when they invoke the competence to reinstate internal border controls. The text of the predecessor of Article 23 Schengen Borders Code, Article 2(2) of the Schengen Implementing Agreement, only stated in general wording that the Member State concerned had to inform and consult with the other Member States as soon as possible of their intention to use this provision.[229] In other words, the purpose of the decision of the Executive Committee was to explain the procedural conditions mentioned in Article 2(2) of the Schengen Implementing Agreement.[230]

Currently, the procedure which has to be followed by the Member State is included in Article 24 of the Schengen Borders Code.[231] The first step in the procedure consists of a detailed notification to the Commission as well as to the other Member States. The detailed information that is gained through this notification is the basis for the next step in the procedure; the consultation between the Member States and the Commission.[232] In other words, the purpose of this notification is to provide the Commission and the other Member States with all information that is necessary to have a high-quality consultation on the proportionality of the decision to reintroduce temporary border controls.[233] The consultation has to take place at least fifteen days before the Member State wants to reintroduce the internal border controls.[234] While the Schengen Borders Code requires the Member States to comply with these procedural conditions when applying the competence of Article 23(1), the same legal instrument is unclear about the legal consequences of the non-compliance with these procedural requirements. It is unclear what should happen if a Member State relies on the competence to

[227] Article 24 of the Schengen Borders Code O.J. L 105 13-04-2006, p. 12.
[228] Decision of the Executive Committee of 20 December 1995 on the procedure for applying Article2 (2) of the Convention implementing the Schengen Agreement (SCH/Com-ex (95)20 rev. 2) in: *Schengen acquis* O.J. L 239 22-09-2000, p. 133-134.
[229] Article 2(2) of the Schengen Implementing Agreement in: *Schengen acquis* O.J. L239 22-09-2000, p. 20; Decision of the Executive Committee of 20 December 1995 on the procedure for applying Article2(2) of the Convention implementing the Schengen Agreement (SCH/Com-ex (95)20 rev. 2) in: *Schengen acquis* O.J. L 239 22-09-2000, p. 133-134; Groenendijk 2004, p. 153-155 and 162-165.
[230] Decision of the Executive Committee of 20 December 1995 on the procedure for applying Article2(2) of the Convention implementing the Schengen Agreement (SCH/Com-ex (95)20 rev. 2) in: *Schengen acquis* O.J. L 239 22-09-2000, p. 133.
[231] Article 24 of the Schengen Borders Code O.J. L 105 13-04-2006, p. 12.
[232] Decision of the Executive Committee of 20 December 1995 on the procedure for applying Article2(2) of the Convention implementing the Schengen Agreement (SCH/Com-ex (95)20 rev. 2) in: *Schengen acquis* O.J. L 239 22-09-2000, p. 134.
[233] Article 24 of the Schengen Borders Code O.J. L 105 13-04-2006, p. 12.
[234] Article 24 of the Schengen Borders Code O.J. L 105 13-04-2006, p. 12; Groenendijk 2004, p. 154-155 and 162-165.

reintroduce temporary border controls without informing the other Member States and the Commission.

3.3.2 The temporary reintroduction of internal border controls in practice

In *section a* I noted that the legal basis of the competence of the Member States to reinstate temporary border controls if there is a serious threat to public policy can be found in Article 23(1) of the Schengen Borders Code.[235] But the description of the legal framework does not provide us with insight in which situations this exception can be invoked by the Member States. The research of Kees Groenendijk[236] on the situations in which Member States have invoked this exception in the past provides us with insight on the actual conduct of the Member States with regard to this competence.[237]

Which situations are considered by the Member States as the justification of their reliance on this exception? This was the central question of the research conducted by Kees Groenendijk. In order to establish a complete picture of the situations in which Member States apply this exceptional measure, Kees Groenendijk consulted the public register of Council documents to find notifications of the temporary reintroduction of the internal border controls in a time-frame between January 2000 and November 2003.[238] Kees Groenendijk found evidence of 33 situations that caused the Member States to invoke this competence in this time period.[239] Kees Groenendijk states in his research that in the period between 2000 and 2003 the organisation of the European Football Championship was on two occasions the reason to rely on this exception.[240] In recent years, after the time period of the research, this practice was also seen during the European Football Championship of 2004 in Portugal.[241] Likewise, Germany reintroduced, in 2006, the controls at its internal borders during the World Football Championship.[242] The second category consists of situations with a strong political aspect. Kees Groenendijk points out that in the period between 2000 and 2003 such situations with a political characteristic have resulted in 27 invocations of this competence.[243] Situations which fall within this category are the visits of political leaders (5 times) or even the holiday of 'high ranking persons'[244] in

[235] Article 23 of the Schengen Borders Code O.J. L 105, 13-04-2006, p. 12.
[236] Groenendijk 2004, p. 150-170.
[237] Groenendijk 2004, p. 150-170.
[238] Groenendijk 2004, p. 158-162.
[239] Groenendijk 2004, p. 159.
[240] Groenendijk 2004, p. 159-161.
[241] 'Free movement to be suspended during Euro 2004' *Statewatch* 2004-2, p. 5; Groenendijk 2004, p. 158-159 and 160-161.
[242] Press release of 24-4-2006 'Bundesinnenminister Dr. Schäuble teilt den Schengen-Partnern offiziell die Wiedereinführung von Grenzkontrollen anlässlich der FIFA WM 2006 in Deutschland mit' retrieved via http://www.bmi.bund.de/cln_012/nn_122688/Internet/Content/Nachrichten/Pressemitteilungen/2006/04/Grenzkontrollen__WM.html on 20 October 2008; Hölscher, 'Hintergrund; Wider die Hooligans; Prävention bei der Fußball-WM', Frankfurter Rundschau 16 Mai 2006 retrieved via http://academic.lexisnexis.nl/uvt on 4 June 2007; Duitstalige nieuwsbronnen; Frankfurter Rundschau; datum: van 15/05/2006 tot 17/05/2006; zoekterm Schengen..
[243] Groenendijk 2004, p. 159.
[244] Groenendijk 2004, p. 159.

the territory of the Member States (2 times).[245] Many Member States, notably Italy, Spain and Austria, have used the possibility to reintroduce controls at internal border as a precautionary measure in the case of a meeting of the G8 or the European Council (in total 16 times).[246] Recently, in 2007, Germany chose to invoke the competence to reintroduce temporary controls at its internal borders for the duration of the G8 meeting in Heiligendamm.[247] Another category of situations that has been distinguished by Kees Groenendijk is connected with the policy of Member States concerning third country nationals.[248] In the period between 2000 and 2003, the desire of the Member States to control the number of third country nationals on their territory had resulted in three invocations of the competence to reintroduce the internal border controls.[249] The most notable example of this occurrence was the conduct of Belgium in 2000 during its regularisation campaign.[250]

This description of the several occasions in which the Member States relied on this competence shows that there is no consistent approach with regard to this exception.[251] It proves that it is possible that not all Member States qualify similar situations in the same way. While one Member State qualifies the situation as representing a serious threat to the public policy of the Member State, another Member State may qualify the same situation as not posing a serious threat to public policy.[252] The Member States have gained this freedom because their conduct in applying this competence is not scrutinized by a supranational authority.[253] It is, therefore, not able to establish a common definition of the public policy concept.[254] However, a common characteristic can be derived from this description; the categories all concern situations in which groups of people, representing opposing views, assemble in a small area. The decision to reintroduce internal border controls is strongly influenced by the fear of national authorities that the assembling of such a large group of people cannot be controlled and will therefore lead to disturbances.[255] Two occurrences in recent years which have been important factors in the increased willingness of the national authorities of the Member States to invoke this measure in such situations are firstly the terrorist attacks of 11 September 2001 and secondly the serious disturbances at the demonstrations during the G8 meeting in Genoa in 2002.[256] The Member States were so shocked by these incidents that they wanted to prevent that such disturbances would

[245] Groenendijk 2004, p. 159 and 161-162.
[246] Groenendijk 2004, p. 159 and 161-162; Apap and Carrera 2003-41, p. 4-5.
[247] 'German border controls to be re-introduced for G8 summit', retrieved via http://www.wombles.org.uk/article200705921.php on 3 June 2007; Press release of 9-5-2007 'Wiedereinführung von Grenzkontrollen aus Anlass des G8-Gipfels in Heiligendamm/Mecklen-Vorpommern retrieved via http://www.bmi.bund.de/cln_012/nn_122688/Internet/Content/Nachrichten/Pressemitteilungen/2007/05/Grenzkontrollen.html on 4 June 2007; Groenendijk 2004, p. 161-162; Apap and Carrera 2003-41, p. 4-5.
[248] Groenendijk 2004, p. 160.
[249] Groenendijk 2004, p. 159.
[250] Groenendijk 2004, p. 160.
[251] Groenendijk 2004, p. 162-163 and 167-170.
[252] Groenendijk 2004, p. 162.
[253] Staples 2002, p. 246 and 248.
[254] Staples 2002, p. 246 and 248.
[255] Groenendijk 2004, p. 158-159 and 164-170; Apap and Carrera 2003-41, p. 1-7.
[256] Groenendijk 2004, p. 159; Apap and Carrera 2003-41, p. 1-7.

occur again. The judgment of the Member States was that these events would be avoided if troublemakers from outside would be kept away during the events.[257] The tragic consequences of these two occurrences have caused the Member States to become even more focused on avoiding situations in which it is possible that groups of people with opposing opinions clash which could lead to serious public disorder.[258]

With regard to the procedural requirements of notification and consultation, the research of Kees Groenendijk proved that, in reality, these are not followed correctly by most Member States.[259] The first critical note, made by Kees Groenendijk, is that not all Member States notify the others by a formal letter to the Council: often they use more informal ways to inform the other Member States.[260] Another critical note that can be made is that, despite the fact that the other Member States and the Commission have to be consulted as soon as possible, the other Member States are often informed just shortly before the decision to reintroduce the internal border controls is taken.[261] This conduct of informing the others at such a late stage makes real consultation impossible which strongly decreases the influence of the other Member States and the Commission.[262] As mentioned in the previous section, it is possible for the Member States to depart from these procedural requirements because no control mechanisms have been established: it is therefore regrettable that the Schengen Borders Code also does not provide clarity on the legal consequences of non-compliance with the requirements.

It has to be concluded that, despite the substantive requirement of a serious threat to public policy and the procedural requirements of notification and consultation of other Member States, the practice of the Member States is strongly characterised by an individual inconsistent approach of the Member States.[263] This is enhanced by the freedom that the Member States appear to offer each other.[264] Member States do not observe the compliance of each other with both the substantive and procedural requirements.[265]

3.3.3 The temporary reintroduction of internal border controls in the case study

I introduced in the first chapter of the thesis the situation in which Germany found it necessary to invoke the competence of Article 23(1) of the Schengen Borders Code. Mr. de Vries, a Union citizen, was hindered as a result of this decision by checks while passing a border-crossing point between Germany and the Netherlands. An invocation of this competence is only justified if both the material and procedural requirements have been fulfilled.

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[257] Thym 2002, p. 233.
[258] Groenendijk 2004, p. 164-170; Apap and Carrera 2003-41, p. 1-7; Thym 2002, p. 233.
[259] Groenendijk 2004, p. 162-163 and 167-170.
[260] Groenendijk 2004, p. 158-159.
[261] Groenendijk 2004, p. 162-163.
[262] Groenendijk 2004, p. 162-163 and 169.
[263] Groenendijk 2004, p. 162-163 and 167-170.
[264] Groenendijk 2004, p. 169.
[265] Groenendijk 2004, p. 169-170.

Article 23(1) of the Schengen Borders Code requires that there must be a serious threat to public policy or internal security.[266] As far as this substantive condition is concerned, it must be noted that the reason why Germany reintroduced the controls at this internal border-crossing point was the celebration of the twenty-fifth anniversary of the AWACS base in Geilenkirchen. This decision of Germany to use this measure during this period was caused by the continuing opposition of a lot of people against the plans concerning the AWACS base. Since the AWACS base became operational in Geilenkirchen in 1982, there has been a conflict between the local government and the citizens, on the one side, and the Dutch government and the AWACS base, on the other side, about whether or not the trees in the forest separating the Dutch village from the AWACS base should be cut. This conflict has grown over the years and has led to a hostile attitude of the citizens of the Dutch village towards the AWACS base. The German authorities feared that the festivities which were organised by the AWACS base would provoke its opponents to increase their fight against the plans of the AWACS base and would thus increase the tense situation. A factor of significant importance for this opinion of the authorities is the fact that a group of opponents revealed its plans to occupy the forest again in that period.[267] The reason behind the decision of Germany to reintroduce the border controls at this particular border crossing point during the period of the festivities is similar to the situations that have been described by Kees Groenendijk. Just like in those situations, the German authorities feared that the celebration would attract a large group of opponents who have a strong desire to demonstrate against the destruction of the forest separating the base from the village. The German authorities wanted to prevent that troublemakers from outside would incite the situation until it would be uncontrollable by the authorities.[268]

With regard to the procedural conditions of Article 24 of the Schengen Borders Code it can be said that they are fulfilled because the other Member States as well as the Commission have been sufficiently notified via the detailed notification that has been sent to them by the German authorities. Secondly, there has been a consultation between Germany, the other Member States and the Commission on the question whether or not the temporary reintroduction of the border controls at this border crossing point was justified by the circumstances. All the parties accepted Germany's arguments and consequently did not prevent that the measure was applied.

Based on these facts, it must be concluded that both the material and procedural conditions have been fulfilled in the case study and thus Germany was competent to reintroduce the internal border controls during the celebration of the twenty-fifth anniversary of the AWACS base.

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[266] Article 23 of the Schengen Borders Code *O*.J. L 105, 13-04-2006, p. 12.
[267] 'Nieuwe bezetting bossen Schinveld voorbereid' *NRC Handelsblad* 13 June 2007 retrieved via http://www.nrc.nl/anp/binnenland/article722195.ece/Nieuwe_bezetting_bossen_Schinveld on 1 October 2007.
[268] Groenendijk 2004, p. 159-162.

3.4 Conclusion

In chapter 2 we saw that Directive 2004/38/EC provides, as a result of the large body of case law of the Court of Justice, strict limitations to the public policy exception in respect to the right of free movement of Union citizens.[269] The Member States must prove, in such instances, that "the personal conduct of the person in question represents a present and serious threat to the fundamental interests of society".[270] This phrase highlights that the reliance on this justification is only permitted if the person in question fulfils these strict conditions. This chapter, on the other hand, demonstrates that in respect to the abolition of internal border controls, which is like the right of free movement of persons one of the foundations of the internal market in Article 14(2) EC,[271] the situation is completely different. In relation to the matter of border controls, the Member States have much more discretion in using public policy to justify the reliance on their right to reinstate the checks at their internal borders. The reason behind this large discretion of the Member States must be found in the difficult development of the notion of the abolition of the internal border controls.[272]

Within the EU, the discussion about border controls between the Member States started a long time ago.[273] The EU institutions regarded internal border controls as an obstacle to the integration process of the EU. Some Member States, however, were not in favour of such a step because they considered the abolition of internal border controls as a reduction of the control on their own territory.[274] These opposing views on the development of such an arrangement resulted in a deadlock[275] within the framework of the EU and led to the cooperation of a few Member States on this matter outside the EU framework; the Schengen Agreement.[276] The Schengen Agreement of 14 June 1985 is the beginning of the framework that is currently referred to as the *Schengen acquis*.[277] Further negotiations between these Member States led to the adoption of the Schengen Implementing Agreement in 1990.[278] Since 1995, this Schengen Implementing Agreement has been operational; meaning that the border controls were terminated between the participating Member States.[279] The amendments realised by the 1997 Amsterdam Treaty meant that the *Schengen acquis*, including the abolition of internal border controls, was included in the EU framework. Regulation (EC) No.

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[269] Consideration 22 of Directive 2004/38/EC O.J. L 158, 30-04-2004, p. 84; Barnard 2007, p. 462.
[270] Case 30/77 *Bouchereau* [1977] ECR 01999, consideration 35; Barnard 2007, p. 465; Article 27 of Directive 2004/38/EC O.J. L 158, 30-04-2004, p. 113-114.
[271] Craig & De Burca 2003, p. 1180.
[272] Weiss and Wooldridge 2002, p. 27; Donner 1993, p. 5-6.
[273] Toner 2000, p. 415-417; Donner 1993, p. 5-6; The introduction of *The Schengen area and cooperation* via http://europa.eu/scadplus/leg/en/lvb/l33020.htm visited on 16 November 2007.
[274] Toner 2000, p. 415-417; Groenendijk 2004, p. 150-151; Staples 2000, p. 2; The introduction of *The Schengen area and cooperation* via http://europa.eu/scadplus/leg/en/lvb/l33020.htm visited on 16 November 2007.
[275] Groenendijk 2004, p. 155.
[276] Eisel 2000, p. 3-4; Craig & De Burca 2003, p. 750-752.
[277] *Schengen acquis* O.J. L 239 22-09-2000; Weiss and Wooldridge 2002, p. 36.
[278] Donner 1993, p. 6 and 9.
[279] Groenendijk 2004, p. 154; Barnard 2007, footnote 86, p. 511; Cholewinski 2002, p. 114.

562/2006, the so-called *Schengen Borders Code*, is the first legal instrument which combines both the matter of internal borders and the matter of external borders in the EU.[280] Article 23(1) of this Schengen Borders Code provides the Member States with some control over their internal borders in exceptional situations; the Member States are allowed to reinstate controls at their internal borders if a serious threat to public policy exists.[281] The invocation of this exception, however, is not unlimited because it is restricted by the procedures that have to be followed by the Member States. These procedures entail a detailed notification procedure to inform the other Member States and the Commission of their plans and the consultation of these other actors.[282]

In theory, the incorporation of the *Schengen acquis* in Community law should have lead to more judicial protection for the persons travelling between the territories of the Member States with regard to the exceptional right of Member States to reintroduce internal border controls because this right became part of Community law which, in general, is protected by the Court of Justice.[283] In other words, the logical consequence of the incorporation should have been that the Court of Justice would be given the opportunity to restrict the discretion that was noticeable in the practice of the Member States with regard to their reliance on the reintroduction of internal border controls during the period in which the *Schengen acquis* was a matter of intergovernmental cooperation, governed by the 1990 Schengen Implementing Agreement.[284] The 1990 Schengen Implementing Agreement attributed to the Member States the competence to reintroduce temporary border controls but the phrasing of this competence was vague with regard to the substantive and the procedural requirements.[285] In his research, Kees Groenendijk highlighted that a uniform application of this competence by the Member States could not be derived from the actual conduct of the Member States under the 1990 Schengen Implementing Agreement; instead the nature of the actual conduct of the Member States was individual and inconsistent.[286] The inconsistent approach towards the invocation of this competence was caused by, on the one hand, the discretionary power given to the Member States by the vague wording of Article 2(2) of the 1990 Schengen Implementing Agreement and, on the other hand, the non-compliance with the procedural requirements of the Member States. The compliance with the procedural requirements was not effectively observed by the Member States.[287] Moreover, the absence of an independent judicial authority with the competence to scrutinize the conduct of the Member States contributed to the inconsistent conduct of the Member State because, due to the absence of a

[280] Barnard 2007, p. 504-506; *Schengen Borders* Code O.J. L 105 13-04-2006; Romein 2006, p. 32-33.
[281] Article 23 of the Schengen Borders Code O.J. L 105 13-04-2006, p. 12.
[282] Article 24 of the Schengen Borders Code O.J. L 105 13-04-2006, p. 12; Groenendijk 2004, p. 162-165.
[283] Monar 1998, p. 330; Albers-Llorens 1998, p. 1287-1288; Guild and Peers 2001, p. 277-278; Staples 2002, p. 246.
[284] Groenendijk 2004, p. 162-163 and 167-170; Staples 2002, p. 246; Monar 1998, p. 330.
[285] Groenendijk 2004, p. 153, 162-163 and 167-170.
[286] Groenendijk 2004, p. 162-163 and 167-170.
[287] Groenendijk 2004, p. 162-163 and 167-170.

supranational judicial authority, it was not possible to establish a uniform approach towards this competence.[288]

The situation after the incorporation of the *Schengen acquis* into Community law, however, is not entirely different from the situation before the incorporation, because the Court of Justice is hindered by Article 68 of the EC Treaty. As we will see in the next chapter, this provision in Title IV functions as a double exclusion of the jurisdiction of the Court of Justice in cases concerning the temporary reintroduction of internal border controls.[289] What do the prohibitions of Articles 68(1) and 68(2) EC entail in a situation in which a Union citizen complains about the restriction of his or her right of free movement as a result of the temporary reintroduction of the internal border controls by a Member State? Consequently, in a situation in which the strict notion of public policy in the field of free movement collides with the vague notion of public policy of the Schengen Borders Code, the Court of Justice does not have the competence to pass judgment.[290] In my opinion, this is an undesirable situation because the strong level of protection of the fundamental right of free movement of persons, developed by the Court of Justice, will be undermined if the Court of Justice is not able to pass judgment on the effect of internal border controls on the right of free movement.[291] In the next chapter I will consider whether or not there is a way to bring the case before the Court of Justice, notwithstanding the wording of Article 68 EC to overcome this undesirable situation.

[288] Staples 2002, p. 235 and 246; Groenendijk 2004, p. 162-163 and 167-170; Papagianni 2001-2002, p. 121.
[289] Monar 2000, p. 31; Weiss and Wooldridge 2002, p. 33.
[290] Albers-Llorens 1998, p. 1287-1288; Guild and Peers 2001, p. 279 and 284-285; Staples 2002, p. 246-247; Barnard 2007, p. 506.
[291] Editorial comments 2007, p. 5; Guild and Peers 2001, p. 284-285.

4 Judicial review by the German court of the application of the public policy exception

4.1 Introduction

Both the previous chapters were concerned with a discussion of the arguments put forward by both parties in the conflict. In the second chapter, Mr. de Vries argued that the reintroduction of temporary internal border controls by the German government at this particular border crossing point did not fulfil the strict conditions of Article 27 and 28 of Directive 2004/38/EC to warrant an obstruction of his right of free movement. The third chapter, on the other hand, focused on the views on this conflict presented by the German government. The German government argued that Article 23 of the Schengen Borders Code made it possible to rely on this measure because it was necessary to protect the public policy during the celebration of the twenty-fifth anniversary of the AWACS base. These public policy reasons, though, do not have to fulfil the conditions of Directive 2004/38/EC because, in its opinion, the protection of internal security is the competence of the national authorities.[292]

In this chapter I will focus on the considerations of the German court in the legal proceedings initiated by Mr. de Vries to fight the decision of the German authorities to refuse him entry permission and to fine him during the period of reintroduced border controls. Because of the complex position of the matter of internal border controls in the Community framework,[293] it is problematic for the German court to involve the Court of Justice in answering the following questions[294]: *whether or not the temporary border controls in question are a hindrance in the exercise of the right of free movement of persons and, secondly, whether or not this hindrance is justified?* At first, the unique position of Title IV matters, including the matter of internal border controls, in the Community framework is illustrated by the preliminary rulings procedure; the competence to start a preliminary reference procedure regarding Title IV matters is governed by a lex specialis, Article 68(1) of the EC Treaty.[295] This provision differs from the lex generalis of the preliminary rulings procedure, Article 234 of the EC Treaty,[296] with regard to the group of national courts which are allowed to refer a preliminary question; denying the German court of first instance the competence to start a preliminary rulings procedure.[297] The German court, at first, has thus to resolve whether it is hindered by Article 68(1) EC in his possibility to refer a preliminary question or whether it is competent to refer a preliminary

[292] Guild and Peers 2001, p. 279; Monar 1998, p. 330-331.
[293] Weiss and Wooldridge 2002, p. 27.
[294] Monar 1998, p. 330.
[295] Craig & De Burca 2003, p. 433-434; COM(2006) 346 final, p. 2-3.
[296] COM(2006) 346 final, p. 4.
[297] Craig & De Burca 2003, p. 434; *Editorial comments* 2007, p. 1-3.

question, based on Article 234 EC, because it concerns an infringement of the right of free movement of persons. In addition, the involvement of the Court of Justice in this case is hindered by Article 68(2) of the EC Treaty which excludes the measures taken by the national authorities to protect the public policy from the jurisdiction of the Court; the reintroduction of temporary border controls.[298] In the second paragraph I will discuss whether or not it is possible to bypass the double exclusion of Article 68 EC with the intention of providing the Court of Justice with jurisdiction to give a preliminary ruling. To bypass the first paragraph of Article 68 EC I will refer to the general objective of the judicial regime of the EU. The reasoning of the Court of Justice in an earlier case, *the Airport Visa Case,*[299] in which it was confronted with a similar jurisdiction problem concerning a third pillar measure will serve as a guideline in deciding whether or not the prohibition of Article 68(2) EC can be bypassed.

In the third paragraph, I will focus on the contents of the conflict; I will determine whether or not the Court would decide, if it had the jurisdiction, if the reintroduction of the temporary border controls is an obstruction of the right of free movement of persons as claimed by Mr. de Vries. In order to answer that question I will apply the proportionality test similar to the one that the Court undertook in its cases *Schmidberger*[300] and *Commission v. France*[301].

In the last paragraph I will provide some concluding remarks on the topic of this chapter.

4.2 Article 68 of the EC Treaty

4.2.1 Legal background of Article 68 of the EC Treaty

In the introduction of this chapter I referred to the fact that the power of the Court of Justice in Title IV of the EC Treaty, part of the so-called Area of Freedom, Security and Justice, differs on several aspects from the standard role of the Court in Community law.[302] Article 68 EC illustrates the differences in the judicial system between Title IV and the other Titles of the EC Treaty. This provision was introduced as part of Title IV of the EC Treaty in the legal framework of the EU during the Treaty amendments of Amsterdam.[303] The focus of this chapter will mostly be on the exceptions of the first and second paragraph of Article 68 of the EC Treaty.

In the first place, the first paragraph of Article 68 EC provides a restriction to the national courts which are allowed to start a preliminary ruling procedure.[304] Article 68(1) departs from the general

[298] Thym 2002, p. 233-234; Albers-Llorens 1998, p. 1289; Monar 2000, p. 31; *Editorial comments* 2007, p. 4.
[299] Case C-170/96 *Commission v. Council* [1998] ECR I-2763.
[300] Case C-112/00 *Eugen Schmidberger, Internationale Transporte und Planzüge v. Austria* [2003] ECR I-5659.
[301] Case C-265/95 *Commission v. French Republic* [1997] ECR I-6959.
[302] COM(2006) 346 final, p. 2; *Editorial comments* 2007, p. 1-2.
[303] Thym 2002, p. 231; Monar 1998, p. 330; Barnard 2007, p. 255.
[304] Monar 1998, p. 330; Guild and Peers 2001, p. 278.

procedure of Article 234 EC which entails that every national court, whether the highest or a lower court, has the competence to refer a preliminary question to the Court of Justice.[305]

Article 68(1) EC provides:

> *"1. Article 234 shall apply to this title under the following circumstances and conditions: where a question on the interpretation of this title or on the validity or interpretations of acts of the institutions of the Community based on this title is raised in a case pending before a court or a tribunal of a Member State against whose decisions there is no judicial remedy under national law, that court or tribunal shall, if it considers that a decision on the question is necessary to enable it to give judgment, requests the Court of Justice to give a ruling thereon."*[306]

The wording of Article 68(1) illustrates that the competence to start a preliminary rulings procedure is restricted to the highest courts of the Member States; no national judicial remedy must be available against the decision of the referring national court.[307] The 'official' reason for including this restriction to the competence of the national courts to start a preliminary ruling procedure was the increasing workload of the Court of Justice. The consequence of the restriction, however, is that only the national courts which are most sensitive to the considerations of the national governments have the possibility to refer a preliminary question to the Court of Justice.[308] Because these courts are more sensitive to the considerations of their governments, they will not quickly decide to refer a preliminary question to the Court of Justice concerning the acts of the governments.[309] This reluctant stance of the highest national courts towards the preliminary rulings procedure concerning the matters of title IV of the EC Treaty underlines the restricted position of the Court of Justice in this title.[310] Secondly, the second paragraph of Article 68 EC denies the Court of Justice the jurisdiction to rule on the validity of Community measures based on Article 62(1) of Title IV of the EC Treaty which are aimed at protecting the public policy and internal security as is provided by Article 64(1)[311]:

> *"2. In any event, the Court of Justice shall not have jurisdiction to rule on any measure or decision taken pursuant to Article 62(1) relating to the maintenance of law and order and the safeguarding of internal security."*[312]

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[305] Craig & De Burca 2003, p. 434.
[306] Text of Article 68(1) of the Treaty establishing the European Community O.J. C 325 24-12-2002, p. 61 via http://eur-lex.europa.eu/en/treaties/dat/12002E/pdf/12002E_EN.pdf downloaded on 31 January 2008.
[307] Albers-Llorens 1998, p. 1288; Fennelly 2000, p. 4.
[308] Guild and Peers 2001, p. 281.
[309] Guild and Peers 2001, p. 281.
[310] Guild and Peers 2001, p. 281.
[311] Fennelly 2000, p. 4; Weiss and Wooldridge 2002, p. 31 and 33; Romein 2006, p. 28; Cholewinski 2002, p. 113-114.
[312] Text of Article 68(2) of the Treaty establishing the European Community O.J. C 325 24-12-2002, p. 61 via http://eur-lex.europa.eu/en/treaties/dat/12002E/pdf/12002E_EN.pdf downloaded on 31 January 2008.

Especially the text of Article 68(2) EC illustrates that while the Treaty of Amsterdam has led to the integration of the *Schengen acquis* in the EC legal framework, this step did not lead to an enhancement of the role of the Court in regards to the matter of internal border controls which is the primary objective of the Schengen cooperation.[313] In other words, the progress that the Member States achieved by finally including the *Schengen acquis* in Community law is diminished by the consequences of the limited role that is attributed to the Court of Justice.[314]

The inclusion of the exception to the jurisdiction of the Court of Justice in Article 68(2) EC concerning the matter of the internal border controls in Title IV of the EC Treaty must be seen in the light of the difficult process of the integration of the *Schengen acquis* in Community law.[315] In order to have a better understanding of the reasons which lay behind this exception, it is important to recall the sensitive position of border controls in the relationship between States. The third chapter taught us that border controls, in the opinion of States, are a kind of representation of their sovereign power vis-à-vis their territory.[316] As a result of the abolition of the internal border controls they have lost the power of controlling who can or cannot enter their territory.[317] Consequently, the abolition of the controls at the borders between the territories of the Member States requires a certain level of trust in each others policies.[318] The competence to temporarily reintroduce these internal border controls on their territory creates some breathing space for the Member States; it gives the Member States the power, in extreme situations, to protect their own territory against threats from outside.[319] In the literature on the exception of Article 68(2) EC, it has been highlighted that especially France was one of the driving forces behind protecting the competence of the Member States to reintroduce internal border controls against interference of the Court.[320] France wanted to ensure that Member States could rely on this power in situations in which they deemed this reliance necessary to protect the public policy or internal security on their territory without having to fear that they would be reprimanded by the Court afterwards.[321] One of the reasons which may have played a big part in the decision of France to defend this point of view is the policy of the Netherlands on soft drugs. France has, since the beginning, been opposed to the Dutch policy on soft drugs because of its possible consequences for France.[322] France

[313] Weiss and Wooldridge 2002, p. 35; Monar 1998, p. 330-331.
[314] Albers-Llorens 1998, p. 1287-1290; Thym 2002, p. 231-234; Staples 2002, p. 246.
[315] Weiss and Wooldridge 2002, p. 27.
[316] Anderson and Bort 2001, p. 16-21; Donner 1993, p. 5-6.
[317] Staples 2000, p. 2; Donner 1993, p. 6.
[318]Consideration 6 of Schengen Borders Code O.J. L 105 13-04-2006, p. 1; Anderson and Bort 2001, p. 21; Romein 2006, p. 44.
[319] Donner 1993, p. 6-7.
[320] Monar 1998, p. 330-331; Monar 2000, p. 31; Papagianni 2001-2002, p. 123; Weiss and Wooldridge 2002, p. 33.
[321] Monar 1998, p. 330-331; Papagianni 2001-2002, p. 123-124; Groenendijk 2004, p. 157; Barnard 2007, p. 506; Guild and Peers 2001, p. 279; Monar 2000, p. 31; Thym 2002, p. 233; Weiss and Wooldridge 2002, p. 33.
[322] Cholewinski 2002, p. 114.

wanted to be able to reintroduce its internal border controls at any moment that it found necessary in order to protect itself against the repercussions of the Dutch policy.[323]

Although Article 67(2) EC expresses that, among others, Article 68 was expected to only be in force for the transitional period of five years after the Amsterdam Treaty, the EU institutions and the Member States have never taken the initiative to adapt this provision.[324] In its Communication of 28 June 2006[325], the Commission for the first time expressed its concern about the limited role of the Court with regard to the competences of Title IV of the EC Treaty. The main concern of the Commission is that Article 68, as a whole, does not provide the citizens with the proper judicial protection that is required in an Area of Freedom, Security and Justice which affects the fundamental rights of persons.[326] Particularly the exception of Article 68(2) EC is regarded by the Commission as undesirable because its consequence is that the Court of Justice is denied legal review of a part of Community law.[327] The Commission therefore, explicitly, supports the idea of applying the standard regime of judicial protection to Title IV instead of continuing to apply the special regime of Article 68 EC in this Communication.[328]

This Communication of the Commission did not result in a change of the judicial regime regarding the matters of Title IV of the EC Treaty until the recent amendments introduced by the Lisbon Treaty. These amendments include the repeal of Article 68 EC.[329] The consequence of the repeal is that the power of the Court of Justice will be broadened because it will no longer be hindered by the exceptions of this provision.[330] But, as a result of the problematic ratification process in several Member States, the future of the Lisbon Treaty has become uncertain.[331] Until the Lisbon Treaty has entered into force, Article 68 of the EC Treaty continues to prohibit the Court from giving its opinion on the validity of the decision of the German government to reinstate the internal border controls temporarily in this particular situation.

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[323] Papagianni 2001-2002, p. 123.
[324] Monar 1998, p. 332; COM(2006) 346 final, p. 2; *Editorial comments* 2007, p. 2.
[325] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee, the Committee of the Regions and the European Communities: *Adaptation of the provision of Title IV of the Treaty establishing the European Community relating to the jurisdiction of the Court of Justice with a view to ensuring more effective judicial protection* COM(2006) 346 final.
[326] COM(2006) 346 final, p. 2-3; *Editorial comments* 2007, p. 2-5.
[327] COM(2006) 346 final, p. 3 and 6-7; *Editorial comments* 2007, p. 4; Albers-Llorens 1998, p. 1287 and 1289; Weiss and Wooldridge 2002, p. 33.
[328] COM(2006) 346 final, p. 7 and 9.
[329] Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, signed at Lisbon, 13 December 2007 O.J. C 306 17-12-2007, p. 211.
[330] 'The Lisbon Treaty Report: An Analysis of the Lisbon Treaty' The European Foundation downloaded on 28 May 2008 via http://www.europeanfoundation.org/docs/4_The%20Lisbon%20Treaty%20Report.pdf, p. 40.
[331] 'Ratificatie EU-verdrag verder in problemen' NRC Handelsblad 21 juni 2008 retrieved via http://www.nrc.nl/europa/article1919241.ece/Ratificatie_EU-verdrag_verder__in_problemen on 1 July 2008.

4.2.2 Admissibility; ways to bypass the exclusion of Article 68 of the EC Treaty

Because Article 68 EC continues to apply for the time being, the relevant question which has to be answered in this case is whether or not it is possible for the Court to bypass the double exclusion of this provision in order to review the validity of the action of the German government in this case. In the following sections of this paragraph I will focus on finding a way to bypass the restriction of Article 68(1) as well as Article 68(2) EC.

a. To bypass Article 68(1) of the EC Treaty

As mentioned before, the German court is initially confronted with the fact that Article 68(1) does not attribute to it the competence to start a preliminary rulings procedure because it functions as a court of first instance in this case.[332] The central question of this section is thus: *is it possible to bypass the restriction of Article 68(1) of the EC Treaty?* In my opinion, it is possible to bypass the restriction of Article 68(1) EC by applying the standard preliminary rulings procedure of Article 234 EC. To justify the use of the standard procedure of Article 234 EC I rely on the fact that the right of free movement of a Union citizen is affected by internal border controls in this case. The case concerns thus the effect of internal border controls on the right of free movement. Because of the effect of the outcome of this case on the right of free movement of Union citizens, it is important that the Court of Justice has the opportunity to pass a judgment on this subject. If the Court of Justice is given the opportunity to pass a judgment on the impact of internal border controls on the right of free movement, a uniform approach towards the conflict between internal border controls and the right of free movement of persons will be established.[333] The establishment of a uniform approach for the national courts dealing with such conflict is important in order to uphold the high standard of protection of the right of free movement of persons by the Court of Justice.[334] The general preliminary reference procedure of Article 234 EC has to be applied in order to ensure effective judicial protection, as stated by the Commission in its Communication.[335]

b. To bypass Article 68(2) of the EC Treaty

Even if it is possible for the German court to bypass the restriction of Article 68(1) by using the argumentation of the previous section, Article 68(2) is still an obstacle for the Court of Justice in passing a judgment on this conflict. Consequently, I will focus, in this section, on bypassing the prohibition of the second paragraph of Article 68 EC by referring to the reasoning of the Court in an earlier case in which it was confronted with a similar jurisdiction problem.[336]

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[332] *Editorial comments* 2007, p. 2; COM(2006) 346 final, p. 3.
[333] COM(2006) 346 final, p. 2-5; *Editorial comments* 2007, p. 2-3; Hall 1991, p. 488.
[334] COM(2006) 346 final, p. 2-5; *Editorial comments* 2007, p. 2-3 and 5; Papagianni 2001-2002, p. 121; Hall 1991, p. 488.
[335] COM(2006) 346 final, p. 7; Editorial comments 2007, p. 5.
[336] Case C-170/96 *Commission v. Council* [1998] ECR I-2763.

The Airport Transit Visa Case[337]

The subject of this '*Airport Transit Visa Case*'[338] was the Joint Action that had been taken by the Council on the matter of 'airport transit arrangements'.[339] This Joint Action was adopted by the Council to improve the control on illegal immigration via the airports. The Council agreed in the Joint Action that every Member State must require a transit visa of a third country national who passes through the airport of a Member State.[340] The Joint Action, however, limited the requirement of this transit visa to nationals of specific third countries and to third country nationals who do not posses any other kind of visa to enter the territory of the Member State.[341] The Council adopted this Joint Action on the basis of its Maastricht third pillar competences, in particular Article K.3 (2) EU.[342] The legal basis of this measure was challenged by the Commission; it argued that the correct legal basis for this Joint Action had to be found in the first pillar, Community law, instead of in the third pillar.[343] For that reason, the Commission started an annulment procedure (ex. Article 230) before the Court in which it underlined its claim by stating that the Council should have taken the decision on grounds of Article 100c of the TEC.[344]

As mentioned previously, Article 68(2) EC denies the Court of Justice jurisdiction to give its judgment about Community measures to protect the public policy in the Member States based on Article 62(1) together with Article 64(1).[345] Because the competence to reintroduce temporary border controls is part of the Schengen Borders Code which incorporates these two provisions, the decision of a Member State to rely on this competence falls outside of the power of the Court of Justice.[346] This problem with the Court of Justice's jurisdiction is similar to the jurisdiction problem presented in the *Airport Transit Visa Case*. The interesting part of the Court of Justice's reasoning is therefore not its considerations on the substantive problem but its arguments for rejecting the claim of the Council that the case was inadmissible because the Court of Justice did not have any jurisdiction on the ground of Article L of the EU Treaty (now Article 46 EU).[347] The Court of Justice based its reasoning on the text of Article M of the EU Treaty (now Article 47 EU).[348] This Article provided that the actions which were taken by the Council pursuant to the third pillar must not affect the competences of the European

[337] Fennelly 2000, p. 12.
[338] Case C-170/96 *Commission v. Council* [1998] ECR I-2763.
[339] Oliveira 1999, p. 149.
[340] Oliveira 1999, p. 150-151.
[341] Oliveira 1999, p. 151.
[342] Fennelly 2000, p. 12-13; Oliveira 1999, p. 149; Case C-170/96 *Commission v. Council* [1998] ECR I-2763, consideration 1.
[343] Oliveira 1999, p. 149; Fennelly 2000, p. 12-13.
[344] Case C-170/96 *Commission v. Council* [1998] ECR I-2763, considerations 1 and 9.
[345] Romein 2006, p. 28; Thym 2002, p. 233-234.
[346] Weiss and Wooldridge 2002, p. 31 and 33; Romein 2006, p. 28; Cholewinski, 2002, p. 113-114; Barnard 2007, p. 503 and 511-514.
[347] Fennelly 2000, p. 12-13; Case C-170/96 *Commission v. Council* [1998] ECR I-2763, considerations 12-18.
[348] Fennelly 2000, p. 13.

Community.[349] In the opinion of the Court of Justice, Article M of the EU Treaty implicitly conferred onto the Court the power to review the content of the Joint Action in question because otherwise it would not be possible for the Court of Justice to decide whether or not the competences of the EC have been affected by the exercise of the particular EU competence.[350] In a later case, the Court of Justice applied this reasoning, relying on Article M of the EU Treaty (now Article 47 EU), as well to obtain the competence to pass a judgment on the validity of a framework decision concerning criminal penalties against environmental offences.[351]

Analysis

The reasoning of the Court is, in so far, interesting because the Court attributes itself the competence to review this Joint Action of the Council despite the fact that Article L of the EU Treaty explicitly denies the Court this power. As mentioned above, the Court based this decision on the text of Article M of the EU Treaty; the Joint Action must not affect the competences of the European Community; in this case Article 100c TEC.[352] The Court regarded the power of review of the Joint Action inherent to the explicit prohibition included in Article M of the EU Treaty[353]; if the Court did not have the jurisdiction to determine whether or not a third pillar measure affected the competences of the Community, the prohibition of Article M of the EU Treaty would be void.[354] The Court consequently awards itself the power to review in this case whether a Community competence is affected by this particular Joint Action.[355] The reason behind the Court's decision is thus its need to act as the protector of Community law; the *acquis communautaire*.[356] The Court would not be able to fulfil this function effectively if it would not be able to review measures that could possibly affect Community law.[357] The way in which the Court approached this jurisdiction problem, by deducing the implicit competence to review the third pillar measure from Article M of the EU Treaty, is similar to the way that the Court has used Article 220 EC to broaden its powers.[358] This provision contains the obligation for the Court to take into account the law while interpreting the provisions of the EC Treaty.[359] In the Court's opinion this obligation to preserve the law justified the exercise of powers which it had not

[349] Case C-170/96 *Commission v. Council* [1998] ECR I-2763, consideration 14.
[350] Case C-170/96 *Commission v. Council* [1998] ECR I-2763, considerations 14-17; Fennelly 2000, p. 13; Oliveira 1999, p. 152-153; Curtin en van Ooik 1999, p. 25 and 28.
[351] Case C-176/03 *Commission v. Council* [2005] ECR I-7879, considerations 38-40.
[352] Case C-170/96 *Commission v. Council* [1998] ECR I-2763, considerations 14-17; Fennelly 2000, p. 13.
[353] Curtin en van Ooik 1999, p. 28.
[354] Curtin en van Ooik 1999, p. 25 and 28; Case C-170/96 *Commission v. Council* [1998] ECR I-2763, considerations 14-18.
[355] Case C-170/96 *Commission v. Council* [1998] ECR I-2763, considerations 14-18.
[356] Curtin en van Ooik 1999, p. 25.
[357] Case C-170/96 *Commission v. Council* [1998] ECR I-2763, considerations 14-17; Fennelly 2000, p. 12-14; Oliveira 1999, p. 152-153 and 155; Curtin en van Ooik 1999, p. 28.
[358] Curtin en van Ooik 1999, p. 28; Craig & De Burca 2003, p. 96.
[359] Craig & De Burca 2003, p. 96.

been attributed explicitly by the EC Treaty.[360] The Court has used Article 220 EC as a legal basis for its implicit powers.[361]

With regard to the case study of the thesis, this line of reasoning of the Court could be useful in order to bypass Article 68(2) EC. This provision is, in general, similar to Article L EU (now Article 46 EU) because both provisions exclude parts of Community law/EU Treaty from the powers of review of the Court.[362] As a result of Article 68(2) EC, the Court will not be able to pass a judgement on the lawfulness of the internal border controls that have been reintroduced temporarily by the German authorities which have consequently had an impact on the right of free movement of Union citizens, in particular Mr. de Vries.[363] The free movement of persons together with the other three fundamental freedoms are considered as preconditions to the objective of the internal market in the EU; in other words, the internal market cannot be realised without the existence of these fundamental freedoms in the area of the EU.[364] The importance of the free movement of persons in the legal framework of the Community is expressed by the activeness with which the Court protects this fundamental freedom in its case law.[365] In my opinion, the Court would not be able to protect the right of free movement of persons adequately if the Court is not allowed to rule on a measure of Community law that could have a deep impact on this fundamental freedom of Union citizens.[366] In other words, the large and detailed body of case law on free movement of persons that has been developed by the Court would thus be undermined if the right of free movement of persons could be infringed by the temporary reintroduction of internal border controls which cannot be reviewed by the Court.[367]

The following conclusion can be deduced from the preceding description; the exclusion included in Article 68(2) EC can be bypassed if the reasoning of the Court in the *'Airport Transit Visa Case'* is followed. The reasoning in that case indicates that the Court attributes itself the power to protect the *acquis communautaire* against infringements.[368] As mentioned before in this thesis, the right of free movement of the Union citizens has become one of the fundamental rights in the European Union and is undoubtedly part of the *acquis communautaire.*[369] This position of the right of free movement of persons in Community law entails that the Court is competent to review the validity of measures which affect the right of free movement. To deny the Court the power to review the validity of the decision by a Member State to reinstate such temporary border controls does thus not agree with the role of the aim that the Court has set for itself; the protection of the *acquis communautaire* against

[360] Craig & De Burca 2003, p. 97.
[361] Craig & De Burca 2003, p. 96.
[362] Fennelly 2000, p. 4-8 and 13.
[363] Fennelly 2000, p. 5-8.
[364] Eijsbouts, Jans & Vogelaar 2004, p. 67-68; Hall 1991, p. 488.
[365] Craig & De Burca 2003, p. 826-841.
[366] Hall 1991, p. 488.
[367] Hall 1991, p. 488.
[368] Curtin en van Ooik 1999, p. 25.
[369] Case 41/74 *Van Duyn* [1974] ECR I-01337, consideration 18; Eijsbouts, Jans & Vogelaar 2004, p. 67-69 and 100; Hall 1991, p. 488.

infringements.[370] The logical consequence is that the Court is able to bypass the prohibition of Article 68(2) EC by referring to its obligation to protect the *acquis communautaire.*[371] In other words, this lex specialis, deliberately introduced by the Amsterdam Treaty, is no longer acceptable in a Community in which the insurance of effective judicial protection is a prominent objective.[372]

4.3 How would the Court of Justice rule in this case?

While the previous paragraph was concerned with the discussion of a possible method to bypass the prohibition of Article 68(2) EC, in the following paragraph I will presume that the Court indeed has the power to rule in this case in order to have a complete discussion on the Court's position in this case. In other words, in this paragraph the jurisdiction of the Court in this matter is not disputed.

4.3.1 Is the right of free movement of persons infringed?

Before it can be determined whether or not the obstruction that was caused by the temporary border controls can be justified by the purpose of this measure, the following question must be answered by the Court of Justice: w*hether or not there has been an infringement of the right of free movement of persons in this particular situation?* Article 5 of Directive 2004/38/EC provides that the only requirement for a Union citizen while travelling from one Member State to another Member State is the possession of a valid passport or identity card.[373] In its early case law, the Court of Justice held that the Member States were still allowed to perform identity checks at their internal borders, albeit not systematic.[374] The fact that Mr. de Vries and the other citizens passing this border crossing point were confronted with checks on a regular basis during the period of the festivities is not compatible with this case law of the Court of Justice. In the light of this occurrence, it must be said that the right of free movement of Mr. de Vries was infringed by the decision of the German government to reintroduce the internal border controls during the festivities. The Court of Justice, therefore, should conclude that there has indeed been an obstruction of the right of free movement of Mr. de Vries, as a result of the invocation by the German government of the competence of Article 23 of the Schengen Borders Code.

[370] Curtin en van Ooik 1999, p. 25.
[371] Curtin en van Ooik 1999, p. 25.
[372] Weiss and Wooldridge 2002, p. 27 and 33; COM(2006) 346 final, p. 2-3 and 7 and 9; Editorial comments 2007, p. 5, Hall 1991, p. 488.
[373] Article 5 of Directive 2004/38/EC OJ L 158, 30-04-2004, p. 91.
[374] Staples 2000, p. 3; Case 321/87 *Commission v. Kingdom of Belgium* [1989] ECR I-997, considerations 11 and 15; Case C-68/89 *Commission v. Kingdom of the Netherlands* [1991] ECR I-2637, considerations 10 and 11; Barnard 2007, p. 422.

4.3.2 Can the obstruction caused by the reintroduction of temporary border controls be justified?

The next step which has to be taken by the Court in its considerations is to determine whether or not the obstruction of the fundamental freedom is justified by the reason which lies behind the decision of the German government.[375] The German government argued that its reliance on Article 23 of the Schengen Borders Code was necessary in order to protect the public policy on its territory. In its view, this provision attributes to Member States the right to decide whether or not the measure is necessary to protect public policy.[376] The right of free movement of persons in this case is thus restricted as a result of the decision of a Member State to rely on a right which is attributed to it by Community law.[377] In its case law on free movement, the Court of Justice has already been confronted with several cases in which the exercise of another right affected the Community right of free movement. In particular, the reasoning of the Court of Justice in *Schmidberger*[378] is relevant in this discussion.

This case concerned a claim by the German transport company Schmidberger that the Austrian authorities had restricted the fundamental freedom of movement of goods because it had allowed a demonstration to take place which closed the Brenner Pass for the transport of goods.[379] The Brenner corridor is the most important transit route for goods between Austria and Italy. During a period of thirteen hours trucks could not pass through it because the demonstration organised by environmentalists blocked the road.[380] Schmidberger claimed the infringement of the right of free movement of goods by the Austrian government on grounds that the authorization of the demonstration was not compatible with its obligations pursuant to Community law.[381] The Austrian government, on the other hand, based its decision to allow the demonstration on Article 10 and 11 of the ECHR; it argued that its consent was necessary to protect both the freedom of speech and the freedom of assembly of the participants.[382] The Court of Justice was thus confronted with a conflict between, on the one hand, the fundamental rights in the ECHR and, on the other hand, a common market freedom.[383] In its ruling the Court of Justice applied the proportionality test in order to decide whether or not the particular infringement of the fundamental freedom as a result of the invocation of fundamental rights could be justified.[384] The Court of Justice expressed the proportionality test with

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[375] Case C-112/00 *Eugen Schmidberger, Internationale Transporte und Planzüge v. Austria* [2003] ECR I-5659, consideration 80-82.
[376] Article 23 of the Schengen Borders Code O.J. L 105, 13-04-2006, p. 12.
[377] Groenendijk 2004, p. 160-161, 165 and 168-169.
[378] Case C-112/00 *Eugen Schmidberger, Internationale Transporte und Planzüge v. Austria* [2003] ECR I-5659.
[379] Case C-112/00 *Eugen Schmidberger, Internationale Transporte und Planzüge v. Austria* [2003] ECR I-5659, consideration 16.
[380] Case C-112/00 *Eugen Schmidberger, Internationale Transporte und Planzüge v. Austria* [2003] ECR I-5659, consideration 10-16; Morijn 2006, p. 23-25.
[381] Case C-112/00 *Eugen Schmidberger, Internationale Transporte und Planzüge v. Austria* [2003] ECR I-5659, consideration 16.
[382] Case C-112/00 *Eugen Schmidberger, Internationale Transporte und Planzüge v. Austria* [2003] ECR I-5659, consideration 17; Ronkes Agerbeek 2004, p. 257; Morijn 2006, p. 24.
[383] Morijn 2006, p. 23-25; Ronkes Agerbeek 2004, p. 257.
[384] Morijn 2006, p. 25; Ronkes Agerbeek 2004, p. 257-258; Brown 2003, p. 1507; Case C-112/00 *Eugen Schmidberger, Internationale Transporte und Planzüge v. Austria* [2003] ECR I-5659, consideration 80-82.

the following words "… *The interests involved must be weighed having regard to all the circumstances of the case in order to determine whether a fair balance was struck between those interests*".[385] The Court of Justice argued that the authorization of the demonstration by the Austrian government did not amount to a restriction of the fundamental freedom on the specific circumstances of this case. Firstly, an important aspect is the fact that the demonstration was not organised to interfere with the transport of goods via this road but rather to raise the awareness about environmental issues in that particular area.[386] Another important aspect in this case is the limited repercussions for the free movement of goods due to the demonstration: the demonstration restricted the free movement of goods on only one transport road and only during a short and predetermined period of time.[387] The Court of Justice considered that the consequence of the demonstration on the free movement of goods in this case was limited in time and place and, as a result, ruled that the influence and the possible negative effect of the demonstration on the trade in the EU in general was minimal.[388]

The observation of the Court of Justice in this case was quite different from its observation in a previous case, *Commission v. France*[389], in which it ruled that the passive attitude of the French government towards the violent acts of its citizens against the importers of foreign products caused a general climate of insecurity which had a negative effect on the trade as a whole.[390] The Court of Justice's decision in that case was based on the fact that these violent acts continued for many years and that the measures taken by the French government against these violent acts were never adequate enough to stop those acts.[391] In other words, the duration and severity of the violent acts attributed to the conclusion of the Court of Justice that the effect on the trade was severe.[392]

After this brief discussion of the Court of Justice's judgement in *Schmidberger*, it is important to shift the focus back to the situation in the case study of this thesis. At this point in the discussion of this case, it is important to discuss whether or not the obstruction of his right of free movement, caused by the exercise of the right to reinstate temporary controls at internal borders by the German government, is justified by the particular circumstances of the case.

Before the proportionality test is applied, it is necessary to determine the aim of the decision to temporarily reintroduce controls at this specific internal border.[393] The reason behind the decision of the German government to temporarily reintroduce controls at this border crossing point was the

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[385] Case C-112/00 *Eugen Schmidberger, Internationale Transporte und Planzüge v. Austria* [2003] ECR I-5659, consideration 81.
[386] Case C-112/00 *Eugen Schmidberger, Internationale Transporte und Planzüge v. Austria* [2003] ECR I-5659, consideration 86.
[387] Case C-112/00 *Eugen Schmidberger, Internationale Transporte und Planzüge v. Austria* [2003] ECR I-5659, consideration 85 and 87.
[388] Case C-112/00 *Eugen Schmidberger, Internationale Transporte und Planzüge v. Austria* [2003] ECR I-5659, consideration 88.
[389] Case C-265/95 *Commission v. French Republic* [1997] ECR I-6959.
[390] Case C-265/95 *Commission v. French Republic* [1997] ECR I-6959, consideration 53.
[391] Case C-265/95 *Commission v. French Republic* [1997] ECR I-6959, considerations 52 and 53.
[392] Case C-265/95 *Commission v. French Republic* [1997] ECR I-6959, considerations 52 and 53.
[393] Craig & De Burca 2003, p. 372.

opinion that this measure was necessary to protect the public policy in the area surrounding the AWACS base. The German government relied on this measure to keep the "troublemakers" away from the AWACS base in order to prevent public disorder.

The first question which must be answered in the proportionality test is *whether or not the introduction of the border controls was an appropriate measure to realise the aim of the German government?*[394] In order to determine whether or not the infringement is justified by the particular circumstances we must make a comparison between the circumstances in the case of Mr. de Vries and the circumstances of the *Schmidberger* case. The German government reintroduced the checks only at this specific border crossing point because this was the nearest crossing point to the area of the AWACS base; the area in which Germany feared the most trouble during the festivities. It was not planned that the effects of this measure would go beyond the particular border crossing point. Similar to the demonstration in the *Schmidberger* case, the reintroduction of the internal border controls was limited in place.[395] This indicates that Mr. de Vries had the opportunity to take another road in order to reach his work place. The distance may have been longer but Mr. de Vries would not have been confronted with the internal border controls. On the other hand, the limitation of the controls to one single crossing point indicates that the demonstrators could have used another border crossing point to cross the border to reach the AWACS base. This diminishes the effect that the German government wants to achieve with the border controls; keeping the demonstrators outside. The reintroduction of the internal border controls was, as well, limited in time because it only continued as long as the festivities took place; as soon as the celebration of the twenty-fifth anniversary of the AWACS base was over the internal border controls were terminated. Both the place and the time of the internal border controls were thus linked to the festivities. The border controls may have been limited in time and place but not only those troublemakers from outside were affected by the border controls; all the persons passing through that crossing border point during that period were confronted with these checks. In order to safeguard the public policy during the celebration, the German government deliberately accepted that the measure did not only affect the right of free movement of the troublemakers but also the right of "the innocent bystanders". However, the checks at this border do not constitute an absolute restriction of the right of "these innocent bystanders" to enter the territory. The objective of the border controls was to check the identity of the persons passing the border crossing point in question. The German authorities used the measure of border controls to identify the "troublemakers" to keep them away from the area of the festivities; to prevent them from causing trouble during the festivities. After the identity check, the 'innocent bystanders" would still be able to enter Germany. The border controls therefore posed more an obstacle than a real restriction to the free movement of Union citizens. As a result, the border controls do not render the right of free movement

[394] Craig & De Burca 2003, p. 372.
[395] Case C-112/00 *Eugen Schmidberger, Internationale Transporte und Planzüge v. Austria* [2003] ECR I-5659, consideration 85.

of persons completely void. Based on the consideration that the right of free movement of Mr. de Vries is not restricted completely due to the limited effect of the border controls, the conclusion must be that the reintroduction of the temporary border controls in this particular case was an appropriate measure.

The second question which is important in the proportionality test is: *whether or not the measure was necessary in the present circumstances to achieve this aim?*[396] The reason of the German government to reintroduce these temporary border controls was its wish to keep the demonstrators outside. The German government was afraid that these "troublemakers from outside" would encourage the citizens to disturb the festivities which could lead to an uncontrollable situation. However, as has been indicated in the description of the case of Mr. de Vries, the interests of the demonstrators from outside and those of the citizens differ: While the demonstrators from outside only became involved in the conflict to protect the forest from being destroyed, the citizens have been fighting against the AWACS base since its establishment twenty-fifth years ago. The main incentive of the citizens to fight against the AWACS base is the nuisance caused by the AWACS planes as well as the fear for their safety. The citizens fight against the cutting down of the forest because they fear that this step will increase the nuisance which has acknowledged negative effects on their health.[397] The demonstrators are exclusively concerned with the environmental consequences that the cutting of the trees will have, while the citizens fight against the AWACS base in general. At the time of the celebration of the twenty-fifth anniversary of the AWACS base the trees had already been cut down which decreased the interest of these environmental activists in this conflict. Moreover, the only indication that the German government has that the activists will be in the area was a statement in a newspaper.[398] Besides this vague statement, there had been no other concrete evidence that the activists would cause trouble during the festivities. This leads to the conclusion that the decision to reintroduce temporary border controls is based on fear rather than on concrete evidence that an uncontrollable situation would occur. The answer to the third question is that this measure was not necessary in the present circumstances.

The last question which is relevant for the proportionality test is: *whether the measure imposed a burden on the individual which was not proportionate to the aim?*[399] Despite the fact that this measure was aimed at the demonstrators, it was particularly the persons who used this border crossing point daily during the period of the celebration to get to their work, the "innocent bystanders," who were confronted with these checks. The burden of the checks has therefore been unreasonably divided between the large group of innocent bystanders and the small group of active opponents.

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[396] Craig & De Burca 2003, p. 372.
[397] `Zwakke lezers door herrie bij vliegveld' *NRC Handelsblad* 6 augustus 2008 retrieved via www.nrc.nl on 14 August 2008; 'RIVM: Gezondheidsklachten rond Awacs-vliegveld' *Dagblad de Limburger* 6 augustus 2008 retrieved via http://www.limburger.nl/article/20080806/videonieuws/808060433 on 14 August 2008.
[398] 'Nieuwe bezetting bossen Schinveld voorbereid' *NRC Handelsblad* 13 juni 2007 retrieved via http://www.nrc.nl/anp/binnenland/article722195.ece/Nieuwe_bezetting_bossen_Schinveld on 1 October 2007.
[399] Craig & De Burca 2003, p. 372.

For its livelihood, the Court of Justice should, based on the foregoing considerations, conclude that the reintroduction of checks at this particular border crossing point was not proportionate in relation to the aim of the German government; to prevent that an uncontrollable situation would be created by troublemakers from outside. Consequently, there is no other conclusion possible than that the hindering of the exercise of free movement rights in the area surrounding the AWACS base by these border controls is not justified by the public policy exception. Instead, a better alternative would have been an increase of security at the AWACS base to prevent public disorder during the festivities at the AWACS base. An increase of security at the gates would provide the German authorities with a better chance to react if disturbances would occur and persons would not be infringed in the exercise of their right of free movement of persons.

4.4 Conclusion

The objective of this chapter was to provide the German court with some guidelines in dealing with the conflict between the right of free movement of Union citizens and the right of Member States to reintroduce temporary border controls. This conflict is complicated due to the fact that the German court, as a result of Article 68 of the EC Treaty, cannot involve the Court of Justice in finding a solution for this conflict.[400] This provision forbids, at first, national courts of first instance to start a preliminary rulings procedure and, secondly, prohibits the Court of Justice to pass a judgment on the decision of a Member State to rely on the temporary border controls in order to protect the public policy.[401] The introduction of the special judicial regime in Article 68 of the EC Treaty illustrated the reluctant stance towards permanent surrendering of controls at their internal borders, as referred to in the third chapter.[402] Whereas the Member States had, at the time of the Amsterdam Treaty, finally agreed to put the matter of abolition of internal border controls under the umbrella of the European Union, they did not give the Court of Justice full power to scrutinize the exceptional measure of reintroduction of internal border controls.[403]

In my opinion, the restriction included in Article 68(1) of the EC Treaty should be bypassed by using the preliminary rulings procedure of Article 234 of the EC Treaty instead. I justify this statement by referring to the fact that this case concerns an infringement of the right of free movement of persons by the reintroduction of temporary border controls. The national courts will only be able to

[400] Monar 1998, p. 330.
[401] Editorial comments 2007, p. 1-5.Albers-Llorens 1998, p. 1288; Fennelly 2000, p. 4; Monar 2000, p. 31-32; Monar 1998, p. 330-331.
[402] Toner 2000, p. 415-417; The introduction of 'The *Schengen area and cooperation'* via http://europa.eu/scadplus/leg/en/lvb/l33020.htm visited on 16 November 2007; Anderson and Bort 2001, p. 22-25; Groenendijk 2004, p. 150-151; Anderson and Bort 2001, p. 16-21 and 22-24; Weiss and Wooldridge 2002, p. 27; Donner 1993 5-7.
[403] Albers-Llorens 1998, p. 1278-1290; Fennelly 2000, p. 4; Monar 1998, p. 330; Thym, 2002, p. 231-234; Weiss and Wooldridge 2002, p. 27 and 33; Barnard 2007, p. 504.

continue to offer the Union citizens effective judicial protection with regard to their right of free movement if every national court is competent to refer a preliminary question concerning the decision of a Member State to reintroduce temporary border controls to the Court of Justice. Otherwise the Court of Justice will not be able to establish a uniform approach towards an infringement of the right of free movement of persons by the reintroduction of internal border controls.

Secondly, I argue that the restriction of Article 68(2) EC to the powers of the Court of Justice is not compatible with the role of protector of Community law, the *acquis communautaire*, which the Court of Justice has taken upon itself.[404] The Court especially exercised its role of protector of the *acquis communautaire* actively in the area of the fundamental freedoms.[405] In discussing whether or not it is possible to bypass this particular exclusion of the Court of Justice's jurisdiction it is important to take into account the Court of Justice's line of reasoning in the *Airport Visa case*[406], in which the Court of Justice attributed itself the power to scrutinize a third pillar measure in order to protect Community competences.[407] In this judgement, the Court of Justice used the method of implicit jurisdiction to attribute itself the power to review the Joint Action of the Council.[408] In its opinion, the prohibition of Article M of the EU Treaty, that third pillar measures are not allowed to affect the competences of the first pillar, cannot be observed effectively if the Court of Justice does not have the competence to review the third pillar measures.[409] Likewise, the Court of Justice has used the text of Article 220 EC to justify the broadening of its powers of review.[410] It reasoned that it needed to have broad powers to review Community acts in order to protect Community law effectively.[411] Based on these considerations on implicit competences, I propose that the Court of Justice must have the power to scrutinize the decision of the Member State to rely on the exceptional measure of temporary reintroduction of internal border controls as long as the Treaty amendments have not entered into force. Otherwise the role of protector of right of free movement that the Court of Justice has taken upon itself will be void.[412] In other words, how could the Court of Justice protect the fundamental freedom of movement adequately if the Member States can infringe this right whenever it feels necessary without judicial control?[413]

After answering the question about how to bypass the prohibitions of Article 68(1) and (2) EC by referring to the Court of Justice's role of protector of the fundamental freedoms, it is important to discuss the substantive side of the case. As mentioned before, this case concerns a conflict between

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[404] Curtin en van Ooik 1999, p. 25; Albers-Llorens 1998, p. 1288; Hall 1991, p. 488; Craig & De Burca 2003, p. 23.
[405] Barnard 2007, p. 461-463; Craig & De Burca 2003, p. 628-630 and 826-841.
[406] Case C-170/96 *Commission v. Council* [1998] ECR I-2763.
[407] Case C-170/96 *Commission v. Council* [1998] ECR I-2763, considerations 14-18.
[408] Curtin en van Ooik 1999, p. 25 and 28.
[409] Curtin en van Ooik 1999, p. 25 and 28.
[410] Craig & De Burca 2003, p. 96-97.
[411] Craig & De Burca 2003, p. 96-97.
[412] Case C-170/96 *Commission v. Council* [1998] ECR I-2763, considerations 14-18.
[413] Editorial comments 2007, p. 5; Hall 1991, p. 488.

two rights; the question is thus which of these rights must prevail? In an earlier case, *Schmidberger*, in which the exercise of fundamental rights infringed the free movement of goods, the Court of Justice undertook a proportionality test in order to decide whether or not the infringement could be justified by the aim of the of the infringement.[414] In applying the proportionality test the Court of Justice gave special attention to the limited effect of the infringement on the free movement of goods.[415] Applying a similar proportionality test to the present case, I came to the conclusion that the Court of Justice would, in this case, rule that the infringement of the free movement of persons is not justified by Germany's need to protect its public policy. I base this conclusion on the fact that, despite the limited effect of the checks on the free movement of persons, these checks actually affect mostly the "innocent bystanders" instead of affecting the small group of opponents that the German government wanted to keep out. In my opinion, the problem with this measure in this particular case is that the particular circumstances are not strong enough to permit such a measure; the implications of this measure are not appropriate in relation to the facts of the case.

[414] Case C-112/00 *Eugen Schmidberger, Internationale Transporte und Planzüge v. Austria* [2003] ECR I-5659, consideration 80-82.
[415] Case C-112/00 *Eugen Schmidberger, Internationale Transporte und Planzüge v. Austria* [2003] ECR I-5659, consideration 84-89.

5 Conclusion

The central issue in this thesis was the complaint of Mr. de Vries, a Union citizen, that his right of free movement was hindered by the decision of Germany to temporarily reintroduce border controls between the territories of the Member States; *how should the German court deal with this matter?*

If the obstruction of the free movement of persons in this case was a 'normal' infringement of this principle, the German court would be able to apply the strict outline which has been established by the European legislator together with the Court of Justice.[416] In other words, in such a situation the German court has to review whether or not the particular restriction satisfies the material and procedural conditions of Directive 2004/38/EC[417] which provides a uniform approach based on both Directive 64/221/EEC[418] and the interpretation of the Court of Justice of the provisions of Directive 64/221/EEC.[419] The second chapter points out that a restriction of the right of free movement of a Union citizen is only permitted if the strict conditions of the public policy concept, *"the personal conduct of a Union citizen is a genuine, present and sufficiently serious threat to one of the fundamental interests of society",* are fulfilled.[420] The Court of Justice continues to play an active role to safeguard the principle of free movement in Community law by continuing to review if a restriction fulfils these strict conditions.

The position of the Court of Justice with regard to the *Schengen acquis* was completely different: while the Court of Justice, at numerous times, has had the opportunity to set a course for the development of the free movement principle within Community law[421], it could not use its powers to guide the development of the concept of no border controls between the Member States because this development happened outside the framework of the EU.[422] The third chapter taught us that this intergovernmental development of this concept is the result of the significant position of border controls in the security policy of states.[423] In the opinion of the Member States, border controls are necessary to keep unwanted persons out. In other words, by way of border controls the Member States can decide who can and who cannot enter their territory.[424] The intergovernmental initiative by a small group of Member States resulted in the Schengen Agreement of 14 June 1985.[425] This agreement was the foundation on which a growing group of Member States developed the principle of no border

[416] Barnard 2007, p. 461-462; Craig & De Burca 2003, p. 825.
[417] Directive 2004/38/EC O.J. L 158, 30-04-2004.
[418] Directive 64/221/EEC O.J. 056 04-04-1964.
[419] Barnard 2007, p. 461-462; Consideration 22 of Directive 2004/38/EC O.J. L 158, 30-04-2004, p. 84.
[420] Craig & De Burca 2003, p. 825-835; Barnard 2007, p. 462; Article 27(2) of Directive 2004/38/EC O.J. L 158, 30-04-2004, p. 114.
[421] Consideration 22 and Articles 27 and 28 of Directive 2004/38/EC O.J. L 158, 30-04-2004, p. 84 and 113-115; Barnard 2007, p. 461-462.
[422] Barnard 2007, p. 506.
[423] Anderson and Bort 2001, p. 16-21.
[424] Groenendijk 2004, p. 150-151; Anderson and Bort 2001, p. 22-25; Staples 2000, p. 2; Donner 1993, p. 6.
[425] The 1985 Schengen Agreement in: *Schengen acquis* O.J. L 239 22-09-2000, p. 13-18.

controls further until it was possible to integrate the *Schengen acquis* in the legal framework of the EU. The integration of the *Schengen acquis* into the legal framework of the EU, however, did not lead to an adaptation of the competence to reintroduce temporary border controls.[426] Under the legal framework of the EU the same vague criterion continued to be decisive: "*a serious threat to the public policy or internal security of a Member State"*.[427] Like the text of the 1990 Schengen Implementing Agreement[428], the text of its successor, the Schengen Borders Code[429], does not provide clarification on the interpretation of this public policy concept.[430] In addition to the vague phrasing of the conditions of the competence, the Member States have not been eager to follow the procedural conditions, introduced by the 1990 Schengen Implementing Agreement to restrict the Member States in their reliance on the competence to reinstate temporary border controls.[431] This lack of eagerness of the Member States is exemplified by a leniency to comply with the procedural safeguards of the Member State which wishes to rely on the competence as well as the lack of control of the other Member States of the compliance of this Member State with the safeguards.[432] Kees Groenendijk[433] highlighted in his research that both the non-compliance with the procedural safeguards and the vague phrasing of the competence have contributed to the inconsistent and individual approach of the Member States with regard to the competence of reintroducing temporary border controls.[434]

Moreover, the step to integration the *Schengen acquis* into Community law did not resolve the problem of the inconsistent application of the competence by the Member States because this step did not resolve the legal vacuum which existed with regard to the judicial review of the exercise of the competence during the period of intergovernmental development of the *Schengen acquis*.[435] Under the legal framework of the EU, Article 68 of the EC Treaty functions as a double exclusion to the involvement of a judicial authority.[436] While Article 68(1) EC denies lower national courts to refer a preliminary question, Article 68(2) EC contains a prohibition for the Court of Justice: it is forbidden to rule on the validity of measures taken by the Member States pursuant to Article 62(1) EC in order to protect the public policy.[437] In the present case, it entails the following problem for the German court; it does not have any guidelines at his disposal on how to interpret the validity of the temporary reintroduction of border controls. As we have seen in the fourth chapter, it is possible for the Court of Justice to bypass both prohibitions to provide the national courts with guidelines to deal with a case in

[426] Groenendijk 2004, p. 155.
[427] Groenendijk 2004, p. 153-155; Article 23(1) of the Schengen Borders Code *O*.J. L 105, 13-04-2006, p. 12.
[428] The 1990 Schengen Implementing Agreement in: *Schengen Acquis* O.J. L 239 22-09-2000, p. 19-62.
[429] *The Schengen Borders Code* O.J. L 105 13-04-2006
[430] Article 2(2) of the Schengen Implementing Agreement in: *Schengen acquis* O.J. L 239 22-09-2000, p. 20; Article 23 of the Schengen Borders Code *O*.J. L 105, 13-04-2006, p. 12
[431] Groenendijk 2004, p. 153, 162-163 and 167-170.
[432] Groenendijk 2004, p. 162-163 and 167-170.
[433] Groenendijk 2004, p. 150-170.
[434] Groenendijk 2004, p. 162-163 and 167-170.
[435] Staples 2002, p. 246; Groenendijk 2004, p. 162-163 and 167-170; Monar 1998, p. 330-331.
[436] Monar 1998, p. 330-331.
[437] COM(2006) 346 final, p. 3 and 6; Monar 1998, p. 330-331; Editorial comments 2007, p. 1-4; Guild and Peers 2001, p. 278-279.

which the right of free movement is hindered by temporary border controls. In that chapter, I argued that it is possible for the German court of first instance to rely on Article 234 EC in order to refer a preliminary question and, consequently, to bypass Article 68(1) EC. I justified this proposition by referring to the fact that the right of free movement of Union citizens is at issue in this case. In order to uphold the high level of protection of the right of free movement of persons, it is important that the Court of Justice can pass a judgment on every action which affects this right.[438] In other words, the involvement of the Court of Justice in this case is important to establish a uniform approach towards this conflict between internal border controls and the right of free movement of persons.[439] Establishing a uniform approach on which the national courts can rely to resolve this conflict will benefit effective judicial protection.[440] With regard to the exclusion of Article 68(2) EC, I proposed that the Court of Justice should apply the reasoning of the *Airport Transit Visa Case*[441] to bypass this prohibition. In that case, the Court of Justice relied on its main objective of protecting the *acquis communautaire* against interference to attribute to itself the implicit competence to judge in the case concerning a third pillar measure.[442] It argued that it could not protect the *acquis communautaire* effectively if it could not determine whether or not this particular third pillar measure infringed the rules of Community law.[443] If the Court applied the same reasoning to the case of this thesis, it would mean that the Court attributes to itself the competence to determine the effect of border controls on the free movement of Union citizens.[444] In other words, the protection of the right of free movement of persons is undermined if the infringement of this right by temporary border controls cannot be reviewed by the Court of Justice.[445]

However, it must be observed that the implication of this reasoning is limited. It is inherent to the reasoning applied in the *Airport Transit Visa Case* that the prohibition of Article 68(2) cannot be completely bypassed by the Court of Justice: while the Court of Justice gains the competence to rule on the effect of temporary border controls on the right of free movement of Union citizens, it will not be able to determine the validity of the decision of a Member State to reinstate temporary border controls. In other words, the decision whether or not the situation requires protecting the public policy continues to fall outside the competences of the Court of Justice.[446] The conclusion that should be drawn is that, as a result of this reasoning, the Court of Justice should be able to gain some access to a

[438] COM(2006) 346 final, p. 2-5; *Editorial comments* 2007, p. 5; Hall 1991, p. 488.
[439] COM(2006) 346 final, p. 2-5; Hall 1991, p. 488.
[440] COM(2006) 346 final, p. 2-5 and 7; *Editorial comments* 2007, p. 2-3 and 5.
[441] Case C-170/96 *Commission v. Council* [1998] ECR I-2763.
[442] Case C-170/96 *Commission v. Council* [1998] ECR I-2763, considerations 14-18; Curtin en van Ooik 1999, p. 25 and 28.
[443] Case C-170/96 *Commission v. Council* [1998] ECR I-2763, considerations 14-18; Curtin en van Ooik 1999, p. 25 and 28.
[444] Guild and Peers 2001, p. 279, 282 and 284-285; Curtin en van Ooik 1999, p. 25.
[445] Editorial comments 2007, p. 5; Guild and Peers, p. 284-285; Hall 1991, p. 488.
[446] Guild and Peers 2001, p. 279.

part of Community law in which it has not been able to exercise its powers of judicial review before.[447]

The exclusion of Article 68 EC, and in particular Article 68(2) EC, was introduced to facilitate the integration of the *Schengen acquis* into the legal framework of the EU.[448] Due to the important position of border controls in the policy of Member States, they were reluctant to bring the competence to reintroduce temporary border controls under the legal framework of the EU.[449] This prohibition provides that the Member States continue to be free of interference by the Court in deciding whether or not a situation requires the temporary reintroduction of internal border controls.[450] It is questionable whether or not this is desirable in regards to the strong connection between the free movement of Union citizens and the abolition of internal border controls of the Member States; every reintroduction of border controls will automatically affect the right of free movement of Union citizens.[451] The text of the Treaty of Lisbon expresses that the Member States have recently acknowledged that it is no longer desirable and acceptable that a part of Community law is excluded from the judicial review by the Court of Justice; one of the amendments, introduced by the Lisbon Treaty, is the repeal of Article 68 EC as a whole.[452] The consequence of this amendment will be that the decisions of Member States entailing the temporary reintroduction of border controls will fall under the general judicial regime of the current Article 234 EC and will therefore be open to complete judicial review by the Court.[453] The approximated date of entry into force was 1 January 2009, however, due to the drawback in the ratification process by the negative result of the Irish referendum the future of the Lisbon Treaty has become uncertain.[454] In my opinion, the delay in the ratification process of the Lisbon Treaty should not keep the Court of Justice from using the reasoning of the *Airport Visa Case* to bypass the prohibition of Article 68(2) EC. The exclusion of jurisdiction is especially not acceptable in respect to the objective of the EU to become closer to the Union citizens.[455] The fact that not every restriction, how small it may be, of the right of free movement of Union citizens is subject to judicial review of the Court is not compatible with this objective of the

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[447] Guild and Peers 2001, p. 279 and 284-285.
[448] Weiss and Wooldridge 2002, p. 27; Monar 1998, p. 330-331; Papagianni 2001-2002, p. 123-124; Groenendijk 2004, p. 157; Barnard 2007, p. 506; Guild and Peers 2001, p. 279; Monar 2000, p. 31.
[449] Anderson and Bort 2001, p. 16-21 and 22-25; Toner 2000, p. 417.
[450] Guild and Peers 2001, p. 279; Papagianni 2001-2002, p. 123-124.
[451] Guild and Peers 2001, p. 284-285; Editorial comments 2007, p. 5.
[452] Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, signed at Lisbon, 13 December 2007 O.J. C 306 17-12-2007, p. 211.
[453] Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, signed at Lisbon, 13 December 2007 O.J. C 306 17-12-2007, p. 211; 'The Lisbon Treaty Report: An Analysis of the Lisbon Treaty' The European Foundation downloaded on 28 May 2008 via http://www.europeanfoundation.org/docs/4_The%20Lisbon%20Treaty%20Report.pdf, p. 40.
[454] http://www.consilium.europa.eu/cms3_fo/showPage.asp?id=1296&lang=en visited on 26 May 2008; 'Ratificatie EU-verdrag verder in problemen' NRC Handelsblad 21 juni 2008 retrieved via http://www.nrc.nl/europa/article1919241.ece/Ratificatie_EU-verdrag_verder__in_problemen on 1 July 2008.
[455] COM(2001) 428 final, p. 11-18; Guild and Peers 2001, p. 289; Hall 1991, p. 488.

EU.[456] In other words, it is hard to explain to the Union citizens that, despite the importance of the right of free movement within the legal framework of the EU, their right can be affected without the possibility of invoking judicial review by the Court of Justice.[457] Consequently, the partial judicial review offered by the Court of Justice as a result of following the reasoning in the *Airport Transit Visa Case* is better than no judicial review, as long as the Lisbon Treaty has not entered into force, in order to provide some form of effective judicial protection.[458]

[456] Editorial comments 2007, p. 5.
[457] Hall 1991, p. 488.
[458] COM(2006) 346 final, p. 2-3 and 7 and 9; Editorial comments 2007, p. 5.

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