ESTONIA

Madis Ernits*, Kati Roostar, Edit Kubinyi, Juuli Hiio**

Preliminary remarks

Estonia became a member of the European Union on the 1st of May 2004. Five months later the Treaty Establishing a Constitution for Europe (hereinafter *the Constitutional Treaty*) was signed. Although the division of competences between the Union and Member States remains a niche topic that is still not widely discussed in Estonia, discussion about how much power should be delegated to the Union begun to emerge in the context of the accession.

The way delegation of competences upon the Union is understood by Estonian lawyers is illustrated by the commentaries to the Constitution of the Republic of Estonia Amendment Act. The act was passed by the people of Estonia in a referendum held on the 14th of September 2003 which states in paragraph 1 that "Estonia may belong to the European Union"[1]. The commentaries to the Act explain that Estonia has conferred some of its competence to the Union to expand the competence of the Union in accordance with the Treaty. New approval by the national parliament, the *Riigikogu*, is considered necessary only if more competences to the EU are proposed to be conferred by the Treaty itself.[2]

Since the accession to the Union, Estonian public opinion has regarded the EU in a relatively positive light[3] and the official position has been in favour of the "ever closer Union". The official position has been summarised in a framework document titled "Estonia's European Union Policy 2011–2015", which has been debated by the *Riigikogu*. According to this document, "*The EU must retain its internal strength, openness and capacity for growth. Estonia is willing to place new areas under EU jurisdiction and broaden its current powers. Estonia does not support reversing or limiting the EU's powers*."[4] In 2013 Carri Ginter, an associate professor of EU law at the University of Tartu, stated that "Estonia has not witnessed any constitutional challenges to its accession to the EU or to amendments of the founding treaties of the EU."[5]

Scholarly literature published around the time of accession already focused on the competence division provided in the Constitutional Treaty[6], while those that analysed the Treaty framework in

* Madis Ernits, judge, Tartu Court of Appeal; lecturer, Faculty of Law, University of Tartu, author of questions 1.1-1.5. The author thanks Carri Ginter, Associate Professor of European Law at the Faculty of Law, University of Tartu for advice and support by the preparation of the report.

** Kati Roostar; Edit Kubinyi; Juuli Hiio, lawyers, European Union Law Division, Ministry of Foreign Affairs. The authors thank Age Inkinen (adviser, EU Secretariat, Government Office), Helena Braun (adviser, Ministry of Justice) and Merike Saarmann (adviser, Chancellor of Justice) for their advice and support by the preparation of the report.

[1] The Constitution of the Republic of Estonia Amendment Act, RT I 2003, 64, 429, § 1.

[2] Eesti Vabariigi põhiseadus: kommenteeritud väljaanne, Tallinn 2012.

[3] According to the latest Eurobarometer survey (May 2015), the EU conjures a positive image for 49% of Estonians, which is 8% above the average in the Union.

[4] Estonia's European Union Policy 2011-2015, available online in English:
https://riigikantselei.ee/sites/default/files/content-editors/Failid/eesti_el_poliitika_eng.pdf.

[5] C. Ginter, Constitutionality of the European Stability Mechanism in Estonia: Applying Proportionality to Sovereignty, European Constitutional Law Review 2013, p. 353.

[6] E.g. M. Rosentau, Suveräänsus Euroopa Liidus, Riigikogu Toimetised 2003.

force at the time also made references to the changes that the Constitutional Treaty would bring forward.[7] The official position on the division of competences was also formulated in the context of Estonia's accession to the EU. The Estonian delegation, just like the delegations of all the Member States and candidate countries, took part of the European Convention that negotiated the draft of the Constitutional Treaty.

It thus follows that the entry into force of the Treaty of Lisbon that brought to reality the changes envisioned by the Constitutional Treaty, enforced the changes that were already discussed and expected in Estonia. Therefore in the Estonian context it is rarely possible to differentiate between pre- and post-Lisbon views to specific aspects of the EU law.

1.1. Does the formulation of the principle of conferral at Article 5 (2) TEU correspond to the classic formulation of the principle in public international law in your language?

In Estonian translation of Article 5(1) and 5(2) TEU the principle of conferral is called 'principle of giving the competence' (*pädevuse andmise põhimõte*). In some translations also the term 'principle of divided competences' (*pädevuste jaotamise põhimõte*) is used.[8] As far as known the translation has been chosen by the lawyer-linguists.

1.2. Has the expression of the principle of conferral introduced in Article 5 (1) TEU by the Treaty of Lisbon been the subject of commentaries in your country?

There is neither commentary to the Article 5 TEU nor has it been a topic of jurisprudence. There has been an introductory article to the Treaty of Lisbon which dealt briefly with the division of competences according to the new Treaties.[9]

1.3. Has the jurisprudence developed a doctrine of ultra vires concerning the exercise of the competences of the European Union?

Before the accession to the European Union (EU) the Estonian Constitution was amended by the *Eesti Vabariigi põhiseaduse täiendamise seadus* [The Constitution of the Republic of Estonia Amendment Act] (CREAA),[10] which provides as follows:

> In a referendum held on 14 September 2003 pursuant to section 162 of the Constitution of the Republic of Estonia, the people of Estonia adopted the following Act to amend the Constitution:
> §1. Estonia may belong to the European Union, provided the fundamental principles of the Constitution of the Republic of Estonia are respected.
> §2. When Estonia has acceded to the European Union, the Constitution of the Republic of Estonia is applied without prejudice to the rights and obligations arising from the Accession Treaty.
> §3. This Act may only be amended in a referendum.
> §4. This Act enters into force three months after the date of its promulgation.

[7] E.g. J. Laffranque, Euroopa Liidu õigussüsteem ja Eesti õiguse koht selles, Tallinn 2006; M. Linntam, Pädevuse jaotus Euroopa Liidu ja liikmesriikide vahel: kas paindlik jäikus või jäik paindlikkus? Juridica 2005.
[8] E.g. ECJ C-370/07, para. 46 and Opinion of Advocate General Kokott in the same case delivered on 23 April 2009, para. 55.
[9] H. Uustalu, Lissaboni leping – samm demokraatlikuma, efektiivsema ja läbipaistvama Euroopa poole, Juridica 2008, p. 315 f.; cf. J. Laffranque, Lissaboni leping: väliselt olemasoleva lepingu reform, kuid sisult siiski põhiseadus? Riigikogu Toimetised 2008.
[10] RT I 2003, 64, 429; RT I 2007, 43, 313.

The delegation of powers to the EU is regulated in §2 CREAA. There are no clear limits to the transfer or delegation of powers to the EU. The brief wording of the CREAA left some major questions, i.e. the effect of the EU law, to be interpreted by the judiciary. According to the Supreme Court (SC):

> Proceeding from of §2 of the Constitution of the Republic of Estonia Amendment Act […], pursuant to which, as of Estonia's accession to the European Union, the Constitution of the Republic of Estonia applies taking account of the rights and obligations arising from the Accession Treaty, the result of the adoption of this Act is that only that part of the Constitution which is in conformity with the European Union law or which regulates the relationships not regulated by the European Union law can be applied. The effect of those provisions of the Constitution that are not compatible with the European Union law and thus inapplicable is suspended.[11]

On 11 May 2006 the SC adopted an opinion regarding the interpretation of the Constitution (the transition to Euro case).[12] According to the opinion:

> In the substantive sense this [i.e. §2 CREAA] amounted to a material amendment of the entirety of the Constitution to the extent that it is not compatible with the European Union law. […] At that, only that part of the constitution is applicable, which is in conformity with the European Union law or which regulates relationships that are not regulated by the European Union law. The effect of those provisions of the constitution that are not compatible with the European Union law and thus inapplicable is suspended.[13]

The opinion of the SC has been criticised in dissenting opinions of two justices. Mainly the existence of limitations to the interpretation of the Constitution as well as the binding nature of the opinion rendered to further practice have been questioned. In a dissenting opinion, Justice Kõve was express in stating that when analysing the implications of §2 CREAA, the court should have clarified also the meaning of §1 as well as the meaning of Chapter I of the Constitution in its entirety.[14] Dissenting Justice Kergandberg equally pointed out the need for an analysis of the nature and impact of §1 CREAA.[15]

The issue of whether the suspension of wide parts of the Constitution by the SC was a good solution[16] or not[17] has been subject to a passionate debate. The supporters of the SC's approach argue that a constitutional review competence of a constitutional court of a Member State would be pointless and useless. They warn that a deviation from the primacy of the EU Law in a singular case could lead to a withdrawal from the EU or even to a collapse of the EU. The critics argue that the

[11] Ruling of the Constitutional Review Chamber of the Supreme Court (CRCSC) 26.06.2008, 3-4-1-5-08, para. 30.
[12] CRCSC opinion 11.05.2006, 3-4-1-3-06.
[13] *Ibid.*, para. 16.
[14] Dissenting opinion of Justice Kõve to CRCSC opinion 11.05.2006, 3-4-1-3-06, para. 2.
[15] Dissenting opinion of Justice Kergandberg to CRCSC opinion 11.05.2006, 3-4-1-3-06.
[16] J. Laffranque, Sõltumatu ja demokraatlik õigusriik Riigikohtu praktikas Eesti Euroopa Liidu liikmesuse kontekstis, Juridica 2009, p. 483 ff.; H. Kalmo, Mis on järel põhiseadusest? Veel kord Euroopa Ühenduse õiguse ülimuslikkusest, Juridica 2008, p. 583 ff.
[17] L. Mälksoo, Eesti suveräänsus 1988–2008, in: M. Luts-Sootak/H. Kalmo, Iganenud või igavene? Tartu 2010, p. 132 ff.; U. Lõhmus, Põhiseaduse muutmine ja muutused põhiseaduses, Juridica 2011, p. 15 ff.; M. Ernits, Põhiõigused, demokraatia, õigusriik, Tartu 2011, p. 35 ff.; M. Ernits, 20 Jahre Menschenwürde, Demokratie, Rechtsstaat, Sozialstaat, in: S. Hülshörster / D. Mirow (eds.), Deutsche Beratung bei Rechts- und Justizreformen im Ausland, Berlin 2012, p. 137 ff.

material amendment of the entirety of the Constitution that was claimed by the SC lacks a mainstay in the text of the Constitution as well as the relevant will of the people to abandon the sovereignty. On the contrary, a clear intention not to abandon the sovereignty can be identified in the explanatory memorandum to the CREAA.[18] Furthermore, such an interpretation is an imperative neither from the point of view of the Constitution nor because of the primacy of the EU Law. There are weighty reasons supporting the thesis that the SC did not act on the basis of the competence conferred on it by the Constitution. Neither the Constitution nor any other act confers on the SC competence to rule on the validity of the constitutional provisions.[19] On the contrary, the Constitution provides the legal basis for the existence of the SC itself and gives to it the task and the competence to act as the Constitutional Court. If the SC does not perform this function, it endangers not only its own existence but also the continuity of the entire Constitution.[20] This situation has been referred by Uno Lõhmus as the erosion of the Constitution.[21]

1.4. In the legal literature and in the declarations of politicians of your country, are there criticisms of the European Union concerning a violation of the division of competences?

There have been a view concerned newspaper articles in the context of the debt crisis but they did not criticize the EU concerning the violation of the division of competences but questioned rather whether Estonian Parliament, courts and legal experts are aware of the scope and limits of the conferral to the EU.[22]

1.5. Is the distinction between the fields of competences of the European Union and the scope of application of EU law understood and explained in the scientific literature and in the practice in your country?

The fields of competencies of the EU have been briefly mentioned.[23] Only the scope of Article 51(1) of the Charter has been discussed.[24] However, it might be of interest to point out that the ECJ repeated in the Estonian *Liivimaa Lihaveis* case (C-562/12) its' so far widest formulation it had used previously in the *Hernandez* case (C-198/13). According to this the implementation of the Union law in the sense of Article 51(1) of the Charter "requires a certain degree of connection above and beyond the matters covered being closely related or one of those matters having an indirect impact on the other".[25]

1.6. Is the principle of subsidiarity invoked in your country as a principle to be applied to the division of competences between the EU and its MS by legal scholarship, by politicians or by the jurisprudence?

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[18] Explanatory Memorandum to the draft CREAA.
[19] Lõhmus, 2011, p. 18.
[20] Ernits, 2011, p. 44, 62, 69 f.
[21] Lõhmus, 2011, p. 24.
[22] R. Maruste, Maruste: võlakriisi lahendamine on jõudnud põhiseadusliku kriisi lähedale, Eesti Päevaleht 09.12.2011; C. Ginter, A. Jõks, Tippjuristid: finantskriis on ka põhiseaduskriis, Postimees 16.12.2011; L. Mälksoo, Lauri Mälksoo: aeg võtta põhiseadust tõsiselt, Postimees 28.12.2011.
[23] Uustalu, 2008, p. 315 f.
[24] Lõhmus, 2011, p. 643 ff., A. Laurand, Euroopa Liidu liitumine inimõiguste ja põhivabaduste kaitse konventsiooniga, Juridica 2013, p. 680 f.
[25] ECJ C-562/12, para. 62; comp. C-198/13, para. 34.

The principle of subsidiarity is mostly invoked in Estonia as a principle that limits the European Union's (excess) power[26] and protects the Member States' sovereignty.[27]

Some authors differentiate between the division of competences and the application of those competences.[28] Others simply claim that the subsidiarity principle has been established to determine the division of competences between different levels of administration[29] or that together with the proportionality principle it determines the limits of the EU competences.[30]

The politicians usually refer to the subsidiarity principle as one of the most important principles of the EU, whose main purpose is to protect the Member States' sovereignty and to limit the damage that the Union's expanding powers may cause to the loss of sovereignty.[31] The politicians rarely connect the division of competences and subsidiarity.

1.7. Has the division of competences generated reasoned opinions in your country in the context of the subsidiarity procedure?

The *Riigikogu* has generated one reasoned opinion in the context of the subsidiarity procedure. The reasoned opinion was adopted in 2013, in response to the proposal for a directive regarding disclosure of non-financial and diversity information by certain large companies and groups. *Riigikogu* did not oppose to the measures proposed in the proposal but found that the measures would be better achieved on a Member State level.[32] *Riigikogu* reasoned that company law remains "rather in the competence of the Member States". *Riigikogu* also found that it is "doubtful" whether the proposal is based on the correct legal basis[33] and stated that the Commission has not sufficiently motivated the need for a directive as opposed to a non-binding measure of EU law[34].

It is also worth mentioning here that in 2013 Estonia also brought an action for annulment to the Court of Justice regarding the directive 2013/34/EU[35] (on the annual financial statements, consolidated financial statements and related reports of certain types of undertakings) alleging that the legislator had infringed both the principles of proportionality and subsidiarity.[36] The *Riigikogu* did not generate a reasoned opinion on the proposal of this directive.

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[26] I. Raig, Eesti tee Euroopa Liitu: unistus paremast Euroopast, Tallinn 2008, p. 140; M. Rosenthau, 2003; M. Nutt, Õiguskeel ja õigusmõtlemine kui võimu instrumendid, Õiguskeel 2013.
[27] A. Aas, Riigikogu ei soovi Euroopa Liidu üleliigseid regulatsioone, 2013, available online: http://www.artoaas.ee/riigikogu-ei-soovi-euroopa-liidu-uleliigseid-regulatsioone/.
[28] E.g. Laffranque, 2006, pp. 101-104.
[29] K. Kasemets, Ü. Sulg, I. Jakobson, H. Lootus, Euroopa Liidu kujunemine ja õiguslikud alused, Riigikantselei 2003, p. 34.
[30] Uustalu, 2008.
[31] Nutt, 2013; Aas, 2013.
[32] Riigikogu otsus, 18.06.2013, Põhjendatud arvamus Euroopa Parlamendi ja Euroopa Komisjoni presidendile ning Euroopa Liidu Nõukogu direktiivi ettepaneku, millega muudetakse nõukogu direktiive 78/660/EMÜ ja 83/349/EMÜ seoses mittefinantsteabe ja mitmekesisust käsitleva teabe avalikustamisega suurte äriühingute ja kontsernide poolt, mittevastavusest subsidiaarsuse põhimõttele, paras 1.1, 1.3.
[33] *Ibid.*, para 1.4.
[34] *Ibid.*, para 1.2.
[35] Directive 2013/34/EU, OJ 2013 L 182, p. 19.
[36] ECJ C-508/13.

1.8. Has the entry into force of the Treaty of Lisbon changed the perception of the doctrine of pre-emption in your country?

The doctrine of pre-emption as such has not been discussed in Estonia, neither prior nor after the Treaty of Lisbon. The term pre-emption in the context of competences lacks a generally accepted equivalent in Estonian.

The formulation of the domains of exclusive competence in Article 3(1) TFEU are generally accepted without criticism. With regards to the creation of the catalogue of competences it can be said that both the Estonian official position and the scholarship have been supportive of the idea. Since in the division of competences established by the Treaties in force at the time of Estonia's accession to the Union was unclear, the division of competences foreseen by the draft of the Constitutional Treaty was applauded rather than criticised. Although there were high-ranking politicians who opposed the creation of the catalogue of competences[37] during the negotiation phase of the Constitutional Treaty, the Estonian official delegation to the Convent supported of the idea.[38]

The scholars also hoped that the catalogue of competences included in the Constitutional Treaty would simplify the previously overly complicated division of competences between the Union and its Member States.[39] Uno Lõhmus, a former judge at the ECJ, wrote that the flexibility clause together with Articles I-12 to I-17 of the Constitutional Treaty (the articles regarding the division of competences) determine the scope of the competence of the Union more precisely than before.[40] The Lisbon Treaty, that made the catalogue of competences a reality, was later, in 2008, praised for bringing a clearer "division of labour" that enabled to understand which obligations were to be fulfilled by the Member States themselves and which competences had been delegated to the Union.[41]

Yet, without making references to the division of competences, politicians sometimes criticise the extent to which the Union exercises its powers, claiming that the Union has started to enact legislation that is unnecessary or should be in the Member States' competence. Mart Nutt, a member of the *Riigikogu*, raises this criticism in connection to the fields of law that are already within the exclusive competence of the European Union, such as competition or the single market.[42]

1.9. The practice in terms of exclusive competences and pre-emption after the entry into force of the Treaty of Lisbon

In Estonia, the acts of the European Union to be transposed or implemented are not differentiated by whether they fall into the categories of exclusive or shared competences. Instead, the implementation process may differ depending on the sensitivity and priority of the act for Estonia. The kind of legislative action, if any, is to be taken to transpose a directive or to implement a regulation or a decision is decided on a case-by-case basis. Estonian officials are instructed to

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[37] T. Kelam, Euroopa Tuleviku Konvent Euroopa ja Eesti tuleviku kujundamisel, Riigikogu Toimetised 2002.
[38] V. Veebel, Estonia and the European Convention, in The Estonian Foreign Policy Yearbook, Eesti Välispoliitika Instituut 2003.
[39] Linntam, 2005, p. 28.
[40] U. Lõhmus, Mida teha põhiseadusega? Juridica 2005, pp. 75-83.
[41] Uustalu, 2008, p. 315.
[42] Nutt, 2013.

determine if the draft EU legal act affects legislation in force in Estonia in order to decide whether the transposition or implementation of the draft act requires the enactment, amendment or repealing of Estonian legislation. If it is found that there is no need to enact new legislation or amend/repeal existing ones in order to transpose a directive, the Commission is notified that the directive is transposed by legislation already in force. [43]

Directives are usually transposed by laws and resolutions of the *Riigikogu* or regulations of the Government or the Ministers. The standard practice is the transposition of directives through a legal act that is at the same level in the hierarchy of legal acts as the rest of the norms regulating the field in question. This standard practice is not applied if the Constitution only allows the norms transposed to be regulated by the *Riigikogu* itself. The standard practice is also not applied if it seems that the Estonian law of the *Riigikogu* would become too technical and detailed if the directive were to be transposed by the law; in Estonia laws of the *Riigikogu* must not contain access detail.

1.10. Reactions to the Pringle ruling

The Treaty establishing the European stability mechanism (hereinafter the ESM Treaty) is an international Treaty. While the primacy of EU Law over Estonian legislation has been accepted by the Supreme Court,[44] the relationship with international law is more complex. According to the Estonian Constitution, “Estonia may not enter into international treaties which are in conflict with the Constitution.”[45]

On the 12th of March 2012 the Chancellor of Justice filed to the Supreme Court an application for constitutional review as he considered Article 4(4) of the ESM Treaty to be in conflict with the Constitution.[46] This Article states that in exceptional circumstances, when the economic and financial sustainability of the euro area are threatened, it shall be possible to grant a contracting party financial assistance under an emergency procedure which requires a qualified majority of 85% of the votes cast. Thus, financial assistance may be granted regardless of the opposition of Estonia.

On the 12th of July 2012 the Supreme Court *en banc* dismissed the application of the Chancellor of Justice by a narrow minority of ten votes to nine.[47] The Supreme Court found that although the contested article restricts the financial competence of *Riigikogu*, the principle of rule of law and the sovereignty of Estonia, the restriction was justified. The Supreme Court weighed the restriction arising from the article, the decrease of the power to decide the use of public finances, against the purpose of the contested article, to ensure an efficient decision-making procedure in case of a threat to the financial stability of the euro area, including Estonia. As stability is necessary in order for Estonia to be able to perform its obligations arising from the Constitution, including ensuring the fundamental rights of people, the restriction was considered justified.[48]

The Supreme Court noted that the Constitution of the Republic of Estonia Amendment Act adopted in a referendum of 2003 does not enable unlimited delegation of Estonia’s competence to the

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[43] Ametniku Euroopa Liidu käsiraamat, Riigikantselei 2009, pp. 94-100.
[44] See question 3.4.
[45] The Constitution of the Republic of Estonia, RT 1992, 26, 349, § 123.
[46] Õiguskantsleri taotlus nr 8, 12.03.2012.
[47] CRCSCr 12.07.2012, 3-4-1-6-12, para. 10.
[48] *Ibid*., paras. 158-166.

European Union. If the founding treaty of the European Union is amended or a new founding treaty is entered into and if it brings about more extensive delegation of Estonia's competences to the European Union and more extensive interference of the Constitution, the consent of the bearer of the supreme political authority, i.e. the people of Estonia, shall be requested and the Constitution probably has to be amended again.[49]

In Estonia, the reaction to the Pringle ruling has not been notable, but the above mentioned ruling of the Supreme Court has been subject to a significant amount of scholarly discussion.[50] Perhaps even more remarkably, a majority of ten judges, including one that voted in favour of the decision, wrote dissenting opinions and six justices found that "the Supreme Court *en banc* has obviously made its decision in a rush."[51] The Pringle ruling has been mentioned in light of the alleged conflict between the ESM and the Estonian Constitution explained above. The Pringle ruling has been mentioned to point out that in Ireland the constitutionality of the ESM Treaty was also called into question.[52] The findings of the Estonian Supreme Court referenced above have also been compared to the Court of Justice's findings in the Pringle ruling:

> In the case at hand, which formally does not deal with EU law, the Court accepted that the [ESM] Treaty is an integral part of the EU due to its potential ability to support the stability of the euro zone. This contrasts with the position of the Court of Justice in Pringle, which emphasized the indirect nature of the effects of the ESM Treaty to the stability of the Euro. This illustrates the fact that different judicial instances have a different understanding of the Treaty framework and a very different perspective of how it should be applied.[53]

1.11. Has the entry into force of the Treaty of Lisbon changed the perception of the doctrine of implicit competences in your country?

The entry into force of the Treaty of Lisbon has not changed the perception of the doctrine of implicit competences in Estonia. The Estonian scholarship shows more concern towards the Union implicitly expanding its competence if the Union's competence potentially conflicts with the Estonian Constitution. For example, the rules on the acquisition and loss of nationality fall within the competence of the Member States. In Estonia those rules are considered to be at the core of the Estonian sovereignty as per Article 1 of the Estonian Constitution. The ECJ, however, decided that the fact that a matter falls within the competence of the Member States does not alter the fact that, in situations covered by European Union law, the national rules concerned must have due regard to the latter. Thus, the Member States must, when exercising their powers in the sphere of nationality, have due regard to European Union law.[54]

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[49] *Ibid*., para. 223.

[50] E.g. A. Lott, Süvendatud majandus ja rahandusliidu rajamine: mõju põhiõiguste kaitsele ning põhiseaduse aluspõhimõtetele, Juridica 2013, pp. 546-564; K. Eller, Demokraatia ja finantsstabiilsus. Õiguskantsleri taotlus Euroopa stabiilsusmehhanismi asutamislepingu artikli 4 lõike 4 põhiseadusele vastavuse kontrollimiseks, Juridica 2012, pp. 319-330; I. Pärnamägi, A. Inkinen, A. Lott, Euroopa stabiilsusmehhanismi asutamislepingu artikli 4 lõike 4 kooskõla Eesti põhiseadusega, Juridica 2012, pp. 331-342.

[51] Dissenting opinions of Justices Jõks, Järvesaar, Kergandberg, Kivi, Kull and Laarmaa regarding CRCSCr 12.07.2012, 3-4-1-6-12.

[52] E.g. M. Ernits, A. Laurand, M. Saluste, ESM asutamisleping: rahvusvaheline leping ja *malpropre* Euroopa Liidu õigus, Juridica 2012, p. 366.

[53] Ginter, 2013, p. 353.

[54] ECJ C-135/08, pp. 41-45.

Analysing the case, Berit Aaviksoo finds that even when an area appears to be within the sovereign competence of a Member State, an expansion of EU competence may actually be taking place.[55]
In her doctoral thesis, Aaviksoo comes to the conclusion that:

> [F]ollowing the ECJ judgments in Rottmann and Ruiz Zambrano, the Court has reversed the rule of primacy of Member State nationality, and turned the EU citizenship into a status, which basically provides any legal relationship with a cross-border element. More importantly, still, it has given a clear indication of federalisation of the European Union by an example of determination of people, which – taking account of the role of the people in the classical theory of statehood – is of symbolic significance.[56]

Yet Aaviksoo does not view this development with hostility, she simply claims that this development must be acknowledged. [57]

1.12. What is the position of scholarship in your country with regard to Article 3 para. 2 TFEU?

The position of the Estonian scholarship regarding Article 3(2) TFEU cannot be precisely determined. The provision has only been mentioned in connection with either the principle of conferral or the flexibility clause. There has been no significant legal debate in Estonia regarding this provision, although some lawyers have explained it in course of the analyses of other topics.

For example, Marika Linntam has stated in an analysis concerning the flexibility clause that the inflexibility of the principle of conferral is softened by the principle of implicit competence that has been developed by the ECJ. She has also pointed out that the principle of conferral is softened by the theory of implicit competences developed by the ECJ, but also by the flexibility clause that adds certain fluidity to the system of the division of competences that enables the Union to operate before the treaty amendments expressly providing the Union a legal basis.[58]

Julia Laffranque, has claimed that the principle of implied powers could be considered "rather risky" and could easily endanger the limits of competences conferred upon the Union. She therefore finds that Estonia, just like all the other Member States should approach with caution the Union implying more powers to itself with caution and carefully observe if the Union operates within the powers that have been conferred upon it. Laffranque also observed that the importance of the principle of implied powers has decreased. The more precisely the division of competences between the Union and the Member States is defined, the less the Union needs to make use of the doctrine of the implied powers. With regard to the principle of conferred powers, Laffranque explained that if a Member State is not pleased with the actions taken by the EU, it should start by foremost blaming itself, because this Member State together with all the others has conferred the competences upon the Union.[59]

Linntam and Laffranque have made these observations in 2005 and 2006 respectively, i.e. before the entry into force of the Treaty of Lisbon. After that, a reference to the catalogue of competences

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[55] B. Aaviksoo, Petturlik hr Rottmann, föderaliseeruv Euroopa ja põhiseaduse aluspõhimõtted – poleemiline pastišš, Juridica 2013, pp. 223-233.
[56] B. Aaviksoo, Narrowing of State Discretion: Citizenship in Contemporary Europe, University of Tartu, PhD thesis 2013, p. 329.
[57] Aaviksoo, 2013, p 233.
[58] Linntam, 2005, p. 29.
[59] Laffranque, 2006, p. 100.

is made in the explanatory memorandum of the Ratification Act of the Treaty of Lisbon. The explanatory memorandum describes the amendments made by the Treaty of Lisbon regarding the competences as codifying the case law and as more precisely determining the fields of competences in the Treaty of Lisbon.[60] All in all, the Article 3 (2) TFEU has not received much attention in Estonia.

1.13. Is the flexibility clause of Article 352 TFEU considered as an expression of the doctrine of implicit competences?

Generally, the analyses of the flexibility clause have been formulated as part of the analyses of the whole system of the division of competences between the Member States and the Union, or in course of the analyses of the Constitutional Treaty. Most of the analyses have been compiled after Estonia's accession to the EU in 2004 and the research conducted earlier is not sufficient to state that the analyses of the flexibility clause have been modified after the adoption of the Constitutional Treaty or the entry into force of the Treaty of Lisbon. The scholars do not distinguish between the period preceding the adoption of the Single European Act and that following it.

Also in 2005, Viljar Veebel, a political scientist, expressed the view that the flexibility clause would not add much flexibility as it would be seldom used. In 2008, Ivar Raig, an economist and politician, pointed out the contrary, that the flexibility clause has been used to expand the powers of the Union.[61] The Estonian scholars have pointed out that the flexibility clause has been used to extend the competences of the Union in the field of energy, the fight against terrorism[62], the European Union Solidarity Fund (EUSF) which was set up to respond to major natural disasters and express European solidarity to disaster-stricken regions within Europe, the creation of decentralised agencies of the Community and macro-financial aid for third countries.[63]

Both Julia Laffranque and Marika Linntam have found that the expression of the flexibility clause is an expression of implied powers. J. Laffranque explained in 2006 that the clause is described as giving the Union the opportunity and the right to expand its competences in matters that are within the goals or aims of the Union according to the Treaties, but in relation to which the Member States "have forgotten" to confer the Union the powers to act and take measures to achieve these goals.[64] Marika Linntam stated in 2005 that the flexibility clause constitutes a separate category in the general system of the division of competences. The author considers it important to emphasise that the competence conferred by the flexibility clause is subsidiary to all other categories of competences and it can only be applied when any other legal basis of the Treaty is not applicable.[65]

According to explanatory memorandum of the Act of the Ratification of the Constitutional Treaty, the amendments modifying the flexibility clause, amongst other innovations, decrease the Member States possibilities to influence the decisions of the Union, while at the same time enabling the integration of the Union.[66] In his analysis, Viljar Veebel considered the flexibility clause amongst

[60] Lissaboni lepingu, millega muudetakse Euroopa Liidu lepingut ja Euroopa Ühenduste asutamislepingut, ratifitseerimise seaduse eelnõu seletuskiri, pp. 71-73.
[61] Raig, 2008, pp. 139-140.
[62] Eesti ja Euroopa Liit, EL-i pädevused Euroopa põhiseaduse lepingus, Riigikantselei Euroopa Liidu teabetalitus 2005.
[63] Linntam, 2005, p. 30.
[64] Laffranque, 2006, p. 101.
[65] Linntam, 2005, pp. 28-34.
[66] Euroopa põhiseaduse lepingu ratifitseerimise seaduse seletuskiri, pp. 14-18.

the most controversial innovations in the Constitutional Treaty. Veebel pointed out that there is a possibility that the euro-sceptics see a danger in the flexibility clause as it could increase the power of the Union. Veebel also considered the flexibility clause to be a compromise between the Member States that prefer federalisation and closer integration and those Member States that are against it. However, he found it to be useful for smaller Member States, because it could give them the tools to promote a deeper integration of the Union.[67]

In 2005, Gert Antsu explained that the flexibility clause in the Nice Treaty is necessary for the functioning of the Internal Market. According to the author, in the Constitutional Treaty the phrase "internal market" has just been left out from the wording of the flexibility clause, as the EU is moving towards a political union. He claimed that "if the flexibility clause did not exist, the ministers of the interior would just look at each other and agree that there is nothing that they can decide upon regarding, for example the fight against terrorism".[68] The fact that the flexibility clause has been consistently used in the field of energy is considered to be problematic by Antsu. He also finds that the less the flexibility clause is used, especially in every-day matters, the more correct and elegant its use would be.[69]

Just like the scholars, the Constitutional Committee of the *Riigikogu*, in the course of analysing the Constitutional Treaty, laconically expressed the view that the flexibility clause is an expression of the doctrine of implicit competence. The Committee also raised the question of whether the flexibility clause could further limit the decision-making powers of the Member States. The Committee came to the conclusion that if the *Riigikogu* could ensure that the subsidiarity review is systematically and well conducted and that the government ministers are well prepared for the meetings of the Council of Ministers, there would be no need to fear the use of the flexibility clause.[70]

2.1. How is the concept of legal basis in EU law understood and presented in your country?

The concept of legal basis is seldom referred to in Estonian scholarship and has not been the subject of jurisprudence. In EU law textbooks it is mentioned laconically in the context of EU's competence to enact secondary law.[71] Tanel Kerikmäe has explained that if the Treaty contains both general and specific norms, it is preferable to choose the latter as the legal basis.[72] With regards to directives, Kerikmäe pointed out that the legal basis is one of the three elements a directive must contain and that this legal basis has to be consulted by the Member State's administration in order to fully grasp the scope of the directive.[73] As explained above in point 1.13, Marika Linntam considers it important to emphasise that the flexibility clause can only be applied when no other legal basis of the Treaty is applicable and that the competence conferred upon the Union by using the flexibility clause is subsidiary to all other categories of competences.[74]

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[67] Eesti ja Euroopa Liit, EL-i pädevused Euroopa põhiseaduse lepingus, Riigikantselei Euroopa Liidu teabetalitus 2005.
[68] *Ibid.*
[69] *Ibid.*
[70] Euroopa põhiseaduse lepingu riigiõigusliku analüüsi töörühma seisukohad lepingu ratifitseerimise küsimuses, 2005, pp. 28-33.
[71] T. Kerikmäe, Euroopa Liit ja õigus, Tallinn 2000, p. 73; Laffranque, 2006, pp. 269-270, 273.
[72] Kerikmäe, 2000, p. 73.
[73] Kerikmäe, 2000, p. 74.
[74] Linntam, 2005, pp. 28-34.

2.2. ***What is the institutional practice of your country concerning the legal bases of EU acts?***

The Estonian official position concerning the legal bases of EU acts should be formulated in accordance with the Guidelines for Procedure for Handling European Union Affairs. The Estonian officials responsible for EU law matters have begun to acknowledge that the question of legal basis is important in relation to both the principle of conferral and to the subsidiarity and proportionality review conducted on EU legal acts. The Guidelines for Procedure for Handling European Union Affairs adopted in January 2015 foresee the obligation of assessing whether the EU legal act has been adopted on the correct legal basis. The Estonian administration has taken a pragmatic approach to the assessment of the legal bases of EU legal acts, taking into account the importance of the specific matter in question and formulating its position on a case-by-case basis.[75]

There have been no actions for annulment by the Estonian government based upon the absence of legal basis of an EU act, nor any references for preliminary rulings by Estonian courts to the ECJ concerning the legality of acts of the Union, which would question the validity of an act for lack of legal basis. As mentioned earlier in response to question 1.7, the *Riigikogu* has issued only one reasoned opinion under the *Riigikogu* Rules of Procedure and Internal Rules Act. In the reasoned opinion, the *Riigikogu* laconically doubted the correctness of the legal basis of the EU act.[76]

2.3. What are the themes and who are the authors of requests aimed at modifying the competences of the European Union?

The main theme discussed in the context of modifying the competences of the EU is the possible federalisation of the EU. The authors of the requests aimed at modifying the competences of the European Union vary from think tanks, politicians and lawyers to state officials. While some authors support a more integrated Europe, even the federalisation of Europe, a minority demands widening the competences of the Member States.

For example, the former Minister of Justice and attorney at law, Jüri Raidla claims that we are witnessing the process of federalisation of EU. According to him, the EU citizens are beginning to realise that the time of a confederation is coming to an end and he predicts that instead of dissolution of the Union, the citizens will choose a federal Europe.[77] Raidla claims that the formation of the European fiscal union, for example, would be an expression of this process. In Raidla's view the federal substance of the EU was already clearly present in 2012.[78]

The European Movement Estonia, a civil society organisation that supports European integration and unites people and organisations that value European ideas, has claimed that the Union could

[75] The Guidelines for Procedure for Handling European Union Affairs, Riigikantselei 2015.
[76] Riigikogu otsus, 18.06.2013, Põhjendatud arvamus Euroopa Parlamendi ja Euroopa Komisjoni presidendile ning Euroopa Liidu Nõukogu direktiivi ettepaneku, millega muudetakse nõukogu direktiive 78/660/EMÜ ja 83/349/EMÜ seoses mittefinantsteabe ja mitmekesisust käsitleva teabe avalikustamisega suurte äriühingute ja kontsernide poolt, mittevastavusest subsidiaarsuse põhimõttele.
[77] J. Raidla, Põhiseadus ja Eesti rahvuslikud huvid vs. Euroopa föderalism, Juridica 2013, pp. 542.
[78] K. Aasmäe, Jüri Raidla: Euroopa Ühendriigid on tulekul, Postimees 1.11.2012.

economically be more efficient and more secure from the aspects of foreign and security policy if it would have more competence or if it would move towards federalisation.[79]

The candidates campaigning to be elected to the European Parliament in 2014 expressed differing views with regards to stronger integration and unification of the EU. Jevgeni Ossinovski, a candidate of the Social Democratic Party, found that a united and more integrated EU is stronger and therefore claimed that the direction of the integration should not be reversed. He added that all Member States would lose if the balance of competences would change in a manner that more matters would be in the competence of the Member States.[80] Martin Helme, a candidate of the Estonian Conservative People's Party, on the other hand, expressed the view that the EU has already exceeded the limits of competences that the electorate meant to confer upon it. He found that the level of integration should not be developed more, but instead reversed.[81]

An Estonian daily newspaper *Postimees* conducted interviews with the candidates and asked them questions about the future of the EU, the involvement of the EU in the field of public defence and the common or uniform taxation. Marju Lauristin, the elected candidate of the Estonian Social Democratic Party (S&D), replied that the single market cannot develop without further economic and political integration. She also pointed out that the application of the principle of subsidiarity should be applied with more caution. Concerning the common foreign and security policy, she found that the security of the European people is directly dependant on the efficacy and consistency of the Union's foreign policy. Regarding taxes she was of the opinion that the EU should have an additional base of income in addition to the contributions of the Member States, which could be created by imposing Europe-wide taxes.[82] Andrus Ansip, the elected candidate of the Reform Party (ALDE) and presently the Vice-President of the European Commission responsible for the Digital Single Market, found that the EU should play a bigger role in the common foreign and security policy and that the common market is in need of a push that cannot take place without the widening of the scope of competences of the EU.[83] Vilja Savisaar-Toomast, a candidate of the Reform Party, an MEP during the years 2009–2014 (ALDE), did not support the idea of Europe-wide taxes, but proposed that each Member State should allocate 1% of its VAT to the EU budget.[84] Indrek Tarand (Greens–EFA), the only elected independent candidate, reiterated the need to create European armed forces.[85]

2.4. In your country, has there recently been a review of the balance of competences in the Union?

There has been no review of the balance of competences in the Union recently in Estonia.

2.5. What is the political and scholarly reaction to such reviews of the balance of competences of the European Union?

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[79] V. Veebel, A. Kovalenko, Kellega, milleks ja millisesse Euroopa Föderatsiooni? Eesti Euroopa Liikumine, available online: http://www.euroopaliikumine.ee/?id1=1382&id2=1383.
[80] M. Himma, Kandidaatide seisukohad lähevad ühtse Euroopa osas eri suundades, ERR 28.04.2014.
[81] *Ibid*.
[82] A. Reinap, 8 küsimust kandidaadile: Marju Lauristin, Postimees 20.04.2014.
[83] A. Reinap, 8 küsimust kandidaadile: Andrus Ansip, Postimees 5.05.2014.
[84] A. Reinap, 8 küsimust kandidaadile: Vilja Savisaar, Postimees 29.04.2014.
[85] I. Tarand, Saksa kindral, inglise keel ja ühendatud relvatööstus, Diplomaatia 2014.

As there are no such reviews, there is no political or scholarly reaction to such reviews.

3.1. How is the difference between legislative competences and executive competences of the European Union perceived and presented in your country?

There is no literature in Estonia specifically devoted to EU administrative law. To this date there are not many Estonian language textbooks written by Estonian authors. The textbooks widely quoted in this report date to 2000 and 2006[86] and no more recent ones have been published as of November 2015. The textbook from 2006 by Julia Laffranque devotes a chapter to the execution of EU law in the Member States. It also differentiates between direct and indirect execution/administration, although it also states that the line between those has become increasingly blurred as the EU institutions have begun to cooperate more closely among themselves and with the Member States.[87]

The legal textbooks in Estonia explain this multi-level governance in legal terms,[88] the non-legal textbooks explain the same concepts using the vocabulary of political sciences. For example, Ivar Raig has explained that the EU law is the law of supranational bodies that is broader than the sum of sovereignty transferred by the Member States to the Union and therefore the Member States, as well as their enterprises and citizens, are subordinate to this supranational power. However, the limits of this power extend only to the fields defined by the Treaties and not even to their full extent of those fields.[89]

Even before the Treaty of Lisbon entered into force, Tanel Kerikmäe explained that the Commission's competence in the field of legislative drafting can be categorised as contractual competences that are derived from the Treaties and delegated competences.[90] Kerikmäe stated that it is "notable" that the Commission functions both as the legislative initiator as well as the executor and claims that it is a political institution that uses legal tools to strive for integration, "of course" trying to expand its competences.[91]

The Estonian scholarship also differentiates between the competence of execution and the competence of oversight. Tanel Kerikmäe has also noted that the oversight consists of multiple layers – auditing, oversight by the Ombudsman as well as control through political lobbying.[92] While the principal supervisor is the Commission,[93] the final control rests within the Court of Justice of the European Union.

As explained above in the preliminary remarks, the official position in Estonia views further integration of the EU as a positive development. It can thus be deduced that the Estonian administration is not opposed to the EU's executive federalism. A good explanation to this somewhat peculiarly euro-friendly position has been provided by Urmas Paet, the Minister of Foreign Affairs at the time. Paet explained that a strong Commission protecting the interests of the

[86] Kerikmäe, 2000; Laffranque, 2006.
[87] Laffranque, 2006, pp. 388-389.
[88] *Ibid.*, p. 149, pp. 388-389.
[89] Raig, 2008, p. 140.
[90] Kerikmäe, 2000, p. 109.
[91] *Ibid.*, pp. 108-109.
[92] *Ibid.*, p. 116.
[93] *Ibid.*, p. 117.

whole Union and its Treaties is an equaliser of large and small Member States, and that further integration is therefore in Estonia's interests.[94]

Berit Aaviksoo finds in her doctoral thesis that "it does not seem too arbitrary to argue that if the Court has acquired/seized the power to determine the citizenry of a Member State, or its politically full-fledged people, it has also acquired/seized the decision-making power over who make up the „masters of the Treaties", i.e., the nation-States." She argues that the Member States have lost their statehood in the classical sense and become instead a federated State[95] that can be distinguished from a federation mainly because the Member States have retained their right to leave the Union.[96] As explained above, in response to question 1.11, Aaviksoo does not take a stance on whether this federalization is positive or negative.

However, some concern and criticism towards the executive federalism has been voiced. Mart Nutt has found that the federalism in Europe has developed in a method of trial and error, where the subsequent Treaties have failed to bring along stability, making the system inefficient and possibly short-lived. A potential new treaty would increase the rights of the Euro-Bureaucracy and decrease those of the Member States but there is little hope that it would last for more than a few years.[97]

3.2. How is the doctrine of procedural autonomy of Member States perceived and presented?

The EU is understood to be an organ between a confederate state and an international organisation that is ever changing mostly towards adding new competences.[98] It is clear in Estonian scholarship that these are the Member States that confer their competences to the Union and not the other way around.[99] The vocabulary of social sciences, which refers to delegating sovereignty to the EU, is sometimes used in this context.[100]

It is understood in Estonia that after the accession to the EU, the legislative power has largely been delegated to the institutions of the EU and the role of the *Riigikogu* in adopting legislation has thus diminished. For example, Ivar Raig claims that the national legislation makes up only about 10 to 30 percent of the legislation that is implemented on the territory of the EU and points out that in smaller and newer Member States, such as Estonia, the proportion of national legislation is lower than in the older Member States.[101]

The fact that Estonian law must be interpreted in compliance with the EU law is understood by scholars as well as the courts.[102] In 2008, Ivar Raig explained that every new EU legal act brings along changes to Estonian legislation in the respective fields of law.[103] The extent to which EU procedural law affects Estonian procedural law, however, has not been analysed.

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[94] U. Paet, Eesti 10 aastat Euroopa Liidus – head ja vead ning kuidas edasi, Diplomaatia 2014.
[95] Aaviksoo, 2013, p. 329.
[96] Aaviksoo, 2013, p. 329.
[97] Nutt, 2013.
[98] Raig, 2008, p. 139.
[99] Laffranque, 2006, p. 149; Raig, 2008, p. 140, 143.
[100] Raig, 2008, p. 143.
[101] *Ibid.*, p. 141.
[102] Laffranque, 2006, pp. 295-299.
[103] Raig, 2008, p. 139.

3.3. In your country, is there an organizational structure and/or specific procedures to aid the administrations to resolve the legal problems inherent to the indirect or shared execution of the law of the European Union?

There is no central organisation that aids the administrations in resolving legal problems inherent to the indirect or shared execution of EU law. Yet, while every ministry is responsible for the execution of EU law in their competence field, the EU Secretariat in the Government Office functions as the coordinator that aids the ministries in the developing of Estonia's positions on EU affairs and the transposition of EU law. The problems encountered while implementing or transposing EU law should be resolved in accordance with the following guidelines and handbooks that are meant to be used by the administration.

The Guidelines for Procedure for Handling European Union Affairs[104] is a document addressed to all ministries and communicated for information to constitutional institutions and local government associations. The Guidelines provide basic instructions for the preparation of EU affairs for Government sessions, the procedure for preparing documents required for EU working groups or committees and measures to ensure the timely transposition of directives.

The European Union Handbook for Estonian officials[105] is intended as a resource for all officials involved in the European Union decision-making process as well as for those who are responsible for the national implementation of the EU acts.

The Rules for Good Legislative Practice and Legislative Drafting[106] is a binding legal document that *inter alia* regulates the transposition of EU law.

3.4. In your country, are there specific legal problems in the indirect or shared execution of the law of the European Union?

The Estonian courts are aware of their obligation to ensure the primacy of EU law and its uniform and effective implementation. The Supreme Court of Estonia has acknowledged the primacy, stating that the EU law "has indeed supremacy over Estonian law, but taking into account the case-law of the European Court of Justice, this means the supremacy upon application."[107] The Constitutional review Chamber of the Supreme Court of Estonia has acknowledged the primacy of EU Law even over the Constitution.[108] However, both of these court opinions have dissenting opinions. Justice Villu Kõve stated in his dissenting opinion, that the Supreme Court has "overrated" the primacy of the EU law over Estonian law.[109] Julia Laffranque has later analysed the Supreme Court`s opinion and found it unprecedentedly Euro-friendly, especially since the Supreme Court has traditionally been considered as the last safeguard of sovereignty.[110]

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[104] The Guidelines for Procedure for Handling European Union Affairs, Riigikantselei 2015.
[105] Ametniku Euroopa Liidu käsiraamat, Riigikantselei 2009.
[106] The Rules for Good Legislative Practice and Legislative Drafting, RT I, 29.12.2011, 228.
[107] SC judgement 19.04.2005, 3-4-1-1-05, para. 49.
[108] CRCSC opinion 11.05.2006, 3-4-1-3-06.
[109] Dissenting opinion of Justice Kõve to CRCSC opinion 11.05.2006, 3-4-1-3-06, para. 3.
[110] J. Laffranque, Pilk Eesti õigusmaastikule põhiseaduse täiendamise seaduse valguses. Euroopa Liidu õigusega seotud võtmeküsimused põhiseaduslikkuse järelevalves, Juridica 2007, p. 531.

The far reaching primacy given to the EU law may potentially lead to a conflict if the Union expands its competence to the fields that are considered to be important from the perspective of Estonia's sovereignty. For example, in her PhD thesis Berit Aaviksoo argued that the principled affirmation of the competences of the Union in respect of citizenship matters, which have traditionally been within the exclusive competence of the Member States, raises the question of primacy of EU law. This is especially relevant in the Estonian context, because Estonian scholars consider the duty of „preservation of the Estonian nation, language and culture through the ages", as provided in the preamble to the Constitution of Estonia, as well as that of sovereignty to be the fundamental principles of the Estonian Constitution. She came to the conclusion that "[t]he readiness to protect these principles against the growing competence appropriation by the European Union may, in the future, thus prove to be a trigger releasing the process of leaving the Union or, alternatively, the refusal to apply European Union law."[111]

As explained above, the Estonian courts have acknowledged a far reaching primacy of the EU law. Yet it may appear that the courts do not always take all the steps necessary to ensure that EU law is applied in a uniform manner. There have been cases, where the Supreme Court has resolved questions to which European Union law applies without either asking for a preliminary ruling from the European Court of Justice or expressly referring on the exception of *acte éclairé* or *acte clair*.[112] This practice of the Supreme Court of Estonia has been criticised by legal scholars. Piret Schaschmin and Carri Ginter, for example, have argued it to be certain that if the court of the last instance ignores the obligation to ask for a preliminary ruling, it raises a doubt to whether EU law is implemented in a uniform and effective manner on the one hand, and whether a fair trial and effective judicial protection are granted on the other hand.[113]

The problems could also arise if the court declares an internal legal norm incompatible with EU law and therefore decides that EU law should apply instead[114] without declaring the internal norm invalid. This practice may raise questions as to what extent the Estonian law that has not been declared invalid should remain applicable in Estonia after the court has declared that it is incompatible with EU law.

3.5. What is the attitude in your country to the establishment at Union level of principles and rules of administrative procedure required to be applied to the execution of the European Union's policies?

No scholarship in Estonia has been devoted either to the provisions regulating the procedure of application of EU law in sectoral policy acts, or to the codification of the EU administrative procedure. Neither has Estonia taken an official position on the codification of administrative procedure.

Estonia has, however, taken a position on the Inter-institutional Agreement on Better Law-Making, and found that from the perspective of the uniform application of EU law it is important that the

[111] Aaviksoo, 2013, p. 330.

[112] E.g. judgements of the Administrative Law Chamber of the Supreme Court (ALCSC) 3-3-1-36-10; 3-3-1-2-14 and 3-3-1-84-12.

[113] P. Schaschmin, C. Ginter, Euroopa Liidu õigusest tulenevad võimalused jõustunud kohtuotsuste ja haldusaktide uueks läbivaatamiseks, Juridica 2015, p. 193.

[114] E.g. ALCSC judgements 3- 3- 1- 37- 12; 3-3-1-84-12 and 3-3-1-26-12.

Commission accompanies its draft legislation with all-embracing impact assessments.[115] Estonia has also found that clear and binding EU provisions regulating the procedure of application of EU law are necessary from the perspective of enforcement of EU procedural law. There is a practical need for these provisions if EU legal acts allow one Member State to take action or issue acts that are also effective on the territories of other Member States.[116] An example of a field where such EU legal norms would be necessary seems to be data protection. The enforcement of the decisions taken in accordance with the General Data Protection Regulation by the competent authority of a Member State could be more effectively enforced in other Member States if common procedural norms existed.

3.6. In your country, how does the division of planning and execution competences work for operations financed by EU funds, in particular the Structural Funds, function?

The 2014-2020 Structural Assistance Act[117] regulates the provision of structural support upon implementation of the operational and cooperation programs. It determines how the division of planning and execution competences work for operations financed by EU funds.

In Estonia the Ministry of Finance organises the allocation of structural assistance across operational programs. The ministry is responsible for the creation and updating of the necessary legal framework, disbursing support payments and conducting audits in accordance with EU law. The Ministry of Finance is the Managing, Certifying and also the Auditing Authority with regards to structural assistance. The 1st level intermediate body can be another ministry or the Government Office designated by the Government of the Republic. The 1st level intermediate body is mainly responsible for the development and establishment of the conditions for the provision of support and monitoring of the performance and for the guidance of the 2nd level intermediate body upon the implementation of the legislation concerning the conditions for the provision of the support. The 2nd level intermediate body is an authority of the executive power or a legal person governed by public or private law designated by the Government of the Republic. It is the direct point of contact to the applicants, as this level is directly responsible for the implementation of the measures - it carries out application rounds, makes the award decisions and exercises supervision over the applicants.

No studies in Estonia have been conducted concerning the management of Structural Funds.

3.7. In your country, is there specific jurisprudence relative to the management of Union funds, in particular Structural Funds?

The jurisprudence of the courts in Estonia does not reveal problems relative to the division of competences with regard to the management of Structural Funds within Estonia, nor between the EU and Estonian authorities. The cases in Estonian courts have mainly been brought to court by applicants dissatisfied with the decisions made by the 2nd level intermediary bodies and the cases mainly focus on substantial issues rather than the division of competences.

The Estonian courts have referred one preliminary ruling on structural funds to the ECJ[118], however, the case did not reveal any problems relative to the division of competences between the

[115] The Government has approved Estonia's position on the Interinstitutional Agreement on Better Law-Making on 6.08.2015.

[116] The Government has approved Estonia's position on the the European Commission's public consultation "Completing the European area of Justice" on 5.12.2013.

[117] The 2014-2020 Structural Assistance Act, RT I, 30.06.2015, 53.

EU and national authorities. The case in the Tartu Court of Appeal involved a dispute whether or not the decisions of the monitoring committee of an Estonia-Latvia joint program could be subject to appeal.

[118] ECJ C-562/12.