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# National security clause: law and practice of European Union and Eurasia Economic Union

**Vitaliy Slepak**

Kutafin Moscow State Law University (MSAL), Moscow, 125993,  
Russian Federation

vitaliy.slepak@gmail.com

**Abstract.** Objective of strengthening scientific and technological bases within international organisation implies common framework conditions and access to finance for research and innovation all over the territory of Member States in order to ensure that innovative ideas can be turned into products and services. It could be specific area with its own regulation supplementing the rules on common (internal) market as in the European Union or free movement of scientific information, research results (including the results having market value) could be guaranteed by common provisions for common market, common competition policy etc. as in Eurasia Economic Union. However, states often close their research and development markets for foreign participants in order to secure national interests. General approach to the issues of national security may be described with the following formula: in each specific case the Member State must demonstrate the presence of real and serious threat that touches one of its fundamental interests that could be regarded as more important issues than European integration issues, the derogations deal with exceptional and clearly defined cases and do not provide an inherent general exception, and, like any other derogations from fundamental freedoms, shall be interpreted restrictively.

## 1. Foreword

Nowadays the objective of strengthening scientific and technological bases is not only the goal of individual states but an objective of integration organisations as well. In such organisations this goal usually could be pursued by establishing common research area in which researchers, scientific knowledge and technology circulate freely, and encouraging it to become more competitive, including in its industry, while promoting all the research activities. It could be specific provisions establishing common research area with its own regulation supplementing the rules on common (internal) market as in the European Union (such area is established under article 179 Treaty on the functioning of the European Union) or free movement of scientific information, research results (including the results having market value) could be guaranteed by common provisions for common market, common competition policy etc. as in Eurasia Economic Union.

Objective of strengthening scientific and technological bases within international organisation implies common framework conditions and access to finance for research and innovation all over the territory of Member States in order to ensure that innovative ideas can be turned into products and services.

However, states often close their research and development markets for foreign participants in order to secure national interests. Such limitation could cover both fundamental scientific research and



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its results and applied researches. These limitations could result in full prohibition or setting quotas on technologies sensitive for national security, prohibitions and restrictions on financing foreign researches in the fields sensitive for national security or prohibitions and restrictions for scientists on participation in such researches or publication of results in question.

Such measures could present direct threat to the establishment and functioning of the really common market for scientific research and innovations. For example, EU Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions - A strategy for a stronger and more competitive European defense industry underlines that broad interpretation of security clauses leads to fragmentation of markets [1].

National security clause as a legal basis for exemption of certain legal relations from the scope of legal agreements establishing international organizations of economic integration is quite widespread and originates in WTO law.

Such exemption could be found in Article XXI GATT, Article XIV bis GATS and Article 73 TRIPS with the same name "Security exemptions". Under these provisions nothing in the Agreement shall be construed:

1. to require any contracting party to furnish any information the disclosure of which it considers contrary to its essential security interests; or
2. to prevent any contracting party from taking any action which it considers necessary for the protection of its essential security interests
  - a. relating to fissionable materials or the materials from which they are derived;
  - b. relating to the traffic in arms, ammunition and implements of war and to such traffic in other goods and materials as is carried on directly or indirectly for the purpose of supplying a military establishment;
  - c. taken in time of war or other emergency in international relations; or
3. to prevent any contracting party from taking any action in pursuance of its obligations under the United Nations Charter for the maintenance of international peace and security.

So, the grounds for such exemptions could be summarised as the following:

1. protection of national security information including classified one,
2. protection of national defence facilities and
3. maintenance of international peace and security.

Chief shortcoming of these provisions is their implementation in fact is exempted from WTO bodies control and they are applied by WTO members almost autonomously. There are no common criteria establishing whether the situation in question falls under the scope of mentioned derogations from WTO law as well. In this context such security exemptions could be regarded within WTO law in their political but not economic hue and the economic aspect is yielded to the political one.

However there are certain attempts to limit the scope of the said articles: paragraph 7(iii) of the Ministerial Declaration adopted 29 November 1982 at the Thirty-eighth Session of the WTO members provides that "... the contracting parties undertake, individually and jointly: ... to abstain from taking restrictive trade measures, for reasons of a non-economic character, not consistent with the General Agreement", but the question of whether and to what extent the WTO members can review the national security reasons for measures taken under abovementioned articles is still open. This problem is solved within particular international organisation.

## **2. National security clause in European Union law and practice**

Similar to WTO provisions could be found in EU law. The possibility to exclude certain situations from the scope of EU law is set out in articles 36, 45, 52 and 65 Treaty on the functioning of the European Union (hereinafter – TFEU). These clauses deal with derogations from the internal market freedoms: free movements of goods, persons, services and capitals and payments respectively. According to the established case law Member State measures under the mentioned articles should be

of non-economic nature (that is on line with WTO approach), they should pursue legitimate objectives of common interest and be proportionate, e.g. be less restrictive as possible<sup>1</sup>.

The “second line of defence” is provided in articles 346 and 347 TFEU (ex articles 296-297 Treaty establishing European Community) which protect Member States’ security interests with no direct link to the freedoms of EU internal market<sup>2</sup>.

Under Article 346(1) TFEU the provisions of the Treaties shall not preclude the application of the following rules:

1. no Member State shall be obliged to supply information the disclosure of which it considers contrary to the essential interests of its security;
2. any Member State may take such measures as it considers necessary for the protection of the essential interests of its security which are connected with the production of or trade in arms, munitions and war material; such measures shall not adversely affect the conditions of competition in the internal market regarding products which are not intended for specifically military purposes.

Thus Article 346(1)(a) solely deals with disclosure of classified information contrary to essential interests of a Member State’s security, whereas Article 346(1)(b) – with production of or trade in arms, munitions and war material. Article 346(1)(a) thus has a very limited scope: it concerns the rules on publication of certain sensitive information, and not the general exemption from EU rules [2].

As regards Article 346(1)(b), it specifically provides that any measures taken within its framework shall not adversely affect the conditions of competition in the common market regarding products which are not intended for specifically military purposes.

Article 347 deals with situations of serious internal disturbances affecting the maintenance of law and order, situations of war, or threat of war, and implies an obligation of consultation between the Member States. It could not be invoked unless extreme conditions are present<sup>3</sup>, and a mere reference to the requirements of defence of the national territory cannot suffice to justify discrimination on grounds of nationality<sup>4</sup>.

It should be noted that the approaches to the application of articles 36, 45, 52, 65 TFEU and articles 36 and 347 TFEU are similar. European Court of Justice assessing a legitimacy of derogations under these articles applies single approaches and legal tests judging from the position that any exemptions from EU legal regime should be interpreted strictly and applied in strict adherence to principle of proportionality<sup>5</sup>. The same conclusions were made in relation of security exemptions under EU secondary law<sup>6</sup>.

Thus, although the wordings of the articles in question are in line with WTO provisions their implementation is quite different.

By virtue of Article 4(2) Treaty on the European Union, matters of national security remain the sole responsibility and exclusive competence of each Member State<sup>7</sup>. Accordingly, the definition of essential security interests lies solely within the Member States<sup>8</sup>. Moreover, it is up to each Member State to classify information as confidential, and to grant its own national security clearances

<sup>1</sup> Case C-398/98 Commission of the European Communities v Hellenic Republic, para 30–32, Case C-174/04 Commission of the European Communities v Italian Republic, para 40.

<sup>2</sup> For instance art. 36 TFEU provides for derogations from the rules prohibiting quantitative restrictions on import or export of goods while art. 346 provides for exemptions from any other rules of EU law (see for example Case C-284/05 Commission v. Finland).

<sup>3</sup> Case C-222/84 *Johnston* [1986] ECR 1651, para 60.

<sup>4</sup> Case C-423/98 *Albore* [2000] ECR I-05965, para 21-23.

<sup>5</sup> Case C-273/97 *Sirdar* [1999] ECR I-7403, para 15, Case C-285/98 *Kreil* [2000] ECR I-69, para 15, Case C-503/03 *Commission v Spain* [2006] ECR I-1097, para 45; Case C-490/04 *Commission v Germany* [2007] ECR I-6095, para 86, Case C-141/07 *Commission v Germany* [2008] ECR I-6935, para 50.

<sup>6</sup> Case C-337/06 *Bayerischer Rundfunk and Others* [2007] ECR I-11173, para 64, Case C-480/06 *Commission v. Germany* [2009] ECR I-4747, para 48.

<sup>7</sup> Directive 2009/81, recital 1 to the preamble; Case C-300/11 *ZZ v Secretary of State for the Home Department* [2013] ECLI:EU:C:2013:363, para 35.

<sup>8</sup> Case T-26/01 *Fiocchi Munizioni v Commission* [2003] ECR II-03951, para 58.

certifying a supplier's capacity to protect the classified information [4]. It is also to be added that the concept of "public security", within the meaning of TFEU, covers both a Member State's internal and external security<sup>9</sup>.

As the Court consistently held, the derogations under these provisions deal with exceptional and clearly defined cases and do not provide an inherent general exception<sup>10</sup>, and, like any other derogations from fundamental freedoms, shall be interpreted restrictively<sup>11</sup>. The contrary would impair the binding nature of EU law and its uniform application<sup>12</sup>.

Although the Member States are entitled to take appropriate measures to ensure their security, it does not follow that such measures are entirely outside the scope of EU law<sup>13</sup>. In any event, these measures are to comply with the general principles of EU law, *i.a.*, the principle of proportionality, which requires that derogations remain within the limits of what is appropriate and necessary in order to achieve the aim in view and envisages that the principle of equal treatment needs to be reconciled as far as possible with the requirements of public security which determine the context in which the activities in question are to be performed.<sup>14</sup>

Thus in accordance with the principle of equality (article 4 Treaty on the European Union) the law-enforcement institutions and bodies in the EU, first of all the European Court of Justice, are paying attention to the fact that the right to apply security exceptions is conditional, depending upon the presence of a justifiable reason. General approach to the issue may be described with the following formula of the ECJ: in each specific case the Member State must demonstrate the presence of real and serious threat that touches one of its fundamental interests that could be regarded as more important issues than European integration issues.

### 3. National security clause in Eurasia Economic Union law

Eurasia Economic Union (EAEU) follows the pattern of WTO and the EU allowing to its Member States to exempt legal relations in field of security and defence from the scope of its foundation treaty - Treaty on Eurasia Economic Union (Treaty on EAEU).

The basic issue is to what extent the national security clause could be applied, especially in such fields as free movement of goods, state procurement and state aid that are covered by Eurasia Economic Union law.

As was discussed above the EU established clear system of norms, regulating the application of national security clause by the Member States: general exemptions stipulated in articles 346 and 347 TFEU set limits for European integration as a whole and special provisions establishing derogations from particular freedoms of EU internal market are stipulated in articles 36, 45, 52 and 65 TFEU. Unlike the EU in EAEU there are no general exemption clause for national security matters similar to articles 346 and 347 TFEU and particular exemptions on grounds of national security from various fields of Eurasia integration apply different approaches.

<sup>9</sup> Case C-222/84 *Johnston* [1986] ECR 1651, para 22; Case C-367/89 *Richardt* [1991] ECR I-4621, para 22; Case C-83/94 *Leifer and Others* [1995] ECR I-3231, para 26; Case C-273/97 *Sirdar* [1999] ECR I-7403, para 17; Case C-285/98 *Kreil* [2000] ECR I-69, para 17; C-186/01 *Dory* [2003] ECR I-2479, para 32.

<sup>10</sup> Case C-222/84 *Johnston* [1986] ECR 1651, para 26; Case C-414/97 *Commission v. Spain* [1999] ECR I-5585, para 21; Case C-273/97 *Sirdar* [1999] ECR I-7403, para 16; C-186/01 *Dory* [2003] ECR I-2479, para 31; Case C-285/98 *Kreil* [2000] ECR I-69, para 16; Case C-337/05 *Commission v. Italy* [2008] ECR I-2173, para 43.

<sup>11</sup> Case C-414/97 *Commission v. Spain* [1999] ECR I-5585, para 22; Case C-503/03 *Commission v. Spain* [2006] ECR I-1097, para 45; Case C-490/04 *Commission v. Germany* [2007] ECR I-6095, para 86; Case C-141/07 *Commission v. Germany* [2008] ECR I-6935, para 50; Case C-239/06 *Commission v. Italy* [2009] ECR I-11913, para 47; Case C-284/05 *Commission v. Finland* [2009] ECR I-11705, para 46; Case C-461/05 *Commission v. Denmark* [2009] ECR I-11887, para 52; Case C-615/10 *Insinööritoimisto InsTiimi* [2012] ECLI:EU:C:2012:324, para 35.

<sup>12</sup> Case C-222/84 *Johnston* [1986] ECR 1651, para 26; Case C-273/97 *Sirdar* [1999] ECR I-7403, para 16; Case C-285/98 *Kreil* [2000] ECR I-69, para 16; C-186/01 *Dory* [2003] ECR I-2479, para 31.

<sup>13</sup> Case C-273/97 *Sirdar* [1999] ECR I-7403, para 15; Case C-285/98 *Kreil* [2000] ECR I-69, para 15; Case C-372/05 *Commission v. Germany* [2009] ECR I-11801, para 68

<sup>14</sup> Case C-222/84 *Johnston* [1986] ECR 1651, para 38; Case C-273/97 *Sirdar* [1999] ECR I-7403, para 26.

Article 29 Treaty on EAEU dealing with exemptions from free movement of goods within EAEU common market mirrors the WTO approach stipulated in article XX GATT but adds on the model of the EU such ground as support of defence and security of the Member State. Thus this article in principle follows the pattern established in the EU but covers all matters of free movement of goods while article 36 TFEU covers only matters of quantitative restrictions on export and import of goods. At the same time article 65(6) Treaty on EAEU dealing with derogations from trade on services, freedom of establishment and investments follows the WTO approach to security exemptions under article XIV bis GATS and consequently article 346 TFEU.

Article 74 Treaty on EAEU follows the scheme of article 29 Treaty on EAEU but in relation to matters of competition. It also should be noted that in the EU there is no special provision on national security relating to EU competition policy, it is covered by general exceptions under articles 346 and/or 347 but these articles set out derogations only for matters connected with the production of or trade in arms, munitions and war material while Treaty on EAEU uses a vague term "state security" which allows much wider interpretation and application of article 74(6) Treaty on EAEU than article 346 TFEU.

There is no established case law on the application of security clauses. The only act that partly covers such matters is EAEU Court Advisory Opinion of 30.10.2017. But it deals only with exemptions from free movement of goods and does not cover all other exemptions on the ground of national security stipulated in the Treaty on EAEU.

In principle the Court of Eurasia Economic Union follows the position of European Court of Justice on the application of article 36 TFEU. The Court of Eurasia Economic Union reiterated that the grounds for exemptions under article 29 Treaty on EAEU requires an the exceptional measure<sup>15</sup> that could be introduced by the Member State in question if such measures do not constitute a means of arbitrary discrimination or a disguised restriction on trade between Member States and these measures are necessary to achieve goals stipulated in article 29(1)(2)(3)(4)(5)(6)<sup>16</sup>. Moreover the Grand Chamber of the Court emphasized that Member States are obliged to refrain from any measure undermining achievement of an objectives of the Union and should refrain from introduction of unilateral limitations and restrictions in trade basing on principles of transparency, adequacy and proportionality enshrined in article 3(2) Treaty on EAEU<sup>17</sup>.

The Court of Eurasia Economic Union held that the Member States discretion at application of article 29(1) is not absolute and the provisions of this article should be interpreted strictly.

However the Court of Eurasia Economic Union failed to establish stricter legal tests for application security clause for the matters that are outside the scope of article 29(1). We hope that in future the Court of Eurasia Economic Union will extend this approach to all other exemptions from common legal regime of EAEU. In any way it is the Court of Eurasia Economic Union which is empowered to define the role and the place of defence matters in Eurasia integration and legal system.

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<sup>15</sup> Para 8 of the Advisory opinion.

<sup>16</sup> Para 6 of the Advisory opinion.

<sup>17</sup> Para 9 of the Advisory opinion.

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- [2] E Aalto, '*Interpretations of Article 296*', in D Keohane (Ed.), *Toward a European Defence Market*
  - [3] Chaillot Paper n° 113 (EU Institute for Security Studies: 2008), pp.13-49.
  - [4] Directive 2009/81/EC on the award of contracts in the fields of defence and security. Guidance Note. Security of Information. Directorate General Internal Market and Services. Ref. Ares(2016)765061 – 12/02/2016