ARTICLES

THE CONSTRAINTS OF POWER STRUCTURES ON EU INTEGRATION AND REGULATION OF MILITARY PROCUREMENT

NATHAN MEERSHOEK*

TABLE OF CONTENTS: I. Introduction. – II. Legal structures of military integration and cooperation in the EU. – II.1. The Treaty of Rome (1957): economic Europe as an alternative to the failed European Defence Community. – II.2. After the Lisbon Treaty (2009): strategic autonomy based on national or supranational responsibilities? – II.3. The legal roots of the NATO constraint on EU military integration. – II.4. Interim conclusion: national capability commitments vs the internal market? – III. The function of military procurement in foreign policy. – III.1. Overcoming the "realist challenge" in EU law: from realism to functionalism. – III.2. Systemic constraints on international cooperation and European integration. – III.3. Balance of power and troubled alliance. – III.4. Balance of power and military-industrial policymaking. – III.5. EDA's intergovernmental approach to offsets. – III.6. Interdependence and institutionalism: finding certainty in legal regimes. – III.7. The role of international institutions. – III.8. Issue linkage as a prerequisite for institutionalism. – III.9. Interim conclusion: linking military security to the internal market? – IV. The Commission's pursuit of EU strategic autonomy by industrial and procurement policies. – IV.1. The Defence Procurement Directive (DPD 2009). – IV.2. The European Defence Fund (EDF 2021-2027). – IV.3. The legal fiction of "economies of scale" by cooperation. – IV.4. From fragmentation to "European champions"? – IV.5. Interim conclusion: the problem of linking military security with the internal market. – V. A theoretical basis for EU military procurement law. – V.1. The primary role of military-industrial capabilities and balance of power. – V.2. General implication for EU supranational regulation. – V.3. The need for a dynamic armaments exception to the military procurement regime. – VI. Concluding remarks.

ABSTRACT: Ever since the Maastricht Treaty, the EU has been increasingly engaged in the military domain. More recently, many initiatives on *intergovernmental* EU cooperation have emerged in the area of Common Security and Defence Policy, such as those initiatives in the context of permanent structured cooperation (PESCO). At the same time, the Commission initiated policies and legislation on military industries based on the *supranational* regime of the internal market, such as the Defence Procurement Directive (DPD) which was adopted by the European Parliament and the Council in

* PhD researcher, Utrecht University's School of Law, N.A.Meershoek@uu.nl. The author would like to thank Prof. Dr. Elisabetta Manunza and Prof. Dr. Cedric Ryngaert for their valuable comments in the process of writing this *Article*. The author is also thankful for the extensive discussions on the relationships between NATO, EU defence policy and the EU internal market with Prof. Dr. Elisabetta Manunza and Prof. Dr. Linda Senden in the context of a collaboratively written research report commissioned by the Dutch Defence Ministry (for the outcome of this collaboration, see *infra*, footnote 34).

www.europeanpapers.eu
ISSN 2499-8249
doi: 10.15166/2499-8249/489

2009. The EU Treaties, however, include a clear exception for military equipment and recognise national security as the sole responsibility of the Member States. The DPD aims to liberalise European armaments industries by imposing public procurement obligations on Member States for their military procurement. Such obligations, however, may conflict with the national security strategies of the Member States aimed at the survival of domestic industry. Consequently, Member States often still rely on the Treaty-based exception. This *Article* aims to provide a new legal approach to this conflict by, first, looking at the historic and legal context in which policies and legislation came about, secondly, determining the function of military procurement based on international relations theories and, thirdly, evaluating the internal market policies and legislation within this context. Finally, the author sets out a theoretical basis for legal interpretation of EU military procurement law. To overcome the conflict, the author argues for reconsideration of the internal market legal base of the military procurement regime and regulation of the legally controversial offset agreements.

KEYWORDS: public procurement – military equipment – common security and defence policy – EU strategic autonomy – industrial policy – NATO.

I. INTRODUCTION

While military spending around the world is – once again – increasing rapidly, the viability of Europe's major source of military security (NATO) is under pressure. The Treaty of Maastricht [1992] established a legal basis in the EU Treaties for a common security and defence policy (CSDP), but the current political landscape lacks any prospect of far-reaching progress on this, as it would require unanimity among the Member States. Nevertheless, the EU adopted the Defence Procurement Directive (DPD) in 2009 to foster integration of European military industries by means of liberalisation.[1] The DPD imposes obligations on the Member States to organise non-discriminatory tenders for their procurement of military equipment (hereafter, military procurement). Europeanisation of military industries is deemed to foster economies of scale. This should lead to greater European self-sufficiency in producing military equipment and thereby strengthen the EU's strategic autonomy as a global actor. Military procurement, however, exclusively takes place at the domestic level, where it is structured by military-political incentives.

European integration has always been considered a "peace project",[2] achieving peace by economic instead of military means. Economic interdependence – between Germany and France in particular – was thought to bring balance to the European geopolitical order and peace and welfare to its citizens. Much of liberal thinking post-World War II predicted that this type of economic globalisation would systemically change the relations between

[1] Directive 2009/81/EC of the European Parliament and the European Council of 13 July 2009 on the coordination of procedures for the award of certain works contracts, supply contracts and service contracts by contracting authorities or entities in the fields of defence and security, and amending Directives 2004/17/EC and 2004/18/EC.

[2] In 2012, the EU even received the Nobel Peace Prize for "the advancement of peace and reconciliation, democracy and human rights in Europe".

those states that opened their markets. Their diplomatic relations would no longer primarily be determined by structures of military power, but rather by those of economic power.

However, just as much as interdependence logic, the European project was triggered and shaped by military balance-of-power logic. Military capabilities, which are still within the ambit of the nation state, require a strong industrial and technological base. Integration of military industries in the EU is therefore limited. After the failure to establish the European Defence Community (1954), the Treaty of Rome [1957] provided a clear exception from EU law for the production and trade of military equipment. Realist theories on international relations provide an explanation for this. Economic integration between states perhaps makes their relationships more complex and often prevents them from going to war. Yet, order is, in the last resort, attained by military power. In shaping international relations, the role of the military industry is then fundamentally different from other economic sectors.

Existing legal literature is preoccupied with the legal logic of the rules imposed by the internal market and the CSDP dimensions of EU law. This *Article*, instead, considers the prospects of military-industrial integration by looking at the EU Treaties as a system regulating the military-political relations between sovereign states. By explaining the role of military power's industrial component in the relations between states based on international relations theories, this *Article* provides an external perspective on the EU's legal regime on military procurement. This interdisciplinary approach to EU law is necessary to answer the following research question: is the function of military procurement in international relations sufficiently safeguarded within the Commission's internal market approach to regulating it? The concept of balance of power is considered of paramount importance for answering this question, as it is the primary source of stability in systems lacking centralised authority.

In the context of the research question, both the objective of the DPD and the absence of a set of rules for the legally controversial (but politically feasible) topic of offsets are scrutinised. Offsets (at least direct offsets) consist of obligations for suppliers to include the national industry of the procuring state in their supply chain, thereby distorting the "normal" market function in which suppliers select sub-contractors freely. First, the roots of the legal structures of the EU Treaties are set out so as to understand the role of military power in the processes which shaped the EU Treaties. Secondly, these structures are tested against different theories on international relations to understand the function of the legal norms and the hierarchy between them. Thirdly, EU legislation and policies which aim to integrate military industries by liberalisation are evaluated based on the previous theoretical insights. Finally, a more functional approach to military procurement and the constraints imposed by structures of military power on regulating it is proposed. The concluding remarks address the implications of this for the legality of the DPD's objective and offsets.

II. Legal structures of military integration and cooperation in the EU

In the years after World War II, Cold War tensions, in particular the outbreak of the Korean War in 1950,[3] were pressuring a Western European need for West Germany to rearm itself. The political elites in Western Europe and the US considered that the aggression of North Korea could be a prelude to a Russian attack on Western Europe.[4] The prospect of German rearmament had, however, been the reason for France's reluctance to let Germany join NATO. The designer of the Schuman plan and French government official,[5] Jean Monnet, therefore considered the integration of the military forces of the two countries as the only solution to Europe's security problem. Soon after launching the Schuman plan (proposing integration of coal and steel resources), Monnet was urging the French government to come up with a similar proposal for integrating the future German military forces with the French, because: "a German contribution to Western defence is indispensable and German rearmament unacceptable".[6] In October 1950, the French Prime Minister René Pleven adopted Monnet's proposal and came up with a plan for a common European Defence Community (EDC), entailing a united European army based on integrating all of the Member States' military capabilities under a common political and military authority.[7] If Germany were to rearm, then it would only do so under the control of a supranational authority.

To evaluate the EU's legal regime on military procurement it is first necessary to consider its historic roots which can be traced back to the failure of the EDC and the subsequent accession of Germany to NATO. By considering the developments in the EU Treaties regarding the military domain and their relationship with the North Atlantic Treaty (hereafter, NATO Treaty),[8] the legal foundation for and limitations on the EU's military procurement regime are exposed.

II.1. The Treaty of Rome [1957]: economic Europe as an alternative to the failed European Defence Community

Even though the six potential Member States reached political agreement in 1952, the EDC Treaty never came into force. In August 1954, it was the French parliament that refused to ratify it. The consequences of ratification of this Treaty would have been radical

[3] This is also mentioned as the occasion that triggered the idea of a European army by Monnet himself, see: J Monnet, *Memoirs* (Third Millennium Publishing 2016; originally published in 1978) ch. 14.

[4] See to that extent, in the broader historic context of the European Defence Community: E Fursdon, *The European Defence Community: A History* (Palgrave Macmillan 1980) 51, 67-68.

[5] At that time, Jean Monnet was, as Commissioner-General of the French National Planning Board, in charge of the post-war economic revival of France.

[6] Memorandum to President of the French Council of Ministers, 18 September 1950 www.cvce.eu.

[7] Statement by René Pleven on the establishment of a European army, 24 October 1950 www.cvce.eu.

[8] The North Atlantic Treaty of 4 April 1949.

for the endurance of national military capabilities. First, it would have drastically restricted the Member States in recruiting national armed forces. Only for the specific cases mentioned in art. 10 of the EDC Treaty would this still have been possible, although maintenance of these national armed forces should at no time have compromised participation in the European Defence Forces.[9] Secondly, the Treaty included a general prohibition of the development, production and procurement of war material. The procurement of military equipment at the European level would have been commissioned by the supranational institution, "the Commissariat".[10] This procurement would have been executed through "the most extensive possible competitive bidding"; awarding contracts exclusively on the basis of lowest price.[11] The same institution would have been exclusively in charge of granting licences to authorise Member States to produce, import or export equipment for their national armed forces.[12] The EDC's Member States would only have been authorised to produce, import or export military equipment to an extent which did not go "beyond their needs". Moreover, for exports of military equipment, Member States would only have been authorised if the Commissariat would have "considered" it consistent with the "internal security of the Community".[13] Both for industrial and operational decision-making in the military domain, power would thus have shifted from the sovereign nation states to a supranational European authority.

After the failure of the EDC Treaty, Germany became a member of NATO in May 1955, rendering NATO, and particularly the British and American participation therein, the primary source of military security for Western Europe. Unlike the EDC, NATO is based on the principle of collective self-defence and national responsibilities, rather than supranational military defence. The European integration project was subsequently built on the idea of economic integration by the Treaty of Rome [1957].

In contrast to the economic provisions of the EDC Treaty, the drafters of the Rome Treaty took the exact opposite approach towards military industries. The idea of comprehensive economic integration is simple, although its legal implications are rather complex. By merging the economies of the Member States, greater welfare is stimulated by the efficiency gains which accompany the wider competition between companies. Instead of placing production under the supervision of supranational authorities – as for coal and steel – the Treaty of Rome strictly limited the sovereignty of its signatories on their regulatory and trading capacities by the rules on the internal market and competition. Actions of governments were to be constrained by the forces of a free European market. Instead of preventing war through military integration, the Treaty of Rome sought to make the prospect of war impossible through economic interdependence.

[9] Arts 9 and 10 of the Treaty Constituting the European Defence Community (EDC Treaty) [1952].
[10] Art. 104 of the EDC Treaty.
[11] *Ibid*. art. 104(3).
[12] *Ibid*. art. 107(1) and (4).
[13] *Ibid*. art. 107(4)(c), (d), (e).

As military integration had just been rejected by the French parliament, the Treaty of Rome included an exception (hereafter, the armaments exception) from the application of the rules of the Treaty for the "production of or trade in arms, munitions and war material" as far as a Member State "considers" this necessary "for the protection of the essential interests of its security" (current art. 346 TFEU). The political sensitivity of this area is clear from the term "considers". This implies that applying the exception depends on a subjective test by the national government, whereas (in rule of law systems) legal exceptions should normally be justified based on objective criteria.[14] Hence, the armaments exception is the most far-reaching legal codification of the constraints of power structures on EU integration and regulation of military procurement, which is the subject-matter of this *Article*.

The Court of Justice of the EU eventually ruled in *Commission v Spain* (1999) that the armaments exception, like all derogations from EU law involving public safety, deals with "exceptional and clearly defined cases" and does not therefore lend itself "to a wide interpretation".[15] More recently, in *Schiebel Aircraft* (2014), the Court indicated that the derogation based on art. 346 TFEU should also adhere to the principle of proportionality.[16] As a consequence, there is at least some degree of legal scrutiny over decisions of national governments to derogate from the internal market regime in their military procurement. Legal debate on the nature of the armaments' exception is mostly concerned with the intensity of the proportionality test.[17]

II.2. After the Lisbon Treaty (2009): strategic autonomy based on national or supranational responsibilities?

The Treaty of Maastricht (1993) introduced a legal basis into the EU Treaties for a Common Foreign and Security Policy (CFSP), including a Common Security and Defence Policy (CSDP). As in the 1950s, it was again the prospect of a strengthened (by then unified) Germany that triggered the deepening of European integration. However, the collapse of the Soviet Union at the beginning of the 1990s, also triggered a decline of the military interests of the US in Europe which pressured the EU into becoming more self-reliant. In December 2003, the European Council launched its first security strategy. At the same time, two military operations in the Balkans were initiated, after which more missions undertaken by the Member States in an EU context followed.[18] The 2003 Security Strategy stressed the importance for the EU to share in the "responsibility for global security".

[14] For example: art. 36 TFEU which requires "justification" and excludes "arbitrary discrimination" or "disguised trade restrictions".

[15] Case C-414/97 *Commission v Spain* ECLI:EU:C:1999:417 para. 21.

[16] Case C-474/12 *Schiebel Aircraft* ECLI:EU:C:2014:2139 para. 37.

[17] M Trybus, 'The EC Treaty as an Instrument of European Defence Integration: Judicial Scrutiny of Defence and Security Exceptions' (2002) CMLRev 1347, 1368-1372.

[18] For an extensive overview of the 12 EU-based military operations since 2003 (at the time of writing this *Article*) and analysis on the basis of justification and policy-embeddedness, see: T Palm and B Crum, 'Military Operations and the EU's Identity as an International Actor' (2019) European Security 513, 522-526.

Mentioning the US as the dominant military actor in the world ever since the "end of the Cold War", it proclaimed that no country could tackle global security issues on its own.[19]

The tone in the EU's Global Strategy of 2016[20] is slightly different. The principles and values that the EU seeks to promote in its external actions did not significantly change, but the prolonged means to achieve it did. The Strategy identifies moving defence to a more European level as one of the five priorities of the EU's external actions. It stresses that, regardless of the existence of NATO to protect most of the EU Member States, the EU should be more capable of contributing to this and to "act autonomously if and when necessary".[21] This "strategic autonomy" requires technological and industrial means to sustain sufficient military capabilities. According to the Strategy, this means that "while defence policy and spending remain national prerogatives, no Member State can afford to do this individually".[22] For the strong technological and industrial base, a "fair, functioning and transparent internal market" is deemed necessary. National defence (procurement) programmes are considered insufficient to address capability shortfalls, thus collaborative procurement should be increased.[23]

The most significant change to the EU's defence instruments which was consequently made was the Council decision which established permanent structured cooperation (PESCO) in December 2017.[24] PESCO was established on the basis of art. 46 TEU, which was added to the CFSP frameworks by the Lisbon Treaty [2009].[25] 25 of the 28 EU Member States decided to participate in PESCO.[26] The uniqueness of PESCO, according to the European External Action Service (EEAS), is the legally binding nature of the common "more binding" commitments included in the annex to the Council decision.[27]

The more binding commitments stress the need for collaboration in developing and utilising capabilities. They require commitment to the joint use of existing capabilities, commitment to help overcome European capability shortcomings and demand a European collaborative approach in addressing capability shortcomings.[28] The vague language of these commitments, however, leaves much discretionary power at the national level. When it

[19] European Council, A secure Europe in a better world – European Security Strategy, of 8 December 2003, Council doc. 15895/03, 3.

[20] European External Action Service, Shared Vision, Common Action: A Stronger Europe – A Global Strategy for the European Union's Foreign and Security Policy (2016).

[21] *Ibid*. 19.

[22] *Ibid*. 20.

[23] *Ibid*. 45-46.

[24] Decision 2017/2315/CFSP of the Council of 11 December 2017 establishing permanent structured cooperation (PESCO) and determining the list of participating Member States.

[25] See also Protocol n. 10 of the Lisbon Treaty [2007].

[26] Only the UK, Denmark and Malta did not join.

[27] European External Action Service, Permanent Structured Cooperation (PESCO) – Factsheet. Deepening Defence Cooperation among EU Member States, eeas.europa.eu.

[28] Decision 2017/2315 cit., annex, More binding common commitments n. 10, 15 and 16.

comes to public procurement and industrial policy, the participating Member States for instance committed to "the intensive involvement of a future European Defence Fund in multinational procurement with identified EU added value" and to ensuring "that all projects with regard to capabilities led by participating Member States make the European defence industry more competitive via an appropriate industrial policy which avoids unnecessary overlap".[29] This vagueness is not as strange as it might at first have seemed, now that it has been proclaimed in the considerations of the Council decision that participation in PESCO is voluntary and that it "does not in itself affect national sovereignty or the specific character of the security and defence policy of certain Member States".[30]

The effect of these commitments on procurement liberalisation is therefore minimal and depends on the legal and political-economic structures of concrete projects. PESCO merely provides a platform for the participating Member States to take part in the joint development of military capabilities (be it industrial, technological or operational). By December 2019, there were 47 ongoing projects with a cross section of the Member States involved in each of them. Projects vary from a project of 24 Member States working together on military mobility by simplifying and standardising military transport procedures, to a project involving only France and Italy for designing and developing a new prototype for a military ship.[31] In operational terms, it can therefore easily be argued that PESCO is effective in enhancing – and deepening – cooperation among those parties which participate. The extent to which the commitments are in effect legally binding is, however, more questionable. The nature of PESCO is inherently (as it is project-based) based on cooperation rather than integration (like other CFSP policies, its obligations are intergovernmental rather than supranational).

The participating Member States need to review annually how they fulfil the "commitments" in their National Implementation Plans. The possibilities for holding to account those Member States which fail to fulfil the commitments are very limited. As exemplified by Blockmans, the commitments can therefore be seen as "political declarations of intent" rather than legally binding and enforceable rules.[32] The National Implementation Plans enable the High Representative for Foreign Affairs and Security and the Council to monitor the fulfilment of the commitments by the Member States, but there is no severe sanction mechanism apart from the *shaming* of the rule-breakers and suspension.[33] Suspension may seem like an effective enforcement tool, because – as foreseen in art. 46(4) TEU – suspension of a Member State which "no longer fulfils the criteria or is no longer able to meet the commitments" can take place through a qualified majority vote in the

[29] *Ibid*. n. 8 and 19.

[30] Recital 4 of Decision 2017/2315 cit.

[31] The projects mentioned are Military Mobility (6 March 2018) and European Patrol Corvette (EPC – 12 November 2019); an overview can be found on the website of PESCO.

[32] S Blockmans, 'The EU's Modular Approach to Defence Integration: An Inclusive, Ambitious and Legally Binding Pesco?' (2018) CMLRev 1785, 1820.

[33] *Ibid*. 1821.

Council. However, it will often only further endanger the credibility of PESCO in general because it will hamper inclusivity.

II.3. The legal roots of the NATO constraint on EU military integration

As stressed in section II.2, serious steps towards more institutionalised military cooperation were taken with the Lisbon Treaty. The legal status of these commitments becomes, however, more troublesome when simultaneously considering obligations from the NATO Treaty.[34] For systemic understanding of the EU's legal regime on military procurement, it is necessary to consider these different sources of law (public international law, EU CFSP law and EU internal market law), their political origins and their hierarchy.

NATO is based on the principle and legal norm of collective self-defence. Just as importantly, the NATO Treaty obliges its signatories to "maintain and develop their individual and collective capacity to resist armed attack", i.e. to possess sufficient military capabilities for effective collective self-defence.[35] In 2014, the NATO countries agreed that this means that defence expenditure should entail 2 per cent of their GNP and that 20 per cent of this should be spent on "major equipment".[36] The EU Treaties since the Treaty of Lisbon include a collective self-defence clause as well in art. 42(7) TEU, and PESCO includes similar expenditure and investment commitments. The legal primacy of military security for those Member States which are also part of NATO lies, however, with the transatlantic organisation. The EU's collective self-defence clause itself stresses that NATO "remains the foundation of their collective defence and the forum for its implementation". Moreover, art. 42(2) TEU requires coherence between the EU's CSDP and NATO's security and defence policies. Regardless of the political-historical logic behind these limitations on EU integration, the NATO constraint has a legal logic as well. Art. 351 TFEU emphasises that "rights and obligations arising from agreements concluded before 1 January 1958 [...] shall not be affected by the provisions of the Treaties".

It seems that the flexibility of the CSDP obligations and the Treaty-based primacy of NATO obligations for most Member States make legal compatibility likely, whether always politically feasible or not. However, what about the military procurement obligations arising from the EU's internal market regime? The primacy of the NATO Treaty, as envisioned by art. 351 TFEU should be respected there as well. When it comes to the relationship between international obligations and EU law, the Court of Justice of the EU usually solves

[34] The nexus between NATO obligations and the EU's internal market regime has also been extensively evaluated in a recent study by the author and others commissioned by the Dutch Ministry of Defence, see: E Manunza, N Meershoek and L Senden, 'The Ecosystem for the Military Logistics Capabilities of the Adaptive Armed Forces: In the Light of the NATO Treaty, the EU Treaties and National Public Procurement and Competition Law' Utrecht University Centre for Public Procurement & RENFORCE 2020 www.uu.nl, original version in Dutch language.

[35] Art. 3 of the North Atlantic Treaty.

[36] Wales Summit Declaration Issued by the Heads of State and Government participating in the meeting of the North Atlantic Council in Wales, 5 September 2014, para. 14, www.nato.int.

such tensions by consistent interpretation. The jurisprudence of the Court on the security exceptions to the internal market regime shows that such consistent interpretation is normally possible in a procurement context as well. In *Van Duyn v Home Office* (1974), the Court established that, although derogations must be interpreted narrowly for the effectiveness of EU law, situations in which public policy concerns can justify such derogation vary between different countries and different time periods.[37]

These circumstances include the membership of a military alliance. In *Campus Oil* (1984), the Court implicitly accepted the fact that Ireland was not a member of any alliance and maintained a policy of neutrality as supporting Ireland's security arguments to impose trade restrictions on oil importers to maintain national energy capabilities.[38] Moreover, it is settled case law that derogation from the EU Treaties based on public security includes the foreign policies of Member States. In *Werner* (1995), the Court noted that it is difficult (and too artificial) to draw a hard distinction between security and foreign policy, as the former necessarily depends on the latter. In a globalised world, it would be dysfunctional to consider the security of a state in isolation and to neglect the overall security of the international community and the legal obligations arising from this international context. Therefore, the Court concluded that "the risk of a serious disturbance to foreign relations or to peaceful coexistence of nations may affect the security of a Member State".[39] That considerations of foreign policy, or more specifically NATO membership, may justify derogation from the EU's public procurement regime was emphasised by the Court in *Commission v Belgium* (2001). The Court accepted derogation by Belgium from EU public procurement law without conducting an in-depth proportionality assessment, after acknowledging that the invoked security interests related to Belgium's responsibility for the security of not only its own military installations, but also those on the premises of NATO.[40]

II.4. Interim conclusion: national capability commitments vs the internal market?

Participation in capability projects of PESCO can foster industrial cooperation and integration. However, for creating a liberalised internal market for military equipment, the project-based PESCO – let alone the *intergovernmental* CFSP in general – is not enough. Already, since the 1990s, the Commission has therefore been promoting the prospect of such an integrated market through the *supranational* internal market means. Conse-

[37] Case 41/74 *Van Duyn v Home Office* ECLI:EU:C:1974:133 para. 18.

[38] Case 72/83 *Campus Oil* ECLI:EU:C:1984:256. For the arguments of Ireland in particular, see case 72/83 *Campus Oil* ECLI:EU:C:1984:154, opinion of AG Sir Gordon Slynn, 2759.

[39] Case C-70/94 *Werner v Bundesrepublik Deutschland* ECLI:EU:C:1995:328 paras 25-27.

[40] Case C-252/01 *Commission v Belgium* ECLI:EU:C:2003:547 para. 30.

quently, tensions arise between the ambitions of the Commission, the CFSP and the national security of the Member States relying on their own or NATO capabilities.[41] This section of the *Article* has clarified where these ambitions come from. To scrutinise these tensions systemically it is, however, necessary to conceptualise the nature of the military prerogative of the Member States. This prerogative is rooted in the international system in which nation states are the only sovereign actors. Different theories on international relations stress the primacy of military security therein. By constructing this theoretical context, it becomes possible to evaluate the Commission's internal market initiatives in a broader and more systemic context.

III. The function of military procurement in foreign policy

The UN Charter famously proclaims that members of the UN "shall refrain in their international relations from the threat or use of force".[42] Almost 75 years after the coming into force of the UN Charter, the significance of military capabilities in global politics is still difficult to overlook. Capabilities can roughly be divided into *operational* capabilities and *industrial* capabilities. Operational capabilities consist of the ability to act by deploying forces outside one's territory, depending on geography, recruitment of troops and the logistic capabilities[43] to move these troops. Industrial capabilities consist of the material assets which are necessary to operate effectively; including all procurement of military equipment by the national defence ministry.[44] Although much of the industrial capabilities are initially developed by private parties, national governments are the key actors in shaping industries, as they cover the demand side of these markets. Governments shape these industries through their public procurement policies and industrial policies, with the primary purpose of fulfilling their operational military needs to the best extent possible. The extent to which they succeed in this then partly determines their capabilities as international actors. Analysis in this *Article* is limited to the industrial component of military capabilities.

[41] Opposed to the view and logic expressed in this *Article*, Eisenhut has argued that – among other things – based on this "enhanced cooperation" the security interests of the Member States increasingly converge and should be perceived as consistent, limiting the possibilities to invoke security exceptions, see: D Eisenhut, 'The Special Security Exemption of Article 296 EC: Time For A New Notion of "essential Security Interests"?' (2008) ELR 577, 582-583.

[42] UN Charter of 24 October 1945, art. 2(4).

[43] For an analysis of possible legal obligations arising from EU internal market law for the maintenance of military-logistic capabilities in cooperation with private sector parties, see: E Manunza, N Meershoek and L Senden, 'The Ecosystem for the Military Logistics Capabilities of the Adaptive Armed Forces: In the Light of the NATO Treaty, the EU Treaties and National Public Procurement and Competition Law' cit.

[44] More indirectly, this also includes self-sufficiency in food and raw materials such as oil (economic power), see for instance: HJ Morgenthau, *Politics among Nations: The Struggle for Power and Peace* (4th edn. Knopf 1967) 109-112 and J Mearsheimer, *The Tragedy of Great Power Politics* (WW Norton & Company 2001)55, 67 ff. For a distinction between power in peacetime and power in wartime, see: R Aron, *Peace and War: A Theory of International Relations* (Praeger 1967) 57-61. In the present *Article*, "industrial capabilities" refers to military equipment (including technologies).

Just as legal theories deal with systems of principles and rules, theories on international relations deal with power. Power is often seen as the capability to achieve certain outcomes or, more simply put, the ability to get what you want.[45] The procurement regulation at issue is, however, not directly concerned with political or behavioural outcomes, which are, in any case, problematic to analyse systematically as they depend on a great multitude of variables[46] and coincidences. The regulation concerns the material base of power, so it concerns the *input* rather than the *output* (desired result) of political processes. Meaningful analysis is then based on military power in terms of capabilities (limited in this *Article* to industrial capabilities).[47] Military-industrial capabilities strongly link with economic power, as this provides an industrial foundation for military forces, and wealth in general, as it enables governments to afford it.[48] When referring to "power structures", as in the title of this *Article*, I refer to the function of power in the international system. It is presumed that industrial capabilities are a significant factor in that. This *Article* does not, however, aim to specify this role as such: the focus is on the interaction between law and these capabilities.

Different theories contain different explanations about the influence of power structures on the development and procurement of military equipment and *vice versa*. An extensive overview of these theories would go beyond the purpose of this *Article*. The focus is therefore primarily on two different approaches that are present in the legal tension in the EU Treaties between national security based on realism and European (market) integration based on interdependence. The convincingness of different theoretical assumptions in explaining the military-industrial policies of nations is evaluated. The analysis will start with posing the main methodological question for explaining legal regimes in light of the political forces which created them. This provides a theoretical framework for the interrelationship between law and power. In the same section, the relevance of realism for understanding EU military procurement law is elaborated on, as realism poses the methodological question. Building on this, the focus shifts to interdependence and institutionalism which provide more understanding of states creating and adhering to legal regimes without ideologically neglecting the role of power.

[45] See, e.g., JS Nye Jr, *The Future of Power* (Public Affairs 2011) 3, 5-6.

[46] As well as legal and political variables, these can also have a sociological or behavioural-psychological nature.

[47] Mearsheimer argues that equating power with outcomes is problematic for studying international relations, as one of the most interesting aspects of this area is how "power, which is a means, affects political outcomes, which are ends". The focus should thus be on capabilities and the way in which they could be used. See: J Mearsheimer, *The Tragedy of Great Power Politics* cit. 57-60.

[48] *Ibid*. 60-75. However, this awareness was already active in the economic theories of Adam Smith ("Of the expense of defence"), see: A Smith, *An Inquiry into the Nature and Causes of the Wealth of Nations* (Oxford University Press 1976 - first published in 1776) 689.

III.1. Overcoming the "realist challenge" in EU law: from realism to functionalism

Realism has a long-lasting tradition in philosophy and legal-political theories. In its essence, realism is based on the belief that power precedes morality and law rather than *vice versa*.[49] In the international system there can be a lack of effective authority as there is no centralised authority. Morgenthau therefore considered the refusal to "identify the moral aspirations of a particular nation with the moral laws that govern the universe" to be one of the main principles of realism in international relations, as power comes first. In his theory of international relations, human nature is considered as the driving force of politics. He considered the "political" human as power-seeking and acting out of self-interest in a world in which one is either dominating or dominated. International politics should then be explained by power defined in terms of such interest.[50] To remain free from the domination of others one first needs a secure space, which can be found in the sovereign nation state. International politics are then principally concerned with states seeking to maintain these spaces, by pursuing strategies of state survival. If power precedes morality, there is no limit on the means of domination, and survival is assured by acquiring superior means to potential dominators. Hence, military power is the primary source of authority in international relations.

Lacking a world government, the international system is characterised by anarchy, in which sovereign states are continuously protecting and enhancing their own interests. As a result, conflict – ultimately turning into war – is always near, and can even be considered the *ultima ratio* of power in international relations.[51] Following that line of thought, Waltz considered war in international relations as "the analogue of the state in domestic politics".[52] The difference between the state and war lies in the existence of a monopoly of legitimate physical force in the domestic system, which the decentralised international system lacks. Possessing adequate military capabilities – including as technologically advanced

[49] For Machiavelli there could be no effective morality without effective authority which is secured through military power "for war is the sole art looked for in one who rules", see: N Machiavelli, *The Prince* (Dover Publications 1992 – first published in 1532) 37. This was more bluntly paraphrased by Carr as considering that there can be no effective morality without effective authority, as "Morality is the product of power", see: EH Carr, *The Twenty Years' Crisis, 1919-1939: An Introduction to the Study of International Relations* (Harper & Row 1964 - first published in 1939) 64.

[50] HJ Morgenthau, *Politics Among Nations: The Struggle for Power and Peace* cit. 4-14 (footnote 43) ("Six Principles of Political Realism"). Morgenthau's approach, to a far extent, builds on the political philosophy of Thomas Hobbes, for who the function of the sovereign state was "to live peaceably amongst themselves, and be protected against other men", that is (internal) peace and (external) defence, see: T Hobbes, *Leviathan* (Oxford University Press 1996 – first published in 1651) 115,115.

[51] EH Carr, *The Twenty Years' Crisis, 1919-1939: An Introduction to the Study of International Relations* cit. 109. The idea of war as the ultimate instrument of (international) politics originates from the work of Carl von Clausewitz, see: C von Clausewitz, *On War* (Oxford University Press 2008 - first published in 1832) 13, 28-29.

[52] K Waltz, *Man, the State, and War: a Theoretical Analysis* (Columbia University Press 2018 - first published in 1954) 96.

equipment as those of other sovereign states – becomes vital for national security as a source of survival. If all sovereign states are guided by self-interest, dependency on foreign actors for the development and production of armaments makes one vulnerable. Procurement of military equipment developed and produced outside one's own secure space should be kept to a minimum. Although autarky in armaments production and complete technological autonomy are unrealistic in a globalised economy, somehow it remains the ideal for the realist. Even the founder of free market economic theory, Adam Smith, considered protectionism feasible in all industries that contributed to a state's military power.[53]

How does one then identify and explain legal norms in such anarchy? Does law have any potential at all? If so, can it be a tool to shape the system or is it merely a force within boundaries set by the system? These questions reflect what Slaughter considers the "realist challenge" of international law.[54] Overcoming this challenge requires an interdisciplinary approach to the understanding of legal norms that seek to regulate the relationships of sovereign states. Such an approach only works when accepting, on the one hand, that as proclaimed by Slaughter "the postulates developed by political scientists concerning patterns and regularities in state behaviour must afford a foundation and framework for legal efforts to regulate that behavior",[55] as these patterns can predict the potential effectiveness of these efforts. These patterns are what in the title of this *Article* are referred to as "power structures". On the other hand, one needs to presume that law has the potential of altering processes and outcomes of interaction between nations, as long as these legal regimes to some extent reflect existing power structures. In other words: to be an effective force, law must be functional.

This can be traced back to the functional approach to international law that Morgenthau envisioned in his earlier work.[56] Vigorously opposing the fundamentals of a positivist understanding of international law as a self-sufficient system which can be "understood without the normative and social context in which it actually stands", Morgenthau constructed a basis for a functional theory of international law at a most critical moment for the viability of international law. The invasion of Poland by Nazi Germany had just revealed the failure of the League of Nations and the previous appeasement policy of the UK towards Germany to maintain stability. According to Morgenthau, law stands in a dual functional relationship with the social forces of a particular time and space.[57] In a more normative

[53] A Smith, *An Inquiry into the Nature and Causes of the Wealth of Nations* cit. 452, 463. Smith used this argument to support the British Acts of Trade and Navigation (1651) which completely excluded all non-British ships from shipping goods to Britain. This is obviously a much broader exception to free trade than that provided by either art. 36 TFEU or art. 346 TFEU.

[54] A Slaughter, 'International Law and International Relations Theory: A Dual Agenda' (1993) AJIL 205, 207-208. This "challenge" occurred in particular after World War II had revealed the shortcomings of the post-World War I institutionalisation of international relations in bringing peace and stability.

[55] *Ibid*. 205.

[56] See: HJ Morgenthau, 'Positivism, Functionalism and International Law' (1940) AJIL 260, 274.

[57] *Ibid*. 274.

sense, international law is the "function of the civilisation in which it originates", meaning that it represents ethical values which are current in a society. At the same time, it is a "social mechanism" seeking to achieve certain objectives, be they of an economic or even military nature. The main consequence of such a functionalist approach is that law is only valid when the rules can either achieve a common interest or a balance of power.[58]

III.2. Systemic constraints on international cooperation and European integration

When it comes to cooperation, realism assumes that states pursue "relative gains" rather than absolute gains. For a state, the question is not merely whether integration improves life for its citizens, but, first, whether it strengthens the state's position in the international system. Just as power precedes morality, so security precedes welfare. Bull had already noted in 1982 that enhancing military integration in Europe would require a change of policy in Britain, shifting away from its focus on transatlantic cooperation. But even after the UK joined the European Community (EC) in 1973 this was still problematic. As Bull stressed, the UK had not become the equal of France and West Germany in European politics as the UK had presumed when joining.[59] Even after the UK had joined the EC, some sort of bipolar Franco-German power structure in the decision-making processes of the Community remained. After the collapse of the Soviet Union and the process from a *unipolar* international system (dominated by the US) towards a more *multipolar* system, the influence of the US in Europe gradually decreased, along with the relative power of one of its closest European allies, the UK.

The consequence of states pursuing relative gains, according to Waltz, is that integration is deterred by the fears of inequality in gains and dependency; both threatening state survival.[60] Unlike the presumptions of free market economics, there is no automatic harmony[61] in anarchy. When a state feels threatened, it will increase military spending to gain security after which other states will follow, and so on. In the view of Mearsheimer this leads to an international system in which states (particularly "great powers") must be offensive actors rather than merely defensive, as one can never be certain about the intentions of other states.[62] Increased military spending will only foster overall (global) security when it improves the balance of power. There will always be conflict between the economic advantages of integration and the expensive security guarantee of autonomy. Military procurement is illustrative of the struggle, as military spending in general is "unproductive for

[58] *Ibid.* 275. See also: HJ Morgenthau, *Politics Among Nations: The Struggle for Power and Peace* cit. 266.

[59] H Bull, 'Civilian Power Europe: A Contradiction in Terms?' (1982) JComMarSt 149, 160-161.

[60] K Waltz, *Theory of International Politics* (Random House 1979) 105-106.

[61] Adam Smith called this "the invisible hand". As opposed to the effects of individual security spending on overall security, this means that overall welfare is increased when all actors egoistically pursue their own welfare.

[62] J Mearsheimer, *The Tragedy of Great Power Politics* cit. 31.

all and unavoidable for most".[63] It would consequently be wrong to focus on economics when contextualising the law on military procurement. Economics can provide understanding of different types of secondary considerations, but the function of military procurement originates from the constraints imposed by global structures of military power. To take away the constraints on military cooperation and integration, their legal regimes should be built on balance-of-power logic rather than the economic logic of European integration.

III.3. Balance of power and troubled alliance

EU law is traditionally viewed from a common interest side of things, as exemplified by art. 1 TEU which mentions "the process of creating an ever closer union". One must, however, systematically distinguish between aims and means. As art. 3(1) TEU, sets out the overarching aims of the EU are to "promote peace, its values and the well-being of its peoples". The other paragraphs of the provision, which set out the means, indeed tend to emphasise supranational "common interest" means such as the internal market. Nevertheless, when the promotion of peace in a specific case is best served by more intergovernmental balance-of-power means, it takes precedence. In the words of Morgenthau, the balance of power should not be seen as a "choice of power politics", but as a "manifestation of a general social principle" and that as such it is "not only inevitable" but also an "essential stabilizing factor in a society of sovereign nations".[64] One of the major weaknesses of balance-of-power policies, namely the uncertainty of power calculations and alliances, can be countered by law,[65] but how is the balance of power reflected and safeguarded in EU law? A distinction should first be drawn between the balance of power in the world and among actors within the EU.

The historical overview in section II showed that major shifts in European integration were guided by balance-of-power logic, which in 1954 obstructed military integration. The idea of a common defence provided by the EDC and the incorporation of military policies into EU law by the Treaty of Maastricht were both guided by (a French) fear of a militarily dominant Germany. Paradoxically, the EDC also failed because of a French fear of the loss of military control because of the presence of a militarily dominant Germany in it. Consequently, the military relations between France and Germany were institutionalised within NATO by the principle of collective self-defence. There are now, however, two major problems in the EU-NATO relationship. First, NATO's establishment and success in protecting Europe from Soviet invasion depended on US hegemony within the alliance. Now that the US has been neglecting its hegemonic role,[66] a multipolar power structure within NATO arises. After Brexit, only two out of the four dominant actors within NATO

[63] K Waltz, *Theory of International Politics* cit. 107.

[64] HJ Morgenthau, *Politics Among Nations: The Struggle for Power and Peace* cit. 161.

[65] *Ibid*. 196-215.

[66] This can be illustrated by the US' recent plans to withdraw military troops from Germany, see: 'Donald Trump orders 9,500 US troops to leave Germany' (6 June 2020) The Guardian www.theguardian.com.

are EU Member States. Cooperation within such a multipolar structure is more complex,[67] as it hampers unity and thereby creates uncertainty in military strategy. The second problem starts with not all EU Member States being in NATO. However, even among those EU Member States which are part of NATO, priorities differ. The Baltic States and Poland, bordering the initial threat for which NATO was founded, are more likely than France or Italy to prioritise transatlantic cooperation over the EU.[68]

Within the EU, the identified problems make the achievement of a balance of power more complex. The uniqueness of the EU is that in many policy areas the Member States have limited their sovereign rights and transferred competence to the EU. In those areas, balance of power takes on a legal-constitutional form, almost as in democratic states, by dividing powers among different institutions (*trias politica* for instance) and ideally imposing systems of checks and balances. As art. 4(1) TEU states that national security has remained the sole responsibility of the Member States, it can be assumed that the military domain is not one of these areas. Balance of power in military affairs is consequently a more political process taking place between the Member States. In section IV, the limitations on the residual role of the Commission are elaborated. Although the EU now consists of almost five times as many states as after the Treaty of Rome, the balance of power is often still considered to centre round a French-German consensus. This is even more the case now that the UK has left the EU. Evaluating the balance of power in the EU by looking at France and Germany only is, however, problematic because of the identified problems at the NATO level. German-French consensus will not necessarily lead to a balance of power in military affairs, as the other 25 Member States have two concrete and allied alternatives to EU cooperation. In other words, France and Germany as the main EU powers potentially compete with the UK and the US for the alliance of the smaller European states. The EU's strategic autonomy then depends on unity beyond a simple French-German power balance.

III.4. Balance of power and military-industrial policymaking

Military procurement takes place at the national level, where the operational capabilities are located. Accepting the functional similarity of states (all pursuing their survival) means that in their procurement policies they all primarily strive for military security in terms of relative gains. What makes their procurement policies different is the intensity of the constraints that power structures impose on them. This depends on their capabilities.

[67] See for instance: J Mearsheimer, *The Tragedy of Great Power Politics* cit. 338 on 'The Causes of Great Power War' where he explains why war or conflict is more likely in multipolar power structures, as opposed to unipolar or bipolar structures.

[68] See 'Donald Trump orders 9,500 US troops to leave Germany' cit., after President Trump's statements on withdrawing troops from Germany, Polish President Duda asked for some of these troops to be sent to Poland instead, see: C Oprysko and Z Wanat, 'Trump Says He Will "Probably" Reassign Troops from Germany to Poland' (24 June 2020) POLITICO www.politico.eu.

The military-industrial policy of the Netherlands (as well as other European countries with similar capabilities) post-World War II illustrates an international system in which states are constrained by systemic pressures.[69] The Netherlands did not aspire to be self-sufficient in military industries, as this would have been unrealistic. To maximise national-industrial capabilities within the boundaries of the system therefore, from the 1970s onwards the Netherlands employed offset policies. Simply put, a direct offset means that when importing equipment, the exporting company (the prime contractor) agrees to involve Dutch sub-contractors in the development or production of the equipment. Often such offsets come with some sort of technology transfer from the prime contractor to the sub-contractor, stimulating technological innovation in the national industry (often through licensed production). By involvement in the development and production processes, national industry is stimulated, contrary to what happens when the equipment is imported without an offset agreement. In the latter scenario, the equipment could be acquired for a lower price. As stated by a former Dutch Minister of Economic Affairs, the extra cost serves an industrial policy purpose by aiming to level, however slightly, the unequal nature of the international military equipment market.[70]

The most well-known example of this policy is the participation of the Netherlands in the US-led project of the development of the F-35 fighter plane and the eventual procurement of these planes. In 1997, the Dutch government decided to participate in the development of the F-35 fighter plane, later triggering their procurement. Although there is a multitude of reasons that lay behind the Dutch involvement in the project, it seems clear that access to US military technology – which was deemed superior to European alternatives – and the traditionally close relations between the Netherlands (the Royal Netherlands Air Force in particular) and the US were decisive.[71] As opposed to the European alternatives such as the Tornado, Eurofighter Typhoon and Saab JAS39 Gripen programmes, the development phase of the F-35 programme was fully controlled by the US, which aimed to retain monopolies in high technology industries.[72] The involvement of companies from the non-US partners in the programme has been mainly in the production phase. Moreover, the lead contractors (Lockheed Martin and Boeing) had already been selected before other countries joined the programme, and were located in the US.

[69] With regard to this example, see: E Dirksen 'The Defence-Industry Interface: The Dutch Approach' (1998) Defence and Peace Economics 83, 91.

[70] Letter of the Dutch Minister of Economic Affairs to the Second Chamber of Parliament, Enforceability of offset-agreements of 21 June 1996 Nr. 24 793, 4, original version in Dutch language.

[71] See: G Scott-Smith and M Smeets, 'Noblesse oblige: The Transatlantic Security Dynamic and Dutch Involvement in the Joint Strike Fighter Programme' (2012-2013) International Journal 49 and S Vucetic and KR Nossal, 'The International Politics of the F-35 Joint Strike Fighter' (2012-2013) International Journal 3 and in C Klep, *Dossier-JSF* (Boom/Amsterdam 2014) 11, 68.

[72] This comparison was made by Hartley in: K Hartley, 'Collaboration and European Defence Industrial Policy' (2008) Defence and Peace Economics 303, 308.

As explained by Scott-Smith and Smeets,[73] Dutch participation and gradually expanding involvement in the F-35 project was first and foremost a geopolitical decision rather than an economic one. A "deep-rooted" preference of the Royal Netherlands Air Force (RNAF) for cooperating with the US was primarily based on the aim to secure alignment with a global "superpower".[74] This fits in with the aspect of realism as set out in this section. For a country with limited capabilities to increase its power it is better to align with a global superpower than a regional (European) one: it triggers a greater relative power increase. Only once the decision had been made to participate in the F-35 programme, did industrial reasons become increasingly important to expand the involvement and to procure the aircraft. In their study, Van de Vijver and Vos estimated a turnover value of the F-35 programme for Dutch companies of over €9.2 billion and over 23,000 man-years of employment.[75] In time, the Dutch aerospace industry became dependent on the F-35 programme and the Dutch involvement in it. So, even when Saab, in 2008, once again offered the Gripen planes to the Netherlands for a significantly lower cost price, the Netherlands was by then engaged too deeply with the F-35 project and had become too industrially dependent on it to switch.[76] Although such collaboration is complex, realists would simplify the crux of these decision-making processes by stating that the military benefits of alliance with the US superseded economic concerns, just as these type of benefits supersede morality and law. Concerns of military power constrain the achievement of economic gains by collaboration rather than vice versa, as security is – more generally – a precondition for economic welfare.

III.5. EDA's intergovernmental approach to offsets

A striking example of the difference between intergovernmental and supranational regulation of military procurement is the approach to offsets of the EU Defence Agency (EDA). The Codes of Conduct of EDA on Defence Procurement and on Offsets seek to promote transparency and objectivity in procurement procedures of military equipment and limit the use

[73] G Scott-Smith and M Smeets, 'Noblesse oblige: The Transatlantic Security Dynamic and Dutch Involvement in the Joint Strike Fighter Programme' cit. 66-69.

[74] Stemming from the US context, such preferences are sometimes also linked to what is referred to as the "military-industrial complex", which was introduced by former US President Eisenhower. It refers to informal ties between the military, politicians and industry actors, influencing (and possibly corrupting) such acquisition processes, see: Transcript of President Dwight D. Eisenhower's Farewell Address (1961), www.ourdocuments.gov. See also: K Hartley, 'The Arms Industry, Procurement and Industrial Policies' (2007) Handbook of Defense Economics 1139, 1155-1156.

[75] M Van de Vijver and B Vos, 'The F-35 Joint Strike Fighter as a Source of Innovation and Employment: Some Interim Results' (2006) Defence and Peace Economics 155, 158.

[76] Moreover, the Dutch Court of Auditors concluded in a report presented to the Dutch Parliament in March 2019 that the time-planning of the programme was completely dependent on political decision-making in the US, leaving the Dutch only with the choice to "get on the bus, or let it pass", see: Netherlands Court of Audit, Lessons Learned from the JSF Project: Keeping Major Defence Procurement Projects under Control of 06 March 2019 english.rekenkamer.nl, original in Dutch language .

of offsets.[77] At the same time, it seems to acknowledge offsets as a legitimate instrument to ensure that military spending has a positive impact on national strategic industry or even the economy in general. Indirect offsets in particular (elaborated on in section III.6), however, remain problematic in the context of the EU's rules on public procurement and the internal market because the industrial obligations which they impose on suppliers can hardly be linked to national security. According to the Commission, these even, by definition, distort a free (liberalised) and integrated market.[78] However, the EDA's Code of Conduct does not distinguish between direct and indirect offsets. Next to promoting transparency, the strongest commitment which the Code of Conduct imposes is that offsets should not exceed the value of the procurement contract.[79] The question of market distortion is omitted, leaving it as a matter of proportionality.

III.6. Interdependence and institutionalism: finding certainty in legal regimes

Compared with realism, institutionalism and interdependence provide more optimism for a rule-based international order, beyond merely shaping and facilitating a balance of power. Keohane and Nye's theory of complex interdependence offers both an additional and alternative approach to global politics. Although core realist assumptions are accepted, interdependence grants a less dominating role to states as the main actors in international politics and the use of force as their primary – and of last resort – policy instrument.[80] Deepened transgovernmental relations by increased international trade constrain the actions of states in different ways from the ways in which realism perceives the use or threat of military force to do. Consequently, international relations have become more like domestic politics. Next to military power, there is a multitude of issues involved, lacking a clear hierarchy.[81] Particularly in a region as economically integrated as the EU, the *high politics* of national (military) security do not necessarily dominate the *low politics* of welfare.[82]

As opposed to the previously discussed direct offsets in military procurement, indirect offsets are a straightforward example of the interaction between high politics and

[77] EDA, The Code of Conduct on Defence Procurement of the EU Member States Participating in the European Defence Agency, 21 November 2005 and EDA, The Code of Conduct on Offsets, 24 October 2008.

[78] See: Communication COM(2007) 764 final from the Commission of 5 December 2007 - A strategy for a stronger and more competitive European defence industry, 7. See also: Directive 2009/81/EC cit.

[79] EDA, The Code of Conduct on Offsets cit. 3.

[80] RO Keohane and JS Nye Jr, *Power and Interdependence* (4th edn. Longman 2012 – first published in 1977) 19.

[81] *Ibid*. 22-23. In Waltz's structural realist approach, the structure is determined by military power only and all behaviour is explained within this structure, see: K Waltz, *Theory of International Politics* cit. Interdependence theory, on the contrary, relies on issue structure in which "different issue areas often have different political structures that may be more or less insulated from the overall distribution of economic and military capabilities", *Ibid*. 42.

[82] *Ibid*. 19.

low politics. By means of indirect offsets, national governments oblige foreign suppliers of military equipment to place orders with domestic industrial actors which are not directly connected with the imported goods.[83] Hence, military expenditure is used to promote low-politics objectives, aiming to stimulate national industries and increase employment. This does, however, not indicate that military industries are interchangeable with other economic sectors. Indirect offsets are mostly used when direct offsets are impossible because of a lack of relevant industry in the procuring state. The hierarchy in which military concerns supersede general economic concerns remains.

According to Keohane and Nye, increase in non-discriminatory international trade and the development of huge multinational companies after World War II took place in a "political environment favourable to large-scale institutionalized capitalism".[84] One of the core presumptions of this "economic process model" of explaining international relations is that economic welfare is the dominant political goal for national governments. Although economic interdependence and integration lead to loss of national autonomy, once interdependence has been institutionalised withdrawal is difficult, as the welfare costs of disrupting economic (international) relations will generally outweigh the autonomy benefits. Military power is then not considered a suitable policy instrument to address issues lacking a direct security concern and is thus not always the last resort option. Keohane and Nye therefore consider realism as inadequate to explain much of international relations because it relies on a presumed hierarchy of issues in which military security always takes precedence. In their alternative approach, different issues are considered to occur in different political structures. Following this approach of issue structuralism, these different issues should then be analysed in isolation.[85]

The example of the Dutch participation in the F-35 programme is more complicated to explain based on issue structuralism. Although the Netherlands deliberately sacrificed much more of its autonomy than it would have done within a similar European project, the prospects of relative gains were higher, as it ensured alliance with a global superpower rather than with regional European powers. At the same time, the conviction of the Dutch government that the project was feasible was triggered by the disaster of Srebrenica in 1995, where the Dutch military was incapable of protecting the Bosnian population from the Serbian military because of NATO's failure to provide air support.[86] This

[83] E Dirksen 'The Defence-Industry Interface: The Dutch Approach' cit. 91.

[84] RO Keohane and JS Nye Jr, *Power and Interdependence* cit. 33.

[85] *Ibid*. 43.

[86] This is pointed out by Scott-Smith and Smeets in G Scott-Smith and M Smeets 'Noblesse oblige: The Transatlantic Security Dynamic and Dutch Involvement in the Joint Strike Fighter Programme' cit. 54 and mentioned in C Klep, *Dossier JSF* cit. 20. Interestingly, the failure of Europe to act in the Yugoslav wars is often also mentioned as triggering higher involvement by the EU in military affairs, see for instance: T Palm and B Crum 'Military Operations and the EU's Identity as an International Actor' cit. and T Palm, 'Normative Power and Military Means: The Evolving Character of the EU's International Power' (Dissertation: Vrije Universiteit Amsterdam 2017) 20.

made it clear that the Netherlands needed to be more self-sufficient (less dependent on international cooperation) in operational terms. By engaging in the F-35 programme its relative power in the international system increased and meanwhile the domestic aerospace industry could survive.

To evaluate the EU's regime on integrating military industries on the basis of interdependence and institutionalism, it is necessary to consider the role which these theories prescribe to institutions and the precondition of issue linkage.

III.7. The role of international institutions

Interdependence-based theories tend to stress the equal importance and reinforcing relationship between wealth and power as the goals of states.[87] Even when accepting that nations are preoccupied with relative gains rather than absolute gains, Keohane prescribes systemic value to international institutions. These international institutions, first, allow "small and weak states" to form coalitions and align their policies.[88] Secondly, these regimes "change the calculations of advantage that governments make".[89] They facilitate cooperation by creating patterns of legal liability which reduce uncertainty of outcomes. Regimes also solve the problem of asymmetrical information which impedes cooperation in a state of anarchy.[90] They thereby reduce the fear of states about the intentions of others. By engaging in international institutions and committing themselves to shared purposes, it is then presumed that the behaviour of states is significantly influenced. In particular, the reliability of states would be affected if one state fails to fulfil its commitments. A decrease in reliability would then make states lose power as well. This approach implies that diplomacy is a dynamic process in which international institutions influence states and vice versa.

It should, however, be noted here that the EU's legislation on military procurement is more ambitious than just changing the ways in which states approach military industries. It is obvious that institutionalised collaboration in military affairs (mostly within the context of CSDP) has created awareness among EU Member States that they often are stronger together, but the legislation seeks to reduce the ability to choose between a domestic or European approach. In concrete cases, it is difficult to decide when national security interests necessitate a domestic approach. However, if military industries are completely Europeanised, some states will lose their industrial capabilities which they now have, while the international and the EU-CSDP systems still pressure them to be self-sufficient in operational capabilities.

[87] This definition is used by Keohane in: RO Keohane, *After Hegemony: Cooperation and Discord in World Political Economy* (Princeton University Press 1984). He refers to: R Gilpin, *U.S. Power and the Multinational Corporation: The Political Economy of Foreign Direct* (Basic Books 1975) 43.

[88] RO Keohane and JS Nye Jr, *Power and Interdependence* cit. 30.

[89] RO Keohane, *After Hegemony: Cooperation and Discord in World Political Economy* cit. 26.

[90] *Ibid*. 85.

III.8. Issue linkage as a prerequisite for institutionalism

The main condition under which cooperation and integration can take place is "issue linkage". Keohane considers issue areas to be the scope of international regimes and to include different issues that are regarded as so closely linked by governments that they should be dealt with together.[91] Regimes, in that sense, facilitate the linkage of issues to one another.[92] More importantly, they provide incentives for compliance, even when this is for a specific issue which is not beneficial, by "retaliatory linkage". When a state chooses to disturb a certain issue in a regime this will not only affect cooperation or integration on this issue, but it will disturb the functioning of the regime as a whole. It might even disturb other regimes which exist within the same network.[93] Accepting Keohane's understanding of regimes means that the potential effectiveness of placing new rules within a regime depends on whether the new issue is regarded as so closely linked that it should be dealt with together with the other issues. Alternative to this "substantive linkage", Haas considers linkage to be possible through some sort of *do ut des* ("tactical linkage") or when non-linkage would create great uncertainty ("fragmented linkage").[94] For tactical linkage it is, however, still necessary that different issues have similar value for the sovereignty of the actors, meanwhile fragmented linkage relies on the impossibility to deal with something at a national level. If one of the linkage methods is not sufficiently present but linkage is institutionalised anyway, incentives for compliance are deemed to be minimal.

According to Trybus, sovereignty for EU Member States in the area of defence would imply "defence autarky", i.e. being fully independent from any other nations through self-sufficiency.[95] It is clear that even for the European nations with the largest capabilities (UK, Germany and France) autarky will not be such a realistic option, because this would come with too high a cost. Unwillingness of governments to increase military expenditure at the cost of welfare-oriented policies, in a general sense, fits interdependence theories. In particular, at the national level, in a context of budgetary constraints, the boundaries between security and socio-economic policy objectives become increasingly blurred. However, this does not indicate that issues of military and economic power can easily be linked to each other in an international regime. It only indicates that military security and wealth reinforce each other, as military power requires an industrial and technological base to produce armaments. Likewise, military power requires a population from which to recruit troops. In a more general sense, wealth is simply necessary – in the last resort

[91] *Ibid*. 61.

[92] *Ibid*. 91.

[93] *Ibid*. 104.

[94] EB Haas, 'Why Collaborate? Issue Linkage and International Regimes' (1980) World Politics 357, 372.

[95] M Trybus, *Buying Defence and Security in Europe: The EU Defence and Security Procurement Directive in Context*, (Cambridge University Press 2014) 40-41.

– to make going to war affordable.[96] The available budgetary and industrial means in a state for military procurement alter the state's capabilities, not its function.

III.9. Interim conclusion: linking military security to the internal market?

Military power and its industrial base are fundamentally different from economic power and non-military sectors of the economy in the ways in which they structure power in international relations. These differences lie in their substance (the military function instead of an economic function; therefore, no substantive linkage) and their value for the functioning of a state (as state survival is primarily ensured by military power; thus, no tactical linkage). In a state-centric world, possessing military capabilities is inherently a national matter (so, no fragmented linkage). Consequently, the linkage of the military-industrial capabilities of states with other economic capabilities, as the internal market-based DPD aims to achieve, cannot find a theoretical basis in realist, interdependence or institutionalist theories. The requirements for successful issue linkage are not met, as the military-power logic of states in military procurement cannot be equated with the economic-power logic of states in engaging in the internal market.

IV. The Commission's pursuit of EU strategic autonomy by industrial and procurement policies

Defining and implementing the CFSP is the prerogative of the European Council and the Council. The Treaty of Maastricht did, however, create political momentum for intervention by the Commission in domestic industrial policies on military equipment. This started with a 1996 policy document. The actions of the Commission in the field of military industries are based on the internal market competence of the EU, as the Commission lacks competence on CFSP matters. In internal market affairs, the Commission can initiate legislation and monitor compliance. In the 1990s, the end of the Cold War had led to significant cuts in military spending by the Member States. This had triggered a crisis in military industries, both in terms of employment and industrial capabilities. The Commission stressed that international competition was threatening the existence of the European military industry and that overcoming this required a "traditional"[97] European approach based on economic efficiency in procurement policies.[98] The Commission also mentioned the lack of competitiveness of European industry by mentioning that "inclusive of intra-EU trade: 75% of imported major conventional weapons came from the US in the

[96] Mearsheimer considers that military forces are built on societal resources of which "the size of a state's population and its wealth are the two most important components for generating military might", see: J Mearsheimer, *The Tragedy of Great Power Politics* cit. 60-61.

[97] "Traditional" in the sense that it is based on the legal frameworks of the internal market adopted with the Treaty of Rome which established the European Community.

[98] Communication COM(96) 10 final from the Commission of 24 January 1996, The challenges facing the European defence-related industry, a contribution for action at European level, 3.

1988-92 period".[99] Most EU Member States appeared to be more deeply integrated with the US than with each other.

The Commission took on a rather ambiguous approach to European security in its 1996 policy paper by claiming that this depended on two factors. First, the creation of a "centre of stability" should take place through expansion, by letting in all European countries wishing to join the EU. Secondly, this stability should be reached by establishing a "fully fledged" CFSP.[100] For the latter, it was deemed essential to develop a common armaments policy; this ambition can still be found in art. 42(3) TEU. Both the establishment of the EDA and PESCO, however, reveal that this approach led to differentiated integration rather than deepened integration in the field of defence. Geographical expansion of the EU and deepening integration, even though they both aimed to foster security, do not go hand in hand, nor do they necessarily reinforce each other. The lack of binding legal commitments also raises questions about how "fully fledged" the EU's defence policy is.

The Commission furthermore contested the broad interpretation and application of the art. 346 TFEU exception by the Member States by proclaiming that the exception does not grant any general powers to the Member States. More concretely, the Commission stressed that the exception does not fully exclude armaments from the scope of EU law. Only when objectively necessary for the protection of national security interests, can the exception be invoked. This approach – which, as mentioned, departs from a literal interpretation of the text of art. 346 TFEU – gained legal strength from a judgment of the CJEU in 1999. In the context of Spain exempting the import of armaments from VAT contrary to an EU directive, the Court ruled that Spain had "not demonstrated that the exemptions provided for by the Spanish Law are necessary for the protection of the essential interests of its security".[101] In a more recent judgment the Court even read some sort of proportionality test into the exception.[102] This shows that there is a limit to the discretionary power of the Member States to invoke art. 346 TFEU.

To understand the difficulties of linking military security integration to the internal market regime in a more practical sense, this section evaluates the Commission's most prominent policies and legislation in this field, i.e. the Defence Procurement Directive (DPD) and the European Defence Fund (EDF), based on the theoretical findings of section III.

[99] *Ibid*. 7.
[100] *Ibid*. 11.
[101] *Commission v Spain* cit. para. 22.
[102] *Schiebel Aircraft* cit. para. 37.

IV.1. The Defence Procurement Directive (DPD 2009)

The jurisprudence of the Court eventually opened the way for the Commission to propose sector-specific procurement legislation for the military sector.[103] The DPD was subsequently adopted in 2009 by the EU legislature on the basis of art. 114 TFEU, the EU's competence to harmonise legislation relating to the internal market.[104] The Directive is not based on art. 42(3) TEU, thus it cannot – theoretically – be considered part of a common armaments policy as envisioned by the Commission in 1996. The fact that arms exports are still regulated within the realms of the CFSP confirms this.[105] Considering the exclusion of legislative competence in the area of the CFSP, adopting a Directive would have been impossible. This does not, however, make the Directive less ambitious. In the Preamble the legislature proclaims that "the gradual establishment of a European defence equipment market is essential for strengthening the European Defence Technological and Industrial Base and developing the military capabilities required to implement the European Security and Defence Policy".[106]

There is a clear logic in these objectives. The CSDP requires industrial military capabilities to be developed in a more transnational setting. As this sector is characterised by public *monopsonists* (i.e., the demand side is exclusively covered by governments), integration is only possible when governments refrain from protectionism in their procurement. For the smaller countries to take advantage of the extended economies of scale, collaborative procurement is often needed. Even if military capabilities remain at the national level, integration of industries can strengthen the overall EU industrial capabilities by the efficiency gains. Combined with increased spending, economies of scale should also foster technological innovation which is crucial in an international system characterised by state competition and technological arms races.[107]

Next to the substantive legal implications for the procurement policies of the Member States, the main institutional implication of the entry into force of the Directive in 2011 is perhaps more ground-breaking. By initiating the Directive, the Commission strengthened its position in military affairs. It created a legislative basis for enforcement, as the Commission has a general competence to monitor the compliance of Member

[103] See for this line of thinking, based on the idea of the Commission engaging in "judicial politics": M Blauberger and M Weiss, 'If You Can't Beat Me, Join Me!" How the Commission Pushed and Pulled Member States into Legislating Defence Procurement' (2013) Journal of European Public Policy 1120, 1134-1135.

[104] In addition, the Directive has been based on the specific internal market legal bases of the freedom of establishment (current art. 53(1) TFEU) and the freedom to provide services (current art. 62 TFEU). See: Directive 2009/81/EC cit.

[105] Common Position 2008/944/CFSP of the Council of the EU of 8 December 2008 defining common rules governing control of exports of military technology and equipment.

[106] Recital 2 of Directive 2009/81/EC cit. Interestingly, the objectives of the supranational DPD resemble the Treaty-based tasks of the intergovernmental EDA; see, in particular: art. 45(1)(b) and (e) TEU.

[107] See for instance: 'Mind Control - Artificial Intelligence and War' (5 September 2019) The Economist, www.economist.com.

States with the EU Treaties.[108] The proper implementation and application of Directives is a part of this. As mentioned before, the Commission cannot monitor the compliance of Member States within the area of the CFSP.

When it comes to offsets, the implications of the Directive are surrounded with ambiguity. It has been argued that the Commission intentionally left this issue outside[109] the Directive, as including its strict interpretation on the compatibility of it with primary EU law would not be accepted by the Council.[110] At the same time, any inclusion of regulation on certain types of offsets would undermine the Commission's position on the inherently discriminatory nature of these. Offsets can then only be justified on a case-by-case basis on grounds of public or national security. Nevertheless, with the Directive the Commission got "a foot in the door".[111] To fully shape its strict approach on offsets, the next step for the Commission was to "step through the door".[112] In January 2018, the Commission opened infringement procedures against both Denmark and the Netherlands for imposing unjustified offset requirements on foreign suppliers, thereby infringing primary EU law and incorrectly transposing the Directive.[113] The fact that Denmark does not participate in EDA or PESCO makes these infringement procedures politically extra sensitive.

The Directive does not regulate or even mention offsets but it does offer an alternative. Contracting authorities may require a successful tenderer to sub-contract a maximum of 30 per cent of the contract to third parties[114] and they may oblige tenderers to sub-contract based on non-discriminatory and transparent procedures.[115] There is, however, no obligation to do so. In procurement procedures in which it is likely that a domestic company will win, there is little to no incentive for a Member State to require competitive bidding for sub-contracts. According to Trybus, the sub-contracting regime of the DPD is a compromise between the Member States with the bigger industries (prime-con-

[108] Art. 258 TFEU.

[109] Although the Directive provides rules on sub-contracting, see: art. 21 and Title III of Directive 2009/81/EC cit.

[110] M Weiss and M Blauberger, 'Judicialized Law-Making and Opportunistic Enforcement: Explaining the EU's Challenge of National Defence Offsets' (2016) JComMarSt 444, 452-453. This is also explicitly mentioned in: para. 18 of Guidance Note – Offsets, 12-02-2016 Directive 2009/81/EC cit.

[111] See: M Weiss and M Blauberger, 'Judicialized Law-Making and Opportunistic Enforcement' cit. 453 ff.

[112] *Ibid*.

[113] Press release, COM IP/18/357 of the Commission of 25 January 2018, Defence procurement: Commission opens infringement procedures against 5 Member States. However, from these five infringement procedures, already four have been dropped by the Commission after negotiations. Only the procedure against Denmark (see Commission database: infringement nr. INFR(2017)2187) is still open (at the time of writing). This is remarkable, as enforcement of EU public procurement rules in the defence sector is one of the key responsibilities which was assigned to the Commission's new Directorate-General for Defence Industry and Space by the Von der Leyen Commission.

[114] Art. 21(4) Directive 2009/81/EC cit.

[115] Art. 21(3) and 51 Directive 2009/81/EC cit.

tracting capabilities) and the ones with smaller industries (sub-contracting capabilities).[116] That the regime is an outcome of political compromise is certainly true, but the question remains whether the rules are capable of fully liberalising the major EU military supply chains. When there is no obligation to do so, the Member States with prime-contracting capabilities will have little incentive to use the options. Following realist logic of state competition, the Member States with the sub-contracting capabilities will subsequently have less incentive to use the DPD at all, and instead will invoke art. 346 TFEU to buy domestically or impose offsets on a foreign supplier. Compromise or not, the sub-contracting regime of the DPD does not genuinely reflect the balance-of-power logic put forward above, in section III.

The figures of the 2015 evaluation of the Directive by the Commission do not show a complete shift towards an open and integrated military sector. From the roughly €80 billion of military procurement by the Member States, only €19.3 was procured within the regime of the Directive.[117] It seems that the exception of art. 346 TFEU is still extensively used by the Member States to procure military equipment outside of the Directive's regime. Considering that more than half of the value of military procurement within the regime of the Directive took place in the UK, future compliance with the rules of the Directive is – to put it mildly – not so certain.

IV.2. The European Defence Fund (EDF 2021-2027)

The Council and the European Parliament reached political agreement in 2019 to adopt the Commission's proposal for a European Defence Fund (EDF), worth €13 billion, for the budget period 2021-2027.[118] The budget and with it the ambitions of the EDF were, however, significantly reduced to €7 billion in 2020 because of the political compromise on the general EU budget in the context of the COVID-19 crisis.[119] The objective of the fund is clear. In line with its legal basis in the EU Treaties (art. 173 TFEU), the fund aims to foster the competitiveness of the EU's industry. More particularly, the efficiency and innovation capacity of the EU's defence technological and industrial base should be strengthened

[116] M Trybus, *Buying Defence and Security in Europe: The EU Defence and Security Procurement Directive in Context* cit. 452-453.

[117] Staff Working Document SWD(2016) 407 final from the Commission of 30 November 2016, Evaluation of Directive 2009/81/EC on public procurement in the fields of defence and security, 10, 33, 34. See also the document which the SWD accompanied: Report COM(2016) 762 final from the Commission to the European Parliament and the Council of 30 November 2016 on the implementation of Directive 2009/81/EC on public procurement in the fields of defence and security, to comply with art. 73(2) of that Directive.

[118] Resolution TA/2019/0430 of 18 April 2019 of the European Parliament on the proposal for a regulation of the European Parliament and of the Council establishing the European Defence Fund European Commission Press Release, 'EU Defence Gets a Boost as the European Defence Fund Becomes a Reality' (29 April 2021) ec.europa.eu.

[119] European Council (EUCO 10/20), Special meeting of the European Council (17, 18, 19, 20 and 21 July 2020) – Conclusions, 21 July 2020, 53.

for the sake of increasing the EU's "strategic autonomy and freedom of action" in the international order.[120] It is clear from both the preamble and the award criteria for funding that "technological autonomy" is considered the crucial factor in this objective.[121] Eligible projects should contribute to "the innovation and technological development of European defence industry" and thereby increase independence from third country technologies.[122] Obviously, these aims are deemed to be achievable only in a "more integrated defence market in Europe".[123] The Commission will be the institution responsible for determining eligibility and allocation of funds. Broadly speaking, this integration should happen on three different levels.

First, integration should be fostered at the level of the supply side. Projects are only eligible for funding when undertaken within a consortium consisting of at least three different entities which are established in at least three different Member States.[124] Moreover, all the infrastructure to be used as well as the executive management structures must be on EU territory during the project. None of the recipients or involved sub-contractors can be under the control of a non-associated third country or an entity based in such a country. This is intended to safeguard the "security and defence interests of the Union and its Member States" as established in the CFSP.[125]

Secondly, integration should be stimulated throughout the supply chains of military equipment. A consortium should, in that regard, contribute to cross-border cooperation, in particular by including as sub-contractors from Member States other than the recipients. The legislation does not, however, in itself oblige the consortia which receive such funding to select their sub-contractors on the basis of non-discriminatory and transparent procedures. As mentioned above (section IV.1), this is possible, but not obligatory when procuring within the regime of the DPD.

Thirdly, integration is sought on the demand side through the promotion of collaborative procurement. In a general sense, it is mentioned that it is important that Member States intend to jointly procure the final product of a project.[126] For certain development activities, it is required that at least two different Member States have already expressed the intention to procure the final product in a coordinated way.[127] Collaborative procurement is also stimulated by the Council's PESCO decision, under which the participating Member States are also committed to involvement in the EDF.

[120] Art. 3(1) Resolution 0430 (2019) cit.
[121] *Ibid*. recital 3.
[122] *Ibid*. art. 13 (b) and (d).
[123] *Ibid*. recital 1.
[124] *Ibid*. art. 11(4).
[125] *Ibid*. art. 10.
[126] *Ibid*. recital 22.
[127] *Ibid*. art. 23(3).

IV.3. The legal fiction of "economies of scale" by cooperation

The different initiatives of the Commission in the military domain designate fragmentation as a crucial obstacle to a strong European defence industrial base.[128] Such a base is deemed to be a prerequisite for the EU's strategic autonomy. The obvious economic argument against this fragmentation is that it is inefficient because potential economies of scale are not achieved.[129] "Unnecessary overlap" (as mentioned in the PESCO commitments) resulting in duplication is the consequence of a "systematic bias" for national solutions. Particularly when it comes to Research and Development (R&D) – characterised by major investments and limited public budgets – integration is considered crucial. In its impact assessment of the EDF, the Commission essentially blames fragmentation on the demand side of the market. If only Member States would collaborate more closely and refrain from buying domestically, the supply side would follow, which would then increase economies of scale. The free-market logic of the Commission is tempting, but the political economy of military procurement is dominated by military power rather than economics.

An example of this fragmentation, according to the Commission, is the development and production of combat aircraft. By the end of the 20th century there were three different projects being undertaken in Europe: the Eurofighter Typhoon (Germany, UK, Italy and Spain among the countries involved in the development, production and procurement), Dassault Rafale (France) and the Saab Gripen (Sweden). At the same time, the UK, the Netherlands, Denmark and Norway were financially engaged in the development and production of the F-35 project which was effectively controlled by the US government. As the Commission argues, the research costs of the three European projects exceed the costs of the F-35 project, yet the US-led project will produce more than double the number of aircraft.[130] The figures on which the Commission bases its assessment seem, however, quite meaningless when considering the different European projects separately, as there are significant differences in cost-efficiency. The research costs of Saab Gripen (€1.48 billion) are much lower than those of the Typhoon (€19.48 billion) or the Rafale (€8.61 billion) relative to its expected output.

Looking at the politics of these projects brings more systemic understanding. As pointed out by Hartley, the savings in development and production costs are often only theoretical. In practice there is a departure from the economies of scale of "perfect collab-

[128] See: Press release, COM IP/16/4088 of the European Commission of 30 November 2016 on European Defence Action Plan: Towards a European Defence Fund.

[129] This is exemplified in the impact assessment by the Commission of the European Defence Fund, see: Staff Working Document SWD(2018) 345 final from the Commission of 13 June 2016 Impact Assessment – Proposal for a Regulation of the European Parliament and of the Council establishing the European Defence Fund, 14-15.

[130] According to a study conducted by the Centre for Studies on Federalism (CSF) and the Istituto Affari Internazionali, see: V Briani, *The Costs of Non-Europe in the Defence Field* (CSF 2013) 1, 16. This is referred to in the EDF's impact assessment by the Commission, see: Staff Working Document SWD(2018)345 final cit. 15.

oration", as work-sharing is often based on political equity and offsets rather than efficiency.[131] France was initially part of the Typhoon programme, but withdrew from it in 1985 and eventually started its own programme. As mentioned by Heinrich, there is "ingrained resistance" in a "state-centric world" to hand over control of weapon systems to foreign nations, thus France apparently insisted on getting 50 per cent of the work share.[132] If one follows a realist understanding of European politics it cannot come as a surprise that including the three major European military powers in such a cooperative programme might result in failure of cooperation. Achieving a balance of power is much more complex in a multipolar power structure – as opposed to a unipolar or bipolar structure.

Even though cooperation has a great efficiency potential, a twofold fear (in comparison with both the UK and Germany) of a relative loss of power was for France perhaps too much. The much higher efficiency in research spending of the Saab Gripen and F-35 programmes could in that regard also relate to a lower intensity of systemic pressures against cooperation because there was a unipolar power structure within these programmes; this meant that one actor was "holding the balance". At the same time, realism provides an explanation for the reasons of a state such as the Netherlands to prioritise participation in the F-35 programme. Here, only the US and the UK had a deeper level of involvement, whereas in the Typhoon programme the Netherlands would have competed for control with four more powerful European countries. Less absolute political control within a certain programme does not indicate fewer relative gains.

This reality is also visible in the 2018 Defence Industry Strategy of the Dutch government. In the maritime sector, it envisions a dominant position for domestic industry, as there are prime-contracting capabilities domestically. The lower level of industrial capabilities in the aviation industry and industries providing equipment for the land forces does not trigger a more economic approach, as the Commission foresees. Instead, the strategy seeks to compensate this by international cooperation rather than through a European market-based approach.[133] In practice such a cooperative approach indicates the use of offsets as in the F-35 programme. Offsets can, in that light, be considered a balance-of-power policy. Based on the proposed functional approach to EU law, it triggers the question whether effective regulation should include a legal framework for these offset agreements.

[131] K Hartley, 'The Arms Industry, Procurement and Industrial Policies' cit. 1172-1173. Hartley also specifically evaluated the collaboration inefficiencies of the Typhoon programme, which led to cost increases, delays and reduced quantities, see: K Hartley, 'The Political Economy of Arms Collaboration', in R Matthews, *The Political Economy of Defence* (Cambridge University Press 2019) 244-250.

[132] MN Heinrich, 'The Eurofighter Typhoon Programme: Economic and Industrial Implications of Collaborative Defence Manufacturing' (2015) Defence Studies 341, 353.

[133] The Netherlands Ministry of Defence and the Netherlands Ministry of Economic Affairs and Climate Policy, 'Memo: Defence Industry Strategy', www.government.nl, see the charts on 23.

IV.4. From fragmentation to "European champions"?

At the same time, France and Germany are promoting a so-called "European champions" approach, seemingly suiting the Commission's urge for greater economies of scale.[134] The Franco-German proposal for this renewed European industrial policy approach was paradoxically a reaction to the Commission's blocking of the *Siemens-Alstom* merger in the rail infrastructure sector on the basis of EU competition law. Fragmentation in the military sector is, however, more complex than a lack of large companies. According to the Commission, trans-border consolidation in the military sector has often led to "multi-domestic" companies rather than multinational ones. The use of offsets in particular stands in the way of deep integration, since it obliges these multi-domestic companies to include domestic industry in the supply chain.[135] Considering this, it is not so strange that Competition Commissioner Vestager responded to the blocking of the merger by stressing the need for a level playing field for European companies, for instance by using the public procurement rules.[136] The Commission pursues economic integration through a system of free competition, not through mergers.

However, also within the ambit of EU public procurement law, the proposed liberalisation of the European military industry brings with it the fear of the smaller EU Member States of an internal market dominated by "European champions" located in the major industrial countries (after Brexit: France and Germany; also, to a lesser extent, Italy, Spain and Sweden).[137] The larger industrial Member States then have a much greater potential for relative gains than the smaller ones. Consequently, complete liberalisation would disrupt the balance of power between the stronger and weaker states in the EU. As mentioned before (in section III.3), most of these "weaker" states are not powerless, as they can choose to prioritise NATO cooperation over an EU-based approach.

[134] See: Bundesministerium für Wirtschaft und Energie, *A Franco-German Manifesto for a European industrial policy fit for the 21st Century* www.bmwi.de. More recently, however, the German government also published a strategy proposing to keep certain parts of "strategic industry" within their own borders, see: Bundesministerium für Wirtschaft und Energie, *Strategiepapier der Bundesregierung zur Stärkung der Sicherheits- und Verteidigungsindustrie* www.bmwi.de.

[135] Staff Working Document SWD(2018) 345 final cit. 15. Contrary to the findings in: M Kluth, 'European Defence Industry Consolidation and Domestic Procurement Bias' (2017) Defense and Security Analysis 158, 171. Kluth compared the amount of domestic procurement (of Germany, France, UK and Italy) in the period before and after several consolidations that led to European cross-border companies (Airbus, MBDA Missile Systems, Thales and SELEX) in the areas of missiles, airborne radar and shipborne radar. Across the different segments, he found a decline of domestic procurement bias from 65 per cent to 43 per cent after several mergers in the military sector.

[136] Statement by Commissioner Vestager statement/19/889 of 6 February 2019 on the proposed acquisition of Alstom by Siemens and the proposed acquisition of Aurubis Rolled Products and Schwermetall by Wieland.

[137] See for instance the SIPRI Arms Industries Database 2018, which included only EU-based companies from France, Germany and Sweden in its global top 50 of arms producing companies: www.sipri.org.

To overcome this fear, the Commission has given special attention to SMEs in the EDF and the DPD. It is, however, questionable whether the regulatory frameworks succeed in this. Under the regulatory regime of the EDF, there seems to be no general requirement of competitive bidding for sub-contracts. It is likely that at least between the participating Member States there will be some sort of competitive bidding for sub-contracts, as only cross-border consortia are eligible for funding. The DPD, however, only grants contracting authorities the possibility of requiring competitive bidding for sub-contracts. Cross-border access for SMEs remains difficult if the Member States with the larger industries do not require competitive bidding for sub-contracts when they procure under the regime of the Directive. Consequently, for the Member States with smaller industries, there will often be no political incentive to use the Directive at all. These Member States traditionally sought to balance the power of the bigger industrial states by making use of offsets, which are left unregulated by the DPD and often considered illegal by the Commission. If these Member States want to include their domestic SMEs within the framework of the DPD, they can only do so while granting access to SMEs from other Member States without the guarantee of reciprocity. Only budgetary constraints on military spending can sometimes trigger the usage of the Directive, as offset agreements can be costly. In times of increasing military spending, these constraints are less dominant.

IV.5. Interim conclusion: the problem of linking military security with the internal market

This section on the legislation and policies initiated by the Commission exposed – in a more practical sense – that linking military security integration to the internal market regime is problematic. The next section seeks to provide a theoretical basis to overcome this problem.

V. A theoretical basis for EU military procurement law

Economic and political integration in post-war Europe brought improved welfare conditions and greater stability to the continent. At the same time, there is profound ambiguity between the aims and means of integration. The EU's most important aim has always been peace, thus European integration has always come with significant geopolitical implications. However, only since the Maastricht Treaty have the EU's means intruded into the military domain. In the context of CSDP, the EU has been engaged in military missions outside its own territory and several initiatives for closer cooperation have been launched. But the EU's military capabilities are rather limited, as they are severely constrained by the military sovereignty of its Member States when compared with actors with similar or smaller economic capabilities (US and China, but also regional powers such as Russia, Turkey, Iran and Saudi Arabia).

These constraints are first on the operational capabilities and secondly on the industrial capabilities. First, although PESCO has increased and structured military cooperation, the EU itself cannot deploy military forces. This results in severe political constraints on the EU's operational capabilities, as collaboration depends on political compromise between Member States with diverging geopolitical interests. Secondly, the military prerogative of the Member States constrains the EU's industrial capabilities because of the inefficiencies that accompany both fragmentation and intergovernmental collaboration. According to the Commission, these inefficiencies severely constrain the competitiveness of European military industries in the world, leading to dependence on imports from third countries.

V.1. The primary role of military-industrial capabilities and balance of power

The limit on EU industrial capabilities has left the Member States with great discretionary power in their responsibility to ensure their own capabilities. To strengthen the industrial base underpinning an effective CSDP – and perhaps to compensate for the lack of operational autonomy – the Commission has been seeking to minimise the limits on the EU's industrial capabilities by requiring Member States to procure military equipment on the basis of free market principles. However, European liberalisation would bring with it winners and losers. Ensuring relative gains in a rule-based system becomes rather complex in a multipolar power structure. In the period before the Maastricht Treaty, a large proportion of the cross-border arms trade of EU Member States was still with the US, implying a more unipolar structure in Europe based on US hegemony. For a country with a relatively small or mid-sized industry like the Netherlands, greatly relying on the economic activities of sub-contractors, it was sensible to participate in the US-led F-35 programme rather than one of the European programmes. For smaller NATO states facing a higher intensity of systemic pressures, like the Baltic States, alignment with the US is even more necessary in the absence of EU capabilities. In both cases, international cooperation outside the EU frameworks is used to seek a greater balance of power between the bigger and smaller Member States. Offset agreements are a tool for this. The absence of rules on offsets and the presupposed illegality of offsets often make the DPD an ineffective instrument for these states' military policies.

These power struggles show the relevance of realism for studying military procurement. The governments of EU Member States pursue relative gains in their industrial activities, not only as opposed to third countries, but also compared with each other. The latter is shown by the *economically* inefficient, yet *militarily* effective French pursuit of its own striker plane programme. In a more general sense, it is also shown by the failed attempt of the UK to become a dominant actor within the EU. In military terms, the period after the collapse of the Soviet Union has been a period of transition. Before then, the EU's power structures were still determined by the security umbrella of the US. Since the Maastricht Treaty, the EU has made great efforts to become a more autonomous actor

in global politics, mostly by intergovernmental military means. The question remains whether the DPD fits the EU's overall military approach.

V.2. General implication for EU supranational regulation

The DPD and the EDF are, from a constitutional perspective, particularly interesting examples of the EU's pursuit of strategic autonomy. This is because their legal frameworks are supranational, while the EU Treaties place strong limits on the autonomous nature of the military and security competences in the domain of the CFSP. Evaluation of the legality and (potential) effectiveness of these supranational EU actions therefore needs to take the power structures into account of which the relevant Treaty provisions and its secondary legislation are a product. These power structures are based on capabilities. Without EU capabilities, the national security prerogative remains the basis for law and politics.

For the procurement regime, this means that proclaiming that it takes national security in a general sense into account is insufficient. The nature of the security interests of a country like France differs drastically from that of the security interests of Lithuania when security is defined in terms of capabilities. Hence, a more dynamic approach is necessary. In a general sense, this fits the jurisprudence of the CJEU on security exceptions. It does not, however, fit the legal framework of the DPD. Regulation can only be successful when different existing capabilities/security dynamics and balance of power are appreciated. To put it more simply: restraining Member States by imposing free market principles on their military procurement does not suffice when leaving open the option for winning tenders to execute contracts unrestrained by the same principles. This becomes even more problematic when considering that there is a great differentiation between the amounts of state ownership and state aid of the EU Member States in military industries. For the smaller countries, regardless of the DPD, reliance on the armaments exception will still be necessary.

V.3. The need for a dynamic armaments exception to the military procurement regime

It might appear paradoxical to argue for both a more *dynamic* and more *systemic* approach to EU law on military procurement, but this is inherent to the way in which interdependence and realist presumptions interact and conflict in the legal system imposed by the EU Treaties. Interdependence is traditionally framed as the norm (internal market), and realism (national security) as the exception. Legal interpretation by the Court of Justice of the EU has played a stimulating role in the integration of the EU's internal market. The Court has done this through *teleological* (wide) interpretation of the norms and *restrictive* (narrow) interpretation of the exceptions. The latter sometimes goes against the

literal meaning of legal provisions.[138] This approach makes sense when considering the purpose of the EU Treaties. If Member States were to use the exception excessively so as to circumvent their duty to contribute to the establishment of an internal market – especially by adopting protectionist measures – it would undermine the achievement of the EU's objectives. In the military domain this is fundamentally different, because the norms themselves were adopted as alternatives to integration of military capabilities (operational and industrial). This is both apparent in the security derogations to the internal market regime and in the intergovernmental frameworks for military cooperation.

Moreover, with the Lisbon Treaty the supranational internal market pre-occupation of the EU Treaties systemically shifted towards a more intergovernmental peace and security focus. art. 3(1) TEU now reads that the overarching objective of the EU Treaties is to "promote peace, its values and the well-being of its peoples". When it comes to peace, the EU contributes through the CFSP, lacking supranational obligations like the ones which the DPD prescribes.

When interpreting the public security and national security exceptions to the internal market rules (hence, to public procurement obligations) this context should first be understood. This does not mean that industrial integration in the EU is impossible or infeasible. In an international order in which the interests of the US and the EU increasingly diverge, most Member States can only be effective actors through the EU.[139] However, the legal and political security prerogative of the Member States does indicate that the security exception needs a systemic understanding just as much as the interdependence norm does. First, this means that security needs an interpretation that suits the different security interests of Member States (along with their differences in capabilities). Secondly, the free-market norm can only be effectively imposed on the Member States as far as markets are genuinely free. This requires enhanced consistency between the enforcement of the EU's public procurement rules and competition and state aid rules. Punishing a Member State for directly awarding a contract to a national company could be rather meaningless when the "legal" alternative is to open its procurement procedures to different types of subsidised foreign companies. Thirdly, the security exceptions should enable the use of offsets when these are necessary for effective national security strategies pursuing the maintenance of capabilities. For the DPD to constitute an effective and consistent legal regime on military procurement, it should regulate offsets.[140]

[138] See *supra*, section II.2, especially the cases *Commission v Spain* cit. para. 22 and *Schiebel Aircraft* cit. para. 37.

[139] See for instance the Churchill lecture given by the Prime Minister of the Netherlands in 2019 in which he stresses the need for the EU to become a stronger actor in the global order, M Rutte, 'The EU: From the Power of Principles towards Principles and Power' (13 February 2019) www.government.nl.

[140] EU Regulation of offsets has also been proposed, although based on different reasoning, by Heuninckz, see: B Heuninckx, '346, The Number of the Beast? A Blueprint for the Protection of Essential Security Interests in EU Defence Procurement' (2018) PPLR 51, 71-74.

VI. Concluding remarks

The security exceptions in the EU Treaties grant wide discretionary powers to the Member States when it comes to military procurement. To a large extent, it could be argued that Member States sought to keep all their sovereign powers in the area of military procurement when adopting the Treaty of Rome in 1957. European integration is goal-driven and somewhat expansionist in that regard. The severe limitations which the EU Treaties include on competences when it comes to military security are a natural result of power structures which are shaped by varying degrees of national capabilities. In reverse, power structures constrain the potential of liberalising and integrating military industries in the EU. These constraints bear two legal consequences for effective EU regulation of military procurement.

First, the appropriateness of the legal basis of the DPD in the internal market sphere of EU law, instead of regulation in the intergovernmental sphere of the CFSP, needs to be re-evaluated.[141] The means used by the DPD are perhaps reconcilable with the system of the EU Treaties, as the DPD leaves open the option of derogation based on art. 346 TFEU. However, the DPD's aim of complete liberalisation conflicts with the structures of the EU Treaties which rather reflect full sovereignty of Member States over their military capabilities.[142] Establishing an integrated market for military equipment based on economic logic is unachievable and contradictory to the military-power logic which guides national decision-making and European legal structures for military cooperation (for instance within PESCO). If these opposing legal structures were to be irreconcilable, the EU Treaties would precede secondary law like the DPD. The legality of the DPD and its legal base would be at stake.

Secondly, balance-of-power policies in military procurement are often pursued by means of offset agreements. The facts that the legislature refused to regulate these agreements and that the Commission still considers those agreements to be almost always illegal reveal the great legal uncertainty that surrounds them. It did not, however, cause the Member States to stop using them. Balance-of-power policies *in abstracto* are legitimate tools by which smaller Member States can curb the power of the dominant actors in European (military) politics. However, when there are *in concreto* no clear legal constraints on them, integration of markets for military equipment is hampered more than necessary. As argued in this *Article*, the role of power structures in military procurement fundamentally differs from other public procurement, as military industries fundamentally differ from other economic sectors. It cannot be expected therefore that the

[141] The issue of the DPD's legal basis has also been raised in: ER Manunza and CEC Jansen, 'Een interne markt voor defensieopdrachten?' (11 June 2019) Staatscourant research.vu.nl 8.

[142] Especially since the EDA (which was established in 2004) has been assigned with the same objectives as those pursued by the DPD. Art. 45(1) TEU thus provides an alternative legal basis (which is more specific than art. 114 TFEU) for the fulfilment of the DPD's objectives.

military domain is simply integrated on the basis of trade liberalisation. Limiting the liberalising effect of the rules by legalising the use of offsets based on objective criteria does not stand in the way of military integration in political terms. It would only indicate integration based on military logic rather than economic logic. To achieve military-strategic autonomy, the EU and its Member States should accept that it is a matter of military power with economic implications rather than the other way around.