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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

(Translation from Dutch)

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INTRODUCTION

By means of a strategy letter to the market, the Deputy Commander of the Royal Netherlands Army announced in April 2019 that he was to start a survey (also referred to here as 'preliminary market consultation') among about a dozen logistics companies with the aim of eventually creating a so-called Logistics Ecosystem (hereinafter: the Ecosystem). This is in line with the plan to create 'adaptive armed forces' (often referred to by the concept of 'total force'). The aim is to establish a long-term strategic collaboration between the Ministry of Defence and undertakings in which personnel, assets and methods are reciprocally shared and exchanged.

The question had already arisen at that time as to what legal form this collaboration should take, and more specifically whether there were any legal obligations under public procurement law and/or restrictions under competition law that would preclude the setting-up of the Ecosystem and/or its maintenance over the years. That question was submitted to us. In this study we therefore examine whether, and if so how, the setting up of the Ecosystem should be put out to tender under European and/or national (procurement) law, and whether competition law restrictions are applicable with regard to its realisation (i.e. setting-up and maintenance), particularly with regard to those aspects relating to the reciprocity between the Ministry of Defence and the (external) undertakings and/or among the undertakings themselves.

In order to answer these questions accurately, it is imperative to first of all identify the goal to be pursued by the Ecosystem. In organising the Ecosystem, its goal – to provide the logistics capabilities necessary for the national security of the State of the Netherlands – will take centre stage. This particularly concerns logistics capabilities that form part of the military-operational capabilities to defend the Netherlands' own and allied territory and to promote international peace and security.

The reasons necessitating its setting-up and maintenance in this form are also discussed. The Ecosystem will provide the Ministry of Defence with guarantees for achieving the military objective because the participating undertakings will commit themselves to this objective and will make available all the necessary logistics capabilities in times of crisis. For this, as will be explained below, the participating market players must be established in the Netherlands and participate in military exercises in peacetime. These participants must also have a specified number of employees who have Dutch nationality and are reservists, so that they can take part in military operations in crisis situations. In order to induce undertakings to participate in the Ecosystem, there will have to be commercial advantages to be gained from participation in peacetime, such as taking part in and giving support to military exercises and so-called 'white logistics'.

The purpose and need for this kind of solution, the set-up of the Ecosystem, are discussed in Part I of this study. We will discuss this goal of the Ecosystem in the light of the geopolitical developments and legal structures within which it is pursued.
We will then discuss how applicable EU law should be interpreted, namely on the basis of an examination

of its purpose and in relation to the entire EU law system (Part II) This is essential because internal market law is a 'means' of pursuing the fundamental 'goal' of the EU – namely to ensure peace between the peoples of Europe – and is essentially subordinate to it. Only after discussing this can the Ecosystem finally be tested against EU internal market law (Part III) and national law (Part IV). National law will be dealt with last because the Defence and Security Procurement Act (DSPA)[1] exclusively serves the implementation in the Netherlands of Directive 2009/81/EC[2] for public procurement in the fields of defence and security (hereinafter: the Defence Directive). Therefore, this Act and its scope are identical to the Defence Directive. The definition of the scope of this Act is thus dependent on the analysis of the Directive, whose scope in turn depends on an analysis of EU law as a whole.

In this study, we wish to emphasise above all that the various crises that have affected the EU in the last two decades – in the fields of financial markets, migration, the rule of law and currently public health as a result of the Covid-19 epidemic – prove that, in general, the EU's legal framework is ill-suited to respond adequately to crisis situations, which often results in emergency measures and emergency legislation and regulations. For example, during the financial crisis, emergency funds and support measures for banks had to be rapidly put in place in order to limit the economic impact of the crisis. The migration crisis led to the closing of borders of a number of Member States, major conflicts between Member States about admitting migrants and to a politically controversial deal with Turkey to prevent migrants from entering EU territory as much as possible.

The current response to the Covid-19 crisis in terms of EU law shows how fluid EU internal market, state aid, and competition law can become in times of crisis and how this may lead to the suspension of EU law obligations; borders being closed to people and goods, emergency aid granted to companies to prevent bankruptcies, etc. As a result of the inadequate preparedness for the possibility of a pandemic on the part of almost all Member States, we have also witnessed the disastrous consequences of shortfalls in manpower in healthcare and many other logistical shortcomings in terms of testing capacity, materials, ICU capacity, etc.

One lesson that the EU and Member States should draw from this is that it is necessary to develop an optimally effective *ex ante* policy in case Europe is confronted with a security crisis. It is therefore very important to determine what scope EU law currently offers Member States to develop such a policy themselves, such as the proposed Ecosystem in the Netherlands, particularly given that, and as long as,

[1] Act of 28 January 2013 on the implementation of Directive No 2009/81/EC of the European Parliament and of the 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 (Defence and Security Procurement Act);
[2] Directive 2009/81/EC of the European Parliament and of the 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, Official Journal of the European Union L 216, 20/08/2009, page 76 (the Defence Directive).

the EU fails in this respect. Proactively determining and interpreting the legal scope and rules for such a system is preferable to reactively abandoning all types of market rules in the event of a crisis such as the one we are facing today.

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PART I

Purpose and organisation of the Logistics Ecosystem in the light of international geopolitical developments and complex legal defence and internal market structures

1.1. Purpose of the Logistics Ecosystem

The primary purpose of the Ecosystem is strategic in nature. The aim of the system is to provide the logistics capabilities necessary to safeguard national security in crisis situations, as also required under allied obligations in the NATO and EU context. By entering into constant collaboration with undertakings, the Ministry of Defence aims to obtain guarantees in terms of the speed and scalability of logistics capabilities during security crises.

The fact that the Ecosystem is concerned in particular with allied obligations (NATO and EU) and not just with the Netherlands' own national territorial integrity is demonstrated by the geographical scope of the capabilities sought. The logistics capabilities must be sufficient to sustain the deployment of troops outside the Netherlands' own territory. They should at least be able to sustain the deployment of one brigade-sized task force at a distance of approximately 1,500 kilometres for a period of one year.[3] This would make the Ecosystem suitable for protecting at least a section of the eastern border of allied (NATO and EU) territory for a period of one year.

This strategic goal is expressed in specific terms in the so-called *red button scenario* provided by the Ecosystem. This means that in various types of crisis situations the Ministry of Defence must have the necessary logistics capabilities of participating undertakings at its disposal. As a starting point for this scenario, the Survey uses the situation in which Article 5 of the NATO Treaty is triggered following an armed attack on a NATO member.[4] This falls under the first main Defence task, namely the protection of own and allied territory (*Defence Main Task I*).[5] The Survey shows that the market (in this case the undertakings which participated in the Survey) can (and wishes to) meet the Ministry of Defence needs in terms of logistics capabilities. This goes beyond simply guaranteeing deployment of the capabilities of the participating market players. In order to be able to function militarily in crisis situations, periodic large-scale exercises and the associated training of (civilian) personnel are also required in peacetime.[6]

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[3] R. Meijers and D. Verhoef (Kirkman Company), *Verslag verkenning Logistiek Ecosysteem - naar een strategische en innovatieve samenwerking* (Survey Report Logistics Ecosystem – toward a strategic and innovative collaboration, March 2020, p. 17.

[4] See: *Survey Report Logistics Ecosystem*, p. 88 (Annex 2).

[5] See: Netherlands Ministry of Defence, *Final Report: Future Policy Survey – A new foundation for the Netherlands Armed Forces* 2010, p. 25.

[6] *Survey Report Logistics Ecosystem*, p. 20.

In addition to providing logistics capability for the first main Defence task, the Ecosystem should also provide logistics capability for the carrying out of the other two Defence main tasks, namely the promotion of the international rule of law and stability (*Defence Main Task II*) and the provision of support to civilian authorities in law enforcement, disaster relief and humanitarian aid (national and international; *Defence Main Task III*).[7]

This is in line with the constitutional role regarding the military security of the State of the Netherlands, which extends beyond its own territorial integrity. As enshrined in Article 97 of the Constitution, the armed forces also serve to "maintain and promote the international legal order". This requires international cooperation in the EU and NATO context.

A correct analysis of the Ecosystem from a legal point of view requires knowledge of the complex developments after the Second World War (WWII) that resulted in the current defence system. The international geopolitical developments of recent decades have influenced the way the Netherlands armed forces are organised, and this in turn affects the way the Ecosystem should be designed so as to meet the purpose for which it is intended. We will explain this below in section 1.2.

1.2. Legal analysis of the Logistics Ecosystem requires knowledge of the complex development of the post-war defence system

1.2.1. The origins of a defence system comprising several layers of (incomplete) regulation

In the years following the foundation of NATO, tensions increased sharply between the United States (hereafter: US) and Western Europe on the one hand and the Soviet Union on the other. The outbreak of the Korean War in particular led to the conclusion that West Germany should rearm itself. Jean Monnet, the mastermind behind the Schuman plan that established the European Coal and Steel Community (ECSC), had said in 1950: "*La contribution allemande à la défense de l'Ouest étant indispensable, et le réarmement de l'Allemagne inacceptable*".[8] Thus emerged the plan for a European Defence Community (EDC), which would integrate the military power of the Member States and entrust industrial and operational decision-making to a supranational authority (similar to the ECSC). Although a political agreement was reached between the six intended Member States (France, Germany, Italy, the Netherlands, Luxembourg and Belgium), the French parliament eventually refused to ratify the treaty in 1954. As a result, the rearmament of West Germany was in fact effected by its accession to NATO in 1955, and the primacy of (Western) European security was definitively vested in this intergovernmental organisation.

[7] See: Netherlands Ministry of Defence, *Final Report: Future Policy Survey – A new foundation for the Netherlands Armed Forces* 2010, p. 25.

[8] A contribution by Germany to the military defence of the West is necessary, and rearmament of Germany is unacceptable. J. Monnet, *Mémorandum au Président du Conseil* (18 September 1950), accessible through: https://www.cvce.eu .

1.2.2. The obligations under the NATO Treaty (1949)

To guarantee security in Europe and therefore in the world after WWII, the NATO Treaty[9] had already been signed in 1949 by most of the countries of Western Europe, the US and Canada. The NATO Treaty is based on the right of collective self-defence, as enshrined in Article 51 of the UN Charter. This principle simply means that "an armed attack against one or more of them in Europe or North America shall be considered an attack against them all", as laid down in Article 5 of the NATO Treaty.

However, the NATO Treaty does not only create responsive obligations, but also contains obligations of a preventive nature, as the parties to the treaty undertook to "by means of continuous and effective self-help and mutual aid, [...] maintain and develop their individual and collective capacity to resist armed attack" (Article 3). In short, NATO member states must have the capabilities to *effectively* offer each other protection in military crisis situations. A number of these obligations have also been formulated explicitly. In 2014, for example, NATO countries agreed to link the above obligation to a budgetary commitment. They agreed that at least 2 percent of each country's GNP was to be spent on defence, of which at least 20 percent was to be invested in materiel.[10] However, the essence of the obligations still lies in the capability to offer each other effective protection. The effective utilisation of industrial capabilities in crisis situations therefore requires the necessary logistics capabilities.

1.2.3. Development of the EU defence strategy

European integration of a supranational nature took definite form with the *Treaty establishing the European Economic Community* (Treaty of Rome or EEC Treaty) concluded in 1957, which established the European Economic Community and laid the foundations for a European internal market. The EEC Treaty sought to ensure peace and security between the peoples of Europe indirectly through economic integration and cooperation.[11] The EEC Treaty firmly limited the potential for defence integration within

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[9] North-Atlantic Treaty, Washington D.C., 4 April 1949.

[10] NATO, *Wales Summit Declaration*, 5 September 2014, para. 14.

[11] The following is a literal quote by E.R. Manunza taken from footnote 59 of her Preliminary Opinion to the Dutch Construction Law Association: "Naar een consistente en doelmatige regeling van de markt voor overheidsopdrachten" to *Vereniging voor Bouwrecht* : "For the sake of convenience, in this study we will use the term European Union also to refer to what at the time was still known as the European Community (E[E]G). By way of a reminder.,. in 1957, the *Treaty establishing the European Economic Community* (Treaty of Rome) was concluded in Rome, which established the European Economic Community. The legal structure of this association, which initially had only five members, gradually expanded in terms of membership (currently 27) and fields of activity over the years. One of the most important changes was effected in 1992 with the Treaty on European Union (EU Treaty), establishing the European Union, which began to function alongside the EEC, which had been renamed the 'European Community'. At the same time, the name of the founding treaty was changed to the *Treaty establishing the European Community* or *EC Treaty*. As a result of the changes effected by the Lisbon Treaty signed on 13 December 2007, the Treaty of Rome is now called *Treaty on the Functioning of the European Union (2008/C11/47, TFEU)*. See the consolidated version of the Treaty on European Union (2008) C115/13 and the consolidated version of the Treaty on the Functioning of the European Union (2008) C115/47. The consolidated versions of these documents currently form the legal basis of the European Union."

the economic context of the Treaty. The earlier failure of the EDC led to the inclusion of several provisions in the EEC Treaty to guarantee the military sovereignty of the Member States in the internal market context by allowing exceptions to the internal market rules on the grounds of the protection of public security (current Articles 36, 52, 62, 65, 346 and 347 TFEU - Treaty on the Functioning of the European Union).

After the fall of the Berlin Wall on 9 November 1989 and the further disintegration of the Soviet Union, a shift took place in the traditional dynamics of international security. EU Member States were no longer under direct territorial threat from the Soviet Union. As a result, the US began to gradually withdraw from Europe. It was the beginning of a transformation from a unipolar security world order – with the US as military global power – towards a multipolar one. In response, the EU worked on an expansion eastward and developed a Common Foreign and Security Policy (CFSP) on the basis of the Maastricht Treaty (concluded in 1992). It was only with this Treaty that a legal basis for military cooperation was incorporated into primary EU law and an ambition for developing a common security and defence policy emerged (CSDP; now Article 42 TEU – Treaty on European Union or EU Treaty). However, it would take another decade before the European Council launched its first CSDP strategy in December 2003.

This made the EU's responsibility to directly contribute to international peace and security a reality.[12] The first two EU military missions to the Balkans were launched in 2003, and more missions followed.[13] However, participation in such missions can in no way be seen as an obligation for Member States.[14]

The role of the US and the need for transatlantic cooperation nonetheless remained a reality. Military cooperation based on the NATO Treaty remained the backbone of European security. However, due to the erosion of US hegemony and of its political willingness to guarantee European security, the EU Global Strategy of 2016 saw a shift in emphasis from transatlantic cooperation to 'strategic autonomy'.[15] In addition to the decline of US dominance and the industrial and military rise of China, today's world is also characterised by regional superpowers such as India, Iran, Saudi Arabia and Russia. The EU's external policy is now aimed at acquiring and maintaining an autonomous role in this world by itself.

[12] European Council, 15895/03 PESC 787, *A secure Europe in a better world – European Security Strategy*, Brussels: 8 December 2003.
[13] For an overview of 12 military missions since 2003 and their limited character, see: T. Palm & B. Crum, 'Military operations and the EU's identity as an international actor', *European Security* 2019, pp. 513-534.
[14] Alone among Member States, Denmark even has a complete 'opt-out' in relation to the CSDP.
[15] EU External Action Service, *Shared Vision, Common Action: A Stronger Europe – A Global Strategy for the European Union's Foreign and Security Policy*, June 2016.

PART II

Legal admissibility of the Ecosystem must be assessed in the light of the development, purpose, system and spirit of EU law as a whole

It is evident from the foregoing that the Ecosystem provides the logistics capabilities needed by the Netherlands armed forces to carry out their tasks. It has also become clear why the security of the Netherlands is dependent on alliances, which entail obligations. A survey of the legal autonomy and room for decision-making remaining for Member States to realise *adaptive armed forces* based on an Ecosystem as proposed, cannot remain limited to an assessment solely based on national public procurement law or EU public procurement law and internal market law. Such an approach is, after all, too 'narrow' as it does not take into account the impact on that law of other relevant developments regarding national security in other areas of EU law, and would therefore lead to a different assessment of the legal admissibility of the Ecosystem in significant respects, as we will see in Part III. Internal market law must thus be seen as part of the overall system of EU Treaty law and interpreted in the light thereof.

We will therefore explain in more detail below the obligations that the NATO Treaty and the EU Treaties entail for the Netherlands in the light of the EU's overarching objective and how the EU's legal system has evolved with regard to security and defence policy. Such explanation is crucial because this evolution reflects the dynamic, 'living' nature of the Treaty framework and consequently has implications for the assessment of the Ecosystem within that Treaty framework and the interpretation and application of the internal market exceptions in particular.
The importance of this broader view is underlined by the fact that the Court of Justice of the EU (hereafter also referred to as the Court or CJEU) in its interpretation of EU law mainly applies goal-oriented (*teleological*) and systematic methods of interpretation. This means that for the interpretation of (a provision of) EU Law, understanding of the underlying purposes of the EU Treaties and the broader system to which a specific provision belongs is needed.

We will therefore first outline those methods of interpretation of the Court, and subsequently the important changes to the EU Treaty framework that give greater significance to peace as an EU objective and to European and national security as part of the system of EU law. In that discussion, we also take into account the general principles of EU law that play a decisive role in the interpretation of EU law and, consequently, in the assessment of the legality of the Ecosystem. A combination of the above will then serve as broader EU law benchmarks for the assessment of the Ecosystem against internal market law in Part III. This analysis will demonstrate that an Ecosystem of the type proposed can be justified on the basis of national security.

2.1 Purpose and coherence are fundamental to the CJEU's interpretation of the system under Treaty law as a whole

Under the preliminary ruling procedure (Article 267 TFEU), the Court has a decisive say on the interpretation of EU law and also, under the infringement procedure (Article 258 TFEU), on the assessment of the legality of Member States' actions under EU law. Therefore, when assessing the Ecosystem, it is important to have an understanding of how the Court goes about its interpretation.

As a general rule, judicial interpretation involves choices and room for consideration, which cannot be scientifically understood or predicted, but can only be 'calculated' based on factors that point to a consistent argumentation or factors of legal reasoning and decision-making.[16]A decisive factor for acceptance of the authority of law is ultimately its persuasiveness, and that of its interpretation. This in turn depends on the extent to which legal decisions are perceived as correct/fair and not as arbitrary, and they must be understandable in the sense that they can be justified by reference to existing legal standards.[17]

A broad analysis of judicial choices of interpretation and the use of different methods of interpretation in the major Western legal systems has made it clear that these can be broken down into three main categories of argumentation, which are deemed to contribute to the previously mentioned persuasiveness: (i) linguistic, (ii) systematic and (iii) goal-oriented.

2.1.1 Not (merely) interpreting the letter of EU law

Although these different methods of argumentation can be seen as complementary, and as mutually reinforcing a particular interpretation, a literal interpretation of the text of a legal provision is usually the starting point, followed by systematic and goal-oriented methods of interpretation.

Traditionally, however, the CJEU has mainly used the second and third methods because the linguistic, literal interpretation is further complicated in the context of EU law by the fact that all the languages of the EU Member States are official languages, and therefore all – 24! – language versions of EU law are authoritative, and also by the fact that all EU provisions are a reflection of political compromises between all – currently 27 – Member States of the EU. The result is therefore sometimes referred to in terms of *constructive ambiguity*;[18] as a text can be kept general, vague, unclear and multi-interpretable, or may contain legal loopholes in order to reach a political compromise. The relevance of the linguistic interpretation method may be further diminished by the extent to which the context or reality at the time of the adoption of old, long-standing provisions has now become unimportant or outdated; the existence of conflicting standards; and strong or stronger counter-arguments of a different type that override the

[16] G. Beck, *The Legal Reasoning of the Court of Justice of the EU*, Hart Publishing, Oxford, 2012, p. 161.
[17] Ibid.
[18] See, for example: M. Jegen and F. Merand, 'Constructive Ambiguity: Comparing the EU's Energy and Defence Policies', *West European Politics* 2014, pp. 182-203.

regular power of a linguistic argument, for example the importance of systematic coherence.[19]

This scenario, and in particular the limitations of the linguistic interpretation method, can be seen very clearly when interests are weighed that concern the internal market on the one hand and issues of international politics and security on the other, as is the case when assessing the legal admissibility of the Ecosystem. In section 3.2.2.3 we will see that the above is relevant to the *Albore* case with regard to the interpretation of Article 347 TFEU. That case shows that on the basis of the purpose of the provision the Advocate General clearly assumes a wider margin of discretion for the Member States than the wording of the provision would suggest.

2.1.2 Assessment of admissibility of the Ecosystem under internal market law is based on a goal-oriented and coherent interpretation of the 'whole' system

Section 2.1.1. has made it clear that it is essential to view the EU Treaties themselves as a coherent system, and their various components – such as internal market law, public procurement law, competition law and security policy – not as independent pillars but as coherent parts of a single common system and in the light of the overarching objective set out in Article 3(1) of the TEU (see below, section 2.2.1.).
Since the Lisbon Treaty of 2009, the EU Treaties also place more explicit emphasis on good governance aspects of EU action, including the need for consistency and efficiency. For example, Article 13(1) TEU now provides that the EU must have an institutional framework 'which shall aim to promote its values, advance its objectives, serve its interests, those of its citizens and those of the Member States, and ensure the consistency, effectiveness and continuity of its policies and actions'.

The systematic interpretation method is rooted exactly in the ideal of coherence and non-contradiction of law and policy and expresses a basic requirement of consistency, namely that concepts are used consistently and standards are compatible not only with the regulations of which they form part but also with other relevant components of the law and of the legal system more generally, including general legal principles.[20] Where reliance on the legislation itself and the broader legal context does not lead to an unambiguous or satisfactory explanation, the goal-oriented interpretation method comes into play, according to which the Court is guided by the goal envisaged by a provision as well as its context. In this regard, it will take into account not only the values and objectives of the specific legislation in question, but also those laid down at Treaty level and, in doing so, arrive at an interpretation 'in the spirit' of the EU Treaties.[21] These are the methods that the Court uses to assess measures that impede the internal market – the Ecosystem being an example – and that Member States attempt to justify on the basis of the exception provisions.

[19] Beck 2012 (footnote 16).
[20] Beck 2012 (footnote 16).
[21] Cf. the earlier case *Van Gend en Loos* in which the Court considered 'the spirit, the general scheme and the wording' of the Treaty provision to assess whether it could have direct effect or not. See: ECJ 5 February 1963, *Van Gend & Loos v. Netherlands Inland Revenue Administration*, Case C-26/62, European Court Reports 1963, 00003.

Illustrative of this is the *Leifer* case, which concerned national (public) security, in which the Court held in para. 27: "As the Advocate General stated in point 41 of his Opinion, it is difficult to draw a hard and fast distinction between foreign-policy and security-policy considerations. Moreover, as he observes in point 46, it is becoming increasingly less possible to look at the security of a State in isolation, since it is closely linked to the security of the international community at large, and of its various components".[22]

The European principle of effectiveness is the guiding principle behind these methods of interpretation. In interpreting EU law, this legal principle requires that its 'useful effect' (*effet utile*) must be taken into account.[23] This means that EU law must not be interpreted in such a way that it leads to an outcome that is inconsistent with the objectives pursued or impedes its effective and practical operation.[24] In addition, the Court takes into account not only the legal consequences of its decision, but also the possible social, political and economic consequences thereof. Again, the *Albore* case referred to in section 2.1.1. serves as an illustration in this respect; the Advocate General explicitly points out the importance of the useful practical effect of the interpretation to be given to Article 347 TFEU and the preventive measures which Member States should be allowed to take in this connection (see further section 3.2.2.3). The principle of effectiveness may thus entail that, in certain circumstances, a *broad* interpretation should be given to European law provisions, such as, in the present case, the national margin of discretion in matters of national security, and that in other cases a *narrow* interpretation should be used. Part III will focus on this in more detail with regard to the internal market exemptions in connection with the Ecosystem.

Given the strong emphasis on the system, purpose and spirit of the EU Treaties as a guiding principle for interpretation, we should now look at which relevant changes to the Treaty have had an impact on those three elements and which therefore also have an impact on the assessment of the Ecosystem on the basis of the internal market provisions.

2.2 The changes to the EU Treaty lead to a different interpretation of internal market law and to a different weighing of interests regarding national security

The European legal order and the EU Treaties underpinning it can be regarded as a 'living constitution'.[25] This concept has its origins in the USA and refers on the one hand to the written, formal and political Constitution, but also, on the other hand, to the unwritten constitution and the scope that exists for taking into account any social, political and historical realities changing over time that were not envisioned by

[22] ECJ 17 October 1995, *Landgericht Darmstadt Germany v. Peter Leifer, Reinhold Otto Krauskopf and Otto Holzer*, Case C-83/94, European Court Reports 1995, I – 3248.
[23] Inter alia ECJ 4 December 1974, *Yvonne van Duyn v. Home Office*, Case 41/74, European Court Reports 1974, 01337.
[24] ECJ 10 July 1991, *Neu,* Case C-91/90, European Court Reports 1991, I-03617, paras. 12-16 and ECJ 4 October 2011, *Italy v. Commission*, Case C-403/99, European Court Reports 2001, I-06883, para. 37; Beck 2012, p. 211.
[25] D. Curtin, *Executive Power of the European Union: Law, Practices, and the Living Constitution*, Oxford University Press 2009.

the drafters of the Constitution.[26] Although the EU lacks a formal 'Constitutional Treaty for Europe', as early as the mid-1980s the Court characterised the (then so-called) EEC Treaty as 'the constitutional charter on which the Community is founded'.[27] As regards their content, the current EU Treaty and the Treaty on the Functioning of the EU can indeed be seen as the constitutional foundations on which the European legal order is based, and they contain important basic principles as regards the EU's objectives, values and tasks and the relations of competence between the EU and its Member States; who is allowed to do what, for what purpose and under what preconditions? The many amendments to the Treaties show that these constitutional foundations are not static, but in a continuous process of evolution.

The changes introduced by the Lisbon Treaty in 2009 to the central objective of the EU – now having an explicit focus on the realisation of peace – and to the legal framework for the protection of national constitutional identity and the CSDP, which will be discussed below, are a concrete reflection of this 'living', dynamic core characteristic of the EU's constitutional basis.

2.2.1 Peace is the EU's objective, the internal market an instrument subordinated to it

A first important observation is that since the entry into force of the Lisbon Treaty, the EU's objective – *raison d'être* – has been expressed in Article 3(1) of the EU Treaty as follows:

"The Union's aim is to promote peace, its values and the well-being of its peoples."

Safeguarding and realising peace and security in Europe has thus become one of the central, guiding principles of the EU's actions and, as such, must also be a benchmark for the interpretation of EU law. Those actions are not only embodied by the CFSP and CSDP. The internal market, too, is one of the means of achieving this goal and is subordinate to it, in the sense that internal market law must be interpreted and applied in such a way that it does not merely lead to a social market economy, such as that provided since Lisbon by Article 3(3), in so many words, but that it also contributes to the fundamental goal of peace and security in Europe. In the earlier versions of both the EU Treaty and the Treaty on the Functioning of the EU such a definition of purpose in terms of the promotion of peace was lacking.

Additionally and importantly, this goal is not limited to the territory of the Member States, seeing that Article 3(5) provides that:

"In its relations with the wider world, the Union shall uphold and promote its values and interests and contribute to the protection of its citizens. It shall contribute to peace, security, the sustainable development of the Earth, solidarity and mutual respect among peoples, free and fair trade, eradication of poverty and the protection of human rights, in particular the rights of the child, as well as to the strict observance and the development of international law, including respect for the principles of the United Nations Charter."

[26] Ibid.
[27] ECJ 12 February 1985, *Les Verts*, Case 284/83, European Court Reports 1985 00553.

As the quote in section 2.1.2 from the *Leifer* judgment shows, national security – in the context of the EU – and the security of the international community are closely linked.

2.2.2 Possessing and exercising military power is solely a national responsibility

In the pre-Lisbon version, the former Article 6(3) TEU stated simply that "(t)he Union shall respect the national identities of its Member States". Article 4(2) TEU in the post-Lisbon version is much more specific and first of all makes it clear that the EU– which, incidentally, must be understood to include all its institutions – respects the national identities of the Member States inherent in their fundamental structures, political and constitutional. It then continues more specifically:

"It shall respect their essential State functions, including ensuring the territorial integrity of the State, maintaining law and order and safeguarding national security. In particular, national security remains the sole responsibility of each Member State."

It can therefore be concluded that the Member States, in their capacity as drafters of the EU Treaty, wished to establish unequivocally that ensuring national security is a competence which has remained with the Member States.

This is in line with the principle of conferral of competences laid down in Articles 4(1) and 5(2) TEU, according to which the EU must act only within the limits of the competences conferred upon it by the Member States in the Treaties to attain the objectives set out therein. These provisions now also explicitly state that competences not conferred upon the EU by the Treaties remain with the Member States.

However, this is only one side of the coin; the other side is that, at the same time, the TEU now contains a basis of competence for the development of a common security and defence policy. How, then, can this 'sole responsibility of each Member State' be reconciled with this competence of the EU; how do they relate to each other? To answer this question, Article 42 TEU is relevant. The purport of this provision is that, although the aim is to create a European defence policy, this can only be decided with the approval of *all* Member States through the framework of the European Council[28] and after its approval in all Member States in accordance with national constitutional provisions (i.e. parliamentary approval) (paragraph 2).

Decisions concerning the CSDP also require unanimity in the Council (paragraph 4). Designing the CSDP must thus be based on political commitment on the part of *all* Member States and, in this sense, there is no real transferral of competences to the EU but, above all, the exercise of national competences within a European framework to the extent that the Member States themselves so wish. In short, defence policy retains a highly intergovernmental character within the EU and as yet there is no agreement among Member States for genuine commonly organised defence forces. In concrete terms, this means that, in the military field, the Member States remain solely competent to authorise military operations and to

[28] The European Council should not be confused with the Council of the European Union.

procure military materiel; in other words, to possess and exercise military power.

At the same time, however, since the entry into force of the Lisbon Treaty, Article 42 TEU also assumes that the CSDP provides the EU with an operational capability drawing on civilian and military assets (paragraph 1); that the Member States progressively improve their military capabilities and make civilian and military capabilities available to the EU for the implementation of the CSDP (paragraph 3); and includes an obligation of collective self-defence (paragraph 7). In that context, new structures have been created within which this can be done and cooperation between Member States can be organised. First of all, this concerns the European Defence Agency (EDA) (Article 42(3) TEU in conjunction with Article 45 TEU); in addition, the Lisbon Treaty provided for the possibility of stepping up military cooperation in the context of so-called 'permanent structured cooperation' (Article 42(6) TEU in conjunction with Article 46 TEU). In December 2017, this cooperation started on the basis of a Decision of the Council of the EU.[29] Of the 27 Member States (28 at the time), 25 decided to participate in this cooperation.[30] What is special about this new instrument are the "ambitious and more binding common commitments" listed in the Annex to the Decision. As in the case of NATO cooperation, military obligations have been formulated more explicitly here. In December 2019 there were 47 ongoing cooperation projects within this framework. These vary from a military mobility project in which 24 Member States are participating to a project in which France and Italy are jointly designing and developing a prototype frigate.

In conclusion, on the one hand, the Member States, in their capacity as drafters of the Treaty, have assigned greater weight in the EU Treaty to the goal of peace and the importance of developing a structural CSDP to realise it, by linking to it more European ambitions, commitments and institutional structures in Articles 42 to 45 inclusive. On the other hand, however, the EU law system still assumes that this main objective of the EU – which includes a collective self-defence obligation – will be achieved within the framework of the exercise of a competence which is still in the hands of the Member States themselves, leaving them with the discretion under the CSDP to give their own interpretation to it.

It is therefore up to the Member States to determine how to achieve the operational civilian and military capabilities required to safeguard national security, which is not confined to their own territory but extends to that of the EU as a whole, of NATO member states and beyond (see Part I). The interpretation of internal market law in Part III of this opinion must therefore take into account the changed legal context, and therefore particularly take on board how the different course taken in the Treaty of Lisbon in the areas of national security and CSDP calls for a different interpretation of internal market law than that pertaining before 2009. In this context, it may already be pointed out that the development history of the Defence Directive dates back to 2007 and that the Directive thus came into being in a different political, economic and legal reality than the reality that we have been in since the entry into force of the Lisbon Treaty.

[29] Council of the European Union, Decision (CFSP) 2017/2315 of 11 December 2017 establishing permanent structured cooperation (PESCO) and determining the list of participating Member States.
[30] Only the United Kingdom, Denmark and Malta decided not to participate.

2.2.3 Principle of EU loyalty strengthens national responsibility

The previous section also calls for account to be taken of Member States' obligations ensuing from the principle of EU loyalty or sincere cooperation laid down in Article 4(3) TEU with a view to safeguarding national and European security. In general terms, this principle constitutes a reciprocal duty between the EU and the Member States to assist each other, in full mutual respect, in carrying out tasks which flow from the Treaties. Furthermore, it creates the specific obligation for Member States to take all necessary measures to fulfil their obligations under EU law and to facilitate the achievement of the EU's tasks and refrain from any measure which could jeopardise the attainment of the EU's objectives. In view of the proposed Ecosystem, it can be argued that as, on the one hand, the CSDP seeks to impose obligations on Member States to safeguard peace and security but, on the other hand, does not itself create actual capabilities to meet those security requirements, national polices should be given the requisite scope to realise the necessary military capabilities. Based on the principle of EU loyalty, it can even be argued that the Netherlands as a Member State must use this scope to ensure it has sufficient military capabilities to make an effective contribution to safeguarding European security as pursued by the TEU. Then again, the principle of EU loyalty can also be seen as a guide for the interpretation of the internal market's security exceptions (Articles 36, 45(3), 51, 52, 62, 347 TFEU); when a Member State exercises its own responsibility and/or competence to protect national security, there is still an EU law obligation based on EU loyalty to consider the interest of the internal market and to seek to limit the negative impact on it as much as possible.

2.2.4 Relationship between EU and NATO; hierarchy of standards and NATO-compliant interpretation

In order to guarantee national security – i.e. at national level – transatlantic cooperation within NATO nevertheless continues to play a crucial role. An important issue that still needs to be addressed here is how military obligations under the NATO Treaty then relate to the CSDP and also whether or when these can take precedence over EU internal market obligations. The NATO Treaty enjoys a privileged legal position within the EU Treaties. This is because the NATO Treaty entered into force in 1949, almost ten years before the Treaty of Rome (1958) and Article 351 TFEU provides that "rights and obligations arising from agreements concluded before 1 January 1958 [...] between one or more Member States on the one hand, and one or more third countries on the other, shall not be affected by the provisions of the Treaties".

This is also emphasised in Article 42(7) TEU, which explicitly states that "commitments and cooperation in this area shall be consistent with commitments under the North Atlantic Treaty Organisation, which, for those States which are members of it, remains the foundation of their collective defence and the forum for its implementation". This is not surprising given that there are six EU Member States which are not members of NATO (Sweden, Austria, Ireland, Finland, Malta and Cyprus). For the Netherlands, strictly legally speaking, the NATO obligation of collective self-defence would take precedence over the EU obligation in the event of a military conflict between Cyprus and Turkey, if both countries were to invoke these obligations. That means that the Netherlands would have to take Turkey's side, as Turkey is a

member of NATO.[31] This legal reality seems difficult to reconcile with the geopolitical reality of tension between certain NATO members,[32] and it demonstrates the complexity and fragility of military cooperation for the Netherlands.

However, absolute conflicts of internal market law obligations with NATO obligations are not likely to occur. This is because fulfilling NATO obligations is an inherent part of the national security of its members, based on which EU obligations under the EU Treaties may proportionately be departed from in specific cases. EU law provisions relating to the internal market and the exceptions thereto must therefore be interpreted as much as possible in accordance with the obligations arising from the NATO Treaty.

[31] As a result of the ongoing conflict between Turkey and Cyprus about Northern Cyprus (recognised only by Turkey as the Turkish Republic of Northern Cyprus and generally considered by other countries as occupied territory), Cyprus is also the only EU Member State that is not a member of the NATO Partnership for Peace. Since the accession of Cyprus to the EU in 2004, this issue has complicated institutional cooperation by which security intelligence is exchanged between the EU and NATO.

[32] Moreover, none of the NATO members apart from Turkey recognises the Turkish Republic of Northern Cyprus. On the current tensions, see, for example: NRC, *De Amerikanen dreigen Turkije om Russische raketten,* 5 March 2019 (https://www.nrc.nl/nieuws/2019/03/05/de-amerikanen-dreigen-turkije-om-russische-raketten-a3908068)

PART III

Compatibility of the Logistics Ecosystem with EU internal market law[33]

3.1 Implementation of national security is the sole responsibility of Member States

This entire study focuses on the question of whether or not the Ecosystem is legally admissible under national and EU public procurement and competition law. More specifically, the question is whether, and if so, on what legal grounds, the Ministry of Defence may adopt a measure such as setting up and maintaining the Ecosystem which leads to the restriction of the EU's free movement of (logistics) services.

After all, it is a fact – in terms of free movement – that the Ecosystem acts as an impediment to trade. By exclusively and directly awarding public contracts[34] to the undertakings participating in the system, other (foreign) economic operators are denied access to this specific part of the public procurement market in the Netherlands. In particular, the establishment and nationality requirements imposed on undertakings for participation in the Ecosystem are restrictions to cross-border trade.

The EU internal market, with its freedoms – the freedom of establishment and the free movement of services, goods, persons and capital between Member States –, should be seen as a pillar of post-war European integration. Economic liberalisation was crucial for peace and prosperity, and still forms the basis for the EU as an economic power bloc in the world. Since the Treaty of Rome, these freedoms have been enshrined in the EU Treaties in provisions in which they were given the form of 'prohibitions' on trade barriers between Member States (so-called 'negative integration').

These prohibitions failed to deliver as regards liberalisation of the internal public procurement market. Governments continued to favour domestic economic operators over those from other Member States. It was therefore decided in the 1970s to introduce secondary regulation in the form of public procurement liberalisation and harmonisation directives.[35] The completion of the internal market for public procurement was considered to be achieved by reinforcing the 'prohibitions' on trade barriers (negative integration) by 'imposing' Member States to actively remove any form of trade barriers (positive integration). This resulted in the introduction of the public procurement

[33] For more information about the method used in this study for testing the Ecosystem against the Treaties, see E.R. Manunza, *Europese aanbestedingsrechtelijke problemen bij privatiseringen en bij de bestrijding van georganiseerde criminaliteit*, Kluwer 2001, Dissertation Amsterdam; particularly the second part.

[34] Article 1 Defence Directive provides that a 'service contract' is understood to mean a "contract for pecuniary interest concluded in writing" for the performance of services. Reference is made in this respect to the (former) Directives 2004/17/EC and 2004/18/EC, which refer, as does the current public procurement directive, to an agreement between one or more contracting authorities/entities and one or more economic operators.

[35] Directive 71/305/EEC for public works contracts and Directive 77/62/EEC for public supply contracts.

directives, which should be seen as a concrete elaboration of the freedoms guaranteed by the EU Treaty prohibitions.

The TFEU itself provides for several exceptions to these freedoms to prevent the internal market legal system from having an absolute character. Internal market law, composed of negative and positive measures, is only a 'means' to achieve the EU's aim of promoting peace, values and the well-being of the peoples of Europe (Article 3(1) TEU). Clearly, there are certain exceptions to the prohibition on trade barriers or restrictions to the free movement of goods, services and persons for situations where public policy and public security are at stake, such as provided for in the current Articles 36, 52, 62, 65, 346 and 347 TFEU. Indeed, many competences in the field of public security (as well as public policy and public health) still remain almost entirely at Member State level. In the light of this division of competences, free cross-border trade can never be completely unrestricted, as that would preclude the effective carrying out of core tasks of the State.

The concept of public security (as well as the concept of public policy) is not defined in detail in the EU Treaties.[36] In a number of judgments, however, the Court has given important indications regarding its meaning.[37] In this respect, the Court's starting point was that Member States had discretion of their own in their handling of public security (and public policy). In the *Van Duyn* judgment, for example, the Court held that:

"(...) the particular circumstances justifying recourse to the concept of public policy may *vary from one country to another and from one period to another*, and it is therefore necessary in this matter to allow the competent national authorities an area of discretion" (emphasis supplied).[38]

That, according to the Court, the concepts of public security and public policy form a collective term for essential national interests is clearly seen in its case law.[39]

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[36] Herman Boonk, *De openbare orde als grens aan het vrij verkeer van goederen, personen en diensten in de E.E.G.* (dissertation Groningen), Alphen aan de Rijn, Tjeenk Willink 1977, pp. 136-149. T.C. Hartley, 'Case Law', *CMLR* 1983, no. 20, pp. 131-145. R.H. Lauwaars, 'Het voorbehoud voor de openbare orde als beperking van het vrije verkeer van personen in de EEG', *SEW* 1978, pp. 829-839.

[37] See for example ECJ 26 February 1975, *C.A. Bonsignore v. Oberstadtdirektor der Stadt Koeln*, Case 67/74, European Court Reports 1975, I-0297; ECJ 7 July 1976, *L. Watson and A. Belmann*, Case 118/75, European Court Reports 1976, I-1185; ECJ 27 October 1977, *Regina v. P. Bouchereau*, Case 30/77, European Court Reports 1977, I-1999; ECJ 22 May 1980, *Regina v. Minister of the Interior*, *ex parte Mario Santillo*, Case 131/79, European Court Reports 1980, I-1585. See also the judgment of the ECJ of 13 July 2000 *Alfredo Albore*, Case C-423/98, European Court Reports 2000 I-05965, paras. 14-19.

[38] ECJ 4 December 1974, *Van Duyn v. Home Office*, Case 41/74, European Court Reports 1974, pp. 1350-1351; *SEW* 1976, p. 67 et seq., annotated by Lauwaars.

[39] The decisions of the Court in *Johnston* (222/84), and – briefly – *Sirdar* (C-273/97), *Kreil/ Federal Republic of Germany* (C-285/98) and *Leifer* (C-83/94) are crucial to this analysis: ECJ 15 May 1986, *Marguerite Johnston v. Chief Constable of the Royal Ulster Constabulary*, Case 222/84, European Court Reports 1986, pp. 1651-1694.

3.2 The legal question: can the Ministry of Defence adopt a measure such as setting up and maintaining the Logistics Ecosystem without conflicting with EU internal market law?

Below we will answer the fundamental legal question of this study by discussing two solution variants.

The first solution variant examines the scope for assessing whether the Ecosystem can deviate from the provisions of the Public Procurement Directive in order to protect public security (and public policy) by invoking the grounds for exception provided for by Articles 52 (establishment) and 62 (services) TFEU. The second solution variant addresses the more specific question of whether primary EU law allows member states (in our case the Netherlands) the possibility, under the circumstances addressed therein that threaten to (seriously) disrupt public (national) security, of deeming itself exempt from the obligations resting with the Netherlands pursuant to the Directives (and the EU Treaties).

3.2.1 The first solution variant: can the Ecosystem be justified by invoking the protection of 'public security' in Articles 52 and 62 TFEU?

3.2.1.1 Actual interest, necessity and proportionality

As noted before, the EU Treaties provide for exceptions in cases where a Member State wishes to take measures to pursue key objectives which may impede cross-border trade. This possibility is no longer available as soon as the matter is regulated by secondary EU legislation. Reliance on these exception clauses – Articles 36, 52 and 62 TFEU – is in principle no longer possible in that case. The decisive question is now the extent to which such secondary rules regulate the relevant matter *exhaustively*.[40] If it cannot be inferred from the *text* and *purpose* of a Directive that its intention is to regulate the matter exhaustively, Member States must be deemed to have recourse to the escape provisions laid down in Articles 36, 52 and 62 TFEU.

That the Public Procurement Directives leave discretion and competence with the Member States because they do not contain an exhaustive body of EU law rules is demonstrated by the following legal finding by the Court in the *Beentjes* judgment.

ECJ 26 October 1999, *Angela Maria Sirdar v. The Army Board and Secretary of State for Defence*, Case C-273/97, European Court Reports 1999, I-7403. ECJ 11 January 2000, *T. Kreil v. Federal Republic of Germany*, Case C-285/98, European Court Reports 2000, I-00069; ECJ 17 October 1995, *Landgericht Darmstadt Germany v. Peter Leifer, Reinhold Otto Krauskopf and Otto Holzer*, Case C-83/94, European Court Reports 1995, I-3231.

[40] Determining the room for manouvre member states still mantain when European rules are adopted covering the same field, requests firstly an analysis of the nature of the Directive. This analysis aims at determining the type of harmonization: minimum, partial or optional harmonisation [*i*] or total harmonisation [*ii*]. Re [*i*]: it is clear that in these cases the Directive leaves legal room to the Member States for national policy and regulation. More specifically, it should be analysed whether Member States may impose requirements for the protection of public policy and security which do not feature in the European rules. Re [*ii*]: in case of total harmonisation, the Member States may not deviate from the provisions of the Directive when implementing the European rules. The system and the wording of the Directive determine the harmonisation standard.

"(...) Furthermore, the directive does *not* lay down *a uniform and exhaustive* body of Community rules; within the framework of the common rules which it contains, the Member States remain free to maintain or adopt substantive and procedural rules in regard to public works contracts on condition that they comply with all the relevant provisions of Community law, in particular the prohibitions flowing from the principles laid down in the Treaty in regard to the right of establishment and the freedom to provide services. (p. 20) (emphasis supplied)"[41]

More specifically, with regard to the Defence Directive adopted in 2009 following years of negotiations between Member States and EU institutions, Article 2(d) provides that services such as those relevant to the Ecosystem fall within the scope of this Directive because they serve a specific military purpose.
The question now is whether the Defence Directive sought to render any reliance on the escape provisions of Articles (36,) 52 and 62 TFEU completely impossible. There is no evidence of this. What is more, an indication to the contrary can be found in Article 2, which explicitly states that the Directive applies "subject to Articles 30, 45, 46, 55 and 296 of the Treaty" (current Articles 36, 52, 62 and 346 TFEU).

In this context, the Court will first examine whether a restrictive measure taken by Member States is aimed at the attainment of an overriding requirement relating to the public interest of the Member States. Where it is clear that a measure is taken because of an actual security interest, it must also be proportionate to the objective pursued. In such cases the well-known requirements of *necessity* and *proportionality* must be met. This entails assessing whether the measure in question is suitable for protecting the interests it seeks to protect and whether it is the most appropriate means (*proportionality requirement*) which does not impede trade more than is necessary to protect the relevant interests. Again, the degree of autonomy of the Member State depends on the intensity of the security risk. For example, the Court ruled that, where the military interests of a Member State are concerned, the necessity of a measure lies in the existence of "*real, specific and serious risks* which could not be countered by less restrictive procedures" (emphasis supplied).[42]

All this means that a military arrangement can be justified if the Member State can demonstrate that in order to achieve the objective for which the arrangement is intended, no other options are available that are less intrusive. In addition, two other important requirements must be met in order to comply with the proportionality principle.
The first requirement is that of coherence and consistency; the objective pursued by a measure must be achieved in a coherent and systematic manner for that measure to satisfy the abovementioned

[41] ECJ 20 September 1988, *Gebroeders Beentjes BV v. the Netherlands*, Case 31/87, European Court Reports 1988, 04635.
[42] ECJ 13 July 2000 *Alfredo Albore*, Case C-423/98, European Court Reports 2000, I-05965, paras. 14-16

suitability criterion.[43]In the present case, this would mean that government action to protect national security must be manifestly coherent and systematic.
The second requirement concerns transparency; market restrictions must be as transparent as possible in order to minimise their negative impact on the internal market. This means that the restrictions must be clear and unambiguous, objectively knowable to market participants and, as far as possible, publicly disclosed beforehand.[44] The fact that a market survey on the Ecosystem has been carried out and information about the system is available online shows that transparency has been observed. Incidentally, transparency will by definition be impossible with regard to classified contracts.

In short, there are many indications that the Defence Directive does not constitute a uniform and exhaustive regime. It follows from this that Member States have not been deprived of all scope to adopt measures to protect public policy and public security. But how should these be set up?

3.2.1.2 The existence of an actual public security interest

First of all, there must be an actual public security interest. The starting point of the Court in this respect is that grounds for exceptions to EU law cannot be interpreted 'extensively'. In other words, there is no 'general proviso' for measures taken on grounds of public security.[45] This would impede the functioning of EU law, in particular the internal market. An exception on the grounds of public security must therefore relate to specific circumstances with a specific security risk. According to established case law of the Court, however, these 'specific circumstances' justifying recourse to an exception "may vary from one country to another and from one period to another".[46] Logically, this implies a certain margin of discretion for the national authorities in determining security requirements.[47] As the security risk intensifies, this margin of discretion will increase. This margin of discretion is also in 'the spirit' of the EU Treaties since Lisbon, given the confirmation contained by Article 4(2) TEU that national security is a solely national responsibility and that the CSDP gives the Member States room to participate, or not participate, in certain forms of cooperation.

The concept of public security is not interpreted so narrowly as to relate only to the internal security

[43] ECJ 21 December 2011, *European Commission v. Republic of Austria,* Case C-28/09.
[44] W.T. Eijsbouts, J.H. Jans, A. Prechal, A.A.M. Schrauwen and L.A.J. Senden (ed.), *Europees Recht. Algemeen Deel*, Europa Law Publishing 2020, p. 147.
[45] ECJ 15 May 1986, *Marguerite Johnston v. Chief Constable of the Royal Ulster Constabulary*, Case 222/84, European Court Reports 1986, pp. 1651-1694, para. 26.
[46] ECJ 4 December 1974, *Yvonne van Duyn v. Home Office*, Case 41/74, European Court Reports 1974, pp. 1350-1351, para. 18.
[47] ECJ 17 October 1995, *Landgericht Darmstadt Germany v. Peter Leifer, Reinhold Otto Krauskopf and Otto Holzer*, Case C-83/94, European Court Reports 1995, I – 3248, para. 35.

of a Member State, but also concerns the external security of a Member State.[48] This external security is inextricably linked to international relations in a broad sense, in particular to membership or non-membership of a military alliance such as NATO. In this respect, the Court has recognised that "the risk of a serious disturbance to foreign relations or to peaceful coexistence of nations may affect the security of a Member State".[49] Furthermore, it held in the *Leifer* judgment that:

"(...) it is difficult to draw a hard and fast distinction between foreign-policy and security-policy considerations. Moreover [...] it is becoming increasingly less possible to look at the security of a State in isolation, since it is closely linked to the security of the international community at large, and of its various components".[50]

The Netherlands government considers participation in NATO and the fulfilment of the obligations arising therefrom to be part of the main task of its military and therefore a crucial part of military foreign relations. Meeting these obligations is an important part of the Ecosystem's goal. This also means that CSDP obligations must be taken into account in the legal assessment of obligations ensuing from internal market law. This is necessary in order to arrive at a coherent interpretation of EU law as a whole. Compliance with the permanent obligations arising from the CSDP is also, as explained in Part II, closely linked to the principle of EU loyalty.

3.2.1.3 Is the Ecosystem 'necessary' to safeguard national security?

Some of the essential features of the Ecosystem can be seen as a barrier to trade from an EU internal market law perspective; however, they may still be considered necessary for safeguarding national security, as we will demonstrate below.

The reason for this is that those features reflect the way in which the Netherlands armed forces have evolved under the influence of international geopolitical developments in recent decades. They have to do with responsibilities evolving over time at national, European and global levels, as we have seen in the previous sections. We will also explain that these features are required in order to be able to meet the Netherlands' allied and constitutional responsibilities and obligations, both in times of peace and in times of crisis.

a. International obligations require national capabilities

Neither the NATO Alliance nor EU defence policy provides for integrated military capabilities. Whether in terms of industrial, logistics or operational capabilities, member states of both NATO

[48] ECJ 4 October 1991, *Aimé Richardt,* Case C-367/89, European Court Reports 1991 I-04621 para. 22.
[49] ECJ 17 October 1995, *Fritz Werner Industrie Ausrüstungen GmbH*, Case C-70/94, European Court Reports 1995, I-03189, para. 27.
[50] ECJ 17 October 1995, *Landgericht Darmstadt Germany v. Peter Leifer, Reinhold Otto Krauskopf and Otto Holzer*, Case C-83/94, European Court Reports 1995, I – 3248, para. 27.

and the EU each have an individual responsibility – towards their own population and towards one another – to possess sufficient military capabilities.

In particular, States need to be prepared for crisis situations. Article 3 of the NATO Treaty provides that parties to the Treaty "separately and jointly, by means of continuous and effective self-help and mutual aid, will maintain and develop their individual and collective capacity to resist armed attack".

In the context of the EU, the State of the Netherlands also has obligations to have military capabilities to contribute to EU defence policy. These ensue on the one hand from Article 42 TEU and on the other hand from the specific commitments entered into by the Netherlands within the framework of permanent structured cooperation. Parts I and II of this study have already gone into this in more depth.

In this context, the concept of *national capabilities* should be interpreted broadly, in that it covers all capabilities established in national territory.

In crisis situations, the State may adopt emergency legislation to requisition assets from private entities (see also below Article 347 TFEU discussed under the second solution variant). In the event of a *national crisis* in one Member State, mutual obligations and a degree of solidarity will normally prompt other Member States to provide assistance by making capabilities available (whatever may be needed). Possessing the capabilities to meet this obligation is an intrinsic goal of the setting-up of a well-functioning Ecosystem for logistics services. However, in the event of an *international crisis situation* such as war, the very same Member States will always first deploy their own capabilities to the best of their abilities for their own national security. The current Covid-19 crisis has highlighted this notion in a different context, as even within the EU's integrated market, Member States first placed the necessary medical equipment at the disposal of their own hospitals and populations before again allowing cross-border trade in it.

This vulnerability is inherent in the system of both NATO and the EU. This is because the structures of NATO and the EU assume a political and legal system based on mutual obligations but do not provide common capabilities to meet those obligations.[51]

The point of departure is thus that Member States themselves are primarily responsible for creating the necessary capabilities to meet both EU and NATO obligations. This is not altered by the fact that military missions are and can be carried out jointly (under single command 'if desirable').[52] National governments remain solely competent to deploy troops and also bear sole political

[51] Incidentally, this is in contrast to the former European Coal and Steel Community (ECSC) and the proposed European Defence Community (EDC).
[52] For example in an EU context, see: Article 42(1) TEU.

responsibility for their success.[53]

b. Collaboration with Dutch private undertakings necessary for the appropriation of (logistics) services in crisis situations

Purely theoretically speaking, the highest degree of security is achieved with the highest degree of self-sufficiency (autarky) in operational and industrial terms. This means that a State must have sufficient capabilities within its borders to protect itself against an attack from outside. In a certain sense, it is irrelevant whether the capabilities are entirely in the public sphere of the State or also partly with private undertakings, in view of the fact that in a crisis situation the government has the authority to requisition those private capabilities.

That this is crucial and also an actual reality became apparent fairly soon after the emergence of the current Covid-19 pandemic crisis. The US invoked an old national war law to stipulate what percentage of the respiratory equipment manufactured by Philips in US territory would remain earmarked for the domestic market and what percentage could be exported outside the United States. This was at odds with agreements made – earlier – by the company itself. EU Member States also used the 'appropriation' strategy vis-à-vis one another following the emergence of the Covid-19 crisis. They introduced an export ban on products that were essential for healthcare, such as face masks, gloves, respiratory equipment, etc. Countries thus ended up in 'self-rescue' mode. Moreover, professions that were previously – in a non-crisis situation – considered to be purely commercial now came to be designated as crucially important.

The Covid-19 pandemic crisis has clearly revealed the vulnerability of the EU internal market system in this sense. Specifically, it does not provide for a system that can effectively counteract the 'appropriation' strategy. The absence of such a system has far-reaching consequences. In addition to the risk that agreements made in times of stability and peace may be suspended in times of crisis, another consequence can be identified.
As we have recently witnessed in the Netherlands, commercial services soon came to be considered vital services/professions. For example, waste and rubbish transport (in the Netherlands, only household waste disposal is normally regarded as a sector of public interest) and also the food supply chain were included in the list of key worker occupation groups. For more information, use this link to see the list of key worker occupation groups and the list of vital processes after the Covid-19 crisis https://www.nationaleberoepengids.nl/cruciale-beroepsgroepen-covid-19.
Incidentally, logistics features prominently in both categories.

Of course, total self-sufficiency is unfeasible. As a scenario, it is unworkable not only from a financial and practical point of view but also from the point of view of international relations. In

[53] See: Article 97(2) Constitution of the Netherlands.

today's globalised and nuclear world order, it is necessary for the Netherlands to be part of economic and military power blocs. From a military perspective, this means that it must make contributions to these alliances and must be able to do so.

In principle, this is at odds with the EU perspective that a competitive *European* military internal market is needed to, on the one hand, guarantee the security and sovereignty of the Member States and, on the other hand, increase the EU's autonomy in the world. This is based on the traditional idea that an integrated European military internal market not only creates economies of scale and has a favourable impact on the sector's innovative strength, but that such improved market conditions also allow Member States to procure better products necessary to safeguard their sovereignty and security in the world. For the EU, an integrated market creates the foundation on which future defence cooperation in the context of the CSDP can be intensified, if desired.[54]

However, these theories only apply to a limited extent when the procurement of logistics services instead of other military items is concerned. In the case of logistics services, the main question is how to ensure that the availability of logistics capabilities meets the increased demand (immediately and continuously) in a crisis situation. Taking into account the current organisation of defence and security in the EU, there can be no doubt that in crisis situations the State must be able to requisition assets from private entities by means of emergency legislation. This possibility is also recognised by the EU Treaties in Article 347 TFEU (see below at solution variant 2).

c. Collaboration with 'Dutch' private undertakings with employees of 'Dutch' nationality required due to the military's reduced personnel size

Since the dissolution of the Soviet Union, the Dutch military has been considerably reduced in size. The military's personnel numbers halved between 1990 and 2010 and they have come to consist entirely of professional personnel. The amount of military materiel has been reduced as well. For example, of the 913 tanks in 1990, only 91 were left in 2009. Over the same period, defence expenditure fell by 15 percent in real terms.[55] This decline continued until 2015 in the wake of the financial crisis, after which an upward trend began again.[56] The current trend of increasing and

[54] At the same time, it is a fact that – from a global viewpoint – this economic 'globalisation of the military sector' has led to higher degrees of specialisation and technological innovation. Therefore, in order to possess high-quality capabilities, it is necessary to import certain military materiel for some purposes. The costs of producing everything independently would be too big a drain on the State budget. In addition, we must not forget that only a few States possess the industrial capabilities to develop nuclear weapons. This geopolitical consideration is unconnected to the Non-Proliferation Treaty (Treaty on the Non-Proliferation of Nuclear Weapons). It forces those States that lack these capabilities to seek protection from at least one other State that does possess these capabilities. Such strategic military cooperation often goes hand in hand with industrial cooperation.

[55] *Future Policy Survey – A new foundation for the Netherlands Armed Forces* 2010, pp. 30-32.

[56] SIPRI Database Military Expenditure, *Data for all countries 1988-2019,* see: https://www.sipri.org/databases/milex

unpredictable changes in security threats requires an expansion of logistics capabilities as part of overall operational capabilities. At the time of writing, the Ministry of Defence has approximately 8,300 vacancies to fill in a personnel force of just under 60,000 people, more than 40,000 of whom are military personnel. By far the largest numbers of vacancies are military positions.[57]

Due to the greatly increased flexibility of the labour market, permanent use of own personnel for the desired logistics capabilities has become unfeasible. In that context, the Ministry of Defence has also embarked on a personnel policy of increasing flexibility. Following the evaluation of the Logistics and Personnel 2017/18 pilot project, the Royal Netherlands Army announced its intention to enter into a long-term strategic cooperation with the business community.[58] In the light of these developments, the Ecosystem endeavours to provide maximum achievable logistics capabilities. This means specifically that in crisis situations personnel from participating private market players must be used.[59] In this sense, the Ecosystem is part of a broader development in which civilian capabilities are integrated into the armed forces in order to provide the Ministry of Defence with flexible capabilities that can be deployed at times when a greater need (also for military positions) temporarily arises in a particular location. This concept can work only if long-term strategic partnerships with market participants are entered into. In that context, a strategic partnership for maritime capabilities is also being sought, for example.[60] As such, this policy satisfies the requirement of coherence and consistency.

Due to the importance of safeguarding national security and the ability to satisfy EU and NATO assistance obligations, combined with the fact that the armed forces simply do not have the (public) personnel and materiel resources to ensure this, it is essential that all companies participating in the Ecosystem fall under the jurisdiction of possible Dutch emergency legislation in times of crisis. It is therefore necessary to make participation in the Ecosystem conditional on establishment on Netherlands territory.

In the *red-button scenario*, (part of) the personnel of the private undertakings participating in the Ecosytem will also have to be militarily deployable. This is necessary because the logistics of military operations are directly linked to the operations themselves. For the Ecosystem, this means that it is necessary to make participation conditional on employing a specified number of reservists and so-called "reservables".[61]

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[57] See also the interview with the Netherlands Chief of Defence, Admiral Rob Bauer: https://www.platformdefensiebedrijfsleven.nl

[58] *Survey Report Logistics Ecosystem*, p. 10.

[59] *Future Policy Survey – A new foundation for the Netherlands Armed Forces* 2010, pp. 184-185.

[60] See: https://www.platformdefensiebedrijfsleven.nl/ministerie-van-defensie-en-spliethoff-starten-pilot-ecosysteem-maritieme-capaciteit/

[61] Personnel willing to become reservists.

In addition, these employees will have to have Dutch nationality in order to be able to function as military personnel in crisis situations. As soon as these workers are militarised, they will fulfil a position of official authority. The EU Treaties contain specific exceptions for positions in the official authority chain (see Articles 45(4) and 51 TFEU). On the basis of the written justifications still to be addressed, including that of public security, 'directly discriminatory restrictions' on grounds of nationality can be justified (see section 3.2.1.4.).

d. Sustained safeguarding of security interests requires closed system

The main conditions to be imposed on undertakings to participate in the Ecosystem have been set out above. After selection of the participants, the Ecosystem will constitute a closed system, at least for a certain period. In the light of the vetting and training of participants' employees and the large-scale exercises conducted with the participating undertakings, the Ministry of Defence must enter into relationships with these third parties for prolonged periods. The duration and conditions of participation will have to be determined on the basis of the above considerations.

e. Keeping national security affordable requires cooperation with private undertakings

The scale of the logistics capabilities as sought by the Ministry of Defence would not be financially feasible if they were constituted by its own permanent logistics capabilities, which would then remain largely unused in times of stability. Governments need to fulfil many requirements with limited resources. In addition to national security, public health and education are also to a large extent financed with public resources. Logically, this requires maximum cost-effectiveness in order to achieve a sustainable balance in public spending and guarantee a variety of public interests. As is the case in other sectors belonging to the core tasks of the State of the Netherlands (healthcare, education and social security), the Ministry of Defence tries to achieve these objectives by using public and private resources as effectively and constantly as possible.

In short: the Ecosystem seeks to achieve an efficient use of logistics capabilities as a whole. This provides the Ministry of Defence with guarantees for sufficient capabilities and their complete deployability in times of crisis. In times of stability, the other private participants will enjoy commercial advantages, as Defence capabilities can then be made available to them.

The fact that a measure was chosen partly because of the financial interests of the State will not render the applicability of a justification for that measure problematic in any way. In the context of public health, the Court's established case law holds that the risk of "seriously undermining the financial balance of the social security system" may indeed justify a restriction on free trade.[62] As regards EU public procurement law, the Court also held that, in the context of a system with a social objective, solidarity and cost-efficiency are relevant considerations which may under certain

[62] ECJ 28 April 1998, *R. Kohll*, Case C-158/96 European Court Reports 1999, I-01931, para. 41.

circumstances justify the direct award of public contracts.[63] The security objective combined with increased cost-efficiency resulting from the exchange of logistics capabilities leads to a similar justification for the non-application of EU procurement law.

f. Certainty regarding provision of logistics services in a crisis situation requires 'Do ut des'[64] relationships between the Ministry of Defence and third parties in times of peace and stability

The Ecosystem is organised on the basis of reciprocity between the Ministry of Defence and market participants. This reciprocity only applies in times of peace and stability. As a crisis situation intensifies, so will the military requirements, and there will be a lesser degree of reciprocity. The Ecosystem's primary aim is after all to ensure that, in times of crisis, the Ministry of Defence can immediately call on the availability of the collaborating parties and that these parties respond without delay. Of course, it has to be attractive for participating market players to guarantee their permanent participation in the Ecosystem. These parties need to have the prospect of being able to conduct (part of) the 'white logistics' in times of peace and stability, as is also evident from the preliminary market consultation conducted by the Ministry of Defence. After all, the private undertaking participating in the Ecosystem need to have the actual capacity to enable the Ecosystem to function immediately and properly in times of crisis. They assume a great responsibility. They need to make continuous investments in peacetime in order to be able to quickly deliver what is required of them in times of crisis. For example, they and their personnel will also have to meet high standards in peacetime and participate in large-scale exercises. Sustainment of all this operational capability can only be assured if these parties receive sufficient contracts from the Ministry of Defence in peacetime as well. In peacetime and under conditions of national stability, numerous contracts for so-called civilian 'white services' will be assigned within the system and the Ministry will also make capabilities available to participants where possible.

The commercial reality of the participants thus implies that they should be able to benefit commercially from participation. In view of that reality, the – hopefully long – periods of stability in which they must remain available to the Ministry of Defence should thus remain feasible. The commercial reality of private undertakings participating in the Ecosystem is that certain services provided to the Ministry – which would normally be subject to a public procurement obligation or which the Ministry itself would provide – will now be contracted within the Ecosystem. Companies that do not participate in the Ecosystem are thus not eligible for award of these contracts. How exactly these contracts will be awarded within the Ecosystem remains to be determined.

[63] CJEU 11 December 2014, *Spezzino*, Case C-113/13, para. 65.
[64] The expression *do ut des*, which derives from Roman law, indicates the will to do something only for own personal gain.

From a legal point of view, this need not be problematic, as long as the 'white services' are necessary for the functioning of the Ecosystem as a whole, which is ultimately aimed at safeguarding national security (more on this can be found in sections 3.2.1.4 and 3.2.2.3 in the discussion on the justifications).

3.2.1.4 Is the Ecosystem proportionate as a preventive military instrument?

The preventive effect of the Ecosystem as an instrument of the State of the Netherlands is essential to operate effectively in times of crisis. This preventive nature implies that, under stable conditions, there are trade restrictions which may not be necessary at that time, but which serve a necessary preventive function in relation to a possible future crisis.

It is inherent in the system of EU law that trade restrictions can be adopted in times of crisis. This is reflected in the previously quoted Article 347 TFEU (more on this in section 3.2.2. under the second solution variant) and the more intergovernmental nature of the EU's defence and security policy (discussed in Part I and II). This EU policy area provides for cooperation and pooling of national capabilities, but not for actual shared capabilities to be used by a supranational body in times of crisis. Application of the public security justification and the considerations below should therefore be interpreted as far as possible in the light of the aforementioned feature of the system of EU law, namely that it is relies on the military capabilities of the Member States, and the Netherlands' obligations to contribute to EU and NATO defence policy.

a. The relevance of NATO membership for the proportionality test

It also follows from the case law of the Court that the geopolitical position of a Member State and the securing of that position can widen a Member State's margin of discretion.

In the *Campus Oil* judgment of 1984 the Court accepted that measures taken by Ireland to benefit the security of oil supply were justified. Arguments for this were that these measures would in particular ensure Ireland's neutrality and the independence necessary for that in times of crisis.[65]

However, obligations ensuing from NATO membership can also widen the margin of discretion in invoking an exception to EU internal market rules. In the *Commission v Belgium* judgment of 2003, the Court applied an extremely marginal proportionality test. The Belgian government had directly awarded a public contract for aerial photography to a Belgian company. According to Belgium, the direct award was possible because the Public Procurement Directive (Directive 92/50/EC) did not apply due to the special security measures necessary to ensure the security of installations on Belgian territory, including NATO installations. The Court held that Belgium was indeed responsible for this and that it was therefore for the Belgian authorities "to lay down the security measures necessary

[65] ECJ 10 July 1984, *Campus Oil*, Case 72/83, European Court Reports 1984, 02727 (see p. 2738, where this is referred to).

for the protection of such installations", referring in particular to NATO installations.[66] The Court did not examine whether it was in fact possible to guarantee security within the parameters of the Public Procurement Directive.

It has already been explained in section 3.2.1.3. of this study why participation in the Ecosystem should be limited to market players that are established on Netherlands territory and employ sufficient Dutch personnel who are also reservists. The suitability of the Ecosystem for serving the strategic security interest of defending allied territory is evident simply from the extra logistics capabilities that the Ecosystem will provide compared with a situation in which the Ministry of Defence would have to provide these capabilities itself. In addition, the Ecosystem will also contribute to the other Defence core tasks, i.e. protecting the international rule of law and supporting civilian authorities in law enforcement, disaster relief and humanitarian assistance.

All these tasks require logistics capabilities. The Ecosystem distinguishes itself by its objective of being capable of providing logistics support at a distance of 1,500 km, by which it is specifically aimed at protecting allied territory.

b. Is the establishment requirement proportionate?

Private undertakings are only admitted to the Ecosystem if they and their logistics capabilities are established on national territory. This is necessary because in times of crisis it must be possible to apply national emergency regulations to these private participants, on the basis of which capabilities can be requisitioned. This is only possible if the State of the Netherlands has jurisdiction, for which establishment on national territory is required. Article 347 TFEU, which is discussed in section 3.2.2. below, also shows that Member States are indeed allowed to issue such emergency regulations in times of war and other types of crises.

c. Is the nationality requirement for employees proportionate?

Private undertakings participating in the Ecosystem must also employ a sufficient number of personnel with Dutch nationality, a sufficient number of whom must then have reservist status. This is necessary because in times of crisis part of the participants' personnel must be able to transform from 'white' to 'green' (and must also be prepared for this). In terms of both materiel and personnel, it is unfeasible and, from the point of view of the system's affordability, undesirable for the Ministry of Defence to have its own permanent capabilities at levels that are adequate to a crisis situation. In the context of the free movement of workers, the personnel policy of the armed forces is excluded from EU law by virtue of Article 45(4) TFEU, which excludes workers in the 'public service'. According to the Court, this includes the "exercise of powers conferred by public law" and

[66] ECJ 16 October 2003, *Commission v. Belgium*, Case C-252/01, European Court Reports. 2003, I-11859, paras. 29-30.

"safeguarding the general interests of the State".[67] There is no doubt that military personnel meets this requirement.

In addition, it should be noted explicitly that, on the basis of the written justifications in the TFEU including that of public security, 'directly discriminatory restrictions' on grounds of nationality can be justified.

d. Is there a risk in allowing economic aspects to play a role in setting up and maintaining the Ecosystem?

As emphasised in Article 36 TFEU – but applying in full to all justifications – national measures must not constitute a "means of arbitrary discrimination or a disguised restriction on trade between Member States".
Put simply, EU law never provides a basis for measures that are in essence protectionist. According to the Court, this means that the justifications cannot be interpreted in such a way as to allow measures serving "purely economic interests".[68] In the *Campus Oil* judgment, the Court added a degree of nuance to this. In the context of measures taken by Ireland for the supply of petroleum products, the Court held that such a measure, because of the "exceptional importance as an energy source in the modern economy, [is] of fundamental importance for a country's existence since not only its economy but above all its institutions, its essential public services and even the survival of its inhabitants depend upon [it]".[69]

It is thus justified, in the interests of public security, to take measures to ensure a constant minimum supply of petroleum products. After all, such a measure by far transcends purely economic considerations.[70] The Court added that "the fact that the rules are of such a nature as to make it possible to achieve, in addition to the objectives covered by the concept of public security [...] objectives of an economic nature" does not exclude application of the public security justification.[71]

This applies equally to the Ecosystem. The Ecosystem will in fact bring advantages to the Dutch logistics sector compared with logistics companies in other EU member states. However, like the security of supply of energy products, the Ecosystem is of fundamental importance to the (continued) existence of the State. In particular, it is necessary for the armed forces' operations in times of crisis and the protection of national and allied territory. In addition, these economic aspects serve another fundamental goal, namely that of setting up such a responsive military-oriented system

[67] ECJ 26 May 1982, *Commission v. Belgium*, Case 149/79, European Court Reports 1982, 01845, para. 7. See also ECJ 2 July 1996, *Commission v. Greece*, Case C-290/94, European Court Reports 1996, I-03285,
[68] ECJ 10 July 1984, *Campus Oil*, Case 72/83, European Court Reports 1984, 02727.
[69] *Campus Oil*, para. 34.
[70] *Campus Oil*, para. 35.
[71] *Campus Oil*, para. 36.

in an affordable way.

Please note! The only remark that needs to be made here is that the amount of public contracts that the Ministry of Defence will assign within the Ecosystem must be proportional to the objective. It is clear that the Ministry will have to give participating companies advantages for the acquisition of so-called 'white' logistics services in order to make them willing to assume the responsibilities that the *red-button scenario* entails.[72] However, the Ministry will have to examine how many public contracts have to be awarded within the Ecosystem rather than by public tender. An indication that the Ministry will be able to adequately meet the requirement of proportionality in the organisation of the Ecosystem is the fact that it has stated that it will not accommodate all logistics services in the Ecosystem and reserves the right to put logistics services out to public tender.[73]

3.2.2 The second solution variant: can the Ecosystem be brought under the exception of Article 347 TFEU?

As already argued, the EU Treaties themselves ensure that the internal market system is not absolute. Ultimately, the internal market is only a 'means' to achieve the EU's aim of promoting peace, its values and the well-being of the peoples of Europe (Article 3(1) TEU). Although this was not expressed so explicitly until the Lisbon Treaty (2009), the relative nature of the internal market had already been made evident since the creation of European integration by the Treaty of Rome (1957) in the exception provision of the current Article 347 TFEU.[74]

This provision made it clear immediately from the EEC's establishment in 1957 that, in the four situations listed in the Article, Member States have been permitted to take security measures which adversely affect the functioning of the internal market.

The text of this Article reads:

"Member States shall consult each other with a view to taking together the steps needed to prevent the functioning of the internal market being affected by measures which a Member State may be called upon to take in the event of **I)** serious internal disturbances affecting the maintenance of law and order, **II)** in the event of war, **III)** serious international tension constituting a threat of war, or **IV)** in order to carry out obligations it has accepted for the purpose of maintaining peace and international security."

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[72] For the conditions of coherent and systematic organisation of the Ecosystem, see: ECJ 21 December 2011, *Commission v Austria*, Case C-28/09, European Court Reports. 2011, 00000.

[73] *Survey Report Logistics Ecosystem.*

[74] This also applies to the exception to EU law contained in Article 346 TFEU for the provision of intelligence and trade in arms, munitions and war material when these are deemed necessary for the 'essential interests' of national security. This treaty provision will not be discussed further in this report, as the Ecosystem does not concern production of or trade in military goods.

This means that, in addition to the exceptions from Articles 52 and 62 TFEU discussed in the first solution variant, a Member State may also invoke Article 347 TFEU in this context.

In the *Johnston*[75] and *Sirdar*[76] cases, the Court was requested, among other things, to explain this provision. In neither case did the Court perform a substantive review of reliance on Article 347 TEU. In *Sirdar*, however, the Court stressed that "depending on the circumstances, national authorities have a certain degree of discretion when adopting measures which they consider to be necessary in order to guarantee public security in a Member State"[77] and that the Member States may adopt suitable measures to ensure their domestic and foreign security:

"(...) to that end, they may take decisions on the organisation of their armed forces which conflict with the principle of equal treatment for men and women laid down in Council Directive 76/207/EEC of 9 February 1976, although such decisions have not been entirely excluded from the scope of Community law." (This was reiterated in the *Kreil* case.)[78]

Now it is crucial to examine whether the Ecosystem can be considered as a measure to be applied in one or more of the four situations referred to above, so that it may benefit from this ground for exception. It can be argued in three different ways that the Ecosystem's set-up falls within this scope, as we will discuss below.

3.2.2.1 Responding to an existing international tension constituting a threat of war

The term 'threat of war' has a very broad scope and is, to a certain extent, subjective. Its subjective character lies in the fact that it is not defined in EU law, which leaves a wide margin of discretion to the Member States.[79] There is no doubt that since the annexation of Crimea by Russia in 2014 there has been 'international tension' threatening the territorial integrity of (Eastern) European States. The Ecosystem also serves to provide logistics support to possible military missions for protecting Dutch allies (in both EU and NATO contexts) when necessary. Since 2014, the EU and NATO have condemned and sanctioned the annexation of Crimea by Russia and have called for it to be ended.[80]

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[75] ECJ 15 May 1986, *Marguerite Johnston v. Chief Constable of the Royal Ulster Constabulary*, Case 222/84, European Court Reports 1986, 01651.

[76] ECJ 26 October 1999, *Sirdar v. The Army Board and Secretary of State for Defence*, Case C-273/97, European Court Reports 1999, I-07403.

[77] *Sirdar*, para. 27. See also para. 35, ECJ 17 October 1995, *Landgericht Darmstadt Germany v. Peter Leifer, Reinhold Otto Krauskopf and Otto Holzer*, Case C-83/94, European Court Reports 1995, I – 3248.

[78] ECJ 11 January 2000, *Tanja Kreil v. Germany*, Case C-285/98.

[79] See: M. Trybus, *European Union Law and Defence Integration*, Hart Publishing 2005, p. 187. See also (discussed in section 3.2.2.): [78] Opinion of Advocate General Cosmas in Case C-423/98, *Alfredo Albore* [2000], para. 29.

[80] See: NATO, *Statement by the North Atlantic Council on Crimea*, 18 March 2019. Since this annexation, the EU has adopted far-reaching economic sanctions against Russia, which are still in force; see: Council of the European Union, *Illegal annexation of Crimea and Sevastopol: EU extends sanctions by one year*, press release 487/19, 20

The question remains whether this context of international tension is sufficient to argue that there is a concrete 'threat of war', directed against the allied relations that the Ecosystem seeks to protect.

It is not inconceivable that this international tension will spread to other geographical areas. In addition, the Netherlands government has a wide margin of discretion in determining that such a threat exists. However, it should be noted here that this first argument is the least plausible of the three, as the situation in Ukraine does not pose a direct and concrete threat of war for EU and NATO Member States.

3.2.2.2 Preventive response to war or international tension constituting a threat of war

It can also be argued that the Ecosystem is a preventive measure directed against a threat of war that may arise in the future. A purely linguistic interpretation of the text of the Treaty would not support such an argument, seeing that it uses the expression 'in the event of'. A more systematic and teleological interpretation does, however, support it, as evidenced by the opinion of Advocate General[81] Cosmas in the *Albore* judgment of 2000.

According to Cosmas, Article 347 TFEU seems "to constitute the demarcation line between the normal circumstances in which national and Community institutions function and difficult situations of national danger which affect the more general relationship between the Community and Member States".[82] Cosmas acknowledges that this cannot be read literally in the provision, but that it is clear from its objective, which is "to confer on the Member States the greatest possible capability to deal with certain exceptional and truly dangerous eventualities".

In fact, Cosmas does not consider it necessary for any of the situations mentioned to actually occur; it is sufficient if "the measures taken are directly and exclusively linked to those situations". According to Cosmas, preventive measures which "are directly and exclusively linked to the exceptional situations [the article] (...) describes" can also fall under the scope of this ground for the exception provided in Article 347 TFEU.

Of crucial importance is Cosmas's interpretation that otherwise the provision would be robbed of its "practical usefulness" and be rendered "entirely redundant".[83] Cosmas did add to his reasoning that such measures could be made conditional on being temporary, and this can be assessed by the

June 2019.

[81] In the absence of any interpretations by the Court itself, the opinions of Advocates General enjoy the highest legal authority in EU law. Advocate General Cosmas's opinion in the *Albore* judgment is even more authoritative because the Court followed the general findings of the opinion but simply did not consider it necessary to apply Article 347 TFEU to the case.

[82] Opinion of Advocate General Cosmas in Case C-423/98, *Alfredo Albore* [2000], para. 27. In 2000, the European Community was still in existence.

[83] Advocate General Cosmas, para. 31.

Court.[84] In particular, regulatory measures of a more general nature would be inadmissible if adopted on a permanent basis. According to Cosmas, the permanence of measures often indicates that they "have not been taken exclusively for the purpose of resolving problems" falling within the scope of Article 347 TFEU. However, to the extent that the Ecosystem has a permanent character, it can still be argued that it is aimed exclusively at the *red-button scenario*. However, this requires a more extensive substantiation than is necessary for a temporary measure.

Please note! What is the weight of the requirement that a measure must be temporary?
Advocate General Cosmas's opinion shows that the Ecosystem can be brought within the scope of Article 347 TFEU; questions do arise, however, regarding the requirement that only measures aimed exclusively at enabling the Netherlands armed forces to respond adequately to a possible war or threat of war can be brought under this exception. This would require that, if such a situation actually occurs, the Netherlands would be able to apply emergency regulations to the participating undertakings in question so that maximum logistics capabilities become available. However, for the 'white' logistics services to be included in the Ecosystem, it will then have to be demonstrated that the actual amount of those services is necessary for the exclusively military purpose of the Ecosystem.

3.2.2.3 Obligations entered into by the Netherlands to maintain peace and international security

The notion that the Ecosystem is a military policy instrument to meet the obligations that the Netherlands has entered into with a view to maintaining peace and international security is, in our opinion, the most convincing argument of the three being discussed here.

As discussed in detail in section 3.2.1.3 above, Article 5 NATO Treaty and Article 42(7) TEU create obligations which compel the Netherlands to possess the capabilities necessary to provide adequate military protection to EU and NATO allies in times of war. It has already been explained why the setting-up of the Ecosystem is necessary in order to be able to provide sufficient logistics support to military operations in the event that a situation arises to which the obligations in question apply. This is particularly supported by the fact that the Ecosystem will focus on providing military protection at a distance of 1,500 km. This covers a significant section of the eastern border of European allied territory. In the light of the international tension referred to above (section 3.2.2.1.), the Ecosystem provides an affordable solution enabling compliance with the obligations entered into.

[84] Advocate General Cosmas, para. 32.

PART IV

Compatibility of the Logistics Ecosystem with national public procurement and competition law

Part III explained how the Ecosystem relates to EU law. Part IV focuses on two other important questions that must be answered from a national public procurement law perspective and from a competition law perspective as well. In the previous Parts, we have demonstrated why we believe that the Ecosystem does not fall under the scope of European public procurement law. Safe set-up and maintenance of the Ecosystem requires the involvement of Dutch undertakings with Dutch employees. This is because under certain circumstances (such as under the so-called *red button scenario*) it is necessary for participating companies and/or their employees to have Dutch nationality. Because the (continued) existence of the Ecosystem requires it to be set up within The Netherlands and by making use of Dutch undertakings or/ and undertakings with Dutch employees, the question of whether and, if so, to what extent the Ecosystem is subject to competition law, is examined from a national law perspective. After all, as a result of the setting-up and maintenance of the Ecosystem there could still be an obstacle to competition within the Dutch market.[85]

This section will therefore first look at the question of whether national public procurement law could be applicable and, if so, what that means; second, it will look at whether competition law could create any obligations for the Ministry of Defence and the other participants in the Ecosystem and, if so, what those obligations are.

4.1 Does national law impose any public procurement requirements on the Ecosystem?

4.1.1 Written procurement law

The Dutch Defence and Security Procurement Act (DSPA) exclusively serves the implementation of the Defence Directive in the Netherlands.[86] Therefore this Act and its scope of application are identical to the Defence Directive. As is the case in relation to the Defence Directive, the Ecosystem falls within the scope of this Act on the basis of the specifically military objectives of the contracts[87] to be included under the Ecosystem (Article 2.1(1)(d) DSPA) In that context, Article 2.1(2) DSPA provides that *inter alia* Articles 52 and 62 TFEU continue to apply in full. That means that application of any justification

[85] See, for example, the prohibition on cartels in Article 101 TFEU, the content of which is the same as the prohibition on cartels in Article 6 of the Dutch Competition Act. This means that if an impediment to competition in the EU internal market were to be established by the European Commission, the same reasoning as in 4.3. below would be applicable.

[86] This is evident from the opening words of the Act and the Explanatory Memorandum thereto.

[87] According to Article 1 of the DSPA, a 'service contract' is a "written contract for pecuniary interest concluded between one or more service providers and one or more contracting authorities or special-sector undertakings and which: a. exclusively concerns the provision of services designated in Annex I or II to Directive No 2009/81/EC". Annex I of the Defence Directive designates different types of transport services as such.

referred to in these provisions renders the DSPA as a whole inoperative, as is also confirmed in the Explanatory Memorandum to the legislative proposal.[88] Therefore, in order to substantiate the assertion that the DSPA does not apply to the Ecosystem, reference can be made to the first solution variant that we discussed in Part III of this study.

If on the basis of EU Treaty law exceptions both Directive 2009/81/EC and the DSPA are rendered inapplicable by services such as those of the Ecosystem, this implies that no provisions from the Public Procurement Act 2012[89] are applicable to those services either. This is confirmed by Article 2.3 DSPA which, in the context of the threshold amounts, provides that "irrespective of the estimated value of a contract as referred to in Article 2.1. [...] Chapters 1.2 through 1.4 of the Public Procurement Act (PPA) 2012 [are] not applicable to it". Those chapters contain simple rules for the application of principles and starting points of public procurement law to contracts that do not fall within the scope of EU law but do fall under these national provisions. In particular, these provisions require from contracting authorities that the choice of procedure on basis of which a public contract is awarded and the choice to allow economic operators access to this procedure need to be determined on the basis of objective criteria and that economic operators are subsequently to be supplied with reasons if so desired (Article 1.4(1) PPA). It is also provided here that public contracts may not be joined unnecessarily (Article 1.5 PPA) and that the principles of equal treatment of economic operators and transparency (Article 1.12 PPA) and proportionality (Article 1.13 PPA) must be observed. Thus, if a public contract lies within the scope of the DSPA on account of its military nature, it cannot fall within the regime of the Public Procurement Act 2012. There is thus no specific Dutch public procurement legislation requiring the application of a specific procurement procedure to the Ecosystem, and the previously mentioned principles and starting points from the Public Procurement Act are not applicable to the Ecosystem.

In brief, the Ministry of Defence has a wide margin of discretion regarding the way the Ecosystem is to be set up. This is because, on the one hand, even the 'light' regime prescribed by the principles and starting points from Part 1 of the Public Procurement Act is not applicable, and, on the other hand, the application thereof is excluded on account of public security. The scope of any legal requirements is thus very limited and dependent on choices made by the Ministry of Defence itself in its relationships with economic operators interested in participating in the ecosystem and the expectations which this may legitimately raise among those economic operators (more on this in the following section).

[88] Explanatory Memorandum to Implementation of Directive No 2009/81/EC of the European Parliament and of the 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 (Defence and Security Procurement Act), Parliamentary Document 32 768, no. 3 (session year 2010-2011).
[89] The Dutch Public Procurement Act (PPA) was adapted in 2016 to implement Directive 2014/23/EU and Directive 2014/24/EU and Directive 2014/25/EU.

4.1.2 General principles derived from the private law principle of reasonableness and fairness: to prevent complaints from disappointed tenderers and to increase the effectiveness of the procurement process

Introductory remarks

The question is whether there are other requirements for the setting-up of the Ecosystem on the basis of (other) unwritten law. In this section we will discuss a number of cases before Dutch courts where the court declared (certain) general principles of law to be applicable to the conclusion of contracts between the government and economic operators in situations where there were no 'written' rules. This is for illustration purposes and with emphasis on the fact that the ruling of the Court of Appeal of The Hague of 2010 referred to below did not pertain to a 'purchase procedure' but to a 'sales procedure'. This discussion is relevant because in the Netherlands there are no written rules for sales procedures (meaning that they also fall outside the scope of the public procurement directives as well as the Public Procurement Act). It is also important to emphasise that in this case law there are no examples of cases in which public security played a fundamental role as it does in the Ecosystem.
In brief, while interesting parallels can be drawn, there are above all also essential differences between the situation of the Ecosystem and the situations at issue in these cases.

Discussing these cases is also useful for seeing how Dutch courts deal with dissatisfied economic operators who invoke (i) the private law principle of reasonableness and fairness and/or (ii) the principles of good governance and/or (iii) EU-derived principles – such as public procurement principles, including in particular the principles of equality and transparency – vis-à-vis a contracting authority in cases that fall outside the scope of public procurement legislation.
In the eyes of the EU law expert, it is clear in this respect that the Dutch court has intended to interpret the private law principle of 'reasonableness and fairness' in the light of the EU principle of 'equality' and that it uses the latter principle as a collective term to refer to the EU principle of non-discrimination on grounds of nationality and the principles deriving from that, such as the general principles of public procurement law.[90] In addition, these cases also mention general principles of good governance.

Furthermore, the arguments in these cases may be very useful in increasing the efficiency of the Ecosystem's 'purchase procedure', as these (public procurement) principles indirectly compel deeper reflection on eligibility requirements for economic operators on the basis of objective criteria.

[90] A more in-depth discussion of this theme falls outside the scope of this study; we refer to Sections 2.2 and 2.3 of R.G.T. Bleeker and E.R. Manunza, (2014), 'De invloed van het Europees recht op het Nederlandse aanbestedingsrecht', in: A.S. Hartkamp, C.H. Sieburgh, L.A.D. Keus, J.S. Kortmann, M.H. Wissink (eds.), *De invloed van het Europese recht op het Nederlandse Privaatrecht. Bundel vanwege het Onderzoekscentrum voor Onderneming en Recht van de Radboud Universiteit Nijmegen*, Kluwer, Serie Onderneming en recht, Part 81-II, Special Part, pp.741-810.

The court cases

As early as 1992, the Supreme Court ruled that for judicial control of the general principles of good governance, as partly laid down in the General Administrative Law Act, "only marginal review" cannot suffice.[91] These principles thus also apply to private law actions of administrative bodies (such as the Ministry of Defence). Consequently, when preparing the selection of contracting parties, administrative bodies must comply with the principle of due care and the principle of legitimate expectations (or the principle of the protection of legitimate expectations). This often entails the existence of an obligation to state reasons.

In the context of the conclusion of a contract between a municipality and an economic operator (for the sale of land),[92] the Court of Appeal of The Hague ruled in 2010 that the principles of equal treatment, objectivity and transparency also apply to the selection of parties admitted to a private tender procedure (which, like the Ecosystem, falls outside the scope of public procurement legislation).[93] It should be recalled that – as already discussed in the previous section – military public procurements that are excluded from the scope of the DSPA for security reasons appear to render these principles inoperative. In this case (and other cases), however, the court ruled that violation of these principles can be a basis for liability based on an unlawful act.

However, it does not appear from Dutch case law that there is an obligation to set up a competitive tender procedure[94] if the selection (or rejection) of a certain contracting party can be properly justified.[95] The intensity of the obligation to state reasons could be limited for the Ecosystem on the grounds of public

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[91] Supreme Court 24 April 1992, *Provincie Zeeland*, ECLI:NL:HR:1992:ZC0852.

[92] Procedures for the sale of public property are not regulated in the Netherlands. According to case law, requirements are set by the previously mentioned principles and by EU law. On the relevance of the discussion of these requirements in relation to public procurement law, see, for example: E. Manunza, *EG-aanbestedingsrechtelijke problemen bij privatiseringen en bij de bestrijding van corruptie en georganiseerde criminaliteit. Een beschouwing over de vraag of privatiseringsoperaties en de bestrijding van corruptie en georganiseerde criminaliteit een belemmering vormen voor de voltooiing van de Europese markt voor overheidsopdrachten*, Dissertation VU University Amsterdam, Europese Monografieën series, Part 68, Kluwer, Deventer, April 2001 (p. 382). E. Manunza, 'Naar een consistente en doelmatige regeling van de markt voor overheidsopdrachten', pp. 49-123 in J.M. Hebly, E. Manunza and M. Scheltema: *Beschouwingen naar aanleiding van het wetsvoorstel Aanbestedingswet*, recommendation to Vereniging van Bouwrecht (p. 153).

[93] Court of Appeal of The Hague 26 October 2010, *Gemeente Noordwijk*, ECLI:NL:GHSGR:2010:BO2080.

[94] This means a procedure not set out in legislation (see E.R. Manunza & W.J. Berends, 'Social services of General Interest and the Public Procurement Rules', in U. Neergaard, M. Krajewski, E.M. Szyszczak and Gronden, J.W. van de (eds.), *The Role of SSGIs in EU Law: New Challenges and Tensions*, T.M.C. Asser, The Hague, The Netherlands, pp. 347-384.

[95] On municipal ground lease agreements, see: Court of Appeal of Arnhem 26 April 2011, ECLI:NL:GHARN:2011:BQ3090 and on public contracts outside the scope (because below the threshold) of EU public procurement Directives, see, for example: District Court of 's-Hertogenbosch 10 September 2012, ECLI:NL:RBSHE:2012:BX7223, para. 4.6.

safety, since this is already the basis of the exemption from written public procurement law. Particularly with regard to the ABDO (General Security Requirements for Defence Contracts)[96] authorisation described in section 4.1.2.1, there will hardly be any obligation to state reasons, as the Ministry of Defence, as a contracting party in the Ecosystem, will rely entirely on the assessment of the Defence Intelligence and Security Service (DISS).

In general, from a Dutch contract law perspective, the pre-contractual standards of reasonableness and fairness apply. The Supreme Court ruled in 2002 – although in relation to a competitive procedure initiated by a private contracting party and not by a public contracting authority – that if such a competitive procedure is chosen, the principles of equal treatment and transparency apply. These principles require that the selection and award criteria and the scope of the contract are clear and made known in advance.[97] This is related to "the expectations that the (potential) providers could reasonably have on that basis".[98] From the point of view of reasonableness and fairness, a decisive role is played by the expectations raised among interested parties as to what kind of procedure will be used to select future contracting parties or to award a specific contract through a competitive tender procedure. This ensues from the private law principle of legitimate expectations which must be observed not only by public contracting authorities but by all legal entities. Because the principles of good governance impose stricter requirements on governments than those imposed by the principle of reasonableness and fairness (after all, government action under private law must not only be reasonable and fair, but also 'good'), the following will focus on the principles of good governance.

As noted above, civil courts generally refer to these principles as the 'public procurement principles', both when the legal basis lies in the general principles of good governance and when it lies in the principle of reasonableness and fairness. What cannot be established entirely clearly from this national case law is whether these principles impose requirements (i) if the contracting authority itself has opted for a competitive procedure but has subsequently failed to act in accordance with the relevant principles or (ii) to the effect that an interested party– which for example has not been invited to submit a proposal – can enforce at law for such a competitive procedure to be set up by the contracting authority.

However, it is evident from the Court of Appeal of The Hague's ruling of 2010 that if a market participant itself shows interest in admission to a selection or competitive procedure in due time and the administrative body in question does not give this party a chance to bid, without properly stating reasons for its failure to do so, this may constitute a violation of the principles of good governance. Again, the elaborateness of the reasons stated may be limited on the basis of public security.

These principles may therefore apply to the procedure for joining the Ecosystem, but it is not entirely

[96] 'Algemene Beveiligingseisen Defensieopdrachten 2019': General Security Requirements for Defence Contracts 2019.
[97] Supreme Court 4 April 2003, *RZG*, ECLI:NL:HR:2003:AF2830, paras. 3.4.4 and 3.5.2.
[98] Supreme Court 3 May 2013, *KLM*, ECLI:NL:HR:2013:BZ2900, para. 3.7.

clear to what extent they apply. In addition, the security interests of the State of the Netherlands give rise to a wider margin of discretion than that allowed in the case law under discussion in which the principles must be applied. This wide margin of discretion applies in particular to the publicity to be given to the tender procedure and the associated obligation to state reasons, as may be required by the principle of transparency. Because a comprehensive preliminary market consultation was held to identify the requirements that economic operators must meet to be able to contribute to the objective of the Ecosystem, objective criteria can be formulated and communicated in advance to interested parties designated as such by the Ministry of Defence. There are then two ways in which joining the Ecosystem can be organised.

4.1.2.1 Joining the Ecosystem on the basis of selection criteria

The first option is to set this up exclusively on the basis of selection requirements. In that case, (minimum) requirements for joining would be set. These could be requirements regarding, for example, the minimum number (or percentage of the total number) of employees with reservist status or possessing sufficient and suitable logistics capabilities (to be specified by the Ministry).
In particular, it is the responsibility of the Ministry of Defence to lay down requirements to safeguard national security based on the General Security Requirements for Defence Contracts 2019 (ABDO). Pursuant to Article 10 Intelligence and Security Services Act 2017, the DISS has a duty to conduct an investigation in order to take measures "to prevent activities aimed at compromising the security or preparedness of the armed forces", "to promote a proper process of mobilisation and concentration of the armed forces and to benefit undisturbed preparation and deployment of the armed forces". The fact that, through the Ecosystem, private undertakings contribute to the military logistics capabilities of the Ministry of Defence in crisis situations, justifies the investigation of prospective participants by the DISS and the making of their selection dependent on the outcome of such an investigation.

In this context, the Ministry of Defence is free to set selection requirements that it deems necessary for the security of services in the Ecosystem if, as embedded in the ABDO, the ex-ante screening is carried out by the DISS. Participation in the Ecosystem can therefore definitely be made dependent on an ABDO authorisation specifically related to that participation and for which the participant must take the necessary security measures. This authorisation is granted by the DISS within the parameters of the Intelligence and Security Services Act 2017. Political responsibility lies with the Minister of Defence. Furthermore, the DISS is under the independent supervision of the Review Committee on the Intelligence and Security Services as laid down in Chapter 7 of the Intelligence and Security Services Act 2017.

We do realise, however, that, after this step, there is a risk that the number of parties passing the selection will still be too high for the Ecosystem, which will raise the question of how the Ministry can reduce that number whilst also taking account of the procurement principles and at the same time considering security. If that risk exists and all conceivable objective requirements have already been used during the selection, then it may be useful to apply award criteria in addition to selection criteria. This step will be discussed in the following paragraph.

4.1.2.2 Joining the Ecosystem on the basis of award criteria

Should the Ministry of Defence wish to take account of the possibility that the number of participants in the Ecosystem may still be too large after selection, as a result of which it would have to limit this number further, it should consider the use of award criteria to compare candidates further in order to arrive at the desired number. In order to comply with the principle of transparency, the requirements on the basis of which the candidates will be compared must be determined and communicated in advance to the group of potential market participants. Unlike the ABDO authorisation (which can only be a selection criterion), some of the other selection criteria, such as the number of reservists, may also be suitable as award criteria. In the case of the requirement concerning reservists, the advantage is that it would challenge companies to make more than the minimum number of reservists available in emergency situations.

As the DSPA and PPA do not apply, the Ministry of Defence is free to set up its own procedure. As noted above, it is unclear to what extent the legal principles must be applied. It is clear, however, that these legal principles apply considerably less extensively than in the case of other types of military public procurement which cannot be exempted on grounds of security. It is important to bear in mind that, in the context of reasonableness and fairness and the good governance principle of legitimate expectations, the participating undertakings must be informed that selection may be followed by an award procedure. We have intended to demonstrate in the foregoing that such an award procedure can be used to the advantage of the Ministry of Defence because it could benefit the quality of the logistics services. In short, it is a flexible and simple way to steer the "procurement process" efficiently.

4.2 Obligations for economically active public authorities under the Competition Act

In the context of the Ecosystem, the Ministry of Defence will possibly also conduct other activities than merely awarding public contracts (to which the procurement law analysis bears relevance). One of the Ecosystem's aspects is that the Ministry, as a participant in the Ecosystem, makes available – for example – capabilities or real estate to the other participants.

4.2.1 Is there an 'economic activity' on the part of the Ministry of Defence?

To answer the question of whether competition law obligations apply to the Ministry of Defence in the context of the Ecosystem, the first important question is whether the activity in question can be considered an 'economic activity' conducted by the Ministry. The definition of the concept by the Court of Justice of the European Union is paramount in this respect. According to established case law of the Court, activities aimed at the execution of public authority tasks and activities carried out in relation to public authority tasks, are not of an economic nature.[99] The previously mentioned activities that the Ministry wishes to carry out in the Ecosystem can only be regarded as 'economic' if they can be

[99] CJEU 26 March 2009, *Selex*, Case C-113/07 P, European Court Reports 2009, I-02207, paras. 70-82.

"separated" from the "exercise of its public powers".[100]

As explained in the previous sections, the Ecosystem is a means for the Ministry of Defence to carry out tasks of public authority deriving from Article 97 of the Constitution. In this sense, it can be argued that, where necessary for the maintenance of the system, the previously mentioned activities cannot be separated from the powers of public authority exercised by the Ministry through the Ecosystem. This is highlighted by the notion that, in crisis situations, employees of market participants may be deployed by the Ministry as reservists and can therefore also exercise public authority. In brief, methodical reasoning plays a decisive role here. The choice to carry out tasks of public authority by means of cooperation with private undertakings should be seen within the wide margin of discretion at the Ministry's disposal for safeguarding national security.

4.2.2 Possible obligations of the Ministry of Defence under the Competition Act

In the event that it is concluded nonetheless that there is 'economic activity' on the part of the Ministry of Defence within the framework of the Ecosystem, the Competition Act applies. Article 25(i)(1) Competition Act provides that if public authorities conduct economic activities they must charge customers of the product or service the integral cost of the products or services. In concrete terms, this means that, when providing such services to the other participants in the Ecosystem, the Ministry will charge at least the costs that are customary in regular commercial transactions. If it were to provide services at a lower cost than is customary in regular commercial transactions, this would lead to disruption of the market.

If it is not desirable to charge the integral cost, the Ministry's economic activities conducted within the Ecosystem could be excluded from Chapter 4b Competition Act (also referred to as the: Public Enterprises (Market Activities) Act) pursuant to Article 25h(5) Competition Act. In that case, it must be demonstrated that the economic activities take place in the public interest. Article 25h(5) and (6) Competition Act provide that this can be determined by the "Minister involved", which in this case would be the Minister of Defence.

Such a decision must, however, be supported by reasons. The existence of a public interest, i.e. (national) security, has already become evident from the extensive discussion of the set-up of the Ecosystem and the security interests pursued through it. Specifically for such a decision, the substantiation of the Ecosystem's proportionality as such, which has been set out in Part III of this report, may help to demonstrate the security interest of economic activity by the Ministry of Defence. Finally, it will then have to be demonstrated that the specific activities are necessary for the Ecosystem to function. The argument that this is necessary to make participation attractive to third parties must still be studied in more depth from a national context. In general terms, this is already apparent from the Ecosystem's set-up and the reciprocal obligations it contains.

[100] CJEU 12 July 2012, *Compass Datenbank,* Case C-138/11, para. 38.

4.3 Obligations for other participants under the Competition Act

Within the Ecosystem, there may also be cooperation in various forms between undertakings. Article 6(1) Competition Act prohibits "agreements between undertakings, [...] which have as their object or effect the prevention, restriction or distortion of competition on the Dutch market, or a part thereof". It remains to be seen whether implementation of the Ecosystem will actually lead to a restriction of competition in the logistics sector in the Netherlands. Since there will be cooperation between undertakings in the Ecosystem, it is useful to determine whether, if a restriction of competition were to occur, an exception to the prohibition would apply. In a descending order of likelihood, three alternative grounds for exception will be discussed.

First, according to Article 12 Competition Act, the prohibition provision does not apply to agreements to which the Council of the European Union has declared the prohibition of cartels to be non-applicable pursuant to a regulation. In that respect, Regulation 169/2009 applies to economic activities in the field of transport by rail, road and inland waterway.[101] Article 2 of this Regulation contains an exception for agreements in this sector "the object and effect of which is to apply technical improvements or to achieve technical cooperation". Simply put, this means that if technical cooperation between the undertakings contributes to the economic efficiency of the activities, there may be an exception to the prohibition of cartels. The market survey showed that commercial advantages such as these are an important factor in the decision of market participants to participate in logistics cooperation within the Ecosystem. In addition, the provision provides various possibilities for cooperation between undertakings, the following of which are particularly relevant for the Ecosystem:

"b) the exchange or pooling, for the purpose of operating transport services, of staff, equipment, vehicles or fixed installations".

As long as cooperation between market participants by means of making capabilities available to each other brings efficiency gains and the object and effects of the cooperation do not go beyond what is necessary for that purpose, this exception could be applicable. However, this depends on whether the cooperation can be qualified as only 'technical cooperation'.

The second and third possibility for exception that could apply to the Ecosystem are based on more general exceptions to the prohibition of cartels.

Secondly, there is the exception in Article 6(3) Competition Act. This provides a more general basis for the exception of cooperation between undertakings which entails efficiency gains. The application thereof requires that the objectives of such cooperation contribute towards:

"I) an improvement in production or distribution or are in furtherance of technical or economic progress,

[101] Council Regulation (EC) No 169/2009 of 26 February 2009 applying rules of competition to transport by rail, road and inland waterway.

while II) allowing consumers a fair share of the resulting benefits and which do not impose on the undertakings involved III) restrictions which are not indispensable for the attainment of these objectives, or IV) afford such undertakings the possibility of eliminating competition in respect of an essential part of the goods and services involved."

These criteria are cumulative. In addition to the first requirement (I), the second requirement (II) also appears to be easily satisfied in the context of the Ecosystem. The Ecosystem is of particular benefit to the Ministry of Defence as a user, as it enables the Ministry to fulfil its main public tasks in a more cost-efficient manner. The necessity requirement (III) and the prohibition on eliminating an essential part of the competition in the logistics sector (IV) can only be assessed on the basis of the Ecosystem's specific organisational structure and operation.

Thirdly, there is the possibility provided in Article 7(2) Competition Act. This Article contains an exception for cooperation in which the combined market share of the undertakings involved does not exceed 10% and there is no appreciable effect on trade between Member States. Depending on the definition of the relevant market, this could also apply to the Ecosystem. Using a broad definition that includes the entire Dutch logistics sector, the total market share of the participants in the Ecosystem could remain below 10%. However, it should be noted here that competition authorities tend to define markets more narrowly than comprising an entire sector, as would be the case if the logistics sector in the Netherlands were considered as one single market.

CONCLUDING REMARKS

This study on the legal admissibility or inadmissibility of the Logistics Ecosystem consists of four parts (I, II, III, and IV). In our detailed discussion, we argued why its set-up and maintenance by the Ministry of Defence is possible without organising a tender procedure and without contravention of national and European competition law.
These two areas of law, procurement law and competition law, are an elaboration of European rules, in which context the Defence and Security Procurement Act serves exclusively to implement the Defence Directive. The Competition Act applies only to national situations which fall outside the direct effect of the competition provisions of the TFEU, but has nevertheless been influenced by EU competition law.

It was therefore crucial to first study the EU (internal market) law system in depth in order to be able to answer the research questions correctly.

This was even more imperative in the context of the Ecosystem, as the impression seemed to be that procurement and competition rules apply *per se* to the contractual relationships between the participating private parties and the Ministry of Defence, relationships that form the basis for guaranteeing the functioning of the Ecosystem.

We showed by our legal reasoning that this impression is not correct and even contravenes fundamental provisions of the EU Treaties that require a coherent, consistent and goal-oriented interpretation of EU law 'as a whole'. This means that the internal market and competition rules must be interpreted and applied by looking at the broader context of why European cooperation in the economic field was originally set up, namely to ensure peace between the peoples of Europe, and in the light of developments in defence cooperation since the Lisbon Treaty. The political and legal complexity resulting from the effort to achieve this higher goal in the EU has been discussed in detail by highlighting the NATO Treaty implications as well as the fact that under the EU Treaties the Member States have retained autonomy in this field, while at the same time there is an ambition to develop an EU defence policy.

SUMMARY

By setting up the Ecosystem, the Ministry of Defence intends to provide the logistics capabilities required to ensure the military-operational capabilities of adaptive armed forces capable of defending the Netherlands' own and allied territory and promoting international peace and security. The permanent use of its own public assets for this purpose is practically and financially unfeasible. The Ecosystem will therefore function on the basis of long-term strategic collaboration between the Ministry and private undertakings in which personnel, assets and methods are reciprocally shared and exchanged. Two important requirements to be imposed on the participating market players are that they are established in the Netherlands and that (some of) their employees have Dutch nationality. This is necessary in order to guarantee that logistics capabilities can be fully deployed in crisis situations.

This report, *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*, sets out which legal obligations from EU and national public procurement and competition law are applicable to such cooperation and how, in that light, the Ecosystem can be legally fleshed out. Potential public procurement obligations arise from the intention to accommodate certain public service contracts exclusively in the Ecosystem.

1. Research method (Parts I and II)

The report takes a systemic approach to the issue, starting from the constitutional tasks of the Netherlands armed forces, which must be considered in the context of the NATO Treaty and the EU Treaties (Treaty on the European Union (TEU) and Treaty on the Functioning of the European Union (TFEU)).
At EU level, the potential public procurement obligations ensue from the internal market provisions of the TFEU. The EU Treaties were considered as a 'living constitution', constantly evolving and affecting the entire legal system. In the study, internal market provisions were analysed as coherent parts of a single, common and coherent legal system and described in the light of the EU's overarching objective(s) as set out in the TEU and TFEU. Particular attention was paid to the changes to the EU Treaties introduced by the Lisbon Treaty in 2009 in respect of the EU's central objective – to promote peace, its values and the well-being of its peoples – and the evolution of the Common Security and Defence Policy (CSDP).

Based on this systemic approach to the legal system, the following three starting points emerged:

- The **aim of the EU** is 'to promote **peace**, its values and the well-being of its peoples' (Article 3(1) TEU). The **internal market is one of the means** of achieving this aim and is therefore in fact subordinated to it.
- National security remains the sole **responsibility of each Member State** (Article 4(2) TEU). In 2009, the CSDP was expanded by the Lisbon Treaty (Article 42 TEU). In 2017, for example, this led to the launch of 'permanently structured cooperation' to intensify military cooperation. However,

the EU law system still assumes that military objectives are achieved on the basis of national responsibility and thus also by means of national capabilities. This is due to the intergovernmental nature of the CSDP.

- Within the EU Treaties, **the NATO Treaty enjoys a privileged position**. This is because the NATO Treaty entered into force in 1949, almost ten years before the Treaty of Rome (1958). In this respect, Article 351 TFEU provides that the rights and obligations set out in the NATO Treaty may not be affected by the EU Treaties. This is also emphasised in Article 42(7) TEU, which provides that NATO obligations, for "those States which are members of it, remain [...] the foundation of their collective defence and the forum for its implementation".

Interim conclusion:
This means that provisions relating to the internal market and the exceptions thereto must be interpreted as much as possible in accordance with the EU's central aim, Member States' sole responsibility for their own security and the obligations arising from the NATO Treaty.

2. Compatibility of the Logistics Ecosystem with EU internal market law (Part III)

Part III shows that the Ecosystem can be exempted from EU internal market law, and thus from potential EU procurement obligations. The report proposes and discusses two possible solution variants.

2.1. First solution variant: protection of public security and public authority

The first solution variant is offered by Article 52 (free movement of services) and Article 62 (freedom of establishment) TFEU. These provisions allow Member States to derogate from internal market provisions on grounds relating to the protection of public authority and public security. If the conditions for the application of these provisions are satisfied, the EU procurement directives may be set aside.

This possibility is subject to two requirements, a and b:

a. Actual security interest?

- The Ministry of Defence needs the Ecosystem's logistics capabilities to enable it to perform its constitutional tasks and, in particular, the collective self-defence obligation under the NATO Treaty, on the basis of which an actual security interest exists.
- The concept of public security referred to in Articles 52 and 62 TFEU is not interpreted so narrowly as to relate only to the internal security of a Member State, but also concerns external security. This external security is inextricably linked to international relations in a broad sense, such as participation in military alliances such as NATO and the CSDP.

b. Is the measure suitable for protecting the interests it seeks to protect and is it no more restrictive to trade than necessary (proportionality)?

The report identifies the need for the Ecosystem by means of the following points:

- neither NATO nor the EU provide integrated military capabilities but nonetheless create military obligations, which can thus be met only by national capabilities;
- cooperation with market players established in the Netherlands is necessary in order to be able to requisition capabilities in crisis situations;
- the earlier personnel reductions, the structural shortfall in military personnel and the increasing flexibility of the labour market require cooperation with Dutch market players which employ reservists who have Dutch nationality (military personnel are regarded as holding a position of public authority);
- long-term cooperation requires a closed system of participants;
- keeping national security affordable requires efficient use of the total logistics capabilities;
- and security of supply of logistics services in times of crisis requires reciprocity between the Ministry of Defence and the participating undertakings within certain legal limits.

The Ecosystem is also proportionate as a preventive military instrument because:

- the CJEU attaches particular importance in that respect to obligations ensuing from NATO membership;[102]
- the application of emergency regulations in crisis situations is only possible if market participants fall within the jurisdiction of the State of the Netherlands and are therefore established on Dutch territory;
- if market participants have no employees with Dutch nationality no military deployment is possible in crisis situations;
- lastly, the CJEU does not rule out the possibility that a measure pursuing a public security objective may also achieve objectives of an economic nature.[103]

2.2. Second solution variant: Article 347 TFEU

The second solution is provided by Article 347 TFEU, which is an exemption provision. This provision lists the four situations in which Member States may take measures to protect security even if they have an adverse effect on the functioning of the internal market.
These situations are:

I. serious internal disturbances affecting the maintenance of law and order,

[102] Case C-252/01, *Commission v. Belgium* [2003], paras. 29-30.
[103] Case 72/83, *Campus Oil* [1984], para. 36.

II. war,
III. serious international tension constituting a threat of war,
IV. where measures are taken in order to carry out obligations which a Member State has accepted for the purpose of maintaining peace and international security.

It can be argued in three different ways that the Ecosystem's set-up falls within this scope (in ascending order of plausibility).

- Because the concept of '**threat of war**' has a very broad scope and a subjective nature, it can be argued that the annexation of Crimea by Russia in 2014 has led to an "international tension constituting a threat of war" as it also threatens the territorial integrity of (Eastern) European states.
- But it can also be argued that the Ecosystem is a **preventive measure** directed against a 'threat of war' that may arise in the future. In an opinion in the *Albore* case of 2000, Advocate General Cosmas argues why such a broad interpretation of Article 347 of the TFEU is necessary.[104]
- Finally, it can be argued that the Ecosystem is a means of complying with **international obligations** for the purpose of maintaining peace and security. In that respect, Articles 3, 4 and 5 NATO Treaty and Article 42(7) TEU compel the Netherlands to possess capabilities to offer military protection to allies when necessary.

Interim conclusion:
This means that the Ecosystem and the Defence contracts for services to be provided thereunder can be exempted from the operation of EU internal market law. As a result, under these conditions, no EU procurement law obligations apply to the setting-up and maintenance of the Ecosystem.

3. Compatibility of Ecosystem with national public procurement and competition law? (Part IV)

This last part of the report sets out the potential procurement requirements and competition law restrictions that national law might still impose on the Ecosystem.

3.1. Procurement requirements under national law?

Written public procurement law?

- Because the exceptions under EU law are also included in the implementation in the Netherlands of the Defence Directive, the Public Procurement Act 2012 and the Defence and Security Procurement Act do not apply.

[104] Opinion of Advocate General Cosmas in Case C-423/98, *Alfredo Albore* [2000].

Unwritten public procurement law?

- Because the contracts fall within the scope of the DSPA but are exempted from it, Chapters 1.2 to 1.4 of the Public Procurement Act 2012, which set out the general procurement principles, do not apply either.
- However, to a limited extent, the principles of good governance and the private-law principles of reasonableness and fairness may impose some minor restrictions on the Ministry of Defence.
    - However, it is not evident from Dutch case law that a certain procedure should be followed (type of procurement obligation).
    - It is important that participants are selected on the basis of objective and non-discriminatory criteria.
    - Depending on the extent to which the Ministry wishes to use selection and award criteria for admission to the Ecosystem, the principle of legitimate expectations and an obligation to state reasons, *inter alia*, will apply.

3.2. Obligations of the Ministry of Defence under the Dutch Competition Act?

Economic activity?

- For the Competition Act to apply to the activities of the Ministry of Defence, there must first of all be an 'economic activity'.
- According to the CJEU, this does not exist in so far as the activities of the Ministry cannot be "separated" from the "exercise of its public powers".
- It can be argued that the apparently *economic* activities in peacetime are necessary for maintaining a system involving the exercise of public authority by the Ministry in times of crisis, and that the two cannot therefore be separated.

Charge on integral cost or public interest decision?

- If there is an 'economic activity', the Ministry of Defence will have to charge on the integral cost of possible services to the other participants. In concrete terms, this means that the Ministry must charge an amount that is not lower than what would be customary in regular commercial transactions.
- However, the Ecosystem could be exempted from these obligations under the Competition Act if the economic activities of the Ecosystem are designated as taking place in the public interest pursuant to a decision by the Minister of Defence.

3.3. Obligations for other participants under the Competition Act?

- Since there will also be cooperation between the market participants within the Ecosystem, the question arises to what extent the prohibition of cartels in Article 6(1) Competition Act imposes restrictions on the Ecosystem.

There are three alternative grounds on the basis of which, under certain conditions, the prohibition of cartels can be rendered inoperative:

- **Council Regulation 169/2009** contains an exception to the prohibition of cartels for certain economic activities in the field of transport.
    - Article 2 of this Regulation contains an exception for agreements in this sector "the object and effect of which is to apply technical improvements or to achieve technical cooperation", including the exchange of capabilities.
    - For this provision to be applied, it is important that the cooperation between market participants does not go beyond what is necessary to maintain the Ecosystem with a view to its military objective.
    - It must also be possible to qualify the cooperation as 'technical cooperation'.

- **Article 6(3) Competition Act** contains a more general exception to the prohibition of cartels for cooperation that brings efficiency gains and the benefits of which accrue to the users.
    - It is of particular importance in this case that any possible restriction of competition is necessary and that competition is not eliminated in respect of an essential part of the logistics services in question.

- Application of the prohibition of cartels is also excluded if the combined market share of the undertakings **does not exceed 10% of the relevant market**.

Interim conclusion: This means that there are no procurement obligations under national law for the Ecosystem and that, under certain conditions, it also falls outside the scope of national competition law. However, less stringent obligations do apply based on the principles of good governance and the private-law principle of reasonableness and fairness.

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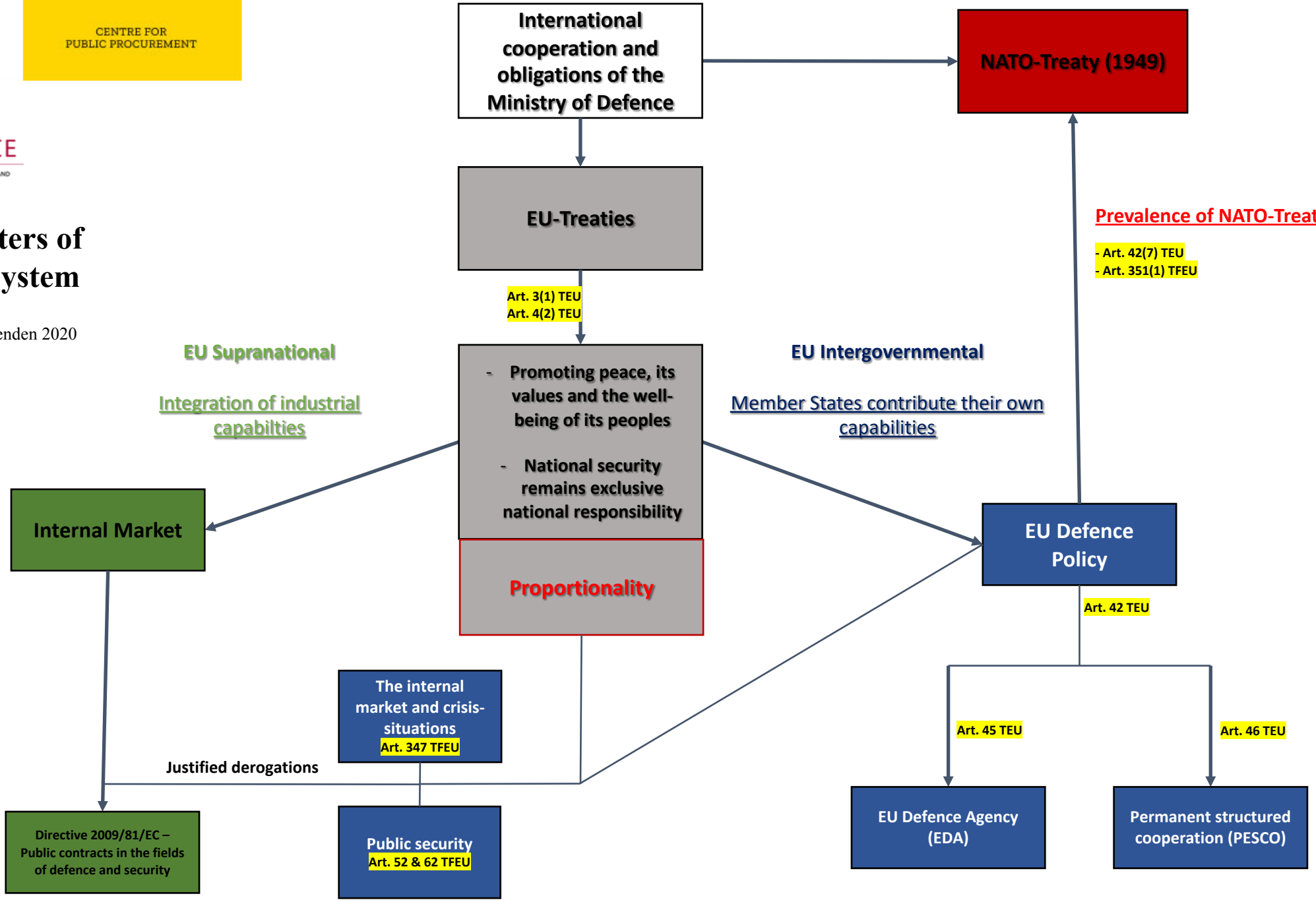
Manunza, Meershoek & Senden 2020



Annex I: Schematic representation of legal parameters for international cooperation and obligations of the Ministry of Defence