THE LAW OF THE EUROPEAN UNION AND NATIONAL SECURITY EXCEPTIONS OF THE MEMBER STATES

Legal expertise presented to the Ministry of Justice of the Republic of Estonia
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A. Mandate

By contract for services No. 4-7/152, signed on 13th and 18th of December 2017, the Ministry of Justice of the Republic of Estonia presented the following questions:

"1. What are the EU's legislative competences in the fields of public order and national security, taking into account art. 72 TFEU and art. 4 (2) TEU? In matters of public order and national security, does the law of the European Union have priority over the national law of the Member States?

2. Does EU law have priority over national rules on the protection of public order in all cases or can derogations be established that are applicable during a state of emergency/state of war?

3. To what extent can the Member States lay down specific provisions (restrictions of fundamental rights and freedoms) to protect their public order and national security during a state of emergency or armed attack where EU law also provides for such restrictions? Do the member States have the right to derogate from the requirements of EU law to protect public and/or national security? If so, are the Member States obliged to inform the EU of such derogations?"

These questions were raised against the background of the provisions of the Estonian Constitution and statute law which may apply if restrictive measures are taken in the interest of public security in a state of emergency or state of war. The Ministry referred the author in particular to (the English translation of) the full text, or excerpts, of the following laws:

- Secs. 26, 33, 40 (3), 45, 47, and 130 of the Estonian Constitution,
- secs. 28 (1) to (4) and 29 (1) to (3) of the Estonian Law Enforcement Act,
- sec. 17 (1) of the Estonian State of Emergency Act and
- sec. 20 (6) and (7) of the Estonian National Defence Act

as well as to

- arts. 3 (4) to (6) of the EU Audiovisual Media Services Directive.

The following statement will first briefly recapitulate pertinent Estonian law and relate it to possibly overlapping EU law (B.). In the following section, the legal questions structured according to the logic of EU primary law will be addressed (C.). The conclusion will summarize the findings as a response to the questions formulated in the mandate (D.).

B. The legal background in Estonian law

The Constitution of the Republic of Estonia (CRE) discerns two types of states of exception: A state of war to be declared, on the proposal of the President, by the Parliament (*Riigikogu*) (art. 128 CRE) and a state of emergency which the *Riigikogu* may declare, on proposal of the President or the Government, if a threat to the constitutional order occurs (art. 129 CRE). In both cases art. 130 CRE allows for restrictions on fundamental rights in the interest of national security or public order under conditions provided for by law.

However, certain fundamental rights have a special constitutional status, such as the right to Estonian citizenship (art. 8 CRE), equality before the law (art. 12 CRE), access to courts (art. 15 CRE), right to life (art. 16 CRE), honour and good name (art. 17 CRE), freedom from torture or cruel or degrading treatment or punishment (art. 18), freedom from arbitrary detention for proceedings (art. 20 (3) CRE), the presumption of innocence (art. 22 CRE), the criminal law guarantees of *nulla poena sine lege*, *lex mitius* and the prohibition of double jeopardy (art. 23 CRE), the fair trial guarantees of art. 24 (2) and (4) CRE, the right to compensation for injuries attributable to the State (art. 25 CRE), the protection of the family, equal marital, and children's rights by the state (art. 27 CRE), the right to health care and social security (art. 28 CRE), the bar to extradition of Estonian nationals to a foreign state (art. 36 CRE), freedom of conscience and belief (arts. 40 and 41 CRE), ethnic identity (art. 49 CRE), and the right to address the public authorities (art. 51 (1) CRE). The same status is assigned to the general requirements for intrusions into, and the obligation of all branches of government to protect, fundamental rights (arts. 11 to 14 CRE). These provisions, according to the English translation, may not be "circumscribed".

It follows from these exemptions from derogations that restrictions can be spelled out in a case of war or emergency, for instance, on the rights to liberty and security of person (art. 20 CRE), private and family life (art. 26 CRE), freedom of profession and employment (art. 29 CRE), the right to own property (art. 32 CRE), the inviolability of home (art. 33 CRE), free movement (arts. 34 and 35 CRE), the right to confidentiality of correspondence and communication (art. 43 CRE), free access to information (art. 44 CRE), the freedom of expression (art. 45 CRE), and the freedom of assembly (art. 47 CRE). The right to free practice of religion, which belongs to the non-derogable rights, is in itself subject to a public order clause (art. 40 (3) CRE).

The conditions for permitted intrusions into fundamental rights are further specified by the National Defence Act and the State of Emergency Act. The National Defence Act (NDA) provides for limitations on fundamental rights during a state of war. Sec. 20 NDA empowers

the Government to prohibit public events and meetings, to suspend strikes and lock-outs, to restrict the sale of goods “of certain type” and to order restrictions of means of communication, the dissemination of data “with certain contents” in mass media and the provision of media services if the needs of military defence so require.

The State of Emergency Act (SEA) sets out requirements for intrusions into fundamental rights in times of a state of emergency declared under threats to the constitutional order of Estonia, as they might arise from attempts to overthrow violently the constitutional order, terrorism, internal strife or forceful secessionist activities (sec. 3 SEA). Sec. 17 SEA contains a catalogue of measures the Government may take “for the purposes of eliminating a threat to the constitutional order”, such as restrictions on entry into, and departure from, Estonia, the prohibition of meetings, strikes and lock-outs, the prohibition of communication of certain data in mass media, restrictions on the sale of certain goods like weapons, toxic substances and alcoholic beverages, and regulations of the sale of foodstuffs as well as on the use of modes of communication or means of transport.

In a supplementary fashion, the Estonian Law Enforcement Act (LEA) applies also in a state of emergency. Similar to other European continental police laws, it provides for bases of power for standard measures of the law enforcement agencies like compelled attendance, establishment of identity, processing of personal data and the like, but it also contains a general clause which permits the authorities to “impose by a precept on a person […] an obligation to counter the threat or to eliminate the disturbance” of public order (sec. 28 (1) read together with secs. 4 and 5 LEA) and to enforce these obligations by penalty payment, substitutive acts and direct coercion (sec. 28 (2) to (4) LEA).

C. The law of the European Union and exceptions in the interest of national security

The restrictions foreseen in the NDA and the SEA aim already by their wording at activities which are encompassed by EU law. The provisions of the LEA and measures taken on its basis, which are on its face indifferent with respect to EU law, have therefore to be dealt with in the context of the NDA and SEA.

As art. 347 TFEU clearly indicates, a state of war or a state of emergency does not per se constitute a suspension from the obligations that derive from EU law incumbent upon the Member States. The prevailing understanding of art. 4 (2) TEU is therefore plausible, according to which this provision does not set an absolute limit but, in principle, is subject to a balancing out of conflicting interests, and its scope depends on the context in which measures are taken. Its function in relation to the numerous public order and security clauses in primary and secondary EU law is of a supplementary nature. Therefore, before entering into the general rule on national security laid down in art. 4 (2) TEU, special security clauses found in the Treaties and in secondary law will be addressed (I.). As these clauses show, the tests that apply in each policy area by and large follow the same logic, but are context-specific in character. Many of them are found within the framework of the internal market (section I.1.). Some of the competencies attributed to the Estonian authorities implicitly address freedoms guaranteed within the Area of Freedom, Security and Justice (section I.2.). Further limits may be set by secondary law enacted in other policy areas (I.3.). Against this backdrop, an analysis of art. 4 (2) TFEU and the question of possible exceptions to the supremacy of EU law will follow (II.). Having assessed the reach of Union law, a statement is possible as to how far the EU Charter of Fundamental Rights (CFR) applies and what the implications of the European Convention of Human Rights are (III.). Final observations will focus on procedural duties of Member States which invoke superior interests of national security (IV.).

I. Specific security exceptions in EU law

1. The internal market and public policy/public security clauses

The Estonian emergency laws allow for derogations of the fundamental freedoms of the internal market in individual cases. Such derogations may be permitted on conditions circumscribed in the Treaties and specified by the ECJ. Thus, all fundamental freedoms are subject to exigencies of “public policy or public security” (arts. 36, 45 (3), 52, 62 TFEU).

Even though these exceptions are formulated in a similar manner for each of the freedoms and a convergence of these freedoms in the case-law of the ECJ has taken place, there are specifications for each of them which makes it worthwhile to deal with the fundamental freedoms separately (*infra* sections a to d), before a synthesis is made (section e).

a) Free movement of goods

Secs. 20 NDA, 17 SEA provide for restrictions on the sale of goods of a certain type, which is defined more narrowly in sec. 17 SEA. It mentions weapons, toxic substances and alcoholic beverages, as well as regulations of the sale of foodstuffs. Before the general rules on the free movement of goods are addressed, specific law on certain categories of goods must be considered.

(1) Military equipment and goods of dual use

As far as weapons are concerned, art. 346 (1) (b) TFEU may apply. The provision establishes a justification for derogations from EU law. Accordingly, a Member State may take measures "as it considers necessary for the protection of the essential interests of its security which are connected with the production of or trade in arms, munitions and war material". The last part of this provision makes the caveat that "such measures shall not adversely affect the conditions of competition in the internal market regarding products which are not intended for specifically military purposes". A list of products to which this clause applies was passed by the Council as early as 1958 and has not been amended since. It was secret for a long time, but has been made partly public in 2008.[1] It mentions all types of war material including, *inter alia*, firearms and ammunition, fire control equipment of all sorts like night guidance devices, position indicators etc., tracking components, toxic or radioactive agents and devices for their detection, and military electronic equipment. The list explicitly mentions hunting weapons, pistols and weapons with a calibre of less than 7 mm as not being encompassed by art. 346 TFEU.[2]

[1] Council Doc No. 14538/4/08 Rev. 4 of 21 November 2008, found via http://register.consilium.europa.eu, accessed 16 January 2018, like all other websites cited hereafter.

[2] Specific legislation was enacted with regard to intra-Union trade with military equipment (directive 2009/43/EC simplifying terms and conditions of transfers of defence-related products within the Community, OJ 2009 L 146/1), to import customs on military equipment (Council regulation (EC) 150/2003 suspending import duties on certain weapons and military equipment, OJ 2003 L 25/1), and to public procurement in the defence sector (directive 2009/81/EC of the European Parliament and the Council on the coordination of procedures for the award of certain works contracts, supply contracts and

For a derogation to be permitted, the Member State concerned may not simply invoke national security in an abstract way, but is under an obligation to prove that it is necessary to have recourse to art. 346 TFEU.[3] The European Court of Justice (ECJ) reviews if the principle of proportionality is observed.[4]

A special regime applies to products which can be used for military as well as for peaceful purposes (dual use). They are not covered by art. 346 TFEU, so that the general provisions of arts. 34 to 36 TFEU apply. In that respect, export restrictions for trade to third countries are laid down in specific regulations.[5] In their decision on export authorizations Member States take considerations of national and foreign security policy into account,[6] which the ECJ has construed in a fashion not stricter than in the context of restrictions in the internal market.[7]

(2) Chemicals

As for toxic substances, a regulation exists which contains obligations on the labelling, packaging as well as the authorization of chemicals; certain hazardous substances are prohibited.[8] The regulation has also established the European Chemicals Agency (situated in Helsinki) which monitors the evaluation and registration of substances and administers relevant information; while applications are to submitted to the Agency, the Commission is responsible for authorization. The purpose of this regulation is to protect human health and the

service contracts by contracting authorities or entities in the fields of defence and security, OJ 2009 L 216/76).

[3] ECJ Cases C-284/05, *Commission v. Finland*, [2009] ECR I-11705, paras. 44-54; C-372/05, *Commission v. Germany*, [2009] ECR I-11801, paras. 68-77; C-38/06, *Commission v. Portugal*, [2010] ECR I-1569, para. 66 and similar cases therein cited, all on VAT for military imports; Case C-615/10, *Insinööritoimisto InsTiimi*, EU:C:2012:324, paras. 35-46 (public contracts); Case C-246/12 P, *Ellinika Nafpigeia*, EU:C:2013:133, paras. 18-22 (state aid).

[4] ECJ Case C-474/12, *Schiebel Aircraft*, EU:C:2014:2139, paras. 37-38 (non-discrimination). The General Court appears to have gone farther than the ECJ by recognizing a "particularly wide discretion", see case T-26/01, *Fiocchi Munizioni*, [2003] ECR II-3951 para. 58; see also *D. Dittert*, Artikel 346 AEUV, in: H. von der Groeben, J. Schwarze and A. Hatje (eds.), Europäisches Unionsrecht (Baden-Baden 7th edn. 2015), para. 7, footnote 21.

[5] Council regulation (EC) 428/2009 setting up a Community regime for the control of exports, transfer, brokering and transit of dual-use items, OJ 2009 L 134/1; for petroleum products see Council regulation (EC) 1061/2009 establishing common rules for exports, OJ 2009 L 291/1, art. 9 and annex.

[6] Art. 12 (1) (c) of the dual use regulation, cited in note 5.

[7] ECJ Case C-70/94, *Werner*, [1995] ECR I-3189, para. 27; Case C-83/94, *Leifer*, [1995] ECR I-3231, paras. 26-30, both with respect to the preceding regulation.

[8] Regulation (EC) 1907/2006 of the European Parliament and the Council concerning the registration, evaluation, authorization and restriction of Chemicals (REACH), OJ 2006 L 396/1.

environment. The obligations are basically addressed to manufacturers, importers and professional or industrial users. Further exceptions are made for medicinal products for which different EU legislation was enacted. The regulation sets out a complex system of terms of trade with chemicals, and also prohibits trade in certain cases. Member states are therefore restricted with regard to domestic law of chemicals (art. 128 of the regulation). However, Art. 2 (3) of the regulation permits that Member State allow "for exemptions from this regulation in specific cases for certain substances […] where necessary in the interests of defence".

(3) Other goods

As far as merchandise is not covered by specific treaty provisions or by secondary law, the guarantee of free movement of goods is pertinent. Thus, even though legislation on agricultural law regulates foodstuff in some respect, it does not bar the application of arts. 34 to 36 TFEU (cf. art. 38 (2) TFEU). The same is true of goods which are of particular importance in emergency situations such as petroleum and other fuels[9] or the sale of goods which might be limited for other reasons, like alcoholic beverages.

Art. 34 TFEU prohibits quantitative restrictions on imports and measures having equivalent effect. The scope is construed widely by the ECJ and is affected by "[a]ll trading rules enacted by Member States which are capable of hindering, directly or indirectly, actually or potentially, intra-Community trade".[10] This means that all measures which have a potentially detrimental effect on the marketing of goods, imported or to be imported, from other Member States fall within the ambit of art. 34 TFEU. The same holds true, according to art. 35 TFEU, of barriers on the export of goods within the EU.

This wide scope of potential limitations on trade raises the question of justifications of restrictive measures on grounds of "public policy or public security" as they are recognized in art. 36 TFEU. The notion of public policy describes all basic rules enacted by a state which are indispensable for the political and social structure of a society. Art. 36 TFEU requires serious that a threat of distortion of this normative fundament is present.[11] However, "public policy" is a comprehensive concept which is only activated if the other grounds of justification in art. 36 TFEU fail.[12] In other words: Since public security is part of public policy, and

[9] ECJ Case 72/83, *Campus Oil*, [1984] ECR 2727.

[10] ECJ Case 8/74, *Dassonville*, [1974] ECR 837, para. 5.

[11] *P.-C. Müller-Graff*, in: von der Groeben et al. (note 4), Artikel 36 AEUV, para. 50.

[12] ECJ Case C-1/96, *Compassion*, [1998] ECR I-1251, para. 66.

supposed it is threatened in a qualified way, public policy is automatically affected; if a measure is justified on grounds of public security, this justification extends to public policy.

The term "public security" is rather narrowly defined and refers to reasons "of fundamental importance for a country's existence" on which "not only its economy but above all its institutions, its essential public services and even the survival of its inhabitants depend".[13] Public security comprises both internal and external security.[14] It protects the monopoly of force of a state against internal and external threats,[15] such as, for instance, the interruption of vital infrastructure and supply.[16] Thus, measures taken in a state of public emergency or in case of war evidently come into the purview of art. 36 TFEU.

The ECJ has acknowledged that "the Member States, which retain exclusive competence as regards the maintenance of public order and the safeguarding of internal security, unquestionably enjoy a margin of discretion in determining what measures are most appropriate" to eliminate disturbances.[17] However, these measures have to be proportional and must not amount to arbitrary discrimination (art. 36, second sentence TFEU). Moreover, in the scope of art. 36 TFEU the fundamental rights of the EU must be respected (see below, IV).

As an interim conclusion it can be noted that derogations from the free movement of goods may be justified, if conditions occur which trigger the declaration of a state of emergency or a state of war.

b) Freedom to provide services

Secs. 17 SEA and 20 NDA grant the power to Estonian authorities to qualify communication by mass media, the use of media of communication as well as the use of means of transport. These activities, which may accordingly be restricted, are services in the sense of art. 57 TFEU. Accordingly, services are "normally provided for remuneration", including activities

[13] ECJ Case 72/83, *Campus Oil*, [1984] ECR 2727, para. 34.

[14] ECJ Case C-273/97, *Sirdar*, [1999] ECR I-7403, para. 17; Case C-285/98, *Kreil*, [2000] ECR I-69, para. 17; Case C-423/98, *Albore*, [2000] ECR I-5965, para. 18.

[15] ECJ Case C-367/89, *Richardt*, [1991] ECR I-4621, para. 22.

[16] Restrictively, on the Greek petroleum monopoly, ECJ Case C-398/98, *Commission v. Greece*, [2001] ECR I-7915, para. 30.

[17] ECJ Case C-265/95, *Commission v. France*, [1997] ECR I-6959, para. 33.

of a commercial and professional character. Media, communication and transport offered across borders thus qualify as services. Again, specific provisions must be considered.

(1) Transport services

The TFEU establishes a special regime for transport services (arts. 90 to 100 TFEU), which excludes an application of the general provisions on the freedom of services (art. 58 (1) TFEU, see also art. 2 (2) (d) of the so-called services directive[18]). Primary law focuses on transport by rail, road and inland waterway (art. 100 (1) TFEU). Secondary law may also be enacted for air and sea transport (art. 100 (2) TFEU). The common transport policy encompasses services within a Member State (art. 91 (1) (b) TFEU) as far as their offering must be open to foreign carriers. In order to liberalize transport markets in these sectors and to exclude discrimination between providers within the EU, a large number of regulations and directives have been enacted. Their common denominator is that foreign carriers must not be treated less favourably than national transport companies (cf. art. 95 TFEU). Member States have retained more powers than it is the case in the services sector in general.[19] The question how far secondary law explicitly provides for security exceptions is, however, not decisive in the end. Legal opinions rightly hold that the basic principles of the law of services as developed by the ECJ continue to apply if they are not set aside by secondary law.[20] Where secondary law explicitly refers to public security concerns, which it generally does not do, the terms are to be specified along the lines drawn with respect to the public security clauses in art. 62 read together with art. 52 TFEU; where they do not, that law is to be construed as to respect public security, as also art. 4 (2) TEU underlines (see below section II.). As far as restrictions do not aim at transport services as such, but at the movement of goods or persons, the respective provisions on these freedoms must be considered (arts. 36 and 45 (3) TFEU).[21]

[18] Directive 2006/123/EC of the European Parliament and the Council on services in the internal market, OJ 2006 L 376/36.

[19] Cf., for instance, ECJ Case C-434/15, *Asociación Elite Taxi v Uber Spain*, EU:C:2017:981, paras. 41-47.

[20] *D. Boeing, T. Maxian Rusche and E. Kotthaus*, in: E. Grabitz, M. Hilf and M. Nettesheim (eds.), Das Recht der Europäischen Union, Looseleaf Commentary, Munich (CH Beck 2017), Art. 90 AEUV (last update 2011), para. 144.

[21] Cf., for instance, ECJ Case C-112/00, *Schmidberger*, [2003] ECR I-5659 (impediments to transit transports as a barrier to free trade).

(2) Electronic communication services

The so-called e-commerce directive regulates all "information society services",[22] i.e. any service "normally provided for remuneration, at a distance, by electronic means and at the individual request of a recipient".[23] This directive is generally understood as to encompass so-called social networks, which are not directly payed for by users, but indirectly by third persons and companies who place advertising.[24] To make such services available free of charge thus falls under the purview of the directive.[25] Art. 3 (4) of the directive expressly foresees an option of the Member States to derogate from the freedom to provide services of the covered nature for public policy, public health and "public security, including the safeguarding of national security and defence".

(3) Audio-visual media services

Special rules are also set out by the audio-visual media services directive (AMSD).[26] Its scope is defined as TV broadcast, on-demand audio-visual media, and commercial communication if disseminated with moving images. The AMSD does not include private correspondence, stand-alone text based services, and electronic versions of newspapers or magazines (recitals 22, 23 and 28); it can be inferred that social media are excluded from the scope of the AMSD as well since they do not provide programmes. The general idea of the AMSD is to ensure freedom of reception and retransmission regardless of the origin, within the EU, of these services, to harmonize the framework in which trans-border exchange of media services takes place, and to promote European production.

The right to regulate or restrict audio-visual media services originating from third countries is not affected (recital 54 AMSD). As to the internal market, Member States may "still take measures that restrict freedom of movement of television broadcasting, but only under the conditions and following the procedure laid down in this directive" (recital 43 AMSD). In that

[22] Directive 2000/31/EC of the European Parliament and the Council on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market, OJ 2000 L 178/1.

[23] Art. 2 (a) of the e-commerce directive refers to art. 1 no. 2 of the directive 98/48/EC of the European Parliament and the Council amending directive 98/34/EC laying down a procedure for the provision of information in the field of technical standards and regulations, OJ 1998 L 217/18.

[24] ECJ Case C-360/10, *Netlog*, EU:C:2012:85, para. 27.

[25] Id.; see also ECJ Case C-291/13, *Sotiris*, EU:C:2014:2209, paras. 28-30; Case C-484/14, *Mc Fadden*, EU:C:2016:689, paras. 37, 43; Case C-339/15, *Vanderborght*, EU:C:2017:335, para. 37.

[26] Directive 2010/13/EU of the European Parliament and the Council on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services, OJ 2010 L 95/1.

respect, Art. 3 (4) AMSD is of interest, which allows Member States to derogate from the obligation to ensure free reception and retransmission in the interest of public policy and public security, but restricts this reservation to on-demand media. The conditions for on-demand media are identical with those defined in the e-commerce directive, where the same exception applies and from which the formula in art. 3 (4) AMSD is taken. Given the approach of the AMSD to regulate the matter in an exclusive manner, the restriction in its art. 3 (4) to on-demand media would mean that the general public security exception for services in art. 62 in connection with art. 52 TFEU does not apply to TV broadcasting. The 105 recitals of the directive do not make it explicit why this should be the case. The result is puzzling, the more so since the recitals state that a lighter regulation is justified with respect to on-demand services, given the choice and control the user can exercise (recital 58) and other parts of the directive take up general interest grounds for derogation such as the protection of minors, public health and safety, the combat of discrimination and hatred and the safeguard of consumer interests. Probably the omitting of public policy and security for TV broadcasting can be explained by the history of the media directive which joins contents formerly governed by the TV directive,[27] which it replaced, with a new regime for on-demand media which would otherwise have been encompassed exclusively by the e-commerce directive. Like the media directive, the TV directive did not provide explicit derogation clauses for public policy reasons, but only for the protection of minors. The ECJ, however, interpreted the old TV directive as being non-exhaustive and to allow for public policy derogations.[28] Hence it appears that the ensuing lacuna in the media directive was unintended. This result would comply with the outcome of proceedings of the Council regarding a recent proposal by the Commission for a new media directive; the revised text does not distinguish any more in its public security clause between on-demand media and linear TV broadcasting. To both, the same exceptions are intended to apply and Member States should be allowed to derogate from the freedom to provide audio-visual media services provisionally "if service provided by a media service provider under the jurisdiction of another Member State […] prejudices or presents a serious and grave risk of prejudice to public security, including the safeguarding of national security and defence".[29] As we will see below, also

[27] Council directive 89/552/EEC on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities, OJ 1989 L 298/23.

[28] ECJ Case C-244/10, *Mesopotamia Broadcast*, [2011] ECR I-8777, paras. 34 and 37.

[29] See Council Doc. 9691/17 of 24 May 2017, sub art. 3 (2) (b).

art. 4 (2) TEU militates in favour of such a reading of the current version of the media directive (*infra* II.).

(4) Other services

By virtue of an explicit reference (art. 62 TFEU), the public security clause valid for the freedom of establishment (art. 52 TFEU) extends to services. The services directive leaves case-law by the ECJ in that respect unaffected and recognizes that this jurisprudence may continue to evolve.[30] The Member States therefore may take measures on grounds of public policy and public security. The clause largely corresponds to art. 36 TFEU dealt with above.

Framed in a more general fashion, according to the ECJ, a measure by a Member State which is liable to hinder or to make less attractive the exercise of services in the internal market can be justified on four conditions: "it must be applied in a non-discriminatory manner; it must be justified by overriding reasons based on the general interest; it must be suitable for securing the attainment of the objective which it pursues; and it must not go beyond what is necessary in order to attain that objective".[31] These requirements also hold true for public security.[32] Since the exceptions of art. 52 TFEU are interpreted strictly,[33] there must be a "genuine and sufficiently serious threat to a fundamental interest of society".[34] In its famous *Omega* case concerning the public policy exception to the freedom to provide services, the ECJ acknowledged that the understanding of this concept may vary from one country to another and that state authorities must "be allowed a margin of discretion within the limits imposed by the Treaty".[35] These limits are not only set by the principle of proportionality, but also by the fundamental rights guaranteed at the EU level.[36] Since the derogation invoked in the case was justified by the constitutional value of human dignity, which forms also part of the fundamental rights of the EU, the measure taken by the Member State was in effect not held to contradict the freedoms of the internal market.

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[30] Recitals 40 and 41, art. 16 (1) (b) of the services directive (note 18).

[31] ECJ Case C-514/03, *Commission v. Spain*, [2006] ECR I-963, para. 26.

[32] Id.

[33] ECJ Case C-36/02, *Omega*, [2004] ECR I-9609, para. 30.

[34] ECJ Case C-168/04, *Commission v. Austria*, [2006] I-9041, para. 64.

[35] ECJ Case C-36/02, *Omega*, [2004] ECR I-9609, para. 31; cf. also Case C-112/00, *Schmidberger*, [2003] ECR I-5659, paras. 76-82.

[36] ECJ Case C-36/02, *Omega*, [2004] ECR I-9609, paras. 33-35.

c) Free movement of Union citizens

Sec. 17 SEA envisages restrictions on the entry to, and departure from, Estonian territory. If persons whose free movement is limited on this basis are nationals of EU Member States and the country to which movement is restricted belongs to the EU, the free movement rules for workers (art. 45 TFEU), self-employed (art. 49 TFEU) as well as the general free movement guarantee for Union citizens (art. 21 TFEU) are pertinent. For third-country nationals, title V of the Treaty on the Area of Freedom, Security and Justice applies (see below section 2).

Free movement comprises the right of every Union citizen and their family members of crossing borders within the EU, which includes the right to leave territory of the home Member State. The right may, like the other market freedoms, be limited on grounds of public policy and security. The TFEU made this restriction explicit for workers (art. 45 (3) TFEU) and self-employed persons (art. 52 (1) TFEU). The general free movement right, which is independent of economic activity, does not contain such a clause, but is "subject to the limitations and conditions laid down in the Treaties and by the measures adopted to give them effect" (art. 21 (1) TFEU), which is generally understood as to refer to arts. 45 (3) and 52 TFEU. The so-called Union citizens directive (UCD) takes up these restrictions and further specifies restrictions.[37] The pertinent arts. 27 and 28 if this directive codified pre-existing ECJ jurisprudence which was taken up and elaborated in further case-law.[38]

These rules and principles, however, are not designed for a state of war or state of emergency. Art. 27 (2) UCD makes this clear in demanding that "[m]easures taken on grounds of public policy or public security shall" not only "comply with the principle of proportionality", but also "be based exclusively on the personal conduct of the individual concerned". This personal conduct "must represent a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society".[39] The principle extends to expulsion orders. In their decisions on restrictive measures, the authorities must consider the preceding time of lawful residence (art. 28 (1) UCD). Access to judicial review must be granted (art. 31 UCD).

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[37] Directive 2004/38/EC of the European Parliament and the Council on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States, OJ 2004, L 158/77, corr. L 229/35.

[38] *S. Kadelbach*, Union Citizenship, in: A. v. Bodgandy and J. Bast (eds.), Principles of European Constitutional Law, Oxford (Hart) 2nd ed. 2010, 441, at 454.

[39] Cf. ECJ Case 115/81, *Adoui and Cornuaille*, [1982] ECR 1665, para. 8; Case C-348/96, *Calfa*, [1999] ECR I-11, para. 21.

That means that the declaration of a state of exception does not per se allow for limitations on free movement rights. Such a restriction would require that the person concerned must pose by his or her own conduct a sufficiently serious threat. Jurisprudence has reaffirmed these principles frequently. Relevant conduct will usually consist of a serious criminal offence,[40] whereas political activism alone will not suffice, let alone if such activities are in themselves protected by EU law such as the membership or activities in trade unions.[41] These strict standards rule out measures of collective expulsion. If the high threshold posed by the Treaties is transgressed, however, nothing advocates against detention ordered for purposes of expulsion.[42]

d) The internal market freedoms: synthesis

Some acts of secondary legislation, such as the e-commerce directive, the audio-visual media services directive, and the Union citizens directive explicitly recognize public security concerns of the Member States. Since they were adopted to implement freedoms of the internal market, where the same concepts are used, case-law of the ECJ can be consulted in order to specify further their implications. That jurisprudence makes it clear that exceptions to the fundamental freedoms must be construed narrowly. Public security is the narrower concept and is recognized as capturing internal and external security. Both concepts may be invoked by Member States only in cases of serious threats to the society. It follows that the ECJ does not completely exempt issues of national security from the ambit of EU law, but it explicitly acknowledges that it does not govern "the Member States' choices of military organisation for the defence of their territory or of their essential interests".[43] If the emergency powers of the Estonian Constitution are activated under strictly described circumstances and after scrupulous evaluation of the facts, this threshold can certainly be met. However, the measures taken even in such a situation must be proportionate. In the context of personal freedoms, this means that no measures of a general nature may be ordered which do not consider the personal conduct and conditions of the individuals concerned.

[40] ECJ Case 30/77, *Bouchereau*, [1977] ECR 1999, para 33/35.

[41] As it is guaranteed not only in art. 28 CFR, but also in art. 8 of the Regulation 492/2011 of the European Parliament and the Council on freedom of movement for workers within the Union, OJ 2011 L 141/1; see ECJ Case 36/75, *Rutili*, [1975] ECR 1219, para. 29/31.

[42] ECJ Case 48/75, *Royer*, [1976] ECR 497, para. 43/44.

[43] ECJ Case C-186/01, *Dory*, [2003] ECR I-2479, para. 35.

Within the realm of the fundamental freedoms, the ECJ has full powers of judicial review, along the procedural paths laid down in the Founding Treaties.

2. The area of freedom, security and justice: art. 72 TFEU

The EU policies in the Area of Freedom, Security and Justice is characterized by a distribution of powers which assigns legislative competencies to the EU, but reserves executive powers to the Member States. Art. 67 (1) TFEU explicitly states that the pertinent title V of the TFEU operates "with respect for fundamental rights and the different legal systems and traditions of the Member States".

a) Secondary legislation

The EU has the powers to enact legislation on terror financing, monitoring controls of borders, asylum and other protection of refugees, immigration, minimum rules on criminal penal and criminal procedure as well as co-operation of the judiciaries and police. One field which falls into the scope of title V TFEU are therefore restrictions on free movement of third country nationals as they are provided for by Estonian emergency legislation. Two regulations are of special interest in the present context, the Visa Code[44] and the Schengen Borders Code.[45]

Whereas the Visa Code governs the issuance of Visa for transit and sojourn up to three months for third country nationals from certain countries within the EU, the Schengen Borders Code specifies the rules on the crossing of the external borders of the EU, for which a valid visa is a requirement. The competent authorities shall refuse a visa if the applicant is considered to be "a threat to public policy, internal security or public health" (art. 21 (3) (d) and art. 32 (1) (a) Visa Code). For stays longer than 90 days the Schengen Borders Code defines the absence of such a threat as a condition (art. 6 (1) (e) Schengen Borders Code). Authorities may conduct border checks to verify this requirement and refuse entry (art. 8 (3) Schengen Borders Code).

[44] Regulation (EC) 810/2009 of the European Parliament and of the Council establishing a Community Code on Visas, OJ 2009 L 243/1.

[45] Regulation (EU) 2016/399 of the European Parliament and of the Council on a Union Code on the rules governing the movement of persons across borders, OJ 2016 L 77/1.

The Schengen Border Code also describes the conditions on which temporary border controls may be reintroduced at the internal borders of the EU. There must be a serious threat to public policy or internal security, the duration must be limited to 30 days or to the foreseeable time period if the serious threat exceeds 30 days, and the measure must be a last resort (art. 25). Procedural duties must be observed which basically aim at prior notification to the EU Commission and the other Member States of the situation (art. 27). In urgent cases, on an exceptional basis and for a period of time of up to ten days, such information may be supplied at a later point in time (art. 28). Measures may be taken for a period of up to sixth months if the overall functioning of a specific area would otherwise be put at risk (art. 29).

b) The security reservation of art. 72 TFEU

Art. 72 TFEU spells out that title V TFEU "shall not affect the exercise of the responsibilities incumbent upon Member States with regard to the maintenance of law and order and the safeguarding of internal security". Whereas the term "maintenance of law and order" is also found in art. 4 (2) TEU, the concept of "security" is restricted to "internal security", i.e. to the matters of justice and home affairs regulated in Title V TFEU. It is thus conceived more narrowly than the term "national security" in art. 4 (2) TEU.[46]

To specify the concept of "maintenance of law and order", jurisprudence of the ECJ may be consulted which deals with the "public policy" exception to the fundamental freedoms of the internal market already dealt with above. By a similar token, "internal security" can be equated with "public security", which is another ground for justifying derogations from the market freedoms so that pertinent jurisprudence can be consulted for further specification (see above, I). Historically, above all, art. 72 TFEU aims at preserving the executive and operational powers to the Member States, but also captures functions of the state which are recognized as essential.[47] The legal consequences of art. 72 TFEU are threefold: It requires an interpretation of EU law which respects state jurisdiction with regard to public order and

[46] Cf. *A. Hatje*, Artikel 4 AEUV, in: J. Schwarze et al. (ed.), EU-Kommentar, 3rd ed. Baden-Baden (Nomos) 2012, para. 15.

[47] *R. Priebe*, Innere Sicherheit – eine europäische Aufgabe?, in: U. Becker et al. (eds.). Verfassung und Verwaltung in Europa – Festschrift für Jürgen Schwarze, Baden-Baden (2014), 394, at 399.

internal security, sets a limit to secondary EU legislation and provides for a possible ground precluding wrongfulness in cases of conflict.[48]

It is against this backdrop that the policies of the Member States covered by the exception of art. 72 TFEU are to be defined. The EU has no own powers to enact measures against terrorism, apart from the competencies with respect to its financing (art. 75 TFEU), minimum rules concerning the definition of criminal offences with a cross-border dimension (art. 83 (1), subsec. 2 TFEU), the co-operation of authorities across borders (art. 89 TFEU) and mutual assistance in case of terrorist attacks or natural or man-made disaster (art. 222 TFEU). Generally speaking, the internal structure of security forces and police authorities is a domestic affair; the EU is only competent for regulating co-operation between these authorities of Member States or between these authorities and European institutions like Europol, Eurojust, Frontex and the IT agency in Talinn, even though also in these areas the national authorities retain their responsibilities (cf. art. 73 TFEU). Member States also have retained their competencies to determine the volume of admission of third-state nationals to their territory (art. 79 (5) TFEU) and to combat irregular residence or immigration.[49] Moreover, to enact legal bases for restrictions of fundamental rights in the public interest remains within the responsibility of Member States, the more so since the EU does not have any powers of enforcement (art. 88 (3) TFEU). That means that all operative powers to maintain public policy and security have remained within the domestic domain, including the exchange of data and police measures even in border areas.[50] The Estonian Law Enforcement Act is thus entirely within the realm reserved by these provisions.

On the other hand, pertinent EU legislation is not simply set aside by art. 72 TFEU. That means, for instance, that measures taken in the context of policies to cope with major influx of migrants into the EU on the basis of the emergency clause of art. 78 (3) TFEU are not as such an argument which justifies an abstention from common burden sharing.[51] In other cases, the ECJ held that identity checks carried out by police in areas close to the border may not be equivalent to systematic border control, which would be incompatible with the

[48] *V. Röben*, Artikel 72 AEUV, in: Grabitz et al. (note 20), para. 16-18 (last update 2014); *S. Breitenmoser and R. Weyeneth*, Artikel 72 AEUV, in: von der Groeben et al. (note 4), paras. 5 and 20.

[49] ECJ Case C-329/11, *Achughbabian*, [2011] ECR I-12695, para. 33; Case C-83/12 PPU, *Vo*, EU:C:2012:202, para. 37.

[50] ECJ Case C-278/12 PPU, *Adil*, EU:C:2012:508, para. 53.

[51] ECJ Case C-643/15, *Slovakia and Hungary v. Council*, EU:C:2017:631, paras. 306-309.

definition of the internal market ("without internal frontiers", art. 26 (2) TFEU) and pertinent secondary law.[52]

In this context, it is of interest that some legal writings hold that art. 72 TFEU provides a justification to introduce internal border controls in exceptional cases even if the requirements of the Schengen Borders Code for a suspension of free movement are not met, provided that the circumstances are of exceptional urgency and the measures remain proportional and temporary.[53] Given the precision which the current version of the Schengen Borders Code devotes to exceptional circumstances, however, the question arises what circumstances these should be. It is imaginable that the time-frame might be too tight for emergencies or states of war of a longer duration.

As for judicial review, the ECJ may determine the ambit of art. 72 TFEU in abstract terms, but it has no jurisdiction to review the legality of law enforcement measures taken within the domain described by art. 72 TFEU.[54] This is explicitly stated in art. 276 TFEU. That means that national courts may not refer the question to the ECJ according to art. 267 TFEU whether or not a national police measure is in conflict with the fundamental rights guaranteed by the Charter of Fundamental Rights (CFR), if this measure is based exclusively on domestic law. The Charter does not apply (art. 51 (1) CFR). However, as far as EU law governs the matter, as it would be the case for the temporary reintroduction of controls along the internal borders within the EU, the ECJ can be seized of the case.[55]

As a result, the Estonian State of Emergency Act and the Estonian Defence Act do not as such collide with EU powers. State prerogatives under these Acts may be affected, however, if they violate without justification primary or secondary EU law. In that respect, the ECJ exerts its jurisdiction.

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[52] ECJ Case C-278/12 PPU, *Adil*, EU:C:2012:508, para. 53; Case C-9/16, *A. v. Staatsanwaltschaft Offenburg*, EU:C:2017:483, paras. 33-75.

[53] *Breitenmoser/Weyeneth* (note 48), para. 20, with regard to the previous version of the Schengen Borders Code.

[54] Cf. ECJ Case C-14/13, *Cholakova*, EU:C:2013:374, para. 24.

[55] Cf. ECJ Case C-188/10, *Melki and Abdeli*, [2010] ECR I-5667, paras. 64-75.

3. Other policies

a) Data protection

Secs. 17 SEA and 20 NDA authorize restrictions on the use of media of communication. As far as this authorization would imply intrusions into the free movement of personal data, the question arises if it interferes into the ambit of the EU right to data protection (art. 16 TFEU). The EU data protection regulation,[56] which will enter into full application on 25 May 2018, however, further specifies this right, declares that its material scope does not extend to the processing of personal data in the course of an activity outside the reach of Union law (art. 2 (2) (a)) and data concerning border controls (art 2 (2) (b)), for which the Schengen Information System has been set up. Furthermore, the regulation does not apply to the processing of data "by competent authorities for the purposes of the prevention, investigation, detection or prosecution of criminal offences […] including the safeguarding and the prevention of threats to public security" (art. 2 (2) d)). Member States may enact legislation allowing for restrictions in the interest of national security, defence, and public security (art. 23 (1) of the regulation).

What that exactly means is not yet entirely clear, as becomes apparent when case-law on the obligations of private communications service providers is considered. In 2014 the ECJ annulled the data retention directive of 2006 for violation of the rights to private life and data protection (arts. 7 and 8 CFR).[57] Some Member States such as the United Kingdom and Germany therefore adopted national legislation on the matter. However, with respect to the Directive on privacy and electronic communication,[58] which follows a similar logic for exceptions as the new General Data Protection Regulation, the ECJ found that this directive must be interpreted as precluding national legislation "which, for the purpose of fighting crime, provides for general and indiscriminate retention of all traffic and location data of all subscribers and registered users relating to all means of electronic communication".[59] Even though arts. 1 (3) and 15 (1) of that directive reserve the powers to Member States to enact

[56] Regulation (EU) 2016/679 of the European Parliament and the Council on the protection of national persons with regard to the processing of personal data and on the free movement of such data, OJ 2016 L 119/1.

[57] ECJ Case C-293/12, *Digital Rights Ireland*, EU:C:2014:238 concerning Directive 2006/24/EC of the European Parliament and the Council on the retention of data generated or processed in connection with the provision of publicly available electronic communications services or of public communications networks, OJ 2006 L 105/54.

[58] Directive 2002/58 of the European Parliament and the Council concerning the processing of personal data and the protection of privacy in the electronic communications sector, OJ 2002 L 201/37.

[59] ECJ Case C-203/15, *Tele2 Sverige*, EU:C:2016:970, *dispositif* no. 1, after para. 134.

legislation in that respect, this fact, according to the Court, "necessarily presupposes that the national measures referred to therein, such as those relating to the retention of data for the purpose of combatting crime, fall within the scope of that directive, since it expressly authorises the Member States to adopt them only if the conditions laid down in the directive are met".[60] Therefore, accordingly, the EU fundamental rights enshrined in the CFR apply.[61] The judgment is also of interest regarding national security, because criminal investigations form part of it: the directive defines national security as "State security – defence, public security, and the prevention, investigation, detection and prosecution of criminal offences or of unauthorised use of the electronic communication system".[62] The ECJ reserves to itself the power not only to assess if national legislation falls into the scope of national security, but also to apply fundamental rights and the principle of proportionality as they are understood at the European level.

It follows that the Member States are acting within the realm of European fundamental rights even in security sensitive areas. Data retention must not be required in a general and indiscriminate fashion from all subscribers and users, but only in exceptional cases if it serves the purpose of "fighting serious crime".[63] There must be "a relationship between the data which must be retained and a threat to public security".[64] National legislation must "be based on objective evidence which makes it possible to identify a public whose data is likely to reveal a link, at least an indirect one […] and to contribute in one way or another to fighting serious crime or to preventing a serious risk to public security".[65] For cases of emergency, the ECJ admits also measures affecting third persons: "However, in particular situations, where for example vital national security, defence or public security interests are threatened by terrorist activities, access to the data of other persons might also be granted where there is objective evidence from which it can be deduced that that data might, in a specific case, make an effective contribution to combating such activities".[66] Prior review is required as a general rule, "except in cases of validly established urgency".[67]

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[60] Id., para. 73.

[61] Id., paras. 90-97 and case-law cited.

[62] Cited id., para. 90.

[63] Id., para. 102.

[64] Id., para. 106.

[65] Id., para. 111.

[66] Id., para. 119.

[67] Id., para. 120.

As a result, the Estonian emergency laws alone would not satisfy these conditions, since they allow for restrictions only in a very general fashion. Whether they would do so if taken together with the Law Enforcement Act or other legal bases, which provide for more specific criteria, depends on how these statutes can be reconciled with the requirements spelled out by ECJ jurisprudence. Such an evaluation would need detailed analysis. Suffice it here to conclude that the measures taken in the interest of national security are not beyond the reach of the Directive on privacy and electronic communication.

b) Access to information

Where authorizations in Estonian emergency laws restrict free access of information, two legal acts are of interest. The first is the directive on access to environmental information.[68] Even though military and police activities can have an impact on environmental concerns dealt with in the directive, it expressly provides for exceptions for internal communications, information which is classified by law as confidential, and "international relations, public security or national defence" (art. 4 (1) (c), (2) (a) and (b)).

The second legal act on access to information is the regulation on access to documents of the EU.[69] Such documents may also be in the possession of Member States (art. 5), in particular if they contain communication of their authorities with EU institutions. Again, exceptions are made with respect to the protection of public security, defence and military matters (art. 4 (1) (a)). Disclosure of such documents shall be refused.

The exceptions made in this legislation restate what is laid down in art. 346 (1) (a) TFEU, that "no Member State shall be obliged to supply information the disclosure of which it considers contrary to the essential interests of its security". In contrast to the legislative acts referred to, art. 346 (1) (a) TFEU primarily aims at information required by the EU itself, in particular the Commission, as for instance according to art. 337 TFEU for the fulfilment of its tasks. Proportionality must be observed, and it must be taken into account that EU officials are obliged to respect confidentiality (art. 339 TFEU).[70]

[68] Directive 2003/4/EC of the European Parliament and the Council on public access to environmental information, OJ 2003 L 41/26.

[69] Regulation (EC) 1049/2001 of the European Parliament and the Council regarding public access to European Parliament, Council and Commission documents, OJ 2001 L 145/43.

[70] *Dittert* (note 4), Artikel 346, paras. 11 and 12.

II. The general security clause of art. 4 (2) TEU

1. Context

At first sight, art. 4 (2) TEU appears to be the basic rule of the Treaties governing national security. Some observers state that art. 4 (2) TEU applies in a supplementary fashion, if none of the other security clauses in the Treaties is pertinent.[71] The clause is an extension of the identity clause which was for the first time inserted into primary law by the Treaty of Maastricht (1992). Its second sentence goes back to the Treaty establishing a Constitution for Europe (2004), which did not enter into force, but was taken up by the Treaty of Lisbon (2009). The third sentence, however, was agreed in the course of the negotiations to the Lisbon Treaty in order to prevent extensive EU policies in case of a terrorist attack based on art. 67 TFEU, in spite of the fact that art. 72 TFEU already governs the matter.[72] The full text reads:

> "The Union shall respect the equality of Member States before the Treaties as well as their national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government. It shall respect their essential State functions, including ensuring the territorial integrity of the State, maintaining law and order and safeguarding national security. In particular, national security remains the sole responsibility of each Member State."

Apart from the principle of equality of Member States, which is not relevant in the present context, art. 4 (2) thus embodies two further obligations of the EU, the duties to respect the national identities and to respect the essential functions of the Member States. The national security clause in the third sentence reinforces the latter guarantee. The terms of the second and third sentences of art. 4 (2) TEU have not been applied so far by the European judiciary, so that their interpretation can to date only be tentative.

[71] *Hatje* (note 46), para. 15; *W. Obwexer*, Artikel 4 EUV, in: von der Groeben et al. (note 4) para. 46.

[72] *Obwexer* (note 71), para. 42.

2. Scope

The wordings of art. 4 (2) TEU and the public interest restrictions on the fundamental freedoms are not identical in the English version of the Treaties.[73] In spite of this linguistic distinction, the meaning of "maintenance of law and order" coincides with the concept of "public policy" used in the internal market provisions of the Treaties; the French and German versions of the Treaties use the same expression ("*ordre public*", "*öffentliche Ordnung*").[74] "National security" differs in wording from the concepts of "public security",[75] "internal security",[76] "essential interests of security"[77] and further descriptions of security[78] which are found in other articles.

Notwithstanding these observations, some conclusions as to the meaning of "law and order" and "national security" may be derived from the general purpose of art. 4 (2) TEU. Obviously, both cover possible policies to address threats to public security, which have been recognized by the jurisprudence of the ECJ as grounds to justify derogations from EU law already in times before the national identity clause and its extension in art. 4 (2) TEU have been incorporated into the Treaties.[79] The case-law referred to above in section I with respect to public policy and public security can therefore be consulted to specify their meaning. As regards "national security", it is therefore clear that it captures the monopoly of power of a State as regards both internal and external security. Practice therefore considers intelligence services as part of that area.[80] Situations of public emergency are paradigmatic examples for what was intended to regulate in art. 4 (2) TEU.

[73] Id., para. 47.

[74] Arts. 36, 45 (3), 52, 65 (1) (b) TFEU.

[75] Art. 65 (1) (b).

[76] Art. 72 TFEU.

[77] Art. 346 TFEU.

[78] Arts. 222, 347 TFEU.

[79] ECJ, Case 72/83, *Campus Oil*, [1984] ECR 2727, para. 34-35 (free movement of goods); Case C-70/94, *Werner*, [1995] ECR I-3189, para. 27 (dual use regulation).

[80] *Priebe* (note 47), 400-401.

3. Legal consequences

With regard to the effects of art. 4 (2) TEU opinions in legal writings are split as to whether or not this provision sets an absolute limit to EU powers.[81] The prevailing view, by contrast, infers from the obligation to "respect" a duty of the EU to balance out in a proportional manner its interest in regulation of a subject matter with the domain of State identity.[82] Accordingly, the closer measures are to the core of state functions, the more likely it is that the proportionality test is met. The ECJ appears to follow a mixed approach. In some cases, it treated the organizational structure of the Member States as guaranteed by art. 4 (2) TEU as a strict limit to EU legislation, but reserved the prerogative to itself to limit the possible scope.[83] In other cases, it applied the criteria of the least intrusive means and the balancing out of colliding interests, which are both steps in the proportionality test, to ascertain whether deviations from EU law by Member States were justified.[84]

The possible legal consequences of a violation of the Member States' right to respect the essential state functions are threefold. They can be derived from what follows from the identity clause, which likewise sets out an obligation to "respect".

Firstly, a measure taken by the EU which is inconsistent with article 4 (2) TEU may be held unlawful.[85] The EU itself may comply with the obligation to respect, for instance, by opening

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[81] Cf. *A. Puttler*, Art. 4 EUV, in: C. Calliess and M. Ruffert (eds.), EUV/AEUV – Das Verfassungsrecht der Europäischen Union mit Europäischer Grundrechtecharta, 5th ed. Munich (CH Beck) 2016, para. 22 (core of constitutional identity as an outer limit of EU powers); similarly, from the perspective of German Constitutional law the German Federal Constitutional Court (FCC) in BVerfGE 123, 267/353 (Lisbon Treaty): "unantastbarer Kern seiner Verfassungsidentität").

[82] *I. Pernice*, Der Schutz der nationalen Identität in der Europäischen Union, Archiv des öffentlichen Rechts 136 (2011), 186, at 194-200; *G. van der Schyff*, The Constitutional Relationship between the European Union and its Member States: The Role of National Identity in Article 4(2) TEU, Eur L. Rev. 37 (2012), 563, at 579-582; *A. von Bogdandy and S. Schill*, Artikel 4 EUV, in: Grabitz et al. (note 20), para. 35 (last update 2013); Obwexer (note 71), para. 49; R. Streinz, Art. 4 EUV, in: R. Streinz (ed.), EUV/AEUV, 2nd ed. 2012, para. 11. An intermediate position is taken by *Hatje* (note 46), para. 18: the core of identity poses an absolute limit, in the periphery of it, proportionality must be observed.

[83] ECJ Case C-156/13, *Digibet and Albers*, EU:C:2014:1756, para. 34; Case C-51/15, *Remondis*, EU:C:2016:985, para. 40; General Court Case T-529/13, *Izsák and Dabis*, EU:T:2016:282, para. 70.

[84] See the analysis by *T. Konstantinides*, Constitutional Identity as a Shield and as a Sword, Cam. Yb. Eur. Leg. Stud. 13 (2011/12), 195, at 200-208. Areas to which case-law has emerged include public service: ECJ Case C-473/93, *Commission v. Luxemburg*, [1996] ECR I-3207, para. 35; admission as notary public: Case C-51/08, *Commission v. Luxemburg*, [2011] ECR I-4231, para. 124; official languages and spellings: Case C-391/09, *Runevič-Vardyn and Wardyn*, [2011] ECR I-3787, paras. 86-94; Case C-202/11, *Las*, EU:C:2013:239, paras. 26-7; a nobiliary name in a republican state: Case C-208/09, *Sayn-Wittgenstein*, [2010] ECR I-13693, paras. 81-95; Case C-438/14, *Bogendorff von Wolffersdorff*, EU:C:2016:401, para. 78.

[85] Cf. ECJ Case C-58/13, *Torresi*, EU:C:2014:2088, paras. 53-58.

its secondary law explicitly for public order and national security concerns or by granting margins of appreciation. As we have seen, secondary law like the dual use regulation, the e-commerce and the audio-visual media services directives, the Union citizens directive, the Schengen Borders Code, the regulations on data protection and access to documents, and the directive on environmental information make express provision for security interests.

Secondly, art. 4 (2) TEU requires an interpretation of secondary EU law that is consistent with the guarantee of a State's identity and essential functions. Thus, the fact that the audio-visual media services directive makes no exception for public security for TV broadcast, but mentions other public order concerns and general interest objectives, cannot mean that national security and defence are excluded from justifying restrictions made in that interest. Art. 4 (2) TEU demands that this lacuna is to be filled by application of art. 62, read together with art. 52 TFEU. All counter-limitations to these reasons for justification apply, including the fundamental rights of the EU and the principle of proportionality (see below section IV).

Thirdly, state conduct which is prima facie in conflict with EU law might be justified on grounds of public security.[86] The rationale of such a justification will be structured along the lines drawn by the ECJ with respect to the freedoms of the internal market.

Art. 347 TFEU, which is more specific in that respect, provides further guidelines and orientation.

4. Measures taken in the national interest and art. 347 TFEU

At first glance, art. 347 TFEU primarily sets out a procedural duty of a Member State to consult in cases in which national security is threatened. However, it is common understanding that the provision also embodies a ground of justification[87] for measures of the Member States. This follows from the formula "measures which a Member State may be called upon to take", which trigger the need to take "steps needed to prevent the functioning of the internal market". Art. 347 TFEU refers to three types of situation, "the event of serious

[86] For an example, concerning state identity, ECJ Case C-438/14, *Bogendorff von Wolffersdorff*, EU:C:2016:401, paras 48 et seq., esp. 73-84.

[87] Like arts. 72 TFEU and 4 (2) TEU, art. 347 TFEU does not describe an absolute exception or reservation of sovereignty, but is, like the other two articles, construed in a relative sense, see *L. Jaeckel*, Artikel 347 AEUV, in: Grabitz (note 20), para. 7 (last update 2011); *J. Kokott*, Art. 347 AEUV, in: Streinz (note 82), para. 12; *Dittert* (note 4), Artikel 347 AEUV, para. 2, with further reference.

internal disturbances affecting the maintenance of law and order", "war, serious international tension constituting a threat of war", and obligations accepted by a Member State "for the purpose of maintaining peace and international security".

In the present context, the first two cases are of interest. The situations triggering the need for specific measures coincide with threats to internal or external security of a State. The threshold is high in that a breakdown of public order or an imminent danger must be present, and the burden of proof is with the State concerned.[88] In such cases, restrictive measures can be taken, without, however, affecting the distribution of powers between the EU and its Member States, as follows from the role attributed to the Commission in these situations by art. 348 TFEU (see below, section IV). That implies that Member States are not dispensed with the conditions outlined above with respect to art. 4 (2) TEU, including the principle of non-discrimination and the proportionality test as a limit to State discretion, which requires a causal nexus between the situation of crisis and the measure taken. Under such circumstances, restrictions to trade and free movement including temporary reintroduction of border controls can be justified.[89]

5. Supremacy of EU law and judicial review

The question which institutions hold the power to decide on these legal consequences in an individual case authoritatively leads to the antagonism between the EU judiciary and national constitutional or supreme courts – and their respective claims to uphold or qualify supremacy of EU law. Obviously, the path foreseen in the Treaties is that the ECJ may be seized either to interpret or to nullify secondary EU law[90] or to declare that a Member State has violated its obligations under EU law.[91] The terms of art. 4 (2) TEU are to be interpreted autonomously at the EU level, even though they refer to the Member States. In this vein the ECJ has repeatedly used its powers to decide whether or not a measure taken by the EU touches the identity of the Member States.[92] On the other hand, national identity and its

[88] See, with respect to the previous, but in wording identical versions (arts. 224 ECT and 297 EC), AG *Jacobs* in Case C-12/94, *Commission v. Greece*, [1996] ECR I-1513, para. 47; ECJ Case C-414/97, *Commission v. Spain*, [1999] ECR I-5585, paras. 21-22.

[89] *Dittert* (note 4), Artikel 347 AEUV, para. 24.

[90] See arts. 263, 267, 277 TFEU.

[91] Cf. arts. 258, 267 TFEU.

[92] For instances in which the ECJ denied such a conflict see Case C-3/10, *Affatato*, EU:C:2010:574, para. 41 (part-time employment in the public sector); Case C-393/10, *O'Brien*, EU:C:2012:110, para. 49 (part-time employment for members of the judiciary); Case C-58/13, *Torresi*, EU:C:2014:2088,

emanations into the constitutional structures and essential functions of a state, as legal concepts, presuppose constitutional autonomy,[93] so that it is to a considerable extent up to domestic actors and particularly the interpreters of domestic constitutional law to whom the task is assigned to define which elements belong to the "fundamental structures" of their respective States. They have retained a margin of discretion in that respect.[94] However, all security clauses of the Treaties are standards of review by the European judiciary. Art. 348 (2) TFEU, which ascribes to the Commission the task to safeguard that the conditions of competition in the internal market are not distorted, reinforces that the ECJ has jurisdiction also when Member States invoke security interests.

On the other hand, as is well known, the highest courts of various Member States claim the power even to declare EU law inapplicable within their respective jurisdictions if they assume that such law either goes beyond the competencies attributed to the Union (*ultra vires*)[95] or that it is in conflict with core tenets of domestic constitutional law.[96] Most notably

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para. 58 (admission to the bar); Case C-276/14, *Gmina Wroclaw*, EU:C:2015:635, para. 40 (VAT for municipalities).

[93] See *G. Jacobsohn*, Constitutional Identity, Rev. of Politics 68 (2006), 361, at 386; *Pernice* (note 82), 189; *van der Schyff* (note 82), at 569-572.

[94] Cf., with regard to national identity, the opinion of AG Poiares Maduro in Case C-213/07, *Michaniki*, [2008] ECR I-9999, paras. 31-36.

[95] BVerfG 126, 286/303-308 ("*Honeywell*"); 134, 366/404-411 ("*OMT*"); for other Member States see Supreme Court of Denmark (Højesteret), *Carlsen v Rasmussen*, I 367/1997 [1998] UfR 800; Corte Costituzionale, Sentenza N. 232/89, *Fragd*, [1990] Foro Italiano I, 1855; Czech Constitutional Court (Ústavní Soud), *Slovak Pensions,* [2012] Pl. ÚS 5/12; with respect to an early decision of the Constitutional Court of Hungary (Alkotmánybíróság) see *A. Harmathy*, Constitutional Questions of the Preparation of Hungary to Accession to the EU, in A.E. Kellermann et al. (eds.), EU Enlargement: The Constitutional Impact at EU and National Level, Heidelberg (Springer) 2001, 315; see also the citation of the FCC in *R on application of HS2 Action Alliance Ltd. et al. v The Secretary of State for Transport*, [2014] 3 UKSC, para. 111.

[96] BVerfGE 123, 267/353 ("*Lisbon*"); see also Conseil Constitutionnel, N. 2006-540 DC, *Loi relative au droit d'auteur et aux droits voisins dans la société de l'information*, JO 2006 p. 11541; Czech Constitutional Court, *Lisbon Treaty,* [2008] Pl. ÚS 19/08; furthermore, basically with respect to fundamental rights, cf. Supreme Court of Ireland, *Society for the Protection of Unborn Children Ltd. v Grogan* I.R. 760, 19 December 1989; Corte Costituzionale, Sentenza N. 183/73, *Frontini*, [1974] Foro Italiano I, 314; Tribunal Constitutional de España, Decl. 1/1992, *Tratado de Maastricht* [1992] BOE núm. 177, p. 2; Decl. 1/2004 *Tratado Constiticional* [2005] BOE núm 3, p. 5, id.; but see also Sent. 26/2014, *Melloni*, [2014] BOE núm. 60, p. 85; reservations with respect to the whole constitutions have been made by the Greek State Council (Symvoulio Epikrateias) in As to *Vagias et al. v DI.K.A.T.S.A.*, No. 2878/97, see *E. Maganaris*, The principle of supremacy of Community law – The Greek challenge, E.L. Rev. 23 (1998), 179; the Polish Constitutional Court (Trybunal Konstytucyjny), *Constitutionality of the Treaty of Accession*, Dec. K 18/04 (2005); and the Lithuanian Constitutional Court (Konstitucinio Teismo), Cases No. 13/2000 and others (2006).

the German Federal Constitutional Court (FCC) reserves to itself the competency to safeguard the essential principles of the Constitution (*Grundgesetz*) as part of the German State's identity.[97] This identity does not only encompass the fundamental principles of the *Grundgesetz* such as human dignity, democracy, and the rule of law, but also the essential functions of the state. In its judgment on the Lisbon Treaty, the FCC grouped defence explicitly under these essential functions and held that the German federal parliament's powers to decide on the deployment of armed forces could not be subject to a transfer of powers.[98] In later judgments the FCC applied this identity control test not only to a future transfer of powers, but also to specific legal acts of the EU.[99]

Such reservations by domestic constitutional courts appear to be hard to reconcile with the claim of the ECJ that "no legal provision, however framed", may take priority over EU law, which has always been meant to include constitutional law.[100] In a recent decision, however, the ECJ seems to have loosened this doctrine. The case involved the duty of the Member States to provide effective sanctions for fraud to the detriment of EU funds (art. 325 TFEU) and a statute of limitation which was shorter than for comparable offences of a purely domestic nature. On reference by the Italian Constitutional Court, the ECJ held that, should the retroactive extension of the statute of limitation violate the rule of law as it is construed under the Italian Constitution, the supremacy of EU law might cede to this principle of domestic constitutional law.[101] The line of reasoning is reminiscent of the *Omega* judgment referred to above.[102] A profound reception of this judgment has not yet begun. But it might mean that the priority of EU law is no longer unconditional, provided that the domestic constitutional value at stake is also recognized in principle by primary EU law, as it is the case with the rule of law and the prohibition of retroactive punishment. Since the unity of EU law and the effectiveness of its application belong to the most fundamental principles of the EU legal order, such cases can only be exceptional.

If this evaluation is correct, one may attempt to transpose the rationale of this judgment to the realm of national security. Such an analogy can only be tentative, since the Italian case

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[97] BVerfGE 123, 267/353-356 ("*Lisbon*").

[98] Id., at 358, 360-361, 422-426.

[99] BVerfG, 2 BvR 2735/14, [2016] NJW 1149.

[100] ECJ Case 11/70, *Internationale Handelsgesellschaft*, [1970] ECR 1125, para. 3; Case 106/77, *Simmenthal*, [1979] ECR 629, paras. 21-22; Case C-416/10, *Križan*, EU:C:2013:8, para. 70; Case C-399/11, *Melloni*, EU:C:2013:107, paras. 58-60.

[101] ECJ Case C-42/17, M.A.S. and M.B. v. Presidente del Consiglio degli Ministri, EU:C:2017:936, para. 59.

[102] *Supra*, notes 33-36 and accompanying text.

concerned an expansive construction of fundamental rights, which are also valid at the EU level, and EU law expressly allows for a higher standard in domestic law (arts. 52 (4), 53 CFR), whereas security policies necessarily imply limitations to the scope of protected rights. Projected at a more abstract level, however, one might conclude that what fundamental rights on the one hand and the defence of the security of the State on the other hand have in common is, if taken together, that they are essential for upholding a constitutional commonwealth under the rule of law. These state functions are explicitly recognized as vital in art. 4 (2) TEU, as long as Member States do not leave the common consensus defined by the EU's constitutional values enshrined in art. 2 TEU and protected by the rule of law procedure of art. 7 TEU. Since situations which trigger the declaration of a state of war or a state of emergency as they are contemplated by Estonian law are by definition exceptional, it is quite safe to argue that the supremacy of EU law may then cede in cases of conflict.

Some authors who consider art. 4 (2) TEU as allowing for an exception to the supremacy of EU law have made varying efforts to circumscribe such conditions in abstract terms.[103] In the last resort, it will depend on the specific measures taken and the provisions of EU law at stake whether such a case of priority of domestic constitutional law can be made.[104] It is therefore necessary to enquire into the specific subject-matter where such conflicts of laws might occur. The duty of loyalty between the Union and its Member states, which is enshrined in art. 4 (3) TEU, requires that conflicts between the two levels must rather be avoided than provoked, and that an interpretation of national law consistent with EU law is a preferable method, even if taking into account the legitimate claim of respect for essential state functions. Furthermore, the obligation of courts against whose decisions no remedies are possible to refer a question regarding the interpretation of Union law to the ECJ (art. 267 (3) TFEU) must not be impaired, even if the constitutional court of the Member State concerned has assessed the constitutionality along parameters similar to those valid at the

[103] *M. Kumm*, The Jurisprudence of Constitutional Conflict: Constitutional Supremacy in Europe Before and After the Constitutional Treaty, ELJ 11 (2005), 262, 303; *L. Besselink*, National and constitutional identity before and after Lisbon, Utrecht L. Rev. 6 (2010), 36, at 48; *D. Preshova*, Battleground or Meeting Point? Respect for National Identities in the European Union, Croat. Yb. Eur. L. & Pol. 8 (2012), 267, at 294-298; cf. also *A. von Bogdandy and S. Schill*, Overcoming Absolute Primacy, CML Rev. 48 (2011), 1417, 1449-1450, who seem to have modified their view in favour of a procedural approach as it is also contended here, see *id*., in Grabitz (note 20), para 47.

[104] See *van der Schyff* (note 82), 582-583.

EU level.[105] For a mitigation of such conflicts of claims to jurisdiction, both levels of judiciary require that paths of cooperative procedures are sought.[106]

As an interim conclusion one may infer from art. 4 (2) TEU that the Estonian National Defence Act is not per se in conflict with EU law, but remains within the national security reservation. The same holds true for the area of internal security covered by the Estonian State of Emergency Act. The ECJ respects discretion of the Member States, but would reserve jurisdiction to itself to assess if national security is rightly invoked.

III. Fundamental rights and restrictions in the interest of public security

1. Binding effect of EU fundamental rights on Member States

In all matters which fall into the scope of EU law, the Charter of Fundamental Rights of the European Union (CFR) applies. The Charter is placed on a rank equal to the EU Treaties (art. 6 (1) TEU) and is binding not only for the institutions of the EU, but on certain conditions also on the Member States. Art. 51 CFR declares Member States bound "only when they are implementing Union law". Such implementation typically takes place in two situations.

The first case arises if Member States implement secondary EU law, either by law-making with regard to directives or by application of secondary law with a direct effect, such as regulations or decisions in the sense of art. 288 TFEU (so-called agency situation).[107] Arguably, Member States are free to apply the fundamental rights guaranteed in their domestic constitutions to the extent secondary law leaves discretion to the Member States, as the German FCC consistently claims. However, the ECJ appears to subject the entire substance matter dealt with in a legislative act of the EU to its judicial review.[108] As a consequence, Member States are bound within the scope of all secondary legislation cited above.

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[105] ECJ Case C-322/16, *Global Starnet*, EU:C:2017:985, paras. 21-26.

[106] Id., for the European level; for German Constitutional law see the recent judgment by the FCC, 2 BvR 424/17 of 19 December 2017, where the Court held it unconstitutional if a lower court refrains from referring a case to the ECJ before refusing an extradition to Romania requested under the framework decision on the European arrest warrant because of possible conflict with fundamental rights.

[107] For regulations see ECJ Case C-2/92, *Bostock*, [1994] I-955, para. 16; for directives Case C-617/10, *Åkerberg Fransson*, EU:C:2013:280.

[108] See ECJ Case C-617/10, *Åkerberg Fransson*, EU:C:2013:280, affirmed, *i.a.*, in Case C-682/15, *Berlioz Investment Funds*, EU:C:2017:373.

As we have seen with respect to the directive on privacy and electronic communication, even national security clauses reserving Member States the right to enact legislation, according to the ECJ, are not excepted from the obligations of the CFR. As a consequence, this likewise holds true for EU legislation with regard to special goods (like the regulation on chemicals), the freedom to provide certain services such as the directives on e-commerce and audio-visual media, as well as for legal acts of the EU concerning the free movement of persons, be they Union citizens or nationals of third states.[109]

The second situation in which Member States are bound by the CFR arises where they invoke reasons for justifying restrictions on fundamental freedoms (so-called derogation cases).[110] Even though this category is at times considered by academic observers as going beyond the reach of the jurisdiction of the ECJ, the official explanations added to the provisions of the Charter, which have to be "given due regard" in its interpretation of the Charter (art. 52 (7) CFR), refer to the ECJ's jurisprudence on derogation cases and thus make it clear that it was intended to be taken up for purposes of interpretation. The CFR therefore applies in principle when reasons of public policy or public security are invoked in order to derogate from EU law.

The guarantees that may be affected by the Estonian emergency laws which fall into the ambit of the CFR are, for instance, the right of personal security and liberty (art. 6 CFR), in particular in cases of detention pending expulsion (art. 19 (2) CFR), respect of private life and protection of personal data (arts. 7 and 8 CFR), freedom of expression and information (art. 11 CFR) as well as economic rights like the freedom to conduct a business (art. 16 CFR) and the right to property (art. 17 CFR). Whether the freedom of assembly (art. 12 CFR) and, in case of strikes and lock-out, the right of collective bargaining (art. 28 CFR) apply depends on whether free movement rights of EU citizens are at issue.[111]

[109] See for the scope of the Visa Code (note 44) ECJ Case C-403/16, *El Hassani*, EU:C:2017:960, para. 37.

[110] ECJ Case C-260/89, *ERT*, [1991] ECR I-2925, para. 42.

[111] ECJ Case C-438/05, *International Transport Worker's Federation*, [2007] ECR I-10779, paras. 33-47; Case C-341/05, *Laval*, [2007] ECR I-11767, paras. 89-95.

2. Restrictions to fundamental rights in emergency situations

a) General principles governing limitations to European fundamental rights

The fundamental rights enshrined in the CFR are, however, subject to the limitations set out in art. 52 CFR. Accordingly, restrictions can be justified if they are provided for by law, respect the essence of the rights concerned, and comply with the principle of proportionality, which means that they have to be "necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others" (art. 52 (1) CFR). This formula is not identical with the limitation clauses which the European Convention on Human Rights sets out in the second paragraphs to the guarantees of private life (art. 8 ECHR), freedom of thought (art. 9 ECHR), expression (art. 10 ECHR) and assembly (art. 11 ECHR). Restrictions are possible if they are prescribed by law and "necessary in a democratic society" in the public interest, in particular of "public safety". Arts. 8, 10 and 11, *i.a.*, also refer to, "national security", art. 9 refers to "public order", arts. 10 and 11 ECHR to "public safety", and art. 10 additionally to "territorial integrity".[112] The European Court of Human Rights (ECtHR) tends to apply uniform standards to all of these provisions, so that the nuances of the respective restriction clauses are not significant; the ECtHR hardly enquires into the reasons for precluding violations themselves.[113] The central element of justification accordingly is a proportionality test read into the term "necessary in a democratic society".[114]

With respect to the relationship between the ECHR and the CFR art. 52 (3) CFR states that, as far as the Charter rights correspond to guarantees of the ECHR, the meaning of these rights shall be the same. Since the drafters of art. 52 envisaged as much coherence with the ECHR as possible, this rationale extends to the limitations to the rights of the CFR.[115] Art. 52 also ensures that more restrictive standards for review than the general limitations clause in art. 52 (1) CFR are upheld for ECHR guarantees where stricter or even no limitation clauses exist, as it is for example the case with regard to personal safety and security (art. 5 ECHR), fair trial rights (art. 6 ECHR) and the right to property (art. 1 AP I ECHR). The

[112] Art. 11 of the Estonian Constitution appears to be open enough to integrate standards emerging from both, the CFR and the ECHR.

[113] *C. Grabenwarter*, European Convention on Human Rights – Commentary, Munich (CH Beck) 2014, Article 8, para. 42.

[114] Cf. *S. Rose-Ackerman and B. Billa*, Treaties and National Security, Int'l L. & Pol. 40 (2008), 437, at 472-475.

[115] *M. Borowsky*, Artikel 52, in: J. Meyer (ed.), Charta der Grundrechte der Europäischen Union, 4th ed. Baden-Baden (Nomos) 2014, para. 8.

second sentence of art. 52 (3) CFR declares that Union law may go beyond the scope of the ECHR guarantees, which it may do by secondary legislation. Likewise, the clause opens to the path for the ECJ to develop a stricter standard. The ECJ has made it explicit that it intends to make use of it, also as far as security interests of Member States are at issue, most particularly in the field of data protection.[116]

What follows from art. 52 CFR for the fundamental rights affected by the Estonian emergency laws as far as they fall within the scope of the CFR? For rights which correspond to ECHR guarantees the standards spelled out therein and further developed by the ECtHR serve as a source of interpretation.[117] In that respect the ECJ has established a standard of proportionality which is largely equivalent to the jurisprudence of the ECtHR. A higher level of protection has probably been established with regard to privacy and data protection, in particular under pertinent directives. Thus, in most instances the proportionality test will decide the case, whereas in some areas absolute limits are set. The latter may be said about the restrictions to free movement rights in cases of expulsion of non-EU citizens, where the ECJ has adopted standards similar to those developed by the ECtHR, if the situation in the country to which expulsion is ordered entails a high probability of grave human rights violation such as a threat of death penalty, torture or inhuman and degrading treatment.[118] The bottom line is marked by art. 53 CFR which assures that the interpretation of the Charter may not lag behind the ECHR and its standards of protection.

b) Limitations in a state of emergency

Estonian law provides that a state of emergency or a state of war can be declared by the competent constitutional institutions (arts. 13, 14 SEA; art. 17 NDA). Thus, the question arises whether, and if so which, rules exist at the EU level governing restrictions of fundamental rights in a state of emergency or state of war.

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[116] See the *Tele2 Sverige* judgment (cited note 59), para. 129; cf. also Case C-601/15 PPU, *N.*, EU:C:2016:84, para. 46.

[117] See also the conclusions drawn from case-law by *S. Peers and S. Prechal*, in: S. Peers at al. (eds.), The EU Charter of Fundamental Rights – A Commentary, Oxford (Hart) 2014, para. 52.128. For pertinent case law see *European Court of Human Rights, Division de la Recherche – Research Division*, Sécurité nationale et jurisprudence de la Cour européenne des droits de l'homme, 2013, http://www.echr.coe.int/Documents/Research_report_national_security_FRA.pdf.

[118] Cf. ECtHR No. 30696/09, *M.S.S. v. Belgium and Greece*, Rep. 2011-I, with ECJ Case C-411/10, *N.S.,* [2011] ECR I-13905.

Art. 15 ECHR allows it to the Member States to take measures derogating from obligations under the European Convention of Human Rights. This article is not explicitly taken up by the CFR, ECJ case law does not exist, and hardly any legal writing deals with the matter.[119] However, the official explanations to art. 52 CFR stress that the Charter

> "does not affect the possibilities of Member States to avail themselves of Article 15 ECHR, allowing derogations from ECHR rights in the event of war or of other public dangers threatening the life of the nation, when they take action in the areas of national defence in the event of war and of the maintenance of law and order, in accordance with their responsibilities recognized in Article 4 (1) of the Treaty on European Union and Articles 72 and 347 of the Treaty on the Functioning of the European Union".[120]

The references in art. 52 CFR to the ECHR are thus understood as to encompass the derogation clause of art. 15 ECHR, including pertinent jurisprudence by the ECtHR. That art. 4 (1) TEU (and not art. 4 (2) TEU, see above section II) is quoted appears to imply that the separation of powers between the EU and its Member States remains unaffected.

As a consequence, legal acts of the EU are not superseded *per se* by derogations declared under art. 15 ECHR; in France, for instance, which declared and notified such a state of emergency on 24 November 2015,[121] EU law continued to apply. However, EU institutions do not keen to place the issue at a high profile. In an answer to a question posed by members of the European Parliament with respect to the French legislation on the state of emergency enacted in November 2015, the Commission took the view that the CFR did not apply; it stated that "it appears that this legislation does not implement EC law".[122] Short as it is, doubts are in place if this statement is an appropriate evaluation of the legal situation.

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[119] See the hint by *Borowsky* (note 115), para. 36 a.

[120] Explanations Relating to the Charter of Fundamental Rights, OJ 2007 C 303/17, at 33.

[121] All declarations on states of emergency notified to the Council of Europe are found at www.coe.int/en/web/conventions/full-list/-/conventions/treaty/005/declarations?p_auth=6LlIDT60.

[122] See Question for written answer to the Commission by N. Griesbeck, S. in 't Veld and C. Wikström, Compatibility of the state of emergency and other exceptional arrangements with the primary and secondary law of the European Union, EP Doc E-00419-16, question of 20 January 2016 and answer thereto, www.europarl.europa.eu/sides/getDoc.do?pubRef=%2f%2fEP%2f%2fTEXT%2bWQ%2bE-2016-000419%2b0%2bDOC%2bXML%2bV0%2f%2fEN&language=EN.

Taken together with the explanations to art. 52 CFR, it seems safe to conclude from these comments that security clauses as those discussed above (sections I to III) are to be construed in the light of art. 15 ECHR. Restrictions to the rights enshrined in the Charter may be justified on the same conditions as in the framework of the ECHR.[123]

It is therefore useful to recapitulate briefly what these conditions are.[124]

Firstly, the emergency must be formally declared. The jurisprudence of the ECtHR requires that the state of emergency must be proclaimed officially and publicly on the domestic plane,[125] and art. 15 (3) ECHR demands a notification to the Secretary General of the Council of Europe.

Secondly, the reason giving rise to such a declaration must amount to "an exceptional situation of crisis or emergency which affects the whole population and constitutes a threat to the organised life of the community of which the state is composed".[126] The ECtHR reviews along objective criteria if such a situation was present, but grants to the States relatively wide discretion.

Thirdly, art. 15 (2) ECHR and some of the Additional Protocols thereto expressly exclude certain guarantees from derogation; additionally, it emerges from the jurisprudence of the ECtHR that also the right of access to a legal remedy must not be impaired.[127] All of these guarantees, however, are also declared as non-derogable by the Estonian Constitution (see above, section B.).

Fourthly, to declare a state of exception is not in itself a justification for interventions into human rights. The measures taken must be proportionate in that they are justified only to

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[123] For the same conclusion see *T. Roeder*, Staatsnotstand im Recht der Europäischen Union, in: A. Zwitter (ed.), Notstand und Recht, Baden-Baden and Vienna (Nomos - Facultas) 2012, 82, at 106-109; *G.L. Neuman*, Constrained Derogation in Positive Human Rights Regimes, in: E.J. Criddle (ed.), Human Rights in Emergencies, Cambridge (CUP) 2016, 15, at 16-17

[124] Cf. European Court of Human Rights, Guide on Article 15 of the European Convention of Human Rights, April 2017, http://www.echr.coe.int/Documents/Guide_Art_15_ENG.pdf; Human Rights Press Unit, Factsheet – derogation in time of emergency, November 2017, www.echr.coe.int/Documents/FS_Derogation_ENG.pdf.

[125] ECtHR No. 14533/89, *Brannigan and McBride*, Ser. A 258-B, para. 67.

[126] ECtHR No. 332/57, *Lawless v. Ireland*, Ser. A 3, para. 28.

[127] *S. Kadelbach and D. Roth-Isigkeit*, The Right to Invoke Rights as a Limit to Sovereignty – Security Interests, State of Emergency and Review of UN Sanctions by Domestic Courts under the European Convention of Human Rights, Nordic JIL 86 (2017), 275, at 287-291.

the extent required by the exigencies of the situation. The most relevant factors, obviously, are the rights affected and the intensity of the intrusion.[128]

If these requirements are met, restrictions of fundamental rights embodied in the CFR can be justified. Under these circumstances, measures which fall into the ambit of secondary EU law or derogate from fundamental rights for reasons recognized by EU law are not barred by the Charter.

IV. Procedural obligations

According to Art. 347 TFEU Member States "shall consult each other with a view to taking together the steps needed to prevent the functioning of the internal market being affected by measures which a Member State may be called upon" to respond to such situations. As a rule, States shall notify envisaged activities and enter into consultations before restrictive measures are taken. If the threat to public order is so grave and imminent that prior consultations are not feasible, they must take place as soon as possible. According to the prevailing view, the proper setting for these consultations is the institutional framework of the EU, and not only intergovernmental and diplomatic modes of communication. This opinion is plausible and can be derived from art. 348 TFEU.[129] Since also the other Member States are to be addressed, the Council is the appropriate forum for consultations.[130]

Art. 348 TFEU ascribes the power to the Commission to start examinations if measures taken by the responsible state under art. 347 TFEU prove to distort the conditions of competition in the internal market, as they might arise from practices of trade restrictions, state aid and public procurement. For states of emergency and war, this kind of abuse should be a theoretical case, but the provision presupposes that the Commission is informed, and the background underlines that even the exceptional situations envisaged in the security clauses of the treaties are embedded in the institutional setting of the EU. Thus, also the Commission must be informed.[131] Practice seems to overlook this obligation: France did not

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[128] For a case of unduly prolonged detention see ECtHR No. 21987/93, *Aksoy v. Turkey*, Rep. 1996-VI, para. 77.

[129] *Dittert* (note 4), Artikel 347, para. 31.

[130] Cf. *Kokott* (note 87), para. 39; *Jaeckel* (note 87), Art. 347 AEUV, para. 28; *U. Karpenstein*, Artikel 347 AEUV, in: Schwarze (note 46), para. 11; *C. Calliess*, Artikel 347 AEUV, in: Calliess and Ruffert (note 81), para. 11.

[131] *Kokott* (note 87), para. 41; *Jaeckel* (note 87), para. 28; Calliess (note 129), para. 10.

notify the Commission of the emergency legislation enacted in November 2015, and the Commission did not require such notification.[132]

Further duties of notification and consultation with the Commission have been established by secondary law. The Schengen Borders Code requires notification to the Commission if temporary border controls are reintroduced (arts. 27 and 28) and thus trigger a consultation procedure as to the necessity and proportionality of the measures taken (art. 27 (4) Schengen Borders Code). A similar path is foreseen in the Audiovisual Media Services Directive, where a contact committee under the aegis of the Commission is competent for consultations on practical problems arising from the Directive (art. 29).

To consult with the Council and Commission would be in keeping with EU state practice under exceptional circumstances. After German reunification as well as in the course of the financial crisis, consultations with a view at adapting to the exigencies of the situation were conducted.

Moreover, for interventions into personal freedoms to be justified by a state of emergency or state of war, the requirements of art. 15 ECHR must be met which include notification to the Secretary General of the Council of Europe of the declaration of the state of exception, the enacted measures and the envisaged timeframe.

Other provisions presuppose procedural steps in order to be activated, but do not make them an obligation of the State concerned by a situation of emergency. Among these provisions are the solidarity clauses with respect to terrorist attacks as well as natural or man-made disaster (art. 222 TFEU). Declaration 37 to the Final Act of the Lisbon Conference makes it clear that this provision does not affect the right of Member States to choose the appropriate means of assistance. However, they are under a duty to coordinate between themselves in the Council, if a Member State so requests (art. 222 (2) TFEU).

[132] See answer of the Commission to the question by three MEP, *supra* note 122.

D. Summary

In addressing the questions posed, the preceding considerations may be summarized as follows:

1. The EU has various legislative competences which touch the fields of public order and national security at the margins, even though the powers of the Member States remain unaffected in principle. Public order and national security are grounds of justification to restrictions on rights and freedoms guaranteed by primary and secondary law. To invoke public order and national security alone, however, does not suffice to justify such derogations. To that end, there is no recognized absolute core of State interests reserved in EU law; instead, a context-related proportionality test applies.
2. As a consequence, EU law keeps its priority over the national law of the Member States also in such cases. Recent case law on fundamental rights might indicate a shift in ECJ jurisprudence with regard to the relationship between constitutional law and EU law. In exceptional cases, where both the EU and the State levels recognize the same values and the common minimum standard of protection is respected, national constitutional law may prevail. It can be argued, but is in effect unclear, if this also applies to emergency clauses in national constitutions.
3. The Charter of Fundamental Rights of the EU has incorporated implicitly the power of the Member States to derogate from ECHR guarantees in a state of emergency or state of war. This is relevant in cases where states derogate from EU law, and fundamental rights form a standard of review in the course of balancing out conflicting interests. However, it cannot be said that EU law cedes to national legislation providing restrictions. As far as national security is invoked to justify derogations in a state of emergency and a state of war, several provisions in EU law, among which art. 347 TFEU is the most important, require notification to, and consultation with, the other Member States and the Council as well as the Commission to inform of such derogations. Such consultations are also the appropriate method if it should come to conflicts of competing jurisprudence in security matters.

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