

**THE LEGALITY PRINCIPLE UNDER THE ECHR APPLIED TO FREEDOM-  
RESTRICTING PUBLIC ORDER POWERS: A CRITICAL ANALYSIS OF THE  
BELGIAN PROHIBITION OF PLACE**

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## **ABSTRACT**

This contribution looks into the principle of legality under the European Convention on Human Rights with regard to public order measures restricting the individual in his fundamental right to freedom of movement. Today, there is an increase in such freedom-restricting public order powers, such as the Belgian prohibition of place introduced in 2013, whilst the legality of such powers is generally not questioned. The legality principle is nevertheless an important principle, stemming from the rule of law and a key value in preventing arbitrary state interference, thus well deserving further examination. Therefore, this contribution gives an overview of the relevant Strasbourg Court's case law, compared to the decisions of the UN Human Rights Committee and the prevailing law in Belgium on the prohibition of place, where questions arise about its legality. In order to find some inspiration for the legality of the Belgian prohibition of place, but also for potential future legislation on new freedom-restricting public order powers, we will also compare where useful with the prevailing law on this issue in the Netherlands and the United Kingdom.

## 1. INTRODUCTION

Today's postmodern society is characterised by a need for safety and security and the maintenance of security has become increasingly important on the political agenda in many postmodern countries over the last twenty years.<sup>2</sup> This in turn translates into an increase in often far-reaching powers at the disposal of the executive and (criminal) judges that drastically restrict an individual in his free movement. These powers take a variety of forms and are imposed by all kinds of administrative and criminal authorities with the aim of maintaining public order. For example, in Belgium, a temporary curfew is possible, such as the curfew prohibiting juveniles to enter a local park after 10 pm imposed by a mayor in order to prevent loitering.<sup>3</sup> Also a temporary prohibition to enter a football stadium (so-called 'football stadium ban') can be imposed, more specifically by a civil servant for three months to five years, in order to tackle football-related violence.<sup>4</sup> Additionally, in 2013, a new Article 134*sexies* has been inserted in the Belgian New Municipality Act (NMA)<sup>5</sup>, which enables mayors to maintain public order by imposing a so-called 'temporary prohibition of place'.<sup>6</sup> On this ground, a mayor can, in case of a disturbance of public order or nuisance, prohibit an individual to enter a certain public place, such as a street or a

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<sup>2</sup> E. DEVROE, *A Swelling Culture of Control? De genese en toepassing van de wet op de administratieve sancties in België* (Maklu, 2012), 19-24 and references therein.

<sup>3</sup> In Belgium, the maintenance of public order is primarily a competence of local administrative authorities, in particular a mayor. See, e.g. the curfew imposed by the former mayor of Mechelen (a city in Belgium) (Jmv, *Mechelen voert avondklok in voor hangjongeren*, [www.destandaard.be](http://www.destandaard.be)).

<sup>4</sup> Art.24 of the Law of 21 December 1998 on Safety at Football Matches (Belgium).

<sup>5</sup> Via the Municipal Administrative Sanctions Act 2013 (Belgium).

<sup>6</sup> This prohibition of place was already known in administrative law, but has now been enshrined generally in a statutory text for the first time. For a first analysis of this new power and its conditions, see L. TODTS, *Het gemeentelijk plaatsverbod: een eerste verkenning en toetsing aan het fundamentele recht op persoonlijke bewegingsvrijheid*, 8 Tijdschrift voor Bestuurswetenschappen en Publiek Recht 2015, 432-448.

neighbourhood, for up to one month.<sup>7</sup> Similar restrictions of an individual's free movement exist in Belgian criminal law. For instance, a criminal judge can impose a football stadium ban for three to even ten years in case of football violence, or may, in case of certain sexual offences, prohibit an individual to be in a certain place, such as the street of the victim, for up to twenty years.<sup>8</sup>

Despite differences in form and competent authority, the above-mentioned measures all pursue the same goal, namely maintaining public order by temporarily *restricting* an individual *in his free movement* regarding a *specific place or area* within a *particular state*. For this contribution, I will subsequently refer to such measures with the notion of '*area-based restrictions*'.

The above trend of increasing reliance on public order powers restricting the individual in his free movement is likely to continue in Belgium. After all, at present, there is an increase in dangerous situations and situations of threat, such as terrorism threat, which may in turn lead to a rise in far-going public order powers. The powers of the executive and judges to safeguard public order are nowhere listed in a limited way in Belgium, so that new forms of

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<sup>7</sup> Art.134sexies, § 2 of the New Municipality Act (NMA) (Belgium). A similar measure also exists in the United Kingdom, where a constable in uniform can impose a so-called 'direction to leave' (see Part 3 of the Anti-social Behaviour, Crime and Policing Act 2014; see also *infra*). Although both the Belgian prohibition of place and the UK direction to leave pursue the same goal, namely maintaining public order by prohibiting individuals to be in a certain public place for a certain period (in other words, by imposing area-based restrictions), they nevertheless slightly differ in the manner of doing so. The direction to leave can obligate the offender to leave the locality and not to return to it, in contrast to the Belgian prohibition of place, which only implies a prohibition to enter the locality. In order to avoid confusion, we therefore prefer not to use the English notion of 'direction to leave' for also the Belgian prohibition of place, but to give a (literal) translation of the measure as it exists in Belgian law, namely the notion of 'prohibition of place' (cf. the French notion in the French version of the Belgian Municipal Administrative Sanctions Act 2013 of 'interdiction de lieu').

<sup>8</sup> Art.41 of the Law of 21 December 1998 on Safety at Football Matches (Belgium) resp. Art.382bis, §4 of the Criminal Law Code (Belgium).

public order powers may well be introduced, for instance to tackle terrorism (threat). For example, in Belgium, the introduction of ‘administrative house arrest’ is proposed in the fight against terrorism as a measure that can be imposed by the National Security Council<sup>9</sup> when the state of emergency is introduced in the Belgian legal system.<sup>10</sup> However, further considerations as to its (potential) content are not given and no legislative proposals have yet been submitted. Note that, in France, similar measures were already introduced in the light of the 2015 Paris attacks and the subsequent implementation of the state of emergency.<sup>11</sup> In France, the Minister of Internal Affairs can, for instance, impose a so-called ‘assignation à résidence’ on a person suspected of posing a threat to public order and safety. This measure obligates the suspect to reside within a certain area for a certain period and can be combined with further restrictions, such as a home curfew. The suspect is then required to remain for a certain period within a specified residence, such as his own house (‘l’astreinte à domicile’).<sup>12</sup>

This trend towards more freedom-restricting powers to maintain public order raises some important legal questions. The above-mentioned area-based restrictions are situated at the boundary between allowable powers to maintain public order and impermissible restrictions of an individual’s fundamental rights and freedoms. They more specifically constitute serious restraints of the fundamental right to freedom of movement, as guaranteed in inter

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<sup>9</sup> A public body coordinating state action against terrorist threats.

<sup>10</sup> As proposed by the New Flemish Alliance party (N-VA) – a centre-right Flemish nationalist party in the coalition – (see N-VA, “Niveau V”, September 2016, [https://www.n-va.be/sites/default/files/generated/files/news-attachment/niveau\\_v\\_-\\_10092016.pdf](https://www.n-va.be/sites/default/files/generated/files/news-attachment/niveau_v_-_10092016.pdf) [accessed 28 June 2017]). See also Dominique Fiers, “De Wever pleit opnieuw voor noodtoestand”, 22 March 2017, available at [www.deredactie.be](http://www.deredactie.be) [accessed 28 June 2017].

<sup>11</sup> The state of emergency has been renewed in December 2016 and again extended until 15 July 2017.

<sup>12</sup> See Art.6, Loi n° 55-385 du 3 avril 1955 relative à l’état d’urgence, as modified by Art.4 Loi n° 2015-1501 du 20 novembre 2015 and Art.2 Loi n° 2016-1767 du 19 décembre 2016.

alia Article 2 of the Fourth Additional Protocol of the European Convention on Human Rights (A2P4).<sup>13</sup>

The first paragraph of this Article reads as follows: ‘Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence’. This right prohibits national authorities to *restrict* the individual’s free movement in an arbitrary way. Importantly, according to the European Court of Human Rights’ case law, the right to freedom of movement in A2P4 must be clearly distinguished from the right to liberty and security in article 5 of the European Convention on Human Rights (ECHR). The latter contains the right of an individual not to arbitrarily lose all freedom of movement and thus not to be arbitrarily *deprived* of his liberty.<sup>14</sup> The above-mentioned area-based restrictions are generally considered to be mere limitations of the individual’s free movement, without depriving him of all liberty. After all, these measures restrict an individual solely as regards one specific area. In other words, they still provide an individual with all free movement, save for the area covered by the restriction. Such measures are generally deemed to merely restrict an individual in his free movement, without depriving him of all liberty.<sup>15</sup> Consequently, this contribution focuses on A2P4 and not on Article 5 of the ECHR.<sup>16</sup>

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<sup>13</sup> See also Art.13 of the Universal Declaration of Human Rights (UDHR) and Art.12 of the International Covenant on Civil and Political Rights (ICCPR).

<sup>14</sup> See also Art.3 of the UDHR and Art.9 of the ICCPR.

<sup>15</sup> However, some of these area-based restrictions are at the boundary between mere restrictions of the free movement and more far-going deprivations of liberty. For a more extended discussion, see L. TODTS, *Area-based Restrictions to Maintain Public Order: The Distinction Between Freedom-restricting and Liberty-depriving Public Order Powers in the European Legal Sphere*, (2017) 4 E.H.R.L.R. 376-386.

<sup>16</sup> Given the fact that this contribution focuses on restrictions imposed within the territory of a particular state, it will not discuss the right to leave any country, as guaranteed in paragraph 2 of A2P4. Accordingly, it will mainly focus on the right to free movement in purely internal situations and not also the right to free movement between

The right to freedom of movement is not an absolute right and restrictions are possible, provided that they are not arbitrarily imposed. It is, however, not unconceivable that freedom-restricting measures, such as area-based restrictions, are used in an arbitrary way, for example to target certain groups in a society. In the United Kingdom, for instance, empirical research has already shown that this may be the case for the so-called ‘dispersal powers’, which are similar powers as to the Belgian prohibition of place. Dispersal powers were already introduced in 2003 via the Anti-social Behaviour Act<sup>17</sup>, which have recently been replaced by the so-called ‘direction to leave’ as introduced by the Anti-social Behaviour, Crime and Policing Act (ACPA) in 2014.<sup>18</sup> These powers enable a constable in uniform to give a direction to an individual requiring him to, for example, leave the locality and not to return to it for a certain period. According to empirical research, such dispersal powers may well lead to the criminalisation of (loitering) youth, based on mere feelings of fear and insecurity that the simple presence of groups of youths in public places may cause to others.<sup>19</sup>

Hence, it is of great importance to examine the conditions under which freedom-restricting measures can be imposed, in order to avoid that these restrictions are used in an arbitrary way. Knowing more about these conditions is essential to find a good balance between the need to maintain public order and the protection of an individual’s fundamental rights and freedoms, in particular the right to freedom of movement. This is even more true in view of

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different EU States, as protected under EU law, nor the right to free movement of aliens in the context of migration law.

<sup>17</sup> S.30.

<sup>18</sup> See Part 3.

<sup>19</sup> For a report of this research, see A. CRAWFORD, *Dispersal Powers and the Symbolic Role of Anti-Social Behaviour Legislation*, (2008) 71(5) *Modern Law Review*, 753-784.

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the above-mentioned increase in freedom-restricting powers available to administrative and criminal authorities.

To be compliant with the right to freedom of movement, restrictions must be in accordance with the standard restriction requirements of *legality*, *legitimacy* and *proportionality*. Restrictions more specifically have to (i) be in accordance with the law, (ii) pursue a legitimate aim, such as the maintenance of public order and (iii) be necessary in a democratic society, i.e. proportionate.<sup>20</sup> This is similar to the conditions set out in Articles 8-11 of the ECHR.<sup>21</sup> Freedom-restricting public order powers mostly pose problems with regard to the question whether they are necessary in a democratic society for the (public order) aim pursued, i.e. the proportionality requirement, whilst neither the legality nor the legitimacy of the measure is generally questioned.<sup>22</sup>

As to the Belgian legislation introducing the prohibition of place, the Belgian Constitutional Court has already held in its judgement of 23 April 2015 that the prohibition of place must be considered as consistent with the right to free movement. After all, it pursues the legitimate aim of maintaining public order and must stand in fair proportion to

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<sup>20</sup> Third paragraph of A2P4. See also Art.12(3) of the ICCPR. Note that the fourth paragraph of A2P4 provides another restriction ground, already enabling restrictions when they are ‘justified by the public interest in a democratic society’. However, and regardless of the applied restriction ground, the measure must always be at least proportionate (C. GRABENWARTER (ed), *European Convention on Human Rights. Commentary* (C.H. Beck, 2014), p.415).

<sup>21</sup> C. GRABENWARTER, *European Convention on Human Rights. Commentary* (C.H. Beck, 2014), p.415; W. A. SCHABAS, *The European Convention on Human Rights. A Commentary* (OUP, 2015), p.402.

<sup>22</sup> NURIA A. HIDALGO, “*Liberty of Movement Within the Territory of a State (Article 2 of Additional Protocol No. 4 ECHR)*” in J. G. ROCA and P. SANTOLAYA (eds), *Europe of Rights: A Compendium on the European Convention of Human Right* (Koninklijke Brill, 2012), pp.622-623. On the content of the proportionality principle as regards area-based restrictions, see L. TODTS, *The Legitimacy of Area-based Restrictions to Maintain Public Order: Giving Content to the Proportionality Principle from a European Legal Perspective*, in *Public Administration Yearbook*, Pedagogical University of Cracow, 2017(3), 128-155.



the public order aim pursued, though it is for the competent court to assess in a given case whether the imposed prohibition can be considered as proportionate.<sup>23</sup>

However, one criterion did apparently fall outside the Court's attention and was not as such assessed by it, more specifically whether the prohibition of place is in accordance with the law, i.e. whether it is compliant with the *principle of legality*.<sup>24</sup> As we will see hereafter, this principle does not only require that the impugned measure is provided by law, in that it is based on a norm in domestic legislation. The legality principle implies much more than that. Being a key principle of the rule of law and fundamental in preventing arbitrary state interference, the legality principle also requires the norm at issue to meet some important *substantive* requirements. Whilst the prohibition of place is set up by a law (i.e. Article 134*sexies* of the Belgian NMA), thus being provided by law, one can wonder whether all the provisions of this Article are compliant with the substantive requirements resulting from the legality principle, as we will see below.

The question thus arises how we can ensure that a domestic system providing for the possibility of imposing freedom-restricting public order measures, such as the Belgian prohibition of place, complies with the principle of legality as interpreted under the ECHR. Therefore, this contribution aims to assess the legality of area-based restrictions to maintain public order, in particular the Belgian prohibition of place, in view of the ECHR. This is not only important for the relevant domestic legislation on the prohibition of place, in this way being able to reveal possible gaps and flaws in it and to subsequently formulate legislative recommendations. It is also relevant for the Belgian legislator when drafting

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<sup>23</sup> Belgian Constitutional Court, 23 April 2015, No.44/2015, at [B.60.7] - [B.60.9].

<sup>24</sup> It should be noted that the Court did refer to the principle of legality, but only in relation to criminal matters. It considered that the prohibition of place is introduced as a preventive police measure, solely aiming at safeguarding public order, and not a penalty, so that the principle of legality in inter alia Article 7 of the ECHR is not applicable (see [B.57.8]). However, the principle of legality is not limited to only criminal matters. It applies to any restriction of any conditional right, such as the right to freedom of movement (see also *infra*).

legislation on *new* freedom-restricting public order powers, for instance in the fight against terrorism. In this way, the domestic legislator can be acquainted with the conditions that must be met, so that these powers are considered to be ‘in accordance with the law’ and thus compatible with an individual’s fundamental rights, notably the right to freedom of movement. Moreover, the results of this research may well be relevant for also other countries, insofar as freedom-restricting measures to maintain public order are concerned. After all, this research focuses on a fundamental human right, i.e. the right to freedom of movement, so that it can be applied, *mutatis mutandis*, to also other Contracting States to the ECHR. We will do so via an analysis of the criteria put forward in the relevant Strasbourg Court’s case law, compared to the decisions of the UN Human Rights Committee (HRC) and the prevailing law on this issue in Belgium. In order to find some inspiration, we will also look where useful into the prevailing law in this regard in the United Kingdom and the Netherlands. The Netherlands has a rich tradition on public order enforcement law, while in the United Kingdom, new freedom-restricting public order powers have recently been introduced and have already been assessed as regards their legality.

Before analysing in detail to what extent freedom-restricting public order powers such as the Belgian prohibition of place are compliant with the principle of legality, we must first clarify the content of this principle under the ECHR. This contribution then proceeds with briefly discussing Belgian public order enforcement law, in order to fully understand the domestic system of the prohibition of place. Subsequently, it investigates the compatibility of freedom-restricting public order powers with the legality principle. The contribution ends with some concluding remarks and recommendations.

## 2. PRINCIPLE OF LEGALITY UNDER THE ECHR

The principle of legality is an important principle. It is thought to be one of the key values emanating from the rule of law<sup>25,26</sup>, which the European Court of Human Rights considers to be one of the fundamental principles of a democratic society and which is inherent in all the Articles of the Convention.<sup>27</sup> The rule of law is of key importance in the development of a liberal political state. It essentially indicates the idea that it is fundamental for the protection of individual liberties that the power of the state is restrained and controlled by subjecting it to ‘the law’.<sup>28</sup> It thus aims to protect individuals from any arbitrariness in the exercise of state power.<sup>29</sup> The rule of law is also closely linked to the

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25 M. KRYGIER, *Rule of Law*, in Michel Rosenfeld and Adrás Sajó (eds), *The Oxford Handbook of Comparative Constitutional Law* (OUP, 2012), p.237 and J. JOWELL, *The Rule of Law and its underlying values*, in Jeffrey Jowell, Dawn Oliver and Colm O’Cinneide (eds), *The Changing Constitution* (OUP, 2015), pp.20-24.

26 The concept of ‘rule of law’ is the notion used in Anglo-American tradition. In German tradition, this principle is referred to with the concept of ‘Rechtsstaat’, whereas in French tradition, the notion of ‘État de droit’ is used. Despite these different notions and (historically) different accents between these concepts, they nonetheless incorporate a number of common, fundamental principles (see L. PECH, *The Rule of Law as a Constitutional Principle of the European Union*, in *Jean Monnet Working Paper Series* No.4/2009, 28 April 2009, available at <https://ssrn.com/abstract=1463242> [accessed 30 June 2017], p.22 and references therein and B. SORDI, *Révolution, Rechtsstaat and the Rule of Law: historical reflections on the emergence of administrative law in Europe*, in Susan Rose-Ackerman, Peter L. Lindseth and Blake Emerson (eds), *Comparative Administrative Law* (Edward Elgar, 2017), pp.23-35).

27 *Iatridis v Greece* [GC] (2000) 30 E.H.R.R 97, at [58]. Moreover, the preamble of the European Convention expressly refers to the rule of law as a ‘common heritage’ of the Contracting States to the ECHR.

28 For a brief overview of the historical background of the rule of law, see e.g. D. MOECKLI, *Exclusion from Public Space. A Comparative Constitutional Analysis* (Cambridge, 2016), pp.119-120.

29 M. KRYGIER, *Rule of Law*, in Michel Rosenfeld and Adrás Sajó (eds), *The Oxford Handbook of Comparative Constitutional Law* (OUP, 2012), pp.241-242 and J. JOWELL, *The Rule of Law and its underlying values*, in Jeffrey Jowell, Dawn Oliver and Colm O’Cinneide (eds), *The Changing Constitution* (OUP, 2015), pp.13-14.

idea of separation of powers, with an independent judiciary as a safeguard against the abuse of state power.<sup>30</sup> In addition, to give an individual adequate protection, it is also – and above all – vital that all state action is *legally authorised*, as is required by the principle of legality.<sup>31</sup>

The principle of legality is probably most known in criminal matters, flowing from the adage ‘*nullum crimen, nulla poena sine lege*’, meaning that only the law can define a crime and prescribe a penalty. It is a fundamental principle, anchored in inter alia Article 7(1) of the ECHR.<sup>32, 33</sup> The Strasbourg Court applies a threefold test in order to assess whether a punishment is sufficiently prescribed by law, requiring that both the crime and the penalty (i) have a *legal basis*, which in turn must be (ii) adequately *accessible* and (iii) sufficiently precisely formulated, thus being reasonably *foreseeable* as to its effects.<sup>34</sup> The

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30 D. MOECKLI, *Exclusion from Public Space. A Comparative Constitutional Analysis* (Cambridge, 2016), p.120.

31 J. JOWELL, *The Rule of Law and its underlying values*, in Jeffrey Jowell, Dawn Oliver and Colm O’Cinneide (eds), *The Changing Constitution* (OUP, 2015), pp.17-18.

32 According to this Article ‘[n]o one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed, [n]or shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed.’ This Article is, however, not confined to only the retrospective application of criminal law to an accused’s disadvantage. It also embodies, more generally, the principle that only the law can define a crime and prescribe a penalty (see *Kafkaris v Cyprus* [GC] (2008) 49 E.H.R.R. 35, at [138]).

33 See also Art.11(2) of the UDHR, Art.15 of the ICCPR and Art.12, 2nd paragraph and 14 of the Belgian Constitution.

34 *Kafkaris v Cyprus* (2008) 49 E.H.R.R. 35, at [140] and *Del Río Prada v Spain* [GC] (2014) 58 E.H.R.R. 37, at [91]. See also Bernadette Rainey, Elizabeth Wicks and Clare Ovey, *The European Convention on Human Rights* (OUP, 2014), p.301 and Council of Europe, *Guide on Article 7 of the European Convention on Human Rights*, 30 April 2017, [www.echr.coe.int/Documents/Guide\\_Art\\_7\\_ENG.pdf](http://www.echr.coe.int/Documents/Guide_Art_7_ENG.pdf), p.11.

latter two are known as the ‘quality of law’ requirements.<sup>35</sup> Hence, a punishment does not only have to be based on a legal norm. The legality principle also requires the norm to embody several substantive requirements, i.e. being sufficiently accessible and foreseeable. Via these requirements, the Strasbourg Court also gives expression to the principle of legal certainty, which is inherent in the provisions of the Convention.<sup>36</sup>

However, Article 7 of the ECHR is only applicable to ‘criminal offences’ and ‘penalties’, terms which have an autonomous meaning.<sup>37</sup> In deciding whether a measure involves a penalty within the meaning of Article 7, the domestic legal classification of the measure may be relevant, though it is not decisive. The starting point should be whether the measure was ordered following a conviction for a ‘criminal offence’<sup>38</sup>, but also other factors may be deemed relevant, such as the nature and aim of the measure – particularly its punitive aim – and its severity<sup>39, 40</sup>. The above indicates that the scope of Article 7 is not

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<sup>35</sup> *Al-Nashif v Bulgaria* (App. 50963/99), judgement of 20 June 2002, at [121] and *Kafkaris* (2008) 49 E.H.R.R. 35, at [140].

<sup>36</sup> *Krasnodebska-Kazikowska and Luniewska v Poland* (App. No.26860/11), judgement of 6 October 2015, at [44]. See also P. POPELIER, *Behoorlijke wetgeving in de rechtspraak van het Europees Hof voor de Rechten van de Mens (2014-2015)*, (2016) 2 *Tijdschrift voor Wetgeving*, 104, 105.

<sup>37</sup> See, e.g. *Welch v the United Kingdom* (1995) 20 E.H.R.R. 24, at [27] and *Brown v United Kingdom* (App. No.38644/97), decision of 24 November 1998.

<sup>38</sup> Whether there is a ‘criminal offence’ is also interpreted in an autonomous way, whereby the same criteria are used to analyse whether there is a ‘criminal charge’ within the meaning of Art.6 of the ECHR (the so-called ‘Engel-criteria’, set out in *Engel v Netherlands* (1979–80) 1 E.H.R.R. 647, at [82]; see also *Brown v United Kingdom* (App. No.38644/97), decision of 24 November 1998). According to this case law, the domestic legal classification is a starting point, but not the most decisive criterion. More important are the nature of the offence and the nature and degree of severity of the measure.

<sup>39</sup> However, the severity of the measure is not decisive in itself, because many non-criminal measures of a preventive nature may have a substantial impact on the person concerned (*Del Río Prada v Spain* [GC] (2014) 58 E.H.R.R. 37, at [82]).

confined to only measures classified as a penalty under domestic law. Also other measures that do not involve a penalty according to domestic law, such as administrative sanctions, may well fall under its scope, for example because of their particularly punitive aim (see also *infra*).

The above does not imply that there is no principle of legality applicable at all to non-criminal or non-punitive measures. The legality principle is not limited to criminal matters. It applies to *any* restriction of *any* fundamental right – to the extent that restrictions are possible – such as the right to privacy and the right to freedom of assembly and association in Articles 8-11 of the ECHR, as well as for instance, the right to freedom of movement in A24P. These are relative or qualified rights, which means that restrictions are possible, including to maintain public order. As already discussed above, to be compatible with these fundamental rights, restrictions must not only pursue a legitimate aim, for example the maintenance of public order, and be proportionate to achieve that aim. They must also be in *accordance with the law*.<sup>41</sup>

In assessing whether an interference with the above-mentioned fundamental rights is in accordance with the law, the Strasbourg Court applies an approach which is essentially the same to that used to cases that fall under Article 7 of the ECHR.<sup>42</sup> It more specifically

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<sup>40</sup> *Welch v the United Kingdom* (1995) 20 E.H.R.R. 24, at [28]; *Del Río Prada v Spain* [GC] (2014) 58 E.H.R.R. 37, at [82] and Council of Europe, Guide on Article 7 of the ECHR, 30 April 2017, [www.echr.coe.int/Documents/Guide\\_Art\\_7\\_ENG.pdf](http://www.echr.coe.int/Documents/Guide_Art_7_ENG.pdf), pp.6 and 7.

<sup>41</sup> It should be noted that different notions are sometimes used in this regard (e.g. ‘in accordance with law’ in A2P4 and Art.8 of the ECHR versus ‘prescribed by law’ in Arts 9-11 of the ECHR and ‘provided by law’ in Art.12 of the ICCPR). However, there appears to be no substantial difference between these notions (see *The Sunday Times v the United Kingdom (No.1)* (1979) 2 E.H.R.R. 245, at [48]; Council of Europe, Doc. H (70) 7, Strasbourg, September 1970, at [128] and W. A. SCHABAS, *The European Convention on Human Rights. A Commentary* (OUP, 2015), 402.

<sup>42</sup> As already indicated on several occasions by the Strasbourg Court; see, e.g. *Baskaya and Okcuoglu v Turkey* [GK] (1999) 31 E.H.R.R. 10, at [48] - [49]; *Achour v France* [GC] (2007) 45 E.H.R.R. 2, at [42]; *Kudrevicius and*

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analyses whether: (i) the interference has a *legal basis*; (ii) the relevant legal basis is adequately *accessible* and; (iii) is sufficiently precisely formulated, thus being reasonably *foreseeable* as to its effects.<sup>43</sup> Hence, even if a restriction of a fundamental right is not a punitive sanction or penalty within the meaning of Article 7, there is nevertheless a legality test applicable, which is furthermore being interpreted in the same way. This identical content of the legality test flowing from Article 7 of the ECHR and the one resulting from other fundamental rights, such as Articles 8-11 of the ECHR and A2P4, can be approved. This enhances the clarity and uniformity of the Strasbourg Court's assessment and case law regarding the legality principle. It moreover prevents that states classify restrictions of fundamental rights as non-criminal or non-punitive in order to circumvent the requirements resulting from Article 7.

However, this does not mean that, in view of the legality principle, it would not be relevant *at all* to make a distinction between punitive sanctions or penalties within the meaning of Article 7 and restrictions of fundamental rights that are no such sanctions or penalties. Despite the identical content of the legality principle, there are nevertheless some differences possible, more specifically as regards the *intensity of review*. In certain cases, the Strasbourg Court will be more or less strict in assessing the legality of a norm, particularly when considering whether the norm in question is sufficiently accessible and foreseeable. The Court has already stated on several occasions that the extent to which a

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others v Lithuania [GC] (2016) 62 E.H.R.R. 34, at [193]. See also B. RAINEY et al., *The European Convention on Human Rights* (OUP, 2014), 301.

<sup>43</sup> See, e.g. *Malone v the United Kingdom* (1984) 7 E.H.R.R. 14, at [66] - [68]; *Leander v Sweden* (1987) 9 E.H.R.R. 433, at [50]; *Silver and others v the United Kingdom* (1983) 5 E.H.R.R. 347, at [85] - [88]; *The Sunday Times v the United Kingdom (No.1)* (1979) 2 E.H.R.R. 245, at [47]-[49]; *Rotaru v Romania* [GC] (App. No.28341/95), judgement of 4 May 2000, at [52]. See also Bernadette Rainey et al., *The European Convention on Human Rights* (OUP, 2014), p.310. Cf. UN Commission on Human Rights, *The Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights*, 28 September 1984, E/CN.4/1985/4, Annex, p.4, at [15] - [18].

norm must be accessible and foreseeable largely depends on, not only *the content of the norm* and *the persons to whom it is applicable*, but also – and most relevant for this contribution – *the field it is designed to cover*.<sup>44</sup>

It is in this regard that the distinction between punitive sanctions or penalties and those which are not may well be important. Punitive sanctions or penalties can only be imposed in situations which are well-defined in law, i.e. in case of a (criminal) offence. Article 7 of the ECHR requires that both the crime and the penalty are defined and prescribed by law, as mentioned above. In certain other fields, on the contrary, the Court has already indicated that legislation is inevitably formulated in a more wide or vague way, but may nevertheless still be compliant with the legality principle.<sup>45</sup> This is for example the case for provisions enabling local authorities to take *preventive* action with the aim of safeguarding public order. In general, preventive public order powers can already be imposed in case of a (*potential*) *disturbance of public order*, without the necessity of an offence that has been committed, contrary to punitive sanctions or penalties.

For example, in *Landvreugd*, the Strasbourg Court had to consider the legality of the preventive powers used by the mayor of Amsterdam, already enabling him to intervene ‘whenever he deems it necessary in order to quell or prevent serious disturbances of public order’, without the necessity of an offence. The mayor used these powers to issue a temporary order prohibiting the individual to be in a certain area of the city, in attempts to

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<sup>44</sup> See e.g. *Groppera Radio AG v Switzerland* (1990) 12 E.H.R.R. 321, at [68]; *Vogt v Germany* [GC] (1995) 21 E.H.R.R. 205, at [48]; *Rekvényi v Hungary* [GC] (2000) 30 E.H.R.R. 519, at [34]; *RTBF v Belgium* (App. No.50084/06), judgement of 29 March 2011, at [104]; *de Tommaso v Italy* [GC] (App. No.43395/09), judgement of 23 February 2017, at [108].

<sup>45</sup> See, e.g. *Barthold v Germany* (1985) 7 E.H.R.R. 383, at [47] - [49] (concerning professional codes for liberal professions); *Vereinigung Demokratischer Soldaten Österreichs and Gubi v Austria* (1995) 20 E.H.R.R. 56, at [31] (concerning provisions related to military discipline).



prevent drug-related disturbances of public order.<sup>46</sup> Although the Court acknowledged that the powers were formulated in general and open terms, it nevertheless found that, given the particular circumstances of the case, the prohibition order was in accordance with the law, as required by A2P4. The Court particularly took into account the fact that, at the relevant time, pertinent case law existed as well as practice from the competent authority, complementing the vague wordings of the norm at issue. The applicant was moreover informed in advance that any further disturbance of public order would entail such a prohibition order (see also *infra*).<sup>47</sup>

The above indicates that the Strasbourg Court applies a relatively supple legality test regarding preventive public order measures that restrict an individual in his fundamental rights, such as the right to free movement. An explanation for this can be found in the very nature of these measures, being essentially *preventive* measures, applicable to a wide range of situations in which public order is (potentially) disturbed, without the necessity of an offence. In *Landvreugd*, for instance, the Court recognised that the circumstances in which a mayor may be called on to intervene in order to safeguard public order are so diverse that it would scarcely be possible to formulate a law covering every eventuality.<sup>48</sup> It is indeed rather difficult to determine in a formal act all situations in which local authorities must take preventive action in order to maintain public order and which measures can be subsequently imposed. It would be unrealistic to expect the domestic legislator to give an exhaustive, full and precise list of all possible behaviour that

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<sup>46</sup> The area was previously designated by the mayor as constituting an ‘emergency area’ in respect of public trafficking and use of hard drugs.

<sup>47</sup> See *Landvreugd v the Netherlands* (2003) 36 E.H.R.R. 56, at [60] - [61]. Cf. *Oliveira v the Netherlands* (2003) 37 E.H.R.R. 32, at [53]-[59].

<sup>48</sup> *Landvreugd v the Netherlands* (2003) 36 E.H.R.R. 56, at [61]. Cf. *Oliveira v the Netherlands* (2003) 37 E.H.R.R. 32, at [54].

cause, or may cause, a public order disturbance and of the measures that can be subsequently imposed.<sup>49</sup>

The above seems to indicate that the legality test is more lenient with regard to preventive measures, contrary to punitive sanctions or penalties, owing to their essentially preventive nature and (broad) field of application. However, this must be nuanced. It is not the *nature* of the measure as such that is decisive. Interpreting this otherwise would enable national authorities to classify measures as ‘preventive’ merely in attempts to avoid the stricter legality test applicable to punitive sanctions or penalties, which requires that both the (criminal) offence and the penalty is well-defined in the applicable law. One must always take into account the *field* that the norm in question is designed to cover, in combination with the content of the norm and the persons to whom it is addressed, as mentioned above. This brings along that preventive measures that have a more confined scope of application, even though they are preventive in nature, will nevertheless be subject to a stricter legality test. This will be the case for instance for the Belgian prohibition of place, as we will see hereafter.

The question arises, then, under which circumstances preventive measures to maintain public order that restrict an individual in his fundamental rights, such as the Belgian prohibition of place, are compatible with the principle of legality at the European human rights level. In other words, which criteria must be met, so that these measures can

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<sup>49</sup> See, per analogy, Belgian disciplinary law for civil servants, where an exhaustive list of all possible disciplinary offences is not required, as this is deemed to be scarcely possible (Belgian Council of State, 29 June 2001, No.97.252; 14 July 2008, No.185.384; 16 December 2008, No.188.829; 25 January 2010, No.199.970; J. DUJARDIN, *Rechtspraak in tuchtzaken door de beroepsorden: toetsing van de wettigheid door het Hof van Cassatie*, (2000-01) 21 *Rechtskundig weekblad* 785, 788-789). It should be noted, though, that (only) the disciplinary sanctions that are enumerated in the applicable disciplinary statute can be imposed (Belgian Council of State, 20 November 2003, No.125.537). The possible disciplinary sanctions are thus exhaustively listed, contrary to the disciplinary offences. For a more extended discussion and references, see Ingrid Opdebeek and Ann Coolsaet, *Algemene beginselen van ambtenarentuchtrecht (die Keure, 2011)*, 47-49.

be considered as having a sufficient legal basis in domestic law that is, furthermore, sufficiently accessible and foreseeable as to its effects. Before analysing this question, we must first give a brief overview of the Belgian system of public order enforcement, in order to fully understand the Belgian prohibition of place.

### **3. BELGIAN SYSTEM OF PUBLIC ORDER ENFORCEMENT: BRIEF OVERVIEW**

In Belgium, the maintenance of public order is primarily a competence of local administrative authorities (municipalities), in particular a mayor. Municipalities have all kinds of measures at their disposal in order to maintain public order. The public order enforcement powers par excellence are on the one hand (*municipal administrative sanctions*), aimed at punishing an offender for the offence he committed, and on the other hand *police measures*, which primarily aim to safeguard public order, without punishing the offender.<sup>50</sup> This distinction has important legal consequences, in particular as regards the principle of legality, so that we will discuss these different public order powers more in detail below (3.2). However, to fully understand these public order powers, we must first analyse the situations in which a municipality can act to maintain public order (3.1).

#### ***3.1. Situations in which a municipality can act to maintain public order***

In Belgium, municipalities are traditionally authorised to maintain ‘public order’. This follows from Article 135, § 2 of the Belgian New Municipal Act (NMA), which

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<sup>50</sup> Cf. the distinction made in other (continental) legal systems in Europe, such as France (‘sanctions administratives’ and ‘mesures de police administrative’), Germany (‘Ordnungswidrigkeiten’ and ‘Polizeiliche Massnahmen’) and the Netherlands (punitive administrative sanctions and administrative reparatory sanctions). The United Kingdom, on the contrary, which is a common-law system, does not formally acknowledge the distinction between administrative sanctions and other, non-punitive administrative measures. Powers used to tackle problematic behaviour are generally considered to be civil orders, i.e. ones where the nature of the proceedings followed by the competent authority is civil and not criminal, as it is not necessary that a crime has been committed.

contains the general administrative police power of municipalities to maintain public order in general. According to this Article, ‘[...] municipalities [...] have the task of providing, in the interest of the residents, in good police, in particular in cleanliness, health, safety and tranquility on public roads and places and in public buildings’.

However, the notion of public order as such is not legally defined. What should be understood by ‘public order’ is difficult to determine. It is a very abstract and evolving concept, the content of which varies according to the circumstances of time and space and thus of social changes.<sup>51</sup> In Belgian administrative law, more specifically within the context of administrative police powers, it is generally accepted as encompassing public health, public safety and public tranquility.<sup>52</sup> According to the Belgian Council of State, Administrative Litigation Section<sup>53</sup>, it is only applicable in cases involving a disturbance of *material* public order, i.e. visible disturbances of public order, such as night noise, alcohol abuse on public roads, fighting and destruction<sup>54</sup>, and not also in case of disturbances relating to moral public order.<sup>55</sup> The latter merely refers to disturbances of ideas or feelings

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<sup>51</sup> Belgian House of Representatives, Belgian Police Bill – Explanatory memorandum, 4 June 1991, Doc. No.1637/1, p.6.

<sup>52</sup> Belgian House of Representatives, Belgian Police Bill – Explanatory memorandum, 4 June 1991, Doc. No.1637/1, p.5.

<sup>53</sup> The Belgian Council of State is the highest administrative court in Belgium, divided into a Legislation Section and an Administrative Litigation Section. The Legislation Section is an advisory body in legislative and statutory matters, whereas the Administrative Litigation Section is empowered to suspend and/or annul any illegal administrative decision.

<sup>54</sup> Belgian Council of State, 20 September 2002, No.110.541; 10 June 2004, No.132.280; 19 July 2004, No.134.006 and 9 August 2006, No.162.080.

<sup>55</sup> Belgian Council of State, 8 November 1994, No.50.082; 11 January 2007, No.166.574 and 18 March 2010, No.202.037. See also Sven Brabants, “Geen gemeentelijke politiebevoegdheid voor de morele openbare orde, ook niet na de invoering van het begrip ‘openbare overlast’” (2010) 3 Tijdschrift voor Gemeenterecht 205, 205 and references therein.

of individuals on what is ‘good’ or ‘bad’, such as the mere presence of minors in a dancing.<sup>56</sup>

However, not all the types of behaviour that municipalities were faced with and that they wanted to tackle fell under this (material) concept of public order. Therefore, the legislator introduced a new category of behaviour in attempts to enlarge the power of municipalities to maintain public order, namely behaviour that is associated with forms of ‘public nuisance’.<sup>57</sup> This new category of behaviour has been inserted in the above-mentioned Article 135, § 2 of the Belgian NMA, via Article 7 of the Municipal Administrative Sanctions Act of 1999 (which has been replaced by the Municipal Administrative Sanctions Act of 2013). This Act enables local authorities to impose municipal administrative sanctions in case of infringements of by-laws, insofar as these infringements cause public nuisance (see *infra*). Additionally, municipalities now also have the competence based on the amended Article 135, § 2 ‘to take all necessary measures to counter all forms of public nuisance’.

However, the notion of public nuisance is nowhere legally defined.<sup>58</sup> According to the Administrative Litigation Section of the Belgian Council of State, it should be

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<sup>56</sup> See, e.g. Belgian Council of State, 8 November 1994, No.50.082. See also S. BRABANTS, *Geen gemeentelijke politiebevoegdheid voor de morele openbare orde, ook niet na de invoering van het begrip ‘openbare overlast’*, (2010) 3 Tijdschrift voor Gemeenterecht 205, 205 and G. VAN HAEGENBORGH, *Hoofdstuk 7. De politionele bevoegdheden van de gemeenteraad in Jean Dujardin and Wim Somers* (eds.), Gemeenteraad. Bevoegdheden (die Keure, 2011), p.358 and references therein.

<sup>57</sup> Belgian House of Representatives, Municipal Administrative Sanctions Bill - Explanatory memorandum, 3 March 1999, Doc No.49-2031/1, pp.2-3.

<sup>58</sup> Although some definition can be found in the Ministerial circular No.OOP 30bis of 3 January 2005 (Belgium), stating that public nuisance concerns ‘mainly individual, material behaviour that can disturb the harmonious course of human activities and that can restrict the quality of life of inhabitants of a municipality, a neighbourhood, or a street, in such a way that it exceeds the normal pressure of social life’. However, this definition refers to concepts, such as the ‘quality of life’, which are as vague as the notion of public nuisance and

understood as a part of the concept of (material) public order, whereby the extent to which the order is disturbed is reduced to the level of ‘nuisance’.<sup>59</sup> Despite this clarification, the notion of public nuisance remains a vague concept. This is because public nuisance is – similar to the concept of public order - an evolving concept that can vary according to time and place.

### ***3.2. Public order powers at the disposal of a municipality***

In order to tackle disturbances of public order or public nuisance, municipalities have different types of powers at their disposal. In general, two categories of public order powers are distinguished, depending on their purpose, namely municipal administrative sanctions on the one hand (3.2.1.) and police measures on the other hand (3.2.2.).

#### ***3.2.1. Municipal administrative sanctions***

Public order powers can be imposed as a municipal administrative sanction. Municipal administrative sanctions essentially aim to *punish* the offender for an *infringement* he committed. Hence, an infringement is always required for the imposition of such a sanction. Municipal administrative sanctions are therefore in essence a reaction to an infringement, so that they are mainly *punitive* in nature.<sup>60</sup>

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seem to even broaden its scope instead of reducing it (see A. DI RONCO and N. PERSAK, *Regulation of incivilities in the UK, Italy and Belgium: courts as potential safeguards against legislative vagueness and excessive use of penalising powers?* (2014) 42 Int. J. Law Crime Justice 340, 358).

<sup>59</sup> Belgian Council of State, 18 March 2010, No.202.037. See also S. BRABANTS, *Geen gemeentelijke politiebevoegdheid voor de morele openbare orde, ook niet na de invoering van het begrip ‘openbare overlast’* (2010) 3 Tijdschrift voor Gemeenterecht 205, 208.

<sup>60</sup> Belgian Council of State, 23 October 2009, No.197.212, at [8]; 8 May 2014, No.227.331, at [20]; 15 May 2014, No.227.421, at [7] and 29 July 2014, No.228.130, at [8]. See also Legislation Section of the Belgian Council of State, Advisory opinion on the Municipal Administrative Sanctions Bill 2013, 28 January 2013, Doc No.53-2712/001, pp.61-62.

The legal basis for these sanctions is Article 119*bis* of the above-mentioned Belgian New Municipality Act (NMA). This Article enables the city council – who is generally the competent authority for establishing local regulations – to determine municipal administrative sanctions for infringements of these regulations that cause public nuisance. The municipal administrative sanctions that can be subsequently imposed can be found in a separate Act, namely the Municipal Administrative Sanctions Act 2013 (MASA). This is a federal law providing a general framework, enabling municipalities to use the system of municipal administrative sanctions in case of infringements of their by-laws. It is by no means an obligation for municipalities to use municipal administrative sanctions. However, if municipalities decide to use this system, they must apply it in accordance with this federal Act.

The MASA provides only a *general* framework, within which municipalities can set their own accents.<sup>61</sup> This respects the *subsidiarity principle*, as municipalities are best placed to determine what should be classified as nuisance and to indicate in their by-laws the behaviour that should be addressed by municipal administrative sanctions.<sup>62</sup> After all, the content of nuisance may well vary from municipality to municipality. For example, cities such as Antwerp and Gent will have another perception of what is nuisance than smaller, rural municipalities with a small number of inhabitants.<sup>63</sup> These differences in

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<sup>61</sup> Belgian House of Representatives, Report on the Municipal Administrative Sanctions Bill 2013, 24 May 2013, Doc No.53-2712/006, 23.

<sup>62</sup> *Ibid.*, p.18, as confirmed by the Belgian Constitutional Court in its judgement of 23 April 2015, No.44/2015, at [B.52.6].

<sup>63</sup> Frankie Schram and Joke Lievens, *Gemeentelijke Administratieve Sancties. Een antwoord op overlast?* (Vanden Broele, 2015), 28.

practice between municipalities also result from the acknowledgement of the fundamental *principle of municipal autonomy*, which is recognised by the Belgian Constitution.<sup>64</sup>

Considering (inter alia) their essentially repressive purpose – primarily intended to punish an offender for the infringement he committed – municipal administrative sanctions must be regarded as sanctions with a punitive nature or penalties within the meaning of the Articles 6 and 7 of the ECHR.<sup>65</sup> As a consequence, the criminal principle of legality resulting from Article 7 is applicable to municipal administrative sanctions. Municipalities can only impose municipal administrative sanctions in certain well-defined situations, i.e. in case of an infringement of a local regulation. Thus, the conduct that may entail such a sanction is exhaustively listed in a by-law. Furthermore, the sanctions which can be subsequently imposed are also listed in an exhaustive way, more specifically in the Municipal Administrative Sanctions Act.<sup>66</sup>

### ***3.2.2. Police measures***

Public order powers can also be imposed as an administrative *police measure*. Police measures mainly intend to safeguard the public from (potential) disturbances of

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<sup>64</sup> Via Art.41 and 162. See also Belgian House of Representatives, Report on the Municipal Administrative Sanctions Bill 2013, 24 May 2013, Doc No.53-2712/006, 16 and 20. See also Const.Court (Belgium) 23 April 2015, No.44/2015, at [B.52.6].

<sup>65</sup> Legislation Section of the Belgian Council of State, Advisory opinion on the Municipal Administrative Sanctions Bill 1999, 3 February 1999, Doc No.49-2031/1, 15 and Belgian Constitutional Court, judgement of 23 April 2015, No.44/2015, at [B.17.2].

<sup>66</sup> These are: an administrative fine, an administrative suspension or withdrawal of a permission or license issued by the municipality and the administrative closure of an; establishment (see Art.4, § 1).



public order and thus *to safeguard public order*.<sup>67</sup> Police measures do not aim to punish the offender for past actions, but only to maintain public order, without any punitive purpose. Therefore, it is not always necessary that an offence has already been committed. A public order disturbance or nuisance, or even the mere fear of a public order disturbance or nuisance may well suffice.<sup>68</sup> As a result, police measures are primarily *preventive* in nature.<sup>69</sup> As far as the Belgian prohibition of place is concerned, the Belgian legislator has clearly classified it as a police measure and not as a (municipal) administrative sanction or a penalty. After all, the prohibition of place can already be imposed with the aim of maintaining public order, without the necessity of an offence that has been committed.<sup>70</sup>

For police measures, the aforementioned Article 135, § 2 of the NMA plays an essential role, in which we can find the general competence for municipalities to maintain public order in general. On this ground, municipalities are competent to take ‘all necessary measures’ in order to maintain public order. These are the so-called ‘police measures’. In addition to this *general* police power, municipalities also dispose of a number of *specific* police powers to safeguard public order, which we can find in Article 134*bis* and

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<sup>67</sup> Belgian Council of State, 8 May 2014, No.227.331, at [20]; 15 May 2014, No.227.421, at [7] and 29 July 2014, No.228.130, at [8]. See also Legislation Section of the Belgian Council of State, Advisory opinion on the Municipal Administrative Sanctions Bill 2013, 28 January 2013, Doc No.53-2712/001, 61-62.

<sup>68</sup> See, e.g. Belgian Council of State, 23 October 2009, No.197.212, at [8]; 15 May 2014, No.227.421, at [9].

<sup>69</sup> Legislation Section of the Belgian Council of State, Advisory opinion on the Municipal Administrative Sanctions Bill 2013, 28 January 2013, Doc No.53-2712/001, pp.61-62. See also Belgian Council of State, 15 May 2014, No.227.421, at [7] and 29 July 2014, No.228.130, at [8].

<sup>70</sup> Belgian House of Representatives, Municipal Administrative Sanctions Bill - Explanatory memorandum, 19 March 2013, Doc No.53-2712/001, 5 and 28, as also confirmed by the Belgian Constitutional Court in its judgement of 23 April 2015, No.44/2015, at [B.57.7] - [B.57.8].

following.<sup>71</sup> As we have already indicated above, a new police power has been added to this list in 2013 via a new Article 134*sexies*, i.e. the power to impose a prohibition of place.

Given the fact that police measures, such as the prohibition of place, are essentially preventive in purpose, they are generally not considered as sanctions with a punitive nature or penalties within the meaning of Articles 6 and 7 of the ECHR.<sup>72</sup> The criminal principle of ‘*nullum crimen, nulla poena sine lege*’ is thus not applicable to police measures. Contrary to municipal administrative sanctions, which can only be imposed in clearly defined situations (i.e. in case of an infringement of a by-law), police measures can already be imposed for any (potential) disturbance of public order or nuisance, without the necessity of an offence (infringement) that has been committed. Hence, the situations in which police measures can be imposed are not clearly outlined. Moreover, which police measures are subsequently possible is nowhere listed in an exhaustive way, in contrast to municipal administrative sanctions. Importantly, the classification as sanction or penalty within the meaning of Articles 6 and 7 is not *by definition* excluded for police measures. After all, as mentioned above, the legal classification at the domestic level is not decisive when considering whether a measure involves a sanction or penalty for the purposes of Articles 6 and 7. The real nature of the imposed police measure takes precedence, which always requires an *in concreto* assessment.

Moreover, this does not mean that there is no principle of legality applicable at all to police measures, such as the prohibition of place. The prohibition of place is an *area-based restriction*, interfering with an individual’s fundamental right to freedom of movement in A24P. Therefore, it must be in accordance with the principle of legality resulting from that Article. As already discussed above, the Strasbourg Court interpretes

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<sup>71</sup> E.g. the power to claim vacated buildings; the power to close any establishment in case of a public order disturbance caused by behaviour in this establishment; etc.

<sup>72</sup> As also pointed out by the Belgian Constitutional Court (judgement of 23 April 2015, No.44/2015, at [B.57.7]).

this legality test in the same way as the test resulting from Article 7. However, the intensity of review may differ, depending on, amongst others, the scope of application of the norm in question. As far as the prohibition of place is concerned, the first paragraph of Article 134*sexies* of the NMA clarifies that it can only be applied in case of a disturbance of public order caused by individual or collective behaviours, or in case of repeated infringements of by-laws committed in the same place or on the occasion of similar events that bring along a disturbance of public order or nuisance. Article 134*sexies* thus has a relatively limited scope of application (see also *infra*). As a result, in our opinion, a stricter legality test is applicable.

In what follows, we will analyse the criteria under which preventive public order measures that restrict an individual in his free movement, especially the Belgian prohibition of place, can be considered as in accordance with the principle of legality at the European human rights level. Therefore, we will first discuss the requirement of having a legal basis, which is then followed by an analysis of the substantive or ‘quality of law’ requirements, i.e. the requirements of accessibility and foreseeability. We do not intend to give a general and complete overview of the Strasbourg Court’s case law on the legality principle. As this contribution concentrates on freedom-restricting public order powers, we will focus on case law with regard to the legality principle in view of A24P.

#### **4. COMPATIBILITY OF FREEDOM-RESTRICTING PUBLIC ORDER POWERS WITH THE LEGALITY PRINCIPLE**

##### ***4.1. Requirement of a legal basis***

The principle of legality first requires that the imposed restriction has a legal basis, more specifically a basis in *domestic law*.<sup>73</sup> ‘Law’ must be interpreted in an extensive way,

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<sup>73</sup> Rotaru v Romania [GC] (App. No.28341/95), judgement of 4 May 2000, at [52]; Centro Europa 7 S.r.l. and Di Stefano v Italy [GC] (App. No.38433/09), judgement of 7 June 2012, at [140] and de Tommaso v Italy [GC] (App. No.43395/09), judgement of 23 February 2017, at [106]. See also UN Commission on Human Rights, The

i.e. a substantive, non-formal way.<sup>74</sup> It covers *any* normative act and not only formal or parliamentary law in the strict sense and thus also, for instance, by-laws<sup>75</sup>, implementation decrees<sup>76</sup>, international law<sup>77</sup> and even unwritten law, such as case law<sup>78, 79</sup>. Hence, echoing

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Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights, 28 September 1984, E/CN.4/1985/4, Annex, p.4, at [15].

<sup>74</sup> *Kruslin v France* (1990) 12 E.H.R.R. 547, at [29] and *Huvig v France* (App. No.11105/84), judgement of 24 April 1990, at [28]. See also NURIA A. HIDALGO, *Liberty of Movement Within the Territory of a State (Article 2 of Additional Protocol No. 4 ECHR)*, in J. G. ROCA et al., *Europe of Rights: A Compendium on the European Convention of Human Right* (Koninklijke Brill, 2012), 622.

<sup>75</sup> Council of Europe, Explanatory Report on Protocols Nos 2 to 5 to the Convention for the Protection of Human Rights and Fundamental Freedoms, Doc. H (71) 11, 42.

<sup>76</sup> See, e.g. DE WILDE, *Ooms and Versyp v Belgium* (App. Nos 2832/66, 2835/66 and 2899/66), judgement of 18 June 1971, at [93]. See also J. VELU and R. ERGEC, *Convention européenne des droits de l'homme* (Bruylant, 2014), 391.

<sup>77</sup> See, e.g. *Jersild v Denmark* [GC] (App. No.15890/89), judgement of 23 September 1994, at [27] and HRC, *Sayadi and Vinck v Belgium*, Communication No.1472/2006, view of 29 December 2008, at [10.6].

<sup>78</sup> In both common-law and continental legal systems; see, e.g. *The Sunday Times v the United Kingdom* (No.1) (1979) 2 E.H.R.R. 245, at [47] and *Kruslin v France* (1990) 12 E.H.R.R. 547, at [29], resp.

<sup>79</sup> NURIA A. HIDALGO, *Liberty of Movement Within the Territory of a State (Article 2 of Additional Protocol No. 4 ECHR)*, in J. G. Roca et al., *Europe of Rights: A Compendium on the European Convention of Human Right* (Koninklijke Brill, 2012), p.616. See also B. RAINEY et al., *The European Convention on Human Rights* (OUP, 2014), pp.310-311 and Velu et al., *Convention européenne*, fn.53 above, p.391. With regard to the ICCPR, see O. DELAS, *Article 12*, in Emmanuel Decaux (ed), *Le pacte international relatif aux droits civils et politiques* (Economica, 2011), p.297.

Hidalgo, ‘law’ refers to the set of rules in force at the domestic level, regardless of whether the origin is legislative, administrative or jurisprudential.<sup>80</sup>

A restriction will not be regarded as having a basis in (domestic) law if there is no legal basis provided at all.<sup>81</sup> In general, though, the legal basis requirement does not pose major problems. In most cases, the Strasbourg Court simply holds that the contested measure is based on a provision laid down in domestic law and therefore has a legal basis in domestic law.<sup>82</sup> Importantly, the Strasbourg Court considers the domestic norm *as it is being interpreted and applied by national authorities*. After all, it is primarily for them – notably domestic courts – to interpret and apply national law.<sup>83</sup> In the above-mentioned case of *Landvreugd*, for example, the Strasbourg Court noted that the provisions in the Dutch Municipality Act – upon which the mayor of Amsterdam based the order prohibiting the individual to be in a certain area of the city – were already considered by the domestic courts as constituting a sufficient legal basis for imposing such prohibition orders. The

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<sup>80</sup> NURIA A. HIDALGO, *Liberty of Movement Within the Territory of a State (Article 2 of Additional Protocol No. 4 ECHR)*, in Javier G. Roca et al., *Europe of Rights: A Compendium on the European Convention of Human Right* (Koninklijke Brill, 2012), 616.

<sup>81</sup> See, e.g. *Denizci and others v Cyprus* (App. Nos 25316-25321/94 and 27207/95), judgement of 23 May 2001, at [405]-[406]. Cf. HRC, *Ackla v Togo*, Communication No.505/1992, view of 25 March 1996, at [10].

<sup>82</sup> See, e.g. *Lambert v France* (2000) 30 E.H.R.R. 346, at [23]-[24]; *Labita* [GC] (2008) 46 E.H.R.R. 50, at [194] and *de Tommaso v Italy* [GC] (App. No.43395/09), judgement of 23 February 2017, at [110]. Cf. HRC, *Peltonen v Finland*, Communication No.492/1992, view of 26 July 1994, at [8.4].

<sup>83</sup> *Vogt v Germany* [GC] (1995) 21 E.H.R.R. 205, at [48]; *Sissanis v Romania* (App. No.23468/02), judgement of 2 January 2007, at [75] and *de Tommaso v Italy* [GC] (App. No.43395/09), judgement of 23 February 2017, at [108].

Strasbourg Court subsequently conformed to this interpretation and held that the prohibition order must be considered as having a basis in domestic law.<sup>84</sup>

As far as the Belgian prohibition of place is concerned, the power to impose it is explicitly laid down in Article 134*sexies* of the Belgian NMA, as mentioned above. It can be therefore considered as having a legal basis in domestic law. Importantly, the Belgian Constitutional Court has already clarified the scope of the prohibition of place on some points in the aforementioned judgement of 23 April 2015. The first paragraph of Article 134*sexies* circumscribes the situations in which a prohibition of place can be imposed. These are first, ‘in case of a disturbance of public order caused by individual or collective behaviours’ and second, ‘in case of repeated infringements of by-laws committed in the same place or on the occasion of similar events that bring along a disturbance of public order or nuisance’. The Constitutional Court indicated that repeated infringements of by-laws alone will not be sufficient for justifying the imposition of a prohibition of place. These repeated infringements must also involve a disturbance of public order or cause nuisance.<sup>85</sup>

Additionally, the Constitutional Court has pointed out that the provided duration of one month is to be regarded as a maximum, so that prohibitions of a shorter duration are also possible.<sup>86</sup> It is important to note, though, that this duration is twice renewable, insofar

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<sup>84</sup> Landvreugd v the Netherlands (2003) 36 E.H.R.R. 56, at [56]. Cf. Oliveira v the Netherlands (2003) 37 E.H.R.R. 32, at [49].

<sup>85</sup> Belgian Constitutional Court, 23 April 2015, No.44/2015, at [B.57.5].

<sup>86</sup> Ibid., at [B.57.6].

as the established disturbance or nuisance persists.<sup>87</sup> A prohibition of place may thus well last longer than one month, more specifically three months in total.

National authorities should take into account the above clarifications provided by the Constitutional Court and impose a prohibition of place only when the repeated infringements cause a public order disturbance or nuisance and solely for a period of (maximum) one month and not, for instance, of three months already from the outset. If not, this would be at odds with the Constitutional Court's case law, with as a consequence that the imposed prohibition will not be regarded as 'in accordance with law', contrary to A2P4.<sup>88</sup>

#### ***4.2. 'Quality of law' requirements***

##### ***4.2.1. Accessibility of the legal basis***

The legal basis authorising interferences with an individual's fundamental rights must be *adequately accessible*.<sup>89</sup> This means that the individual should be able to dispose in advance of sufficient indications of the legal rules that are applicable to the case in question.<sup>90</sup> Such access does not only enable the individual to regulate his conduct in

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<sup>87</sup> Art.134sexies, § 1 of the NMA (Belgium); Belgian House of Representatives, Municipal Administrative Sanctions Bill - Explanatory memorandum, 19 March 2013, Doc No.53-2712/001, p.28 and Belgian Constitutional Court, 23 April 2015, No.44/2015, at [B.57.4].

<sup>88</sup> Cf. *Tatishvili v Russia* (2007) 45 E.H.R.R. 52, at [53] - [54].

<sup>89</sup> *The Sunday Times v the United Kingdom* (No.1) (1979) 2 E.H.R.R. 245, at [49]. See also UN Commission on Human Rights, The Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights, 28 September 1984, E/CN.4/1985/4, Annex, 4, at [17].

<sup>90</sup> *The Sunday Times v the United Kingdom* (No.1) (1979) 2 E.H.R.R. 245, at [49] and *Silver and others v the United Kingdom* (1983) 5 E.H.R.R. 347, at [87]. See also Ben Emmerson, Andrew Ashworth and Alison Macdonald, *Human Rights and Criminal Justice* (Sweet & Maxwell, 2012), 115.

accordance with the law, which is important in view of the foreseeability requirement (*infra*). It also allows him to verify the use made of the powers resulting from the norm at issue, thus constituting an important safeguard against arbitrary state interferences.<sup>91</sup>

The accessibility principle mainly requires that the relevant norm is published in advance, although a specific form or method of publicity is not required and the European Convention does not include any details as to the extent of publicity that should be given to the norm at stake.<sup>92</sup> Moreover, the extent to which the relevant norm should be accessible may well vary, depending on the content of the norm, its scope of application and the persons to whom it is applicable, as already mentioned before. Nonetheless, in general, the accessibility requirement will not pose serious problems. The Strasbourg Court usually considers a norm already sufficiently accessible if it is duly published<sup>93</sup>, for example as part of legislation that has appeared in an official publication such as the official journal of the state concerned or another well spread bulletin<sup>94</sup>, or, in case of domestic case law, if it is sufficiently consultable, e.g. via domestic law reports.<sup>95</sup>

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<sup>91</sup> See the almost identical Joint dissenting opinion of Judges Gaukur, Jörundsson, Türmen and Maruste in *Landvreugd v the Netherlands* (2003) 36 E.H.R.R. 56 and *Oliveira v the Netherlands* (2003) 37 E.H.R.R. 32.

<sup>92</sup> *Špaček s.r.o. v Czech Republic* (1999) 30 E.H.R.R. 1010, at [57].

<sup>93</sup> *Vgt Verein gegen Tierfabriken v Switzerland* (2002) 34 E.H.R.R. 159, at [54].

<sup>94</sup> See, e.g. *Gillow v the United Kingdom* (1989) 11 E.H.R.R. 335, at [50]; *Špaček s.r.o. v Czech Republic* (1999) 30 E.H.R.R. 1010, at [57] - [59] and *Yoslun v Turkey* (App. No.2336/05), judgement of 10 February 2015. See also NURIA A. HIDALGO, *Liberty of Movement Within the Territory of a State (Article 2 of Additional Protocol No. 4 ECHR)*, in Javier G. Roca et al., *Europe of Rights: A Compendium on the European Convention of Human Right* (Koninklijke Brill, 2012), 617.

<sup>95</sup> See, e.g. *Landvreugd v the Netherlands* (2003) 36 E.H.R.R. 56, at [58] and *Oliveira v the Netherlands* (2003) 37 E.H.R.R. 32, at [51]. Although the accessibility requirement does generally not involve any problems, it should be noted that it has recently become an issue in Poland, as the judgements of the Polish Constitutional Tribunal are no longer (automatically) published in the Official Journal since March 2016, in view of some recent serious



As to the Belgian prohibition of place, it is based on a provision laid down in the Belgian NMA, which has been published in advance in the Belgian Official Journal ('Moniteur belge' or 'Belgisch Staatsblad'). Additionally, the scope of this provision is further described in the domestic case law, more specifically in the above-mentioned judgement of the Belgian Constitutional Court of 23 April 2015, which has appeared in (published) domestic legal journals. Thus, it can be argued that an individual disposes of sufficient information on the rules that are applicable when a prohibition of place is imposed. Accordingly, the prohibition of place can be considered as based on a legal provision that is sufficiently accessible.

#### **4.2.2. Foreseeability of the legal basis**

The main element of the legality principle in the Strasbourg Court's case law is the element of *foreseeability*.<sup>96</sup> According to the Strasbourg Court's established case law, a norm cannot be regarded as 'law' unless it is formulated in such a sufficiently precise way that it enables the individual concerned to *reasonably foresee* – if necessary with

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judicial reforms in Poland. According to the European Commission, this creates uncertainty as regards the legal effects of the Polish Constitutional Tribunal's judgements, since the publication of a judgment is a prerequisite for its taking effect in Poland. This in turn undermines the effectiveness of constitutional review and raises serious concerns in respect of the rule of law (see Commission Recommendation (EU) 2016/1374 of 27 July 2016 regarding the rule of law in Poland, OJ L 217, 12.8.2016, pp. 53-68; Commission Recommendation (EU) 2017/146 of 21 December 2016 regarding the rule of law in Poland complementary to Recommendation (EU) 2016/1374; OJ L 22, 27.1.2017, pp. 65-81; Commission Recommendation (EU) 2017/1520 of 26 July 2017 regarding the rule of law in Poland complementary to Recommendations (EU) 2016/1374 and (EU) 2017/146; OJ L 228, 2.9.2017, pp. 19-32 and Commission Recommendation (EU) C(2017) 9050 final of 20 December 2017 regarding the rule of law in Poland complementary to Recommendations (EU) 2016/1374, (EU) 2017/146 and (EU) 2017/1520 (available via <https://ec.europa.eu/>)).

<sup>96</sup> C. PERISTERIDOU, *The principle of legality in European criminal law* (Intersentia, 2015), p.95.

appropriate (legal) advice<sup>97</sup> – the consequences that may result from a given action, so that he can subsequently regulate his conduct in accordance with the law.<sup>98</sup> Hence, a legal basis providing for interferences with an individual’s fundamental rights, such as the right to freedom of movement, should be formulated in such a way that it allows the individual to reasonably anticipate the effects of a specific behaviour, in this way protecting him from arbitrary state interference.<sup>99</sup> In the words used by the HRC, a law authorising restrictions on the right to freedom of movement should be sufficiently precise in its wordings, so that it constitutes an exception to the norm, as the relation between right and restriction, i.e. between norm and exception, must not be reversed.<sup>100</sup>

A norm authorising interferences with an individual’s fundamental rights should thus be constructed in sufficiently clear wordings. Nonetheless, the Strasbourg Court does not require *absolute* certainty and a level of uncertainty is accepted.<sup>101</sup> After all, according to the Court, absolute certainty is not only unattainable, but also unnecessary. Absolute or

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<sup>97</sup> The concept of ‘appropriate advice’ particularly refers to the possibility of taking legal advice (see, e.g. *Chauvy and Others v France* (App. No.64915/01), decision of 23 September 2003 and *Jorgic v Germany* (2008) 47 E.H.R.R. 6, at [113]).

<sup>98</sup> See, e.g. *The Sunday Times v the United Kingdom* (No.1) (1979) 2 E.H.R.R. 245, at [49]; *Landvreugd v the Netherlands* (2003) 36 E.H.R.R. 56, at [59]; *Sissanis v Romania* (App. No.23468/02), judgement of 2 January 2007, at [66] and *de Tommaso v Italy* [GC] (App. No.43395/09), judgement of 23 February 2017, at [107].

<sup>99</sup> *de Tommaso v Italy* [GC] (App. No.43395/09), judgement of 23 February 2017, at [109]. See also Nuria A. Hidalgo, “Liberty of Movement Within the Territory of a State (Article 2 of Additional Protocol No. 4 ECHR)” in Javier G. Roca et al., *Europe of Rights: A Compendium on the European Convention of Human Right* (Koninklijke Brill, 2012), 617.

<sup>100</sup> HRC, CCPR General Comment No.27: Article 12 (Freedom of Movement), 2 November 1999, CCPR/C/21/Rev.1/Add.9, at [13]. See also Olivier Delas, “Article 12” in Emmanuel Decaux (ed), *Le pacte international relatif aux droits civils et politiques* (Economica, 2011), 297.

<sup>101</sup> C. PERISTERIDOU, *The principle of legality in European criminal law* (Intersentia, 2015), p.97.

complete certainty may bring along unnecessary and excessive rigidity, whilst the norm must be able to keep pace with changing circumstances.<sup>102</sup> In addition, however clearly drafted a legal provision may be, there will always be an inevitable element of judicial interpretation. According to the Court, it is precisely the role of judicial decisions to dissolve remaining interpretational doubts in this regard.<sup>103</sup> As a result, the use of vague notions in domestic norms, of which the interpretation and application depend on practice, is sometimes inevitable.<sup>104</sup>

Yet, a certain degree of certainty is still required and there are limits to the extent of vagueness accepted. After all, according to the HRC, provisions that are vaguely defined and open to numerous interpretations by national authorities are susceptible of abuse and may therefore be considered as imposing unreasonable restrictions on an individual.<sup>105</sup> However, the Convention does not give any details about how precise the norm at issue should be. Moreover, it appears from the Strasbourg Court's case law that the extent to which the norm at stake should be precise may well vary depending on the content of the

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<sup>102</sup> *The Sunday Times v the United Kingdom (No.1)* (1979) 2 E.H.R.R. 245, at [49]; *Rekvényi v Hungary* [GC] (2000) 30 E.H.R.R. 519, at [34]; *Centro Europa 7 S.r.l. and Di Stefano v Italy* [GC] (App. No.38433/09), judgement of 7 June 2012, at [141] and *de Tommaso v Italy* [GC] (App. No.43395/09), judgement of 23 February 2017, at [107].

<sup>103</sup> *Cantoni v France* (App. No.17862/91), judgement of 11 November 1996, at [32]; *Rekvényi v Hungary* [GC] (2000) 30 E.H.R.R. 519, at [34]; *Kafkaris v Cyprus* [GC] (2008) 49 E.H.R.R. 35, at [141] and *Kudrevicius and others v Lithuania* [GC] (2016) 62 E.H.R.R. 34, at [110].

<sup>104</sup> See *The Sunday Times v the United Kingdom (No.1)* (1979) 2 E.H.R.R. 245, at [49]; *Rekvényi v Hungary* [GC] (2000) 30 E.H.R.R. 519, at [34]; *Centro Europa 7 S.r.l. and Di Stefano v Italy* [GC] (App. No.38433/09), judgement of 7 June 2012, at [141] and *de Tommaso v Italy* [GC] (App. No.43395/09), judgement of 23 February 2017, at [107].

<sup>105</sup> HRC, Concluding observations of the Human Rights Committee. Belarus, 19 November 1997, CCPR/C/79/Add.86, at [12] and Olivier Delas, "Article 12" in Emmanuel Decaux (ed), *Le pacte international relatif aux droits civils et politiques* (Economica, 2011), 297.

norm, its scope of application and the persons to whom it is addressed, as already mentioned before.

The foreseeability requirement is of particular importance with regard to a norm conferring discretionary powers to national authorities, as is the case for public order enforcement powers, such as the Belgian prohibition of place. According to the Strasbourg Court's case law, such a norm is not in itself inconsistent with the foreseeability requirement, provided that the scope of the discretion and the manner of its exercise are indicated with sufficient clarity, so that an individual is given adequate protection against arbitrary state interference.<sup>106</sup> Similarly, according to the HRC, legislation that authorises interferences with the right to freedom of movement may not confer unconstrained discretion on those competent for implementing the norm at issue.<sup>107</sup> The degree of precision required will depend upon the particular subject matter.<sup>108</sup>

As far as freedom-restricting public order powers are concerned, such as area-based restrictions, the Strasbourg Court has taken into account a number of criteria in order to assess whether and to what extent these powers can be regarded as sufficiently foreseeable under the Convention. The starting point is the formulation of the norm at issue. However, other criteria may also be deemed relevant when assessing the foreseeability of

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<sup>106</sup> *Malone v the United Kingdom* (1984) 7 E.H.R.R. 14, at [68]; *Al-Nashif v Bulgaria* (App. 50963/99), judgement of 20 June 2002, at [119]; *Sissanis v Romania* (App. No.23468/02), judgement of 2 January 2007, at [66]; *de Tommaso v Italy* [GC] (App. No.43395/09), judgement of 23 February 2017, at [109].

<sup>107</sup> HRC, CCPR General Comment No.27: Article 12 (Freedom of Movement), 2 November 1999, CCPR/C/21/Rev.1/Add.9, at [13]. However, the scope of the discretion and the manner of its exercise do not necessarily have to be incorporated in the norm itself, but may also be inferred from, for instance, the preparatory work to the norm (*Olsson v Sweden* (1988) 11 E.H.R.R. 259, at [62]) or domestic case law (*Vogt v Germany* [GC] (1995) 21 E.H.R.R. 205, at [48]).

<sup>108</sup> *Malone v the United Kingdom* (1984) 7 E.H.R.R. 14, at [68]; *Kruslin v France* (1990) 12 E.H.R.R. 547, at [30]; *Herczegfalvy v Austria* (1992) 15 E.H.R.R. 437, at [89].

the norm, in addition to its formulation, such as the existence of relevant domestic case law as well as practice of the competent national authority in applying the norm and whether a warning is issued in advance.<sup>109</sup> Hence, the precise scope of a norm does not necessarily have to be incorporated in the prevailing law on this issue and may also be inferred from relevant domestic *case law*, *practice* of the competent national authority or from a *prior warning*.

The existence of *relevant domestic case law* will be of key importance with regard to norms that are couched in rather general and broad wordings. After all, the Strasbourg Court stated that it is precisely the role of judicial decisions to dissolve remaining interpretational doubts, as mentioned above. As a result, even if the norm at issue is formulated in rather vague terms, it may well constitute a sufficient legal basis for the restriction imposed when its scope is further clarified in domestic case law, to the extent that it can be considered as sufficiently established.<sup>110</sup> As to the Belgian prohibition of place, the Constitutional Court has clarified its scope on some points in its judgement of 23

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<sup>109</sup> Landvreugd v the Netherlands (2003) 36 E.H.R.R. 56; Oliveira v the Netherlands (2003) 37 E.H.R.R. 32; NURIA A. HIDALGO, *Liberty of Movement Within the Territory of a State (Article 2 of Additional Protocol No. 4 ECHR)* in Javier G. Roca et al., *Europe of Rights: A Compendium on the European Convention of Human Right* (Koninklijke Brill, 2012), p.618. It should be noted that, in addition to these criteria, it is essential in view of the rule of law that also certain procedural safeguards are provided in domestic law, in order to give an individual adequate protection against arbitrary state interferences, especially when wide discretionary powers are involved. There must be in particular a provision for judicial control of the exercise of the powers in question, so that an individual can defend himself against any abuse of it (see *Malone v the United Kingdom* (1984) 7 E.H.R.R. 14, at [67]-[68]; *Silver and others v the United Kingdom* (1983) 5 E.H.R.R. 347, at [90]; *Gillow v the United Kingdom* (1989) 11 E.H.R.R. 335, at [51] and *Sissanis v Romania* (App. No.23468/02), judgement of 2 January 2007, at [70]. Cf. UN Commission on Human Rights, *The Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights*, 28 September 1984, E/CN.4/1985/4, Annex, p.4, at [18]).

<sup>110</sup> *Steel and others v the United Kingdom* (1999) 28 E.H.R.R. 603, at [55]; *Laumont v France* (App. No.43626/98), judgement of 8 November 2001, at [51] and P. POPELIER, *Behoorlijke wetgeving in de rechtspraak van het Europees Hof voor de Rechten van de Mens* (2001), (2002) 4 Tijdschrift voor Wetgeving 131, 133.

April 2015, as we have discussed above, but these clarifications were rather limited. In addition, up until now, only two prohibitions of place were brought before the Belgian Council of State<sup>111</sup>, which is the competent authority to appeal against an imposed prohibition.<sup>112</sup> In both cases, however, the Council of State did not assess the conditions under which the prohibitions in question were imposed, as both appeals were already rejected for reasons of inadmissibility. Consequently, the domestic case law will offer only little to no help to further clarify its scope.

The same applies to possible *relevant practice or experience* from the competent national authority. There will probably be only little relevant practice existing yet within municipalities as regards the prohibition of place, as it is a relative newcomer. It is only introduced in 2013 and entered into force in 2014, with clarifications given on its scope by the Constitutional Court only in 2015. As a result, the practice of the competent (local) authorities, too, will probably offer only little guidance as to the specific forms of behaviour that may provoke the imposition of a prohibition of place.<sup>113</sup>

*Giving prior notice* may well play an important role in further clarifying the scope of the prohibition of place. Before analysing this additional criterion more in detail

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<sup>111</sup> Judgements of 22 August 2014, No.228.217 and 25 March 2015, No.320.655.

<sup>112</sup> In addition to the possibility of suspension and/or annulment by the supervisory authority in the context of general administrative supervision.

<sup>113</sup> Although this may vary from municipality to municipality. In Gent, for instance, there will rather be no relevant practice yet, as the city has indicated that they will not use the power of a mayor to impose a prohibition of place in practice (see Beleidsnota GAS-beleid in Gent, 13 April 2014, available at [www.stad.gent.be](http://www.stad.gent.be), p.13). Other cities, such as Kortrijk and Dendermonde, have already imposed a prohibition of place several times (see e.g., K. VANHEE, *Stad legt knokkende bendeleden plaatsverbod op*, 14 September 2016, available at [www.nieuwsblad.be](http://www.nieuwsblad.be) and N. DOOMS, *Plaatsverbod legt stadsbende zwijgen op*, 17 maart 2017, available at [www.hln.be](http://www.hln.be) [both accessed 30 June 2017]), so there may well exist some relevant practice in these cities. However, an analysis of this practice requires an empirical study, which falls outside the scope of this contribution.

(4.2.2.2), we first discuss the *formulation of the norm at issue*, which will be a vital criterion in assessing the legality of Article 134*sexies* of the Belgian NMA, as we will see further down (4.2.2.1).

#### **4.2.2.1. Formulation of the norm at issue**

The domestic norm enabling the domestic competent authority to impose a freedom-restricting measure should be formulated in a sufficiently precise way. Some guidance as to the criteria that should be taken into account in order to assess whether the norm is sufficiently precise is given in the recent Grand Chamber judgement *de Tommaso*.<sup>114</sup> The applicant was deemed to present a danger to society and was therefore restrained in his free movement. He was subjected to several preventive measures, amongst which the obligation to reside in a specific district combined with an overnight home curfew. As to the foreseeability requirement, the Grand Chamber held that the applicable law should not only indicate in a sufficiently clear way (the content of) the measure that can be imposed on an individual (i), but also what kind of behaviour may result into the imposition of such a measure and thus the conditions under which it can be imposed (ii).<sup>115</sup>

##### **(i) Content of the measure**

The applicable law should indicate in a sufficiently clear way the content of the measure that may be imposed on an individual.<sup>116</sup> It should not allow for the imposition of

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<sup>114</sup> *de Tommaso v Italy* [GC] (App. No.43395/09), judgement of 23 February 2017.

<sup>115</sup> *Ibid.*, at [113]. See also the almost identical Joint dissenting opinion of Judges Gaukur, Jörundsson, Türmen and Maruste in *Landvreugd v the Netherlands* (2003) 36 E.H.R.R. 56 and *Oliveira v the Netherlands* (2003) 37 E.H.R.R. 32.

<sup>116</sup> *de Tommaso v Italy* [GC] (App. No.43395/09), judgement of 23 February 2017, at [119]-[122]. Cf. Joint dissenting opinion of Judges Gaukur, Jörundsson, Türmen and Maruste in *Landvreugd v the Netherlands* (2003) 36 E.H.R.R. 56 and *Oliveira v the Netherlands* (2003) 37 E.H.R.R. 32.

measures involving absolute prohibitions, without any temporal or spatial limits, as this would leave the measure entirely to the discretion of the competent authority.<sup>117</sup>

As to the Belgian prohibition of place, Article 134*sexies* of the NMA clearly defines the content of the measure, namely a ‘temporary prohibition of place’, being ‘the prohibition to enter one or more clearly defined perimeters that are accessible for the public, located within a municipality, without covering the whole of its territory’.<sup>118</sup> Article 134*sexies* thus enables a mayor to impose a prohibition of place for only one or more well defined perimeters and prohibits him to impose one that covers the whole of the territory of the municipality concerned. Moreover, the imposed prohibition of place may not include the individual’s place of residence, his work place or the place where his school or training institution is.<sup>119</sup> Additionally, it may only last for maximum one month and can be renewed (twice) solely in case of persistent public order disturbance or nuisance, as already mentioned before. Hence, it is not a vague or absolute prohibition, but a prohibition that is clearly defined and limited in time and space, so that Article 134*sexies* can be considered as a norm indicating with sufficient clarity its content, in line with the Strasbourg Court’s case law.

#### **(ii) Types of behaviour that may result in the imposition of the measure**

The applicable law should also set forth with sufficient precision the conditions under which the measure may be imposed.<sup>120</sup> In the recent case of *de Tommaso*, the Grand

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<sup>117</sup> *de Tommaso v Italy* [GC] (App. No.43395/09), judgement of 23 February 2017, at [122]-[123].

<sup>118</sup> Art.134*sexies*, § 2 of the NMA (Belgium).

<sup>119</sup> *Ibid.*

<sup>120</sup> *Sissanis v Romania* (App. No.23468/02), judgement of 2 January 2007, at [67] and *Gochev v Bulgaria* (App. No. 34383/03), judgement of 26 November 2009, at [46]. See also HRC, CCPR General Comment No.27: Article 12 (Freedom of Movement), 2 November 1999, CCPR/C/21/Rev.1/Add.9, at [12].



Chamber indicated that it should include sufficiently detailed provisions on the *specific types of behaviour* that must be taken into account, in order to assess – in this case – the danger to society posed by the individual, which may in turn trigger the imposition of the measure.<sup>121</sup>

As far as the Belgian prohibition of place is concerned, it is a preventive police measure aiming at counteracting ‘disturbances of public order’.<sup>122</sup> The first paragraph of Article 134*sexies* of the NMA concretises the situations in which public order is deemed to be disturbed and thus the conditions that must be met, so that a prohibition of place can be imposed. This is (i) when individual or collective behaviours disturb public order, or (ii) in case of repeated infringements of by-laws committed in the same place or on the occasion of similar events *and* that bring along a public order disturbance or nuisance.<sup>123</sup>

One can wonder whether all the provisions of Article 134*sexies* of the NMA are sufficiently precise. As can be derived from above, a prohibition of place is not only possible in case of a ‘public order disturbance’, but also when public ‘nuisance’ is involved, so that the question arises what has to be understood by these two concepts. In what follows, we will first give a brief overview of the notions of public order and public nuisance in general, to then analyse the content of these notions in relation to Article 134*sexies* of the NMA. On this basis, we will subsequently give some recommendations in attempts to further clarify the scope of this Article.

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<sup>121</sup> de Tommaso v Italy [GC] (App. No.43395/09), judgement of 23 February 2017, at [117].

<sup>122</sup> Belgian House of Representatives, Municipal Administrative Sanctions Bill - Explanatory memorandum, 19 March 2013, Doc No.53-2712/001, p.28.

<sup>123</sup> It should be noted that a mayor will not only be able to impose a prohibition of place when a public order disturbance or nuisance has actually occurred, but also – being a preventive, police measure – in case of an imminent disturbance of public order or nuisance (L. TODTS, *Het gemeentelijk plaatsverbod: een eerste verkenning en toetsing aan het fundamentele recht op persoonlijke bewegingsvrijheid*, 8 Tijdschrift voor Bestuurswetenschappen en Publiek Recht 2015, 432, 441).

*The notions ‘public order’ and ‘public nuisance’ in general*

As we have discussed above, the notion of public order is traditionally interpreted as encompassing public health, public safety and public tranquility, although municipalities are only competent for maintaining *material* public order and not also moral public order. As far as the notion of public nuisance is concerned, the Belgian Council of State has clarified that it should be interpreted as being the lower limit in which (material) public order can be disturbed, thus being a part of the concept of (material) public order. Despite these clarifications, the notions of public order disturbance and public nuisance remain vague concepts, because they are evolving concepts that can vary according to time and place, as mentioned before. Moreover, public nuisance is also an inherently *subjective* concept. What can be considered as ‘nuisance’ largely depends on personal experiences of individuals as well as the tolerance level in a certain society, so that the concept is inherently subjective in nature.<sup>124</sup> This subjective nature in turn implies that public nuisance remains a rather difficult concept to define.<sup>125</sup>

The vague nature of public nuisance has already been pointed out by the Legislation Section of the Belgian Council of State in its prior advisory opinion on the initial Municipal Administrative Sanctions Bill of 1999<sup>126</sup>, which introduces the concept of public nuisance in Belgian administrative law, as mentioned above. Nonetheless, the notion was retained in the final Act of 1999, as well as in the new Municipal Administrative Sanctions Act of 2013. The latter replaces the 1999 Act, but leaves the concept of public

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<sup>124</sup> F. SCHRAM and J. LIEVENS, *Gemeentelijke Administratieve Sancties. Een antwoord op overlast?* (Vanden Broele, 2015), 28-29.

<sup>125</sup> *Ibid.*, p.30.

<sup>126</sup> Belgian Council of State, Advisory opinion on the Municipal Administrative Sanctions Bill 1999, 3 February 1999, Doc No.49-2031/1, pp.19-20. See also A. DI RONCO et al., *Regulation of incivilities in the UK, Italy and Belgium: courts as potential safeguards against legislative vagueness and excessive use of penalising powers?*, in (2014) 42 Int. J. Law Crime Justice 340, 357-358.

nuisance as introduced by the 1999 Act untouched. The 2013 Act has been brought before the Belgian Constitutional Court. The applicants *inter alia* claimed that the vagueness of the notion of public nuisance is not compatible with the principle of legality in criminal matters. However, the Constitutional Court did not address this claim and did not assess the compatibility of this concept with the (criminal) principle of legality, as it is only possible with regard to a *specific legal provision* in a by-law to consider whether the wordings used in it are so vague that it must be regarded as being at odds with the legality principle.<sup>127</sup>

The term public nuisance does not only appear in Belgian administrative law, but is also used in (Belgian) criminal law. This concept was introduced in Belgian criminal law for the first time in 2003 via the legislation on drugs. Article 11 of this legislation enabled the police to merely register anonymously a (major) person instead of informing the public prosecutor, when possession was established by that person of a quantity of cannabis for personal use that did not involve, amongst others, public nuisance. In this way, prosecution became *de facto* impossible.<sup>128</sup> The Article further clarified that the notion of public nuisance is to be understood in the same way as the one referred to in the New Municipality Act (NMA), as introduced by the Municipal Administrative Sanctions Act (MASA).<sup>129</sup> However, neither the NMA, nor the MASA provides a definition of this concept, as mentioned above. The relevant Article also gave some further indication as to the situations

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<sup>127</sup> Belgian Constitutional Court, 23 April 2015, No.44/2014, at [B.20.2].

<sup>128</sup> See (former) Art.11 of the Law of 24 February 1921 on the traffic in poisonous, soporific, narcotic, psychotropic, disinfecting or antiseptic substances and substances that may be used for the illegal manufacture of narcotic and psychotropic substances (Belgium). This Article was introduced via the Law of 3 May 2003 amending the Law of 24 February 1921 on the traffic in poisonous, soporific, narcotic, psychotropic, disinfecting or antiseptic substances. See also A. DE NAUW, *De gewijzigde drugwet: hopeloos op zoek naar rechtszekerheid*, (2003-04) 30 *Rechtskundig Weekblad* 1161, 1164.

<sup>129</sup> As well as Art.3.5.g of the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances 1988. However, the Belgian Constitutional Court has rightly pointed out that ‘public nuisance’ is nowhere referred to in this Convention (Belgian Const.Court, 20 October 2004, No.158/2004, at [B.84]).

in which public nuisance is deemed to occur, more specifically in case of possession of cannabis in certain buildings, such as ‘the premises of a social service’, or in their immediate vicinity.

The Belgian legislation on drugs was questioned before the Belgian Constitutional Court, inter alia because of the use of vague and imprecise concepts, such as ‘public nuisance’, which was not compatible with the principle of legality in criminal matters according to the applicants. The Court followed the applicants’ arguments. It considered that the concept was nowhere legally defined and that the situations mentioned in the relevant Article in which public nuisance was deemed to occur were difficult to demarcate or too broadly formulated.<sup>130</sup> The Court therefore held that the concept of public nuisance, owing to its ambiguous nature, did not meet the requirements of the (criminal) principle of legality.<sup>131</sup>

The above indicates that the notion of public nuisance may well be problematic in view of the principle of legality, because of its vague nature. However, it is important to note that the above-mentioned cases concern the compatibility of the notion with the (criminal) principle of legality applied to administrative sanctions or penalties. The question arises whether and to what extent this notion is compatible with the legality principle in matters *not* involving administrative sanctions or penalties, in particular as regards the system of the Belgian prohibition of place, which also refers to this notion. The recent case of *de Tommaso* indicates that the applicable law should sufficiently make clear

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<sup>130</sup> It inter alia held that it is difficult to see what is meant by ‘the premises of a social service’, or ‘immediate vicinity’.

<sup>131</sup> Belgian Const.Court, 20 October 2004, No.158/2004, at [B.8.3] - [B.8.6]. See also A. DE NAUW, *De gewijzigde drugwet: hopeloos op zoek naar rechtszekerheid*, (2003-04) 30 Rechtskundig Weekblad 1161, 1164 and F. DHONDT and F. VANDER LAENEN, *De vernietiging van artikel 16 van de Wet van 3 mei 2003 tot wijziging van de Drugwet van 24 februari 1921: Kroniek van een aangekondigde vernietiging* [2005] Tijdschrift voor Strafrecht 36, 38-39.

which kind of conduct may trigger the imposition of the measure in question. One can wonder whether this is the case for Article 134*sexies* of the Belgian NMA.

***The notions ‘public order’ and ‘public nuisance’ for the purposes of Article 134sexies of the NMA***

Article 134*sexies* of the NMA distinguishes between two situations in which a prohibition of place can be imposed. These are, as already mentioned before, in case of a public order disturbance, or in case of repeated infringements of local regulations, insofar as they disturb public order or cause nuisance. In other words, a prohibition of place can be imposed when a *single* disturbance of (material) public order has occurred, or when multiple, *repeated* actions have been committed, constituting infringements of local regulations, to the extent that they subsequently cause a disturbance of (material) public order or nuisance.

It is essential to point out that ‘nuisance’ is only referred to in case of repeated infringements of by-laws. This appears to indicate that nuisance will only be sufficient to give rise to a prohibition of place if it is caused by actions that constitute an infringement of a local regulation *and* insofar as there are multiple, repeated infringements of this regulation. Accordingly, actions that cause nuisance, but that do not interfere with a by-law, or that only involve a one-off infringement of such a by-law, seem to be excluded from the scope of Article 134*sexies*.

Hence, minor disturbances, such as actions merely causing nuisance without interfering with a by-law, or only comprising a one-off infringement of such a by-law, appear to fall outside the scope of Article 134*sexies*. This is also apparent from the initial bill on the prohibition of place, which only enabled the imposition of it in case of a ‘public order disturbance’ or in ‘situations of severe nuisance’ in certain localities.<sup>132</sup> Examples

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<sup>132</sup> Belgian Senate, Bill amending Art.119bis, § 2 of the New Municipality Act with regard to penalties and administrative sanctions, 25 March 2011, Doc No.5-900/1, p.4.

given are deliberately damaging or destroying someone else's property, repeatedly insulting persons in public places, deliberately damaging plants in public parks, installing caravans at places not provided for this purpose, etc.<sup>133</sup>

However – and despite the fact that some indication on the scope of Article 134*sexies* of the NMA can be inferred from reading it together with the initial bill on the prohibition of place – the way in which Article 134*sexies* has been drafted still enables local authorities to apply it in a wide range of situations, thus conferring wide discretionary powers to them. After all, Article 134*sexies* does not give any further indication as to the *specific types of behaviour* that must be taken into consideration, in order to assess whether the individual has disturbed (material) public order or has caused (severe) nuisance. It more specifically does not clarify the forms of behaviour that are deemed to be serious enough to amount to a disturbance of (material) public order. Furthermore, it does not indicate the provisions of local regulations whose (repeated) infringements are considered to disturb public order or cause nuisance, nor does it define the circumstances in which these infringements are considered to be ‘repeated’.

Accordingly, in my opinion, this makes it very difficult for an individual to foresee what particular forms of behaviour are covered by Article 134*sexies* of the NMA and thus what action may trigger the imposition of a prohibition of place. This might be problematic in view of the legality requirement resulting from A24P. Nevertheless, the scope of the norm at issue can be fairly easily clarified<sup>134</sup>, as we will see below.

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<sup>133</sup> Ibid.

<sup>134</sup> See also D. MOECKLI, *Exclusion from Public Space. A Comparative Constitutional Analysis* (Cambridge, 2016), pp.169-171.

*Clarifying the scope of Article 134sexies of the NMA*

One way of clarifying the scope of a norm is by indicating the *effects* that a given action should entail, so that the measure can be imposed. This is, for instance, the case in the United Kingdom with regard to the aforementioned dispersal powers, enabling constables in uniform to impose a ‘direction to leave’ on a person, who is subsequently required to leave a certain locality and not to return to it.<sup>135</sup> A direction to leave can already be imposed when an individual has engaged in, or is likely to engage in ‘anti-social behaviour’ in a certain public area. What must be understood by ‘anti-social behaviour’ is clarified in the Act itself, not by defining this behaviour, but by describing the consequences of it. It involves behaviour that contributes to, or is likely to contribute to ‘members of the public being harassed, alarmed or distressed’ [emphasis added].<sup>136</sup>

According to Moeckli, such norms circumscribing the consequences of the behaviour, rather than defining the behaviour itself, appear to have a narrower scope of application and therefore look as if they are more precise than norms referring to vague concepts<sup>137</sup>, such as Article 134sexies of the Belgian NMA referring to ‘public order’ and ‘nuisance’. They nevertheless lack specificity.<sup>138</sup> Moreover, the scope of application of such norms is inevitably subjective in nature. Whether a person can be considered as being harassed, alarmed or distressed by someone else’s behaviour mainly depends on the

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<sup>135</sup> See Part 3 of the Anti-social Behaviour, Crime and Policing Act (ACPA) 2014.

<sup>136</sup> s.35(2)(a) of the ACPA 2014. This definition is basically taken over from the previous Crime and Disorder Act 1998 and the Anti-social Behaviour Act 2003.

<sup>137</sup> D. MOECKLI, *Exclusion from Public Space. A Comparative Constitutional Analysis* (Cambridge, 2016), p.175.

<sup>138</sup> As indicated by the Home Office itself; see Home Office, “Defining and measuring anti-social behaviour”, 2004, available at [www.gov.uk](http://www.gov.uk), p.3 [accessed 30 June 2017].

sensibility and perceptions of that person.<sup>139</sup> Given this subjective nature of the norm, it may be very difficult for an individual to foresee whether his behaviour will cause someone else feeling harassed, alarmed or distressed.<sup>140</sup>

The subjective nature of these dispersal powers has already been pointed out in the Court of Appeal decision *Singh*, concerning a dispersal order based on the Anti-Social Behaviour Act 2003 imposed on a group of Sikh community members who were protesting against the staging of a play that they found grossly offensive to their religion.<sup>141</sup> As to the content of ‘anti-social behaviour’ used in section 30 of the 2003 Act – a notion that is largely taken over in section 35 of the 2014 Act – Lady Justice Hallett indicated that the perceptions of some people may not be sufficient, as ‘[o]ne or two particularly sensitive members of the public may be alarmed or distressed by conduct that would not or should not offend others’.<sup>142</sup> She added that the use of dispersal powers must be ‘properly justified on an objective basis’.<sup>143</sup> However, no further indications were given as to what this objective basis should be.<sup>144</sup>

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<sup>139</sup> A. CRAWFORD, *Dispersal Powers and the Symbolic Role of Anti-Social Behaviour Legislation*, (2008) 71(5) M.L.R. 753, 758 and Daniel Moeckli, *Exclusion from Public Space. A Comparative Constitutional Analysis* (Cambridge, 2016), p.175.

<sup>140</sup> See also D. MOECKLI, *Exclusion from Public Space. A Comparative Constitutional Analysis* (Cambridge, 2016), pp.175-176.

<sup>141</sup> R (Singh) v Chief Constable of the West Midlands [2006] EWCA Civ 1118.

<sup>142</sup> *Ibid.*, at [89]. See also A. CRAWFORD, *Dispersal Powers and the Symbolic Role of Anti-Social Behaviour Legislation* (2008) 71(5) M.L.R. 753, 769.

<sup>143</sup> R (Singh) v Chief Constable of the West Midlands [2006] EWCA Civ 1118, at [90].

<sup>144</sup> See also. CRAWFORD, *Dispersal Powers and the Symbolic Role of Anti-Social Behaviour Legislation* (2008) 71(5) M.L.R. 753, 769.



In search of other (objective) ways to clarify the scope of a norm, some inspiration can be found in the Netherlands. Today, most of the imposed Dutch prohibition orders are not based on the aforementioned competence of a mayor under the Dutch Municipality Act, i.e. the competence to immediately intervene whenever necessary to maintain public order, but are based on a local regulation. According to Dutch case law, a local regulation is preferred, because it is established by a democratically legitimised legislator (i.e. the city council). Moreover, local regulations can be considered as better known to citizens than *ad hoc* decisions of a mayor based on his very broad competence to immediately intervene ‘whenever necessary to maintain public order’.<sup>145</sup>

In this case, a prohibition order is imposed because of an *infringement* of a certain legal provision. The provisions whose infringement may incite the use of a prohibition order are mostly listed in the local regulation itself. These are, for instance, street prostitution, drug trafficking on the street, fighting, or abuse of alcohol on a public road. In addition, also certain crimes, provided in for instance the Dutch Criminal Code or the Dutch Weapons and Munition Act, may give rise to the imposition of a prohibition order.<sup>146</sup> Hence, in this case, the scope of the norm authorising the imposition of a prohibition order (the by-law), is further defined by clearly indicating the *specific types of behaviour* that may trigger the use of such an order, more specifically in the norm (the by-law) itself.

This way of clarifying the scope of the applicable norm can be approved, not only in terms of democratic legitimacy and better knowability to citizens, but also in view of the foreseeability requirement resulting from the Strasbourg court’s case law. Prohibition orders based on such by-laws can be regarded as being defined in a sufficiently clear and

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<sup>145</sup> Dutch Supreme Court, 11 March 2008, ECLI:NL:HR:2008:BB4096.

<sup>146</sup> See, e.g. Art.2:78(1) of the By-law Westvoorne 2017. See also the ‘Model by-law’ (‘Model-APV’) drafted by the Association of Dutch Municipalities (‘VNG’), 10 July 2014, available at [www.vng.nl](http://www.vng.nl), p.3 [accessed 27 June 2017] and J. J.G. BROUWER en J. A.E. SCHILDER, *Gebiedsontzeggingen in het systeem van het openbare-orderecht* (2007) Jurisprudentie Bestuursrecht Plus 154, 162-163.

detailed way. After all, they allow individuals who may be subject to a prohibition order to be acquainted with the behaviour that can entail the imposition of it *in advance*, thus being able to regulate their conduct, in line with the Strasbourg Court's case law.<sup>147</sup>

As to the Belgian prohibition of place, the legal basis for imposing it is Article 134*sexies* of the NMA and not a by-law. However, this does not impede municipalities – more specifically the city council – to include this power in their regulations as well, insofar as the municipality concerned intends to apply this Article.<sup>148</sup> Via these regulations, which are publicly and freely accessible to every citizen via the official municipal website<sup>149</sup>, the scope of Article 134*sexies* can be further specified. It is in particular recommended that municipalities who intend to apply Article 134*sexies* indicate in these regulations the *specific forms of behaviour* that they will take into account when considering whether a prohibition of place should be imposed, similar to the above-mentioned Dutch by-laws. They more specifically should specify the actions that are taken into account to assess whether a public order disturbance has occurred and/or the provisions of local regulations whose (repeated) infringements are considered to cause a public order disturbance or nuisance and define when these infringements are regarded as 'repeated'.

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<sup>147</sup> As already confirmed by the Dutch Council of State (judgement of 7 July 2004, ECLI:NL: RVS:2004: AP8138).

<sup>148</sup> Some municipalities already refer in their local regulations to the possibility to impose a prohibition of place, in accordance with Article 134*sexies* of the NMA; see, e.g. Art.37 of the By-law Turnhout 2016, p.203; Art.1.8.1 of the By-law Rijkevorsel 2017, p.18 and Art.4 of the By-law Temse 2017, p.44. This is also recommended by the Ministerial circular to the Municipal Administrative Sanctions Act 2013, especially when the municipality concerned intends to sanction the individual who does not comply with an imposed prohibition of place with a municipal administrative sanction (see Ministerial circular explaining the new legislation concerning the municipal administrative sanctions, 22 July 2014, at [44]).

<sup>149</sup> Art.186 of the Municipal Decree (Belgium).

By way of example, reference can be made to some (Belgian) municipalities who have already further confined the scope of Article 134<sup>sexies</sup> in their by-laws. For instance, some municipalities enable a mayor to impose a prohibition of place in case of disturbances of public order caused by (only) serious criminal offences, as provided in the Belgian Criminal Code.<sup>150</sup> In other municipalities, a prohibition of place can be imposed in case of (repeated) infringements of certain provisions which are specified in the by-law itself, e.g. when an individual is present outside the fixed opening hours in certain public places, such as public parks, sports or recreation centers<sup>151</sup> or in certain cases of alcohol abuse on public roads.<sup>152</sup> In addition, these by-laws also clarify when infringements are considered as ‘repeated’. According to the by-law of Kasterlee, for example, a prohibition of place can already be imposed ‘in case of a new infringement within four months after the date of a previous infringement’ of certain provisions laid down in the by-law itself [emphasis added].<sup>153</sup> Via these clarifications, municipalities restrict themselves as regards the power to impose a prohibition of place. According to the adage ‘patere legem quam ipse fecisti’ municipalities are bound by their own regulations<sup>154</sup> and thus also by the specifications made in it, for instance regarding the system of the prohibition of place. As a result, in this case, a prohibition of place can only be imposed in the situations specified in the local regulation.

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<sup>150</sup> Art.37 of the By-law Turnhout 2016, p.203. Cf. Art.37 of the By-law Kasterlee 2015, p.195 and Art.1.8.2 of the By-law Rijkevorsel 2017, 18.

<sup>151</sup> Art.9 of the By-law Kasterlee 2015, 166-167.

<sup>152</sup> Art.1.8.1 of the By-law Rijkevorsel 2017, 18.

<sup>153</sup> Art.9 of the By-law Kasterlee 2015, p.166. See in the same sense Arts 7 and 9 of the By-law Turnhout 2016, pp.170 and 175 and Art.1.8.1 of the By-law Rijkevorsel 2017, 18.

<sup>154</sup> A. MAST, J. DUJARDIN, M. VAN DAMME, J. VANDE LANOTTE (eds), *Overzicht van het Belgisch Administratief Recht* (Kluwer, 2014), 18.

It is true that, by allowing municipalities (i.e. the city council) to determine whether and what forms of behaviour they want to tackle with a prohibition of place, various situations can occur and the types of behaviour envisaged may well vary, depending on the municipality in question.<sup>155</sup> However, this leaves room for the fundamental principle of municipal autonomy, thus enabling local authorities to adjust Article 134*sexies* of the NMA to local concerns and issues, whilst the general conditions and safeguards are still regulated in the overarching Article 134*sexies*.

Importantly, identifying the scope of the relevant norm via clearly defining the specific types of behaviour that it encompasses is not only relevant in view of Article 134*sexies* of the NMA. This is also essential for potential future legislation on freedom-restricting public order powers, so that it can be considered as compatible with the principle of legality and thus with an individual's fundamental rights and freedoms, notably the right to freedom of movement. Future legislation should more specifically formulate the specific forms of behaviour that it contemplates and this, for instance, in the norm itself, as is the case in the Netherlands, or, for reasons of municipal autonomy, via local regulations complementing the norm, similar to some Belgian municipalities.

#### **4.2.2.2. Warning issued in advance**

In the above-mentioned case of *Landvreugd*, the Strasbourg Court attached particular importance to the fact that the applicant had been warned in advance. In this case, the applicant was already subject to several eight-hour prohibition orders due to the multiple, previous public order disturbances he had caused, more specifically by using or having hard drugs in his possession in a particular area. He was warned that if he committed such acts again in the near future, the mayor would be empowered to impose a

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<sup>155</sup> Cf. J. J.G. BROUWER – J. A.E. SCHILDER, *Wijken voor orde: over nieuwe geboden en verboden* (2008) 3 RegelMaat 88, 92 (concerning the differences between the several Dutch by-laws).

*fourteen*-day prohibition order on him.<sup>156</sup> As a result, the Court found that the applicant was sufficiently able to foresee the consequences of his acts, the domestic norm thus being sufficiently precise.<sup>157</sup>

The above indicates that the norm at issue may well be further clarified via prior warnings or notices. In this way, national authorities can indicate to the individual the circumstances in which an area-based restriction may be imposed, so that he is aware of the behaviour that may trigger the imposition of it. It can be argued that this will be especially important when there is only little to no relevant case law or practice (yet) from which further guidelines can be derived, as is the case for the Belgian prohibition of place. After all, in this case, the individual disposes of hardly any guidance from the norm itself, nor from any case law or practice, so that informing him via prior notices of the actions that may give rise to the measure will be vital in view of the foreseeability requirement. For example, as far as the prohibition of place is concerned, a mayor can specify via such prior notices to the individual the circumstances in which he is deemed to disturb (material) public order or cause (severe) nuisance, thus triggering the imposition of it. In this way, the individual can be considered as being able to foresee the consequences of his acts and to regulate his conduct, in line with the Strasbourg Court's case law.

However, the above approach of the Strasbourg Court is, in our opinion, not without criticism, as it may have major consequences. First, national authorities will not be able to use prior notices in *all* situations. This is especially true in the context of preventive police measures, such as the Belgian prohibition of place. Given their essentially preventive

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<sup>156</sup> *Landvreugd v the Netherlands* (2003) 36 E.H.R.R. 56, at [64].

<sup>157</sup> *Ibid.*, at [65]. Cf. *Olivieira v the Netherlands* (2003) 37 E.H.R.R. 32, at [57]-[58]. See also J.A.E. SCHILDER – J. J.G. BROUWER, *Recht op bewegingsvrijheid, kenbaarheidseis en voorzienbaarheidseis*, [2003] Administratiefrechtelijke Beslissingen 15, 17. Cf. *Gillow v the United Kingdom* (1989) 11 E.H.R.R. 335, at [51], whereby the Strasbourg Court took into account the fact that the practice of the relevant national authority – in this case the Housing authority – was fully explained to the applicants in advance, more specifically via several letters.

nature, police measures are generally imposed to *immediately* intervene in attempts to avoid an urgent (threat of a) public order disturbance or nuisance. In this case, giving prior notice may not be possible, having regard to the urgency of the situation. As far as the Belgian prohibition of place is concerned, the norm itself provides for an exception in case of an emergency. Giving prior notice is explicitly stipulated in Article 134*sexies* as an *obligation*. A mayor must give warning to an individual before imposing a prohibition of place. However, there is one exception, more specifically ‘with a view to maintaining [public] order’. According to the Belgian Constitutional Court this exception alludes to situations in which public order enforcement requires a mayor to act *immediately*, without the possibility to inform the individual in advance.<sup>158</sup> In other words, when a situation is so urgent that immediate action is required, a mayor does not have to give a prior notice.

This exception can be approved. After all, requiring the competent authority to clarify the scope of the applicable norm via a warning, also in emergency situations, would drastically change the purpose of police measures, such as the prohibition of place. Municipalities would then be no longer able to immediately intervene whenever necessary to safeguard public order. Hence, giving prior notice cannot always compensate for vague provisions and exceptions to it must remain possible, especially in case of an emergency.

Second, clarifying vague norms through prior warnings will not only be sometimes impossible, it is also not always *desirable*. This could in fact mean that the foreseeability requirement is of only relative importance. After all – as already stated by Schilder and Brouwer – a legal provision does not have to be *in itself* sufficiently precisely formulated, as the competent national authorities are able to compensate for the lack of foreseeability of the norm by specifying it in a prior notice given to the individual.<sup>159</sup> However, this would

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<sup>158</sup> Judgement of 23 April 2015, No.44/2015, at [B.65.6].

<sup>159</sup> J. A.E. SCHILDER - J.L. J.G. BROUWER, *Recht op bewegingsvrijheid, kenbaarheidseis en voorzienbaarheidseis* [2003] Administratiefrechtelijke Beslissingen 15, 17.

bring along a key role to be played by these national authorities, especially when there is only little to no relevant existing case law or previous practice concerning the interpretation and application of the vague norm. In the end, it rests upon them to ensure that, when they impose freedom-restricting public order measures, the vague provisions are made up for via prior notices given to the individual. This neither can, nor should be the task of national authorities competent for imposing such measures. It is primarily for the domestic legislator to indicate when and under which conditions national authorities may act and to ensure that these provisions are sufficiently clear.<sup>160</sup>

The importance given to prior notices in view of the legality principle must therefore be nuanced. Prior notices cannot be used at all times to compensate for any broadly formulated legal provision. The scope of the norm at issue – more specifically the specific types of behaviour that are covered by it – should, above all, be clearly defined in the norm itself, as discussed above. For reasons of municipal autonomy, these behaviours may also be clarified in local regulations complementing the norm, which will be particularly relevant for the already existing Belgian prohibition of place. As a result, prior notices should be used to complement vague norms *only in exceptional circumstances*. National authorities should use such prior notices in view of the legality principle only in situations where there is little to no case law or practice yet from which further guidance can be inferred and where the norm cannot be clarified via the normal law-making procedure. This will be for instance the case when the normal legislative procedure cannot be awaited. It should be noted, though, that the situation may not be so urgent that the competent national authority must *immediately* act. In this case, the authority will not even be able to give a prior notice, let alone to clarify the scope of the norm in it. Consequently, specifying the scope in the norm itself (or via local regulations complementing the norm) must be the rule, clarifying it through prior notices the exception.

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<sup>160</sup> See also D. MOECKLI, *Exclusion from Public Space. A Comparative Constitutional Analysis* (Cambridge, 2016), p.156.

## 5. CONCLUDING REMARKS AND RECOMMENDATIONS

This contribution aimed to assess the principle of legality under the ECHR concerning public order powers that restrict the individual in his right to freedom of movement, notably the Belgian prohibition of place. The applicable legality test will be a stricter one, given the relatively limited field of application of this prohibition. Questions particularly rise as regards the vague and open notions of ‘public order (disturbance)’ and ‘nuisance’. Vague provisions are not necessarily inconsistent with the European Convention, as the use of vague notions in domestic norms is sometimes inevitable, but there are nonetheless limits as to the extent of vagueness accepted. More specifically, the applicable law should sufficiently indicate the types of conduct that are covered by it.

However, the Strasbourg Court’s case law indicates that the Court generally interpretes the legality principle in a rather flexible way, also accepting clarification of the norm’s scope of application via domestic case law, relevant practice or even prior warnings given to the individual. We argued that this may have major consequences. After all, what will be decisive is not so much whether a norm as such is sufficiently precisely and clearly formulated, but whether its rather vague wordings can be compensated for, e.g. via prior warnings. As far as the Belgian prohibition of place is concerned, there is little to no relevant domestic case law or practice yet from which further guidelines can be concluded to assess whether an individual has disturbed (material) public order or caused (severe) nuisance. Some compensation can be offered via prior notices. However, the latter implies too great a role to be played by national authorities competent for imposing freedom-restricting public order powers, such as the prohibition of place. They would then become the authority responsible for ensuring that vague legal provisions are compensated for via prior notices, whilst it is primarily the task of the domestic legislator to make sure that the relevant legislation is sufficiently precise.

Therefore, one may not attach too great importance to prior notices in view of the legality principle. The domestic legislator should, when introducing *new* legislation on freedom-restricting public order powers, identify the specific forms of behaviour that are covered by it in the norm itself. For reasons of municipal autonomy, this can also be



indicated via local regulations complementing the norm, which is in particular recommended for the already existing Belgian prohibition of place and which is already the case here and there in practice. This in turn brings along *legal certainty*, not only for the individual, being able to know the circumstances in which national authorities may legally interfere with his fundamental rights. This is also essential for national authorities competent for imposing freedom-restricting public order measures, in this way being acquainted with the situations in which they are legally authorised to do so.