Special Issue: *Lisbon vs. Lisbon*

Securing the EU Public Order: Between an Economic and Political Europe

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A. Introduction

Until recently, throughout the European Union's integration process, public order and internal security matters have been marked by a concern and respect for the national sovereignty of the EU Member States. Member States enjoyed their respective regulatory autonomy, as public order and internal security matters were dealt with at the EU level merely on the basis of the internal market logic. This is particularly evident in Articles 45(3) and 52 of the Treaty on the Functioning of the European Union (TFEU). These Articles establish the exceptions of public policy and public security as grounds that may be invoked by the Member States to limit the fundamental right to free movement. These grounds have been primarily viewed as deriving from impediments to the creation of the common market.

The establishment of the European Union's area of freedom, security and justice (AFSJ) marks a break with the standard of Member State regulatory autonomy. The Treaty of Amsterdam established the AFSJ as a "self-standing integration objective"[1] alongside the internal market and closely linked the creation of the AFSJ with the integration of the Schengen framework into the EU.[2] Initially, France, Germany and the Benelux countries negotiated the Schengen Agreement outside of the EU framework to enable the free movement of persons through the abolishment of their internal borders. As a consequence, border control was moved to the external borders of the Schengen zone.[3]

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[1] Jörg Monar, *The Area of Freedom, Security and Justice*, *in* PRINCIPLES OF EUROPEAN CONSTITUTIONAL LAW 551, 555 (Armin von Bogdandy & Jürgen *Bast* eds., 2010).

[2] Treaty of Amsterdam Amending the Treaty on European Union, the Treaties Establishing the European Communities and Certain Related Acts, Oct. 2, 1997, 1997 O.J. (C 340) 1.

[3] The Agreement signed in Schengen, Luxembourg, ("Schengen Agreement") on 14 June 1985 by the three States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic, and Convention implementing the Schengen Agreement of 14 June 1985 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

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Essential to implementing the Convention of the Schengen Agreement (the Convention) are the measures that compensate for the abolition of border checks, including the Schengen Information System (SIS), an intergovernmental database to register information on individuals and properties. Similarly, through the adoption of the Schengen framework, the EU is gradually transforming into an area with only a shared external border.

The European Commission stated in 2004 that the AFSJ "is one of the most outstanding expressions of the transition, from an economic Europe to a political Europe at the service of its citizens."[4] The transition is that from the internal market into what we could call a "European public order."[5] Through this transition, public order and internal security matters have gained constitutional importance within the legal framework of the EU.[6] In line with this thinking, we could tentatively define the concept of a European public order as the security and justice concerns of a single European bounded space without internal borders.[7] Importantly, the Treaty of Lisbon marks a new step in the development of the AFSJ. By adopting the Charter of Fundamental Rights of the European Union (the Charter) as a legally binding bill of rights, the Treaty of Lisbon reaffirms the constitutional aspirations of the European Union. Moreover, it has strengthened the role of the Court of Justice of the European Union (CJEU) to safeguard the effective implementation of fundamental rights, empowering it to function as a "fundamental rights tribunal."[8]

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their common borders (CISA), signed on 19 June 1990. Council Decision 1999/435, art. 1(2), 2000 O.J. (L 239) 1 (EC).

[4] A*nnex to the Communication for the Commission, Area of Freedom, Security and Justice: Assessment of the Tampere Programme and Future Orientations*, at 4, COM (2004) 401 final, SEC (2004) 693 final (June 2, 2004).

[5] S. Lavenex & W. Wallace, *Justice and Home Affairs. Towards a 'European Public Order,' in* POLICY-MAKING IN THE EUROPEAN UNION 457, 457-480 (Helen Wallace, William Wallace & Mark A. Pollack eds., 2005); DINO RINOLDI, L'ORDINE PUBBLICO EUROPEO (2008).

[6] Neil Walker, *In Search of the Area of Freedom, Security and Justice: A Constitutional Odyssey*, *in* EUROPE'S AREA OF FREEDOM, SECURITY AND JUSTICE 3–37 (Neil Walker ed., 2004).

[7] Patrick Twomey, *Constructing a Secure Space: The Area of Freedom, Security and Justice*, *in* LEGAL ISSUES OF THE AMSTERDAM TREATY 351 (David O'Keeffe & Patrick Twomey eds., 1999); Hans K. Lindahl, *Finding a Place for Freedom, Security and Justice: The European Union and its Claim to Territorial Unity*, 29(4) EUR. L. REV. 461 (2004). Notice that the absence of internal borders is not the same as the freedom of movement: "[I]t should be noted, however, that in the context of the AFSJ the 'free movement of persons' is essentially defined through the absence of controls on persons at internal borders . . . no reference is being made in this context to the fundamental (market) freedoms under Community law, which arguably contribute to an 'area without internal borders' in a different sense." Monar, supra note 1, at 555.

[8] Sergio Carrera, Marie De Somer & Bilyana Petkova, *The Court of Justice of the European Union as a Fundamental Rights Tribunal: Challenges for the Effective Delivery of Fundamental Rights in the Area of Freedom, Security and Justice* (Ctr. for Eur. Policy Studies, Working Paper No. 49, 2012).

This paper aims to explore the transition from an economic Europe to a political Europe from the perspective of public order and internal security. To this end, we will analyze CJEU case law related to the public policy and public security exceptions in the context of Directive 2004/38/EC (the Directive), which regulates the free movement of persons.[9] Discussing entry restrictions and expulsion as the primary security measures at EU level, we will argue that the justification of the public policy and public security exceptions to the fundamental freedom of movement is examined on the basis of a combination of two criteria: (1) The seriousness of the threat to the public and (2) the individual's level of integration in the host Member State. We will argue that although both these criteria ensure the unity of the internal market, the criterion of an individual's integration does not stem from internal market concerns but from the political rationale to protect the individual vis-à-vis the Member States. Reflecting on the CJEU's implementation of the fundamental right to respect for private and family life in its decisions, we will argue that the individual's protection is conditional upon the freedom of movement.

This paper unfolds in four stages. In section B, we will explore the concept of a European public order as it emerges from the public policy and public security exceptions in the context of Directive 2004/38/EC. In section C, we will demonstrate the two criteria delimiting the discretion of the Member States—i.e., the seriousness of the threat and the individual's level of integration—on the basis of *Commission v. Spain*. In section D, we will reflect on the relationship between the freedom of movement and the fundamental right to respect for private and family life in the context of *Mary Carpenter v. Secretary of State for the Home Department*. In the concluding section, section E, we will wrap up the argument with our conclusions on the transition from an economic into a political Europe.

B. The Public Policy and Public Security Exceptions

In this section, we will explore the emergence of a European public order by reflecting on the public policy and public security exceptions in the context of Directive 2004/38/EC. These grounds are listed in Article 27 of the Directive and form the basis on which Member States are allowed to restrict the right of EU nationals and their families to free movement and residence. As Catherine Kessedijian notes, Member States were initially free to define the concepts of public policy and public security in accordance with their needs.[10] In the first case dealing with the public policy exception, *Yvonne van Duyn v. Home Office*, the CJEU confirmed the discretion of the Member States in defining public policy.[11] Nonetheless, over the course of time, the CJEU has reconsidered its opinion. Because measures on grounds of public policy and public security potentially constrain internal

[9] Council Directive 2004/38, 2004 O.J. (L 158) 77 (EC).

[10] Catherine Kessedjian, *Public Order in European Law*, 1 ERASMUS L. REV. 25, 28 (2007).

[11] Case C-41/74, *Yvonne van Duyn v. Home Office*, 1974 E.C.R. 1337.

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market freedoms, the CJEU has developed an interpretation of the concepts of public policy and public security imposing limitations on the discretion of Member States. These limitations depend on a combination of the two aforementioned criteria. Let us explain these criteria, focusing on entry restrictions and expulsion as a paradigm.

I. Threat

We begin by addressing the difference between the notions of public security and public policy in light of the seriousness of a threat. According to the CJEU, the reference by a Member State to the notion of public policy in its regulations assumes the existence of the "perturbation of the social order" that needs to be prevented.[12] Additionally, "recourse by a national authority to the concept of public policy presupposes, in any event, the existence, in addition to the perturbation of the social order which any infringement of the law involves, of a genuine and sufficiently serious threat to the requirements of public policy affecting one of the fundamental interests of society."[13] This requirement is incorporated into Article 27(2) of the Directive, which prevents Member States from relying on justifications of a general nature or considerations of general prevention.

In regard to public policy, the CJEU has not set a minimum level of criminal conduct that may justify restrictive measures.[14] Therefore, not only serious crimes, but also administrative offences and less serious criminal behavior may fall within its scope. For example, in one of its recent judgments, the CJEU considered whether non-recovery of tax liabilities to a public authority could be a public policy ground on which a Member State may restrict free movement.[15] According to the CJEU, such a restriction is only possible "in circumstances where there is a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society related, for example, to the amount of the sums at stake or to what is required to combat tax fraud."[16]

[12] Case C-50/06, *Comm'n v. Netherlands*, 2007 E.C.R. I-4383. For a conceptual analysis of the notion of public policy, see Hans Lindahl, *Discretion and Public Policy: Timing the Unity and Divergence of Legal Orders*, *in* THE COHERENCE OF EU LAW: THE SEARCH FOR UNITY IN DIVERGENT CONCEPTS 291 (Sacha Prechal & Bert van Roermund eds., 2008).

[13] Case C-30/77, *Regina v. Pierre Bouchereau*, 1977 E.C.R. 1999. *See also* Case C-36/75, *Rutili v. Minister of the Interior*, 1975 E.C.R. 1219; Joined Cases C-482/01 & C-493/01, *Georgios v. Land Baden-Württemburg*, 2004 E.C.R. I-5257.

[14] N. ROGERS, R. SCANNELL & J. WALSH, FREE MOVEMENT OF PERSONS IN THE ENLARGED EUROPEAN UNION 256 (2nd ed. 2012).

[15] Case C-434/10, *Petar Aladzhov v. Zamestnik director na Stolichna direktsia na vatreshnite raboti kam Ministerstvo na vatreshnite raboti*, 2011 E.C.R. I-0000.

[16] *Id.*

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In contrast to the notion of public policy, the CJEU defines the notion of public security broadly, covering both internal and external state security.[17] This opens up the possibility for Member States to place restrictions on the free movement of persons in order to preserve the integrity of their territory and their institutions.[18] For instance, in the *Olazabal* case, the CJEU recognized that preventing the armed and organized Basque ETA terrorist group from engaging in activities on French territory may fall within the maintenance of public security.[19]

As Advocate General Bot clarified, the notion of public security does not refer to the mere infringement of criminal law by committing an offense, as in the case of public policy, but stems from "a criminal conduct which is particularly serious in principle and also in its effects, which go beyond the individual harm caused to the victim or victims."[20] The notion of public security includes "threats to the functioning of the institutions and essential public services and the survival of the population, as well as the risk of a serious disturbance to foreign relations or to peaceful coexistence of nations, or a risk to military interests."[21]

When faced with a serious threat, Member States frequently jointly invoke the grounds of public policy and of public security to justify national measures restricting the right to free movement. There are many similarities between the two notions and their application method. In certain regards, the notions of public policy and public security overlap. Any criminal conduct which is a threat to public security disturbs public policy, even though the opposite is not the case.[22] In fact, the CJEU established that a public policy or public security measure needs to meet two conditions.[23] First, the measure must be targeted to curb "a genuine and sufficiently serious threat"—i.e., a real and severe danger, not just a violation of the rule. Second, the measure should have the objective to protect "one of the fundamental interests of society." So, both grounds of public policy and public security

[17] Case C-423/98, *Alfredo Albore,* 2000 E.C.R. I-5965; Case C-285/98, *Kreil v. Bundesrepublik Deutschland,* 2000 E.C.R. I-69.

[18] *Communication on Guidance for Better Transposition and Application of Directive 2004/38/EC on the Right of Citizens of the Union and Their Family Members to Move and Reside Freely within the Territory of the Member States,* para. 3.1, COM (2009) 313 final (July 2, 2009) [hereinafter *Communication on Guidance for Better Transposition*].

[19] Case C-100/01, *Ministre de l'Intérieur v. Olazabal*, 2002 E.C.R. I–10981.

[20] Case C-348/09, *P.I. v. Oberbürgermeisterin der Stadt Remscheid*, 2012 E.C.R. I-0000.

[21] Case C-145/09, *Land Baden-Württemberg v. Panagiotis Tsakouridis*, 2010 E.C.R. I-11979.

[22] *See* Case C-348/09, *P.I. v. Oberbürgermeisterin der Stadt Remscheid*, 2012 E.C.R. I-0000, ¶ 38.

[23] *See, e.g.*, Case C-355/98, *Comm'n v. Belgium*, 2000 E.C.R. I-01221; Case C-54/99, *Association Eglise de Scientologie de Paris v. The Prime Minister*, 2000 E.C.R. I–1355. *Cf.* Kessedjian, *supra* note 10, at 29.

have to be interpreted restrictively and specifically, ensuring that the public policy and public security measures comply with the principle of proportionality as enshrined in Article 27(2) of the Directive and reaffirmed in Article 52 of the Charter.[24]

II. Integration

A difference in the application of the grounds of public policy and public security can be based on the level of integration in the host Member State of the individual in question. This is clear from the three-level system that protects against expulsion on grounds of public policy and public security introduced by the Directive. Based on the individual's level of integration, the Directive distinguishes between "grounds" and "serious grounds" of public policy and public security and an additional "imperative grounds" for public security.[25]

The first level of protection against expulsion—"grounds" of public policy and public security—requires that a Member State must "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."[26] The second level is applicable to EU nationals and their family members who have permanent residence in the host member state. They may be expelled only on "serious grounds" of public policy or public security. The third and strictest protection level applies to EU nationals who have resided in the host member state for the last 10 years or those who are minors. Their expulsion may be based only on "imperative grounds" of public security, which is given this strict status in order to protect especially those EU citizens who were born and have lived in a host member state their entire life or to safeguard the relations of minors with their family members.

III. The Emergence of a European Public Order

Despite the overlap between the grounds of public policy and public security, they are legally different. As noted by the Commission, in order to apply these grounds correctly, Member States have to make a distinction between them when defining the interests of society that are to be protected.[27] Measures proposed on one ground cannot be fully

[24] *Cf.* Ferdinand Wollenschläger, *A New Fundamental Freedom Beyond Market Integration: Union Citizenship and its Dynamics for Shifting the Economic Paradigm of European Integration*, 17 EUR. L.J. 1, 17 (2011). *See* Case C-33/07, *Ministerul Administraţiei şi Internelor – Direcţia Generală de Paşapoarte Bucureşti v. Gheorghe Jipa*, 2008 E.C.R. I-05157.

[25] Council Directive 2004/38, art. 28(1–3), 2004 O.J. (L 158) 77 (EC).

[26] *Id.* at art. 28(1).

[27] *Communication on Guidance for Better Transposition*, *supra* note 18, ¶ 3.1.

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extended to cover measures proposed on the other one.[28] In regards to the two criteria described above, the ground of public security is considered to be complementary to the ground of public policy. Concerning the first criterion, the CJEU has clarified in the *Tsakouridis* case that the Directive distinguishes between "serious" and "imperative" grounds in order to limit measures covered by the latter to threats with an "exceptional seriousness."[29] Actually, the CJEU stated that "the concept of 'imperative grounds of public security' presupposes not only the existence of a threat to public security, but also that such a threat is of a particularly high degree of seriousness."[30] With respect to the second criterion, the Directive anticipates that EU nationals who have resided in the host member state for the last 10 years (or who are minors) can only be expelled on grounds of public security, not on grounds of public policy. Justification of expulsion measures against strongly integrated individuals on grounds of public policy is not sufficient; in such cases, this justification needs to be complemented with grounds of public security.

Whereas the CJEU has limited the ability of the Member States to interpret the concepts of public policy and public security on the basis of the two criteria for the purpose of ensuring the unity and coherence of the internal market, the criterion of the individual's level of integration does not stem from internal market concerns. Instead, the limitation of the Member States discretion on the basis of the individual's level of integration originates from the political rationale to protect the individual vis-à-vis the Member States. The more integrated the individual is within the host Member State, the stronger the protection against expulsion. As we will see, the political character of the individual's level of integration is defined by the fact that this criterion assumes a distinction between those who enjoy the right to free movement and those who don't, i.e., EU nationals and their family members that may include third country nationals, on the one hand, and third country nationals without relation to EU nationals, on the other.[31]

C. EU vs. Schengen: Case C-503/03, *Commission v. Spain*

As our exploration of CJEU case law on the public policy and public security exceptions in the context of the Directive shows, the CJEU has delimited the discretion of the Member States to restrict the freedom of movement on the basis of the two criteria described above. In this section we will demonstrate these two criteria by reflecting on *Commission v. Spain*. This case concerns the compatibility between the Schengen Convention and the Directive on the interpretation of the concept of public policy, making explicit the political

[28] *Id.*

[29] *Id*. ¶ 49.

[30] *Id*. ¶ 41.

[31] For a normative analysis of this problem, see A RIGHT TO INCLUSION AND EXCLUSION? NORMATIVE FAULT LINES OF THE EU'S AREA OF FREEDOM, SECURITY AND JUSTICE (Hans Lindahl ed., 2009).

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character of the criterion of the individual's integration. In a sense, the integration of the Schengen Convention into the EU framework illustrates the paradigm shift implied by the two criteria: One limiting the discretion of the Member States for the purpose of ensuring the unity of the internal market in a direct way, the other indirectly by means of protecting individuals who are potentially exposed to public policy and public security measures.

It is important to note that the CJEU decided *Commission v. Spain* before the implementation of the Directive. The legal basis for the claim of the European Commission against Spain was therefore not the Directive but its predecessor, Directive 64/211/EEC.[32] Although the Directive simplifies the legal framework integrating several sectorial legal sources, it essentially takes on the provisions of Directive 64/211/EEC on the restrictive grounds of public policy, public security and public health.[33]

In *Commission v. Spain*, the European Commission claimed that Spain failed to fulfill its obligations under the Directive 64/221/EEC because it refused a visa and entry into the Spanish territory to third country nationals who were family members of EU nationals. Spain based its decision to refuse entry on the sole fact that they appeared on the restricted entry list in the Schengen Information System.[34] The claim was based on complaints from two Algerian nationals, Mr. Farid and Mr. Bouchair, who were both married to Spanish nationals and wanted to enter Spain for a short visit. Spain refused Mr. Farid entry upon his arrival at the Barcelona airport. The Spanish Embassy in London, where Mr. Bouchair lived, refused Mr. Bouchair a visa for entry into Spain.

In both cases, the refusal of entry into Spanish territory and the rejection of a visa were based on the fact that Germany had entered an alert in the Schengen Information System for the purposes of refusing entry. Germany had the right to issue such alert according to Article 96 of the Convention.[35] The alerts issued for the purpose of refusing entry in both

[32] On the co-ordination of special measures concerning the movement and residence of foreign nationals that are justified on grounds of public policy, public security, or public health, see Council Directive 64/211 2001 O.J. (C 270E) 150 (EEC).

[33] The Directive 2004/38/EC amends Council Regulation (EEC) No 1612/68 of 15 October 1968 on Freedom of Movement for Workers within the Community and repeals the following acts: Council Directive 68/360/EEC of 15 October 1968 on the abolition of restrictions on movement and residence within the Community for workers of Member States and their families, Council Directive 73/148/EEC of 21 May 1973 on the abolition of restrictions on movement and residence within the Community for nationals of Member States with regard to establishment and the provision of services, Council Directive 90/364/EEC of 28 June 1990 on the right of residence, Council Directive 90/365/EEC of 28 June 1990 on the right of residence for employees and self-employed persons who have ceased their occupational activity and Council Directive 93/96/EEC of 29 October 1993 on the right of residence for students. The Directive also includes relevant case law of the CJEU. Council Directive 2004/38, 2004 O.J. (L 158) 77 (EC).

[34] *See* Council Decision 1999/435, *supra* note 3, at Title IV.

[35] *See id.* at art. 96.

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cases were attributable to previous criminal convictions of the Algerian nationals in Germany. The first applicant, Mr. Farid, was fined many years prior for driving a motor vehicle without a driver's license. The second applicant, Mr. Bouchair, had been sentenced to five months imprisonment because he used a false identity to apply for asylum in Germany.

The central issue of this case concerns the difference between the Convention and the Directive (or, in this case, its predecessor, the Directive 64/221/EEC) with regard to the first criterion we described in the previous section: The definition of a threat to public policy. Article 96 of the Schengen Convention specifies under which conditions the alien—i.e. third country national—can be deemed a threat to public policy which justifies the issuing of an alert in the Schengen Information System. The alien is deemed a threat if she or he has been previously convicted of an offense with at least one year of imprisonment or if there are serious grounds for believing that the alien has committed serious offenses. The decision for issuing an alert may also be based on the fact that the alien has been subject to a measure based on a failure to comply with national regulations on the entry or residence of aliens. Additionally, the Convention established that Schengen states should follow the alerts issued by the other Schengen states. Therefore, once an alert is issued, the alien is refused entry to the whole Schengen area.

In contrast to the Schengen framework, the CJEU developed an interpretation of Directive 64/221/EEC concerning the grounds of public policy and public security based on three principles. The first principle, announced in the *Bonsignore* case, is based on Article 3(1) of Directive 64/221/EEC and states that restrictive measures must be based exclusively on personal conduct and not on reasons of a "general preventive nature."[36] The second principle is based on Article 3(2) of Directive 64/221/EEC and requires a determination that personal conduct must represent a genuine, present, and sufficiently serious threat to a fundamental interest of the society.[37] Therefore, past convictions alone cannot constitute a valid ground to expel or exclude EU citizens and their family members but can "be taken into account in so far as the circumstances which gave rise to that conviction are evidence of personal conduct constituting a present threat to the requirements of public policy."[38] The third principle concerns the proportionality of measures taken to preserve public policy or public security. Measures must be appropriate to achieve the aim pursued and

[36] Case C-67/74, *Carmelo Angelo Bonsignore v. Oberstadtdirektor der Stadt Köln*, 1975 E.C.R. 00297.

[37] Case C-30/77, *Regina v. Pierre Bouchereau*, 1977 E.C.R. I-01999, ¶ 35; Case C-36/75, *Rutili v. Minister of the Interior*, 1975 E.C.R. I-01219, ¶ 28; Joined Cases C-482/01 & C-493/01 *Georgios Orfanopoulos, Raffaele Oliveri v. Land Baden-Württemburg,* 2004 E.C.R. I-05257, ¶ 66.

[38] Case C-30/77, *Regina v. Pierre Bouchereau*, 1977 E.C.R. I-01999, ¶ 28. *See also*, *inter alia*, Case C-348/96, *Criminal Proceedings Against Donatella Calfa*, 1999 E.C.R. I-11; Case C-503/03, *Comm'n* v. *Spain*, 2006 E.C.R. I–1097; Case C-441/02, *Comm'n* v. *Germany*, 2006 E.C.R. I-3449.

must not exceed the limits of what is necessary for that purpose.[39] These three principles have been integrated in Article 27(2) of the Directive.[40]

The Directive differs from the Convention with regard to the definition of the threat to public policy. Whereas the Convention establishes that a previous conviction is a sufficient ground for issuing an alert in the Schengen Information System, the CJEU's interpretation of Directive 64/221/EEC states that previous criminal convictions do not in themselves constitute grounds for taking measures on grounds of public policy and public security. The CJEU case law does not allow expulsion of a person on the basis of "serious grounds for believing that the person has committed serious offences" as stated in Article 96 of the Convention. Additionally, in contrast to the pre-set definition of the threat under the Convention, the Directive requires a case-specific definition. This obliges the Member State to freshly assess in each case whether the personal conduct of the individual represents an actual threat. For this reason, the CJEU precludes expulsion based on "considerations of general prevention."[41]

To continue, the Directive also differs from the Convention with regard to the second criterion described above: The individual's level of integration. The Convention draws a strict distinction between Schengen nationals, on the one hand, and aliens, on the other. This strict distinction stems from the crucial importance of the external borders after the abolishment of the internal borders. In contrast to the Convention, the Directive does not only differentiate between nationals and non-nationals, but also between third country nationals. The Directive covers not only EU nationals but also their family members, which may include third country nationals. It therefore establishes a more inclusive protection regime for individuals vis-à-vis Member States than the Convention. Because Mr. Farid and

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[39] Case C-19/92, *Kraus v. Land Baden-Wuerttemberg*, 1993 E.C.R. I-01663; Case C-55/94, *Reinhard Gebhard v. Consiglio dell'Ordine degli Avvocati e Procuratori di Milano*, 1996 E.C.R. I-04165.

[40] Directive 2004/38/EC, *supra* note 9, art. 27(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. Justifications that are isolated from the particulars of the case or that rely on considerations of general prevention shall not be accepted.

Id.

[41] The issue of "general prevention" is particularly significant in light of Germany's track record regarding Article 96 alerts. *See* EVELIEN BROUWER, DIGITAL BORDERS AND REAL RIGHTS: EFFECTIVE REMEDIES FOR THIRD COUNTRY NATIONALS IN THE SCHENGEN INFORMATION SYSTEM 371 (2008).

Mr. Bouchair were married to EU nationals, they could not be automatically refused entry into Spain on the basis of Article 96 of the Convention. Their special status as spouses of EU nationals—and, accordingly, their level of integration—furnished them with improved protection as third country nationals against public policy measures.

The political character of the protection of the individual is also manifest in *Commission v. Spain*. The CJEU decided the case in favor of the Commission. According to the CJEU, the Commission was right to claim that Spain had failed to fulfill its obligations under the Directive. As stated in the Schengen protocol annexed to the Amsterdam Treaty, the Schengen rules are applicable only if they are compatible with EU law. The Schengen protocol states that the Schengen *acquis* is an integral part of EU law. In this respect, closer cooperation within the scope of the Schengen *acquis* must be conducted within the legal and institutional framework of the European Union and in accordance with the EU treaties. Consequently, compliance with Schengen Information System requirements by the Members States is justified only in so far as it is compatible with the Community rules established in the Directive.

Although the decision of the CJEU seems to be a rather obvious one, the argument that the application of the Convention may be justified with due consideration of the rules of the Community reveals an important point. As Helen Oosterom-Staples argues, the argument of the CJEU hinges on the formulation of "due consideration of," implying that the Community rules take precedence over the Schengen Convention if—and this is crucial—these are advantageous for the individual enjoying the freedom of movement as she or he is regarded and affected by EU law as a whole, as well as in all its specific rules and decisions.[42]

D. Fundamental Freedoms and Fundamental Rights

As we demonstrated in the previous section, the political rationale hidden in the Directive provides protection against public policy and public security measures beyond EU nationals. This means that third country nationals can rely on the Charter in their status as family members of EU nationals. Reflecting on the implementation of the fundamental right to respect for private and family life in the *Carpenter* case, in this section we will explore the relationship between fundamental rights and fundamental freedoms.[43] We will

[42] Helen Oosterom-Staples, *Botsende openbare-orderbegrippen in het Europese Migratierecht*, 12 NEDERLANDS TIJDSCHRIFT VOOR EUROPEES RECHT [NtEr] 169, 177 (2006) (Neth.).

[43] In the *Carpenter* case the grounds of public policy and public security were invoked under the general limitation clause of Article 52 of the Charter. Charter of Fundamental Rights of the European Union, Oct. 26, 2012, 2012 O.J. (C 326) 406. This Article states, "any limitation on the exercise of the rights and freedoms recognized by this Charter must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality," the article continues, "limitations may be made only if they are necessary and genuinely meet objectives of general interest recognized by the Union or the need to protect the rights and

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argue that the fundamental right to respect for private and family life displays a peculiar dynamic in that the protection of individuals is conditional upon the right to free movement.

First enshrined in Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) and later reaffirmed in Article 7 of the Charter, the right to respect for private and family life occupies an important place in the Directive. Initially, the right to respect for family life was guaranteed by the Regulation 1612/68 (the Regulation)—one of the predecessors of the Directive—which recognized that the free movement of EC workers requires free movement of their family members irrespective of their nationality.[44] The preamble to the Regulation referred to freedom of movement as a fundamental right which should be exercised in "freedom and dignity" and aimed to remove obstacles to the mobility of workers "in particular as regards the worker's right to be joined by his family and the conditions for the integration of that family into the host country." As a result, the Regulation granted family members the right to install themselves with the migrant worker in the territory of another Member State. Such regulation in EC law provided a substantive and procedural added value to the family members of EC workers because their rights under most national systems were subject to examination with long delays and limited access to appeal and judicial review procedures.[45]

In general, the CJEU has recognized that the implementation of fundamental rights is closely related to the objectives of the common market, i.e., to exercise the fundamental freedoms of the market. The CJEU has stated that:

> [T]he fundamental rights recognized by the Court are not absolute, but must be considered in relation to their social function. Consequently, restrictions may be imposed on the exercise of those rights, in particular in the context of a common organization of a market, provided that those restrictions in fact correspond to objectives of general interest pursued by the Community and do not constitute, with regard to the aim pursued, a disproportionate and intolerable

freedoms of others." Charter of Fundamental Rights of the European Union, Oct. 26, 2012, 2012 O.J. (C 326) 391, 406.

[44] Regulation 1612/68, 1968 O.J. (L 257) 2 (EEC).

[45] Cathryn Costello, *Metock: Free Movement and "Normal Family life" in the Union*, 46 COMMON MKT L. REV. 587, 588 (2009).

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> interference, impairing the very substance of those rights.[46]

After the Charter was adopted in 2000 as soft law, the CJEU has more explicitly referred to fundamental rights in its decisions, ensuring respect for such rights within the sphere of the EU's competence.[47] For example, in *Commission v. Spain*, the CJEU found that a restrictive interpretation of the public policy exception is necessary because it serves to protect the right to respect for private and family life in the case of spousal migration. The CJEU stated that:

> [I]n the case of a national of a third country who is the spouse of a Member State national a strict interpretation of the concept of public policy also serves to protect the latter's right to respect for his or her family life under Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms.[48]

Because the Charter became legally binding with the Treaty of Lisbon, references by the CJEU to fundamental rights became even more prominent.[49] Restrictions on the fundamental right to respect family life imposed by Member States are perceived by the CJEU as putting in jeopardy the genuine use of European citizenship rights in expulsion cases.[50]

Despite the fact that fundamental rights have become more prominent in the CJEU's decision making, their implementation is nevertheless dependent on the fundamental freedoms.[51] The *Carpenter* case aptly illustrates this relationship between fundamental freedoms and fundamental rights.[52] This case concerns a Philippine national, Mrs.

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[46] Case C-5/88, *Hubert Wachauf v. Bundesamt für Ernährung und Forstwirtschaft*, 1989 E.C.R. 2609.

[47] Case C-127/08, *Metock* v. *Minister for Justice, Equality and Law Reform,* 2008 E.C.R. I-6241; Case C-441/02, *Comm'n* v. *Germany*, 2006 E.C.R. I-3449; Case C-157/03, *Comm'n* v. *Spain,* 2005 E.C.R. I-2911; Case C-109/01, *Akrich*, 2003 E.C.R. I-9607; Case C-540/03, *Parliament* v. *Council*, 2006 E.C.R. I-5769.

[48] Case C-503/03, *Comm'n v. Spain*, 2006 E.C.R. I-01097, ¶ 47.

[49] See the contribution of Chiara Raucea to this volume for a thorough analysis of the relevant CJEU case law. See generally Chiara Raucea, *Fundamental Rights: The Missing Pieces of European Citizenship?*, 14 German L.J. XX (2013).

[50] *Id.*

[51] Thorsten Kingreen, *Fundamental Freedoms*, *in* PRINCIPLES OF EUROPEAN CONSTITUTIONAL LAW 515, 544 (Armin von Bogdandy & Jürgen *Bast* eds., 2010).

[52] Case C-60/00, *Carpenter v. Sec'y of State for the Home Dep't*, 2002 E.C.R. I-6279.

Carpenter, who overstayed her legal residence, failed to apply for an extension of her stay, and married an EU national during her illegal stay in the United Kingdom. A crucial fact in this case was that Mrs. Carpenter had taken care of Mr. Carpenter's children when he was traveling within the EU for business purposes.

Notwithstanding the fact that Mrs. Carpenter had infringed on the immigration laws of the United Kingdom, the CJEU stated that a decision to deport her "does not strike a fair balance between the competing interests, that is, on the one hand, the right of Mr. Carpenter to respect for his family life, and, on the other hand, the maintenance of public order and public safety."[53] According to the CJEU, the conduct of Mrs. Carpenter since her arrival in the United Kingdom "has not been the subject of any other complaint that could give cause to fear that she might in the future constitute a danger to public order or public safety."[54] In fact, the CJEU argued that the marriage between Mr. and Mrs. Carpenter was "genuine" and that Mrs. Carpenter led a true family life, "in particular by looking after her husband's children from a previous marriage" while Mr. Carpenter was away on business within the EU.[55] For this reason, the CJEU decided that Mrs. Carpenter's deportation from the United Kingdom would disproportionally infringe on the fundamental right to respect for family life of Mr. Carpenter.[56]

The *Carpenter* case makes clear that the CJEU could invoke, in the pre-Charter era, Article 8 of the ECHR because Mrs. Carpenter, a third country national, had a familial relationship with Mr. Carpenter, an EU national. But because Mrs. Carpenter wasn't a legal resident at the time of her marriage to Mr. Carpenter, the CJEU added that Mrs. Carpenter's family relation to Mr. Carpenter is pivotal to the exercise of latter's market freedoms: The reference to the right to respect for private and family life was possible primarily to the extent that it was related to Mr. Carpenter's market freedoms. In other words, the CJEU could invoke Article 8 of the ECHR to prevent the deportation of Mrs. Carpenter because, in this case, it functioned to ensure the unity and coherence of the internal market. The *Carpenter* case implies a shift in focus from fundamental rights to fundamental freedoms. Without the enjoyment of fundamental freedoms, the individual could not claim fundamental rights protection.[57] Fundamentally, the internal market predetermines who can, and who cannot, appeal to fundamental rights.[58]

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[53] *Id.* ¶ 43.

[54] *Id.* ¶ 44.

[55] *Id.*

[56] *Id.* ¶ 41.

[57] Kingreen, *supra* note 51, at 543–44.

[58] Emphasizing that "economic, social and territorial cohesion" is a precondition for the EU to succeed as a collective enterprise, the Europe 2020 strategy is a nice illustration of what we could call the EU's "exclusive"

E. Conclusion

Exploring the transition from an economic into a political Europe, this paper traced the emergence of a European public order. Examining CJEU case law on the restrictive grounds of public policy and public security in the context of Directive 2004/38/EC, we observed that the discretion of the Member States to restrict the right to free movement has been limited over the course of time on the basis of two criteria: The seriousness of the threat and the individual's level of integration. We argued that the latter springs from a political rationale that is not reducible to internal market concerns. The criterion on the individual's level of integration limits the discretion of the Member State with the aim of protecting individuals against national public policy and public security measures. This led us to comment on the emergence of a European public order.

Discussing the implementation of the fundamental right to respect for private and family life in CJEU case law as it related to the public policy and public security exceptions, we argued that the relation between fundamental freedoms and fundamental rights displays a peculiar dynamic. If fundamental rights grant protection beyond EU nationals, they can nonetheless only be claimed by individuals enjoying the right to free movement. Therefore, protection on the basis of fundamental rights assumes the primary distinction between those who enjoy the right to free movement and those who don't.

On the basis of our analysis we can conclude two things. We can conclude that the emergence of a European public order is in between an economic and a political Europe: In between in the sense that the "political" Europe is contingent on the "economic" Europe. In this light, the Commission's celebration of the transition brought about by the AFSJ seems to be premature. And finally, our analysis suggests that entry restrictions and expulsion as primary security measures at the EU level are paradigmatic of the way in which the EU creates the AFSJ as an area of freedom. Therefore, the inclusiveness proclaimed at the EU level, for example in the Europe 2020 strategy, is predominantly focused inward.

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approach. *See Europe 2020, A Strategy for Smart, Sustainable and Inclusive Growth*, COM (2010) 2020 final (March 3, 2010).

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